Circuit Court for Howard County
Case Nos. 13-K-17-058080
13-K-17-058190

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2706

September Term, 2018

ORLANDO MANUEL ASCENCIO

v.

STATE OF MARYLAND

Friedman,
Gould,
Wright
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 22, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a bench trial in the Circuit Court for Howard County, Orlando Manuel Ascencio, appellant, was convicted of child abuse, second degree assault, sexual abuse of a minor, sexual offense in the third degree, and two counts of incest. Appellant was sentenced to consecutive sentences of fifteen years for child abuse, twenty-five years for sexual abuse of a minor, ten years for third degree sexual offense, and ten years for each of the two counts of incest, for a total of seventy years. Appellant filed this timely appeal and presents the following questions, which we have consolidated as follows:[1]

1. Did the absence of any waiver of the right to a jury trial deprive appellant of his right to trial by jury under the Federal and State Constitutions and also violate Maryland Rule 4-246?

2. Did the trial court err by allowing improper closing argument?

3. Did the trial court err by relying on bare allegations not resulting in charges or conviction?

We answer all three questions in the negative and affirm the judgment of the circuit court.

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[1] The questions as stated in the appellant's brief read as follows:

1. Did the absence of any waiver of the right to a jury trial deprive appellant of his right to trial by jury under the Federal and State Constitutions?

2. Did the absence of any waiver of the right to a jury trial violate Maryland Rule 4-246?

3. Did the trial court err by allowing improper closing argument?

4. Did the trial court err by relying on bare allegations not resulting in charges or conviction?

BACKGROUND

The State alleged that appellant physically and sexually abused his daughter (hereinafter "Daughter") between June 1, 2016, and June 30, 2017. Daughter turned fifteen a few weeks after she arrived in the United States from El Salvador in 2016. She was seventeen at the time of trial and had been living in the United States for two years.

Daughter testified that approximately a month after her arrival in the United States, appellant began touching her in a sexual manner. At first, he touched her with his hands, but then began to put his penis inside her vagina. This would occur about twice a week when her mother was at work and continued for the entire time that she lived with her parents. Daughter testified that appellant also put his penis inside her anus. Daughter also testified that appellant used condoms and that a few days before she told her teacher about the abuse, appellant gave her birth control pills.

Daughter eventually told her mother what was happening, and her mother got very angry with appellant. Appellant chastised Daughter for telling her mother and told her that if she did not say anything to her mother everything would be fine. The sexual abuse continued, but Daughter did not complain further to her mother for fear of being beaten by appellant.

Daughter testified about a July 5, 2017 incident, during which appellant beat her with a flat iron and its extension cord after seeing her walking home with a boy. The next day, Daughter told Clara Allsup, a liaison for Hispanic students at the victim's summer

school, about the physical and sexual abuse by appellant. The police were informed and spoke with Daughter at school that same day.

Howard County Police Detective Frank Moscoso testified that when he later approached appellant to arrest him at work, appellant made an unsolicited comment in Spanish to a friend, stating, "I'm fucked. [Yesterday] I saw my daughter with some guys and hit her."

Daughter testified that at some point she learned she was pregnant and proceeded to terminate the pregnancy. Howard County Police Detective Stacy McDaniel accompanied her to the clinic for the abortion procedure on July 21, 2017. The fetal material was submitted to Bode Cellmark Analysis for testing. DNA[2] expert Elena Bemelmans testified that the probability of appellant's paternity with regard to the Daughter's pregnancy "is 99.99999999 percent for each of the three traces that were tested."

Daughter testified that since reporting the abuse to the police, her mother had put her on the phone once with appellant, and that appellant then asked her to lie to help him. Several phone calls were transcribed and entered into evidence.

[2] Nuclear DNA is found in the structure of a double helix, or a "twisted ladder of chemicals." *United States v. Coleman*, 202 F. Supp. 2d 962 (E.D. Mo. 2002). The "rungs" of the ladder are composed of four chemical bases known as nucleotides: adenine, cytosine, thymine, and guanine. The chemical bases are generally referred to as A, D, T, and G, respectively. An A is always paired with a T, and C is always paired with a G on opposite "rails" of the ladder. *Id.* at 965. The order of the chemical bases is what provides the informational content of the DNA. *Id.* Everyone's nuclear DNA can be considered unique, with the exception of identical twins. *Id.*

Detective Moscoso testified that on April 7, 2018, appellant placed a phone call from jail and spoke with his wife and Daughter. During that conversation,[3] the following transpired:

> [APPELLANT]: So they – so they have come to interview – so – I'm sorry. So they haven't gone to interview you yet to see what you're going to say or not – or not to say?
>
> [DAUGHTER]: No.
>
> [APPELLANT]: Well that's good, it's important that you pay close attention to what I'm going to say, but I'm not sure if you will be in agreement to speak in my favor.
>
> [DAUGHTER]: I don't know.
>
> [APPELLANT]: It is important, we should be united, we're family. It's best they will never – it's best, they will never do – do you any favors, they are never going to do anything favorable for your family. So it's – so it's important for you to talk. *If you think you will be in favor, I will tell you this, if not, I won't tell you, it's no use to me. I will tell you how we can come out good in this.* I think when this all ends good in the name of God, I will pay for a lawyer so you won't have to be where you are.
>
> [DAUGHTER]: I don't know, because it doesn't only depend on me but with them.
>
> [APPELLANT]: You're not going? You say?
>
> [DAUGHTER]: It doesn't depend only on me but it's them.
>
> [APPELLANT]: Your word is more important. For this we have a couple of days. I punished you – I punished you – *I punished you but it was in just cause, you were disobedient, you were a rebel, and I wanted the best for you. So he punished me because he loves me. But about the other thing that they are telling you, that never happened, and that your boyfriend was your father's cousin.*

[3] The conversation was first translated from Spanish into English, and then transcribed. That transcript was entered into evidence.

[DAUGHTER]: Then they are going to ask for information on who he is. Then I'll be blamed, they are going to ask why I lied.

[APPELLANT]: Listen girl, it's not – it's not a problem what can they do to you?

[DAUGHTER]: Who can I –who can I say it is? They are going to want to look for him.

[APPELLANT]: No, they are not going to look for him. *Just tell them he went to another state and you never knew what happened to him. He fooled you, he's your father's cousin and – and that he went to another state. That's it! (inaudible) and that – and that your father didn't do anything and no, no, no, I just want for him to be set free because he is my dad and he needs to raise my siblings and work for them.* I'm not sure – I'm sure I will be set free that day, please collaborate. Don't worry, don't think – don't think when I get out I will think ill of you, I am a Christian, I want the best for the family. And I want best for the family. So don't worry you haven't done anything to me, you haven't offended me, this was God's plan, so that I could be convert [sic] to Christianity. Don't worry, don't be afraid. *So that's what you're going to say. So please record this – record this [remember].*

The beating was true but he did it because – so that I could study, so that I could learn because he found out about that guy and that guy is my father's cousin and that you planned this out in case your father found out that you would state that he forced you. That's it! And after – and after you say all this – after you say all of this you start to cry so that the Judge can see that it's all true. Can you do it?

[DAUGHTER]: I can't tell you (inaudible) when I say that the process will be prolonged and you won't have a definite court date.

[APPELLANT]: No, that is the last step, going forward nothing will happen. It seems you're not in favor to collaborate, I didn't know your heart was so hard. Don't worry about the little things, don't harden your heart, you're my daughter and I'm your – you're my daughter and I'm father and it benefits us. No one is going to help us and we need to be united, *do me that favor please. If you think you can help me yes or no, if not I'll do other things. That's why I wanted to speak to you, so that you can tell me yes or no.* Tell me today if not I'll take – I'll take what they offered me or what.

> [DAUGHTER]: What will they think of me (inaudible)?
>
> [APPELLANT]: Chica, you prefer to think about what others think than the love of your father, my God what a travesty. *Do me this favor I ask of you.* Don't fall in love with those papers [sic], they will give them to you anyways but don't fall in love with them. That happiness will go away, the love of your father is for a lifetime. You'll be doing right by your siblings and family. God is watching. Do me a favor and don't tell anyone, – it is not – if not it is going to fuck me. Do it for the family and if you're going to do it, ask – ask for them to remove the restriction so we can speak.
>
> [DAUGHTER]: I can do it, but what if it – what is it [sic] doesn't turn out like you think? What will happen to me?
>
> [APPELLANT]: Everything will turn out fine, God guarantees it, I guarantee it. God has touched me and given me the intelligence to tell you this, God is who made this plan, God is working for us, look how much God is doing for us. Do it please, yes? *Thank God no one has gone to you and asked you anything, we're just in time because the date is near.*
>
> [DAUGHTER]: I don't have to – I don't have an answer for you now.
>
> [APPELLANT]: You don't have what?
>
> [DAUGHTER]: Answer.
>
> [APPELLANT]: Well I guess you're not going to help me right? Wow, it's too much, this is how you pay me – this is how you pay me, he [sic] life I gave you, so much I've done for you so you – so you can come and kill me in jail? Think about this, and tell your mother if it's yes or no.

(Emphasis added).

Detective Moscoso also testified regarding a separate telephone call between appellant and his wife. During that call, the following transpired:

> [APPELLANT]: Pay attention, stop what you're doing. Want to talk to you about what we're going to do the day of trial. You guys are going? I was told you guys would be present. So the – then, so that we can – so that I can go free you have to say – you have to say and she has to say that. She [the

victim] wanted to be free without parental advice, she wanted her independence to run around with her boyfriend. The only alternative she had was to wait for us to finish making love and then she [the victim] would go and retrieve the used condom and put it inside her vagina so that there would be traces of semen inside her. That way she could accuse me of sexual assault, she would pass the condom inside her vagina so that she – so that when she would accuse me that would come out in the exams that I had abused her. She was having sexual relations – relations with her boyfriends right there (inaudible) then she took advantage of the opportunity and said, with this I'll get him arrested and they will deport him. That – that's what you're going to say.

[MOTHER]: Who told you to tell me this?

[APPELLANT]: I can't tell you the names of those who are helping me.

***

[APPELLANT]: I'll let you know when it [trial] will happen. Listen, if you think she's in a position to help me, tell her this, if not don't tell her anything.

[MOTHER]: (Inaudible).

[APPELLANT]: This is the only alternative – this is the only alternative, she has to say she did it, she could be free – so she could be free, she took the condom and put it into her vagina. It had to be that way because I had nothing to do with abusing her. Ask her and tell her she cannot tell anyone until the day of the trial. Not her siblings, lawyer, no one just you and God only at the trial she'll say that. You the same, say the same. Say we've been married for over 20 years, we have five children, he's a good father, and we love each other a lot. Don't worry, the Bible said (inaudible) just do it nothing is going to happen. It's the only way. I will talk to you when I told you.

In a third call taking place between appellant and his wife on December 2, 2017, the following transpired:

[APPELLANT]: Did you speak about – did you speak about everything with her, is she in favor that she's not going to tell anyone?

[MOTHER]: She doesn't want everyone there to know.

> [APPELLANT]: Best that she doesn't tell anyone until trial. She should only speak when the Judge asks her. It's the only option, there is no other. She was alerts [sic] when her parents made love and she would take the condom when they finished, and she would put it in her vagina. Because she already had the intentions to get her father put in jail. She wanted to get out – out from her parents' control and since she was already sexually active with him that she – that was the first things she thought of. To charger [sic] her father with sexual assault and to prove that she took several condoms and put it inside her vagina. The prosecution just wants to win, whether it's the truth or not.
>
> Please don't tell anyone, if she's going to tell someone it's best that she doesn't know. Not to her sibling, her lawyer, the State's Attorney, my lawyer. Only the Judge, if the Judge doesn't give her the opportunity, she needs to raise her hand and say she has something to say. But she needs to say it, she needs to say it and ask for no jail time for the offender, for me.

DISCUSSION

I. JURY TRIAL WAIVER

Appellant was tried by a judge without a jury. The parties agree that the record in this case does not disclose a knowledgeable and voluntary waiver of a jury trial. Appellant argues defense counsel's statement that "the court was notified that it would be a bench trial" does not satisfy the required on-the-record waiver injury. Consequently, appellant avers that the absence of any waiver of the right to a jury trial deprived appellant of his right to a trial by jury under the Federal and State Constitutions and constituted a violation of his rights under Md. Rule 4-246.

The discussion when appellant's cases were called for trial is pertinent:

> [THE STATE]: Jennifer Ritter on behalf of the State calling two cases. State of Maryland v. Orlando Manuel Ascencio, 13-K-17-058080 and 13-K-17-058190.

> THE COURT: All right. Let me get some preliminary matters out of the way. In the Case 5819, Mr. Ascencio is charged with sex abuse of a minor, third degree sexual offense, and two counts of incest. And in Case 58080 he is charged with one count of child abuse second degree and a second degree assault. How does he plea?
>
> [DEFENSE COUNSEL]: Your Honor, Mr. Ascencio pleads not guilty in both cases.
>
> THE COURT: All right. Does he wish to have a jury trial or court trial before this judge?
>
> [DEFENSE COUNSEL]: Previously, Your Honor, he elected to have a bench trial. That election has not changed. He also – we have no opposition to consolidating the two cases so that has been done. He would request a bench [trial] in both cases both being tried today before Your Honor.
>
> THE COURT: Okay. When did he waive [a] jury trial?
>
> [DEFENSE COUNSEL]: I believe he – there was a motion filed by Madam State to postpone both matters to the same docket. And in the deferments with our consent the court was notified that it would be a bench trial and that we were not opposed to the cases being consolidated.
>
> THE COURT: Okay. All right. Thank you. All right. Then anything preliminarily before we begin?

We acknowledge that the right to trial by jury is secured by the Sixth Amendment to the United States Constitution, and by several provisions of the State Constitution, including Article 21 of the Maryland Declaration of Rights. *Owens v. State*, 399 Md. 388, 405-06 (2007). Likewise, it is undisputed that there is a fundamental right to trial by jury that may only be waived through an express, personal, knowing, and voluntary waiver.

We wrote in *In re Blessen H.*, 163 Md. App. 1 (2005):

> [T]he Supreme Court made clear that the standard for the waiver of constitutional rights that are "fundamental" is "an intentional relinquishment or abandonment of a known right or privilege." [*Johnson v. Zerbst*, 304 U.S.

> 458,] 464, 58 S. Ct. 1019. The Court explained: "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and [] we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* (citations and footnote omitted). The waiver, moreover, must be "intelligent and competent" and must appear on the record, so that court can decide for itself whether the waiver is sufficient. *Id.* at 465, 58 S. Ct. 1019. The Court held that a criminal defendant's waiver of his Sixth Amendment right to be represented by counsel is valid only if accompanied by this form of waiver. *Id.* at 468-69, 58 S. Ct. 1019.
>
> Since *Johnson v. Zerbst* was decided, the waiver standard developed in that case has been held to apply in other criminal law contexts. The standard applies to a defendant's waiver of the rights to a jury trial and to confront adverse witnesses; to the privilege against compelled self-incrimination; and to the protection against double jeopardy. *See Hersch v. State*, 317 Md. 200, 206, 562 A.2d 1254 (1989) (collecting Supreme Court and Maryland cases); *Parker v. State*, 160 Md. App. 672, 684-86, 366 A.2d 885 (2005) (same). A guilty plea likewise requires a defendant's knowing and intelligent waiver of the trial-related constitutional rights. *Hersch*, 317 Md. at 206, 562 A.2d 1254.

Id. at 11-12. *See also Davis v. State*, 285 Md. 19, 33 (1979) (holding that the *Johnson v. Zerbst* waiver standard applies to trial by jury under *Adams v. United States*, 317 U.S. 269 (1942)).

In *McElroy v. State*, 329 Md. 136 (2010), the Court of Appeals wrote:

> In *Curtis*, we recognized fundamental constitutional rights requiring an intelligent and knowing waiver to include: Sixth Amendment right to counsel (*Johnson v. Zerbst, supra*); rights surrendered by a guilty plea (*Machibroda v. United States*, 368 U.S. 487, 82 S. Ct. 510, 7 L.Ed.2d 473 (1962)); rights under double jeopardy clauses (*Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)); self-incrimination privilege in congressional hearing (*Emspak v. United States*, 349 U.S. 190, 75 S. Ct. 687, 99 L.Ed. 997 (1955)); and right to trial by jury (*Adams v. United States*, 317 U.S. 269, 63 S. Ct. 236, 87 L.Ed. 268 (1942)).

Id. at 140 n.1 (emphasis added). Since the decision in *Adams* in 1942, the law has been clear that a defendant may only waive the right to a jury trial with his "express, intelligent consent." *Adams*, 317 U.S. at 277-78.

Like the constitutional case law, Md. Rule 4-246(b) mandates that before a bench trial may be conducted, there must occur an on-the-record colloquy demonstrating a knowing and voluntary waiver of the right to a jury, after which the judge must announce on the record that the waiver is made knowingly and voluntarily. *See generally State v. Hall*, 321 Md. 178 (1990); *Dedo v. State*, 105 Md. App. 438 (1995).

Md. Rule 4-246(b) provides:

> (b) **Procedure for Acceptance of Waiver.** A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

Because the court did not make an "examination of the defendant on the record in open court[,]" appellant avers that a reversal under Md. Rule 4-246 is mandated. In response, the State asserts simply that, under the circumstances of this case, these claims are unpreserved, as it was apparently because of defense counsel's representation that the court did not conduct a waiver inquiry on the first day of trial. We agree with the State that we need not reach the issue raised on appeal.

The Sixth Amendment to the United States Constitution, as well as Articles 5, 21, and 24 of the Maryland Declaration of Rights, protect the right to trial by jury. *See Boulden*

v. State, 414 Md. 284, 294 (2010). This right may be waived in favor of a bench trial. *See id.* "To satisfy constitutional due process standards, the waiver of the right to a jury trial must constitute 'an intentional relinquishment or abandonment of a known right or privilege.'" *Smith v. State*, 375 Md. 365, 377 (2003) (quotation marks and citation omitted).

In this case, it was apparently because of defense counsel's representation that the court did not initiate a waiver inquiry on the first day of trial. *Cf. State v. Rich*, 415 Md. 567, 575 (2010) (explaining that the "invited error" doctrine is a shorthand term for the concept that a defendant who invites or creates error cannot obtain a benefit from that error); *Klauenberg v. State*, 355 Md. 528, 544 (1999) (same). *See also Nalls v. State*, 437 Md. 674, 693 (2014) (holding that a contemporaneous objection is required to preserve for appellate review issues relative to Md. Rule 4-246(b)). Defense counsel stated emphatically that appellant had waived his right to a jury trial. He cannot at this belated point hope to benefit from his invitation to the court to proceed to a court trial. *See United States v. Brennan*, 562 F.3d 1300, 1306 (11th Cir. 2009) ("The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.").

II. CLOSING ARGUMENT

Appellant argues that the trial court erred by allowing improper comments during closing argument. The State responds that the trial judge properly overruled appellant's objection. During closing argument, the prosecutor argued to the court:

> [THE STATE]: But the point is Your Honor, we know that this theory that some other family member perhaps is the actual father of that child. Despite being scientifically impossible, and *despite there having been no evidence offered* as to who that person is, the evidence that was introduced –
>
> [DEFENSE COUNSEL]: Objection Your Honor. That's a burden shift.
>
> [THE STATE]: It is not Your Honor.
>
> THE COURT: No, I disagree. Because you have this evidence I'm assuming is where she's going is his conversation to his – to the mother, his wife saying it's his father's cousin. So I think that's where it's going. So I don't believe there's a burden shifting whatsoever so, overruled.
>
> [DEFENSE COUNSEL]: Well I believe her – her basis for making this statement that there is an alternative theory is fine. But saying there's no evidence of it, she's shifting the burden onto us to produce evidence. So that was –
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: – I do believe that is objectionable.
>
> THE COURT: Alright, I'm going to overrule. I'm not even looking at it in that manner, but – that's why I'm overruling the objection. Go ahead [counsel].
>
> [THE STATE]: As Your Honor just indicated, the theory that there is an alternative source comes from the jail call in which Mr. Ascencio says to his wife to tell them that – that it is this cousin. Or tell them that it is – and then says to [Daughter] in her phone call, tell them that it is your uncle. He is the one creating in this jail calls alternative theories as to who could've fathered this child. However, we know from the DNA that that is not possible. So the DNA in this case Your Honor established even if you needed it, which I submit you do not need, that beyond a reasonable doubt this defendant sexually abused his daughter by committing the sex – by committing rape, incest, sodomy, and other sexual offenses.

(Emphasis added).

"The regulation of argument rests within the sound discretion of the trial court." *Grandison v. State*, 341 Md. 175, 224 (1995). Counsel are "allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Whaley v. State*, 16 Md. App. 429, 452 (2009) (quoting *Spain v. State*, 38 Md. 145, 152 (2005)). Nonetheless, notwithstanding the leeway given to counsel, "not all statements are permissible during closing arguments." *Donaldson v. State*, 416 Md. 467, 489 (2010). One area in which the State is particularly limited is in its ability to comment on a defendant's failure to present evidence. Such arguments are prohibited because they shift the burden of proof away from the State and to the defendant—a violation of the defendant's right to remain silent and to the presumption of innocence. *Eley v. State*, 288 Md. 548, 556 n.2 (1980). *See also Wise v. State*, 132 Md. App. 127, 148 (2000) ("Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof.").

In this case, appellant avers the prosecutor improperly stated that it was up to the defense to offer evidence as to who was the father of the fetal tissue. The prosecutor consequently argued that, since the defense did not present such evidence, appellant had failed to controvert the State's evidence, and the appellant was therefore guilty. Appellant contends that, despite the wide latitude afforded attorneys during closing argument, these comments crossed the line into being prejudicially improper. Therefore, appellant avers that reversal of this case is required. The State responds that the court properly exercised

its discretion in allowing defense counsel's comments in closing argument. We again agree with the State.

As we have explained:

> "[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). Closing argument typically does not warrant appellate relief unless it "exceeded the limits of permissible comment." *Lee v. State*, 406 Md. 148, 164 (2008). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inference therefrom" and, in doing so, to "indulge in oratorical conceit or flourish[.]" *Wilhelm v. State*, 272 Md. 404, 412-13 (1974). As long as "counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper[.]" *Id.* at 412. "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith and Mack v. State*, 388 Md. 468, 488 (2005). Thus, the propriety of prosecutorial argument must be decided "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381 (2009). Because "[a] trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case[,]" the exercise of its broad discretion to regulate closing argument will not be overturned "unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726 (2012).

Anderson v. State, 227 Md. App. 584, 589-90 (2016).

In this case, what the State did was comment that there was no evidence as to who the other family member who hypothetically got Daughter pregnant may, in fact, be. This was a fair inference in light of the evidence adduced at trial. Daughter testified that, after appellant was arrested, he asked her to lie for him. In his phone calls from jail, appellant tried to convince Daughter to tell the authorities that she had been having sexual relations with his cousin. Daughter then asked him, "Who can I say – who can I say it is? They are going to want to find him." Appellant responded, "No, they are not going to look for him. Just tell them he went to another state and you never knew what happened to him." The

State's comment during closing argument was a fair comment on the story pressed by the appellant from jail as to who impregnated Daughter and thus did not shift the burden of proof. Appellant's fanciful tale of the true culprit, perhaps based on his belief that a close relationship may muddy the DNA findings, need not have been left uncommented upon. Such an unscientific defense strategy could not be left unchallenged.

In addition, reversal is not warranted, as the statements did not mislead the factfinder or influence the factfinder to the prejudice of appellant. Not every improper remark in trial will result in a new trial. *Wilhelm v. State*, 272 Md. 404, 431 (1974). Reversal is required only where it appears that improper remarks of the prosecutor "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the defendant." *Donaldson*, 416 Md. at 496-97 (2010) (quoting *Hill v. State*, 355 Md. 206, 209 (1999)).

The trial judge, trying the case without a jury, made it clear that he did not believe the comment shifted the burden and that he "wasn't even looking at [the comment] in that manner." The court stated thereafter that it understood the burden of proof during its detailed statements in determining appellant's guilt. We agree with the State that the appellant's guilt in this case was overwhelming and there is no reasonable possibility that this comment by the State was prejudicial.

III. SENTENCING

Finally, appellant avers that the sentencing court erred in relying on bald allegations of prior sexual abuse of one of his other daughters. We reject this claim.

The Maryland Sentencing Guidelines prepared in anticipation of sentencing in this case recommended a sentence range of four to fourteen years. During sentencing, the State asked the court to deviate from the guidelines "because of the facts of this case."

A trial court "may exercise wide discretion in fashioning a defendant's sentence." *McGlone v. State*, 406 Md. 545, 557 (2008). Thus, generally, the appellate court reviews a trial court's decisions regarding sentencing for abuse of discretion. *See State v. Wilkins*, 393 Md. 269 (2006) (listing cases in which the Court of Appeals reviewed for abuse of discretion trial courts' decisions as to defendants' sentences.) There are three grounds for appellate review of a sentence:

> (1) whether the sentence constitutes cruel and unusual punishment or violates another constitutional requirement; (2) whether the [trial court] was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits.

Jones v. State, 414 Md. 686, 693 (2010) (internal quotation omitted). This case involves the second ground for appellate review—namely, the alleged impermissible consideration by the trial judge during sentencing.

A judge in a criminal proceeding is "vested with virtually boundless discretion" in imposing a sentence. *Logan v. State*, 289 Md. 460, 480 (1981). In exercising this discretion, the judge "should consider 'the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Ridenour v. State*, 142 Md. App. 1, 11 (2001) (quoting *Jackson v. State*, 364 Md. 912, 911 (2001)). However, a court's discretion is not unfettered. It may not be motivated by prejudice, ill-will, or any

other impermissible sentencing considerations. *Jennings v. State*, 339 Md. 675, 684-85 (1995).

Ordinarily, "when they stand alone, bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted may not be considered by the sentencing judge." *Henry v. State*, 273 Md. 131, 147 (1974). However, it is proper to consider prior arrests or even prior acquittals in unrelated cases if the defendant's involvement in those cases is shown by reliable evidence. *See Smith v. State*, 308 Md. 162, 172 (1986) (a sentencing judge may properly consider uncharged or untried offenses if established by reliable information); *Logan*, 289 Md. at 481 (recognizing that a court may "'consider reliable evidence concerning the details and circumstances surrounding a criminal charge of which a person has been acquitted'" (quoting *Henry*, 273 Md. at 147-48)); *see also Jackson v. State*, 230 Md. App. 450, 469-70 (2016) (reviewing *Henry* line of cases).

In determining whether a sentencing judge was influenced by improper sentencing considerations, an appellate court "must read the trial court's statements 'in the context of the entire sentencing proceeding' to determine whether the trial court's statements 'could lead a reasonable person to infer that the [trial] court might have been motivated by an impermissible consideration.'" *Sharp v. State*, 446 Md. 669, 689 (2016) (quoting *Abdul-Maleek v. State*, 426 Md. 59, 73-74 (2012)). If a judge's comments during sentencing "could 'lead a reasonable person to infer that [the court] might have been motivated' by an

impermissible consideration," the defendant is entitled to a new sentencing. *Abdul-Maleek*, 426 Md. at 74 (citing *Jackson*, 364 Md. at 207).

At sentencing, the State argued that an upward departure from the guidelines was warranted, specifically stating "that they had a good faith basis and belief that this is not the first time, the first of his biological children that this Defendant has offended on." Defense counsel objected, stating that he believed "Madam State is going to get into unproven allegations and I don't believe that's appropriate under *Henry v. State* [273 Md. 131 (1974)]." The State responded that there was a good faith basis for its belief as "these are based on statements of the victim and statements of the mother that this behavior took place in El Salvador." The court overruled the objection, clarifying that "I just don't know what weight, if any, I'm going to give to whatever that information is. So, but the State's foes [sic] indicate as an officer of the Court to have a good faith basis for presenting the information."

The State argued at sentencing:

> Your Honor, if [sic] is well known in this family and [Daughter] disclosed to the police at the time of her interview, and it's provided to the defense and the victim's mother, the Defendant's wife, also was interviewed and confirmed this information to be accurate. That [Daughter's] older sister back in El Salvador gave birth to a child that is recognized in the family as this Defendant's biological child. This is the second family member that he has raped. This is the second family member, his own daughter, that he had fathered a child on.

The court was advised in some detail that it was well known to the family and communicated to the State that appellant had fathered a child by his older daughter. The facts presented were that the older daughter did, in fact, give birth to this child and the child

was being raised in the home as another sibling. The information was sufficiently reliable that the court could have properly considered it as a sentencing factor.

Even so, the sentencing judge explicitly stated that he was not using the information as a factor in sentencing, but merely to understand why the victim's mother failed to protect her daughter:

> [T]he only reason I will consider it is as an explanation as to why the mother did nothing about it when she heard the allegations by [Daughter]. That's the only weight I'm going to give to it. I'm not going to say it's true but it was a question that this Court had is after this young lady went to her mother and said, daddy is raping me, and she just gets upset with him, doesn't do anything else, that would explain. That's the only reason why I'm considering it. Just so you know [defense counsel] and so the record is clear.

Independent of this point, the court fully detailed its considerations for imposing this heavy sentence. The abuse of the older daughter in El Salvador was not taken into consideration.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.