UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1640

September Term, 2014

CLIFTON OBRYAN WATERS

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: March 3, 2016

Convicted by a jury in the Circuit Court for Wicomico County of second degree child abuse and second degree assault, appellant, Clifton Obryan Waters, presents two questions, which we have rephrased:

I. Is the evidence sufficient to sustain the convictions?

II. Did the court abuse its discretion in overruling defense counsel's objections to remarks made by the prosecutor during closing argument?

Finding no error or reversible abuse of discretion, we affirm the court's judgments.

Facts and Proceedings

The Victim in this case is Waters's son, who at the time of the alleged offenses was six years old. On October 31, 2013, Waters took the Victim to the Emergency Department of Peninsula Regional Medical Center and stated that the Victim "fell down the stairs." Dr. Florian Huber, an orthopaedic trauma surgeon, determined that there was a transverse fracture of the midshaft of the Victim's femur. The doctor observed that the femur "had broken . . . in two halves, essentially, and there was some significant displacement." The following morning, Dr. Huber operated on the Victim and stabilized the fracture.

On November 13, 2013, Dr. Huber conducted a "follow-up visit" with the Victim. Following the visit, Dr. Huber "had [his] clinical manager notify Child Protective Services to look into the matter."

The following day, Detective Daniel Schultz of the Wicomico County Sheriff's Office interviewed Waters. During the interview, which was recorded, Waters stated that the Victim fell down the steps "from upstairs down to the living room." Later, however, Waters stated that he "hit [the Victim] with [his] hand." Waters stated that he struck the Victim because "he wasn't listening" and Waters "caught him in the refrigerator trying to sneak a juice." Waters further stated: "I hit him pretty hard because my hand was swollen." Detective Schultz also testified that medical records stated that the Victim was 3'11" tall and weighed approximately 65 pounds and that MVA records listed Waters as 6'3" and weighing 325 pounds.

At trial, the State called Dr. Huber, and the following colloquy occurred:

> [PROSECUTOR:] To a reasonable degree of medical certainty, can you say whether the mechanism of injury for [the Victim's] femur fracture . . . is consistent with falling down the stairs?
>
> [DR. HUBER:] It is possible.
>
> [PROSECUTOR:] Is it likely?
>
> [DR. HUBER:] Fortunately, there's not a big series of children falling downstairs, so there is really no good population to draw from. If you were strike a stair exactly in the middle of your thigh, then the leg could break like that.

> [PROSECUTOR:] Okay.
>
> [DR. HUBER:] The way that the bone is broken is—in order to break a bone with a short transverse fracture line, it has to be a very forceful, direct impact right at that spot.

Later, Waters took the stand and testified that on the morning of October 31, 2013, he "came . . . downstairs" and saw the Victim "in the refrigerator." Waters stated: "[W]hat [are you] doing? Didn't I tell you [that] you couldn't get no juice?" Waters then struck the Victim's leg with an open hand. Waters stated that he struck the Victim "to correct him from what he was doing" and "to discipline him," and that he believed that the Victim "would cry[] and then go sit down."

In rebuttal, the State called the Victim, who at the time of trial was seven years old. When the prosecutor asked the Victim how his leg was broken, he stated that his "dad stomped on it" three times. The Victim further stated that, before Waters "stomped" on his leg, Waters "touched" the Victim's right shoulder with "[h]is fists." When asked if he had fallen down the steps on the day that his leg was broken, the Victim responded "No."

Discussion

I.

Waters was convicted of second degree assault[1] and second degree child abuse[2]. Waters contends that the evidence is insufficient to sustain either conviction. He claims that "the State failed to prove that [the Victim] was injured as a result of cruel or outrageous treatment or a malicious desire to cause pain, and not as a result of permissible parental discipline." (Quotation marks omitted.)

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[1]CR § 3-203(a) states "A person may not commit an assault."

[2]Criminal Law Article ("CR") § 3-601 states in pertinent part:

> **Child abuse.**
> *Definitions*
> (a)(1) In this section the following words have the meanings indicated.
> (2) "Abuse" means physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the minor's health or welfare is harmed or threatened by the treatment or act.
> * * * *
> (3) "Family member" means a relative of a minor by blood, adoption, or marriage.
> * * * *
> *Child abuse in the second degree*
> (d)(1)(i) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause abuse to the minor.
> (ii) A household member or family member may not cause abuse to a minor.
> * * * *

The standard for appellate review of evidentiary sufficiency in a criminal case, summarized by the Court of Appeals in *State v. Smith*, 374 Md. 527 (2003),

> is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder. We give due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses. We do not re-weigh the evidence, but we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.

Id. at 533-34 (internal citations, quotations, and brackets omitted).

At common law, a parent could inflict "moderate and reasonable" physical punishment on a minor child without incurring criminal liability for assault, battery and similar offenses. *Bowers v. State*, 283 Md. 115, 126 (1978). What was "moderate and reasonable" depended upon, among other factors, the "age, condition and disposition of the child." *Id.* The *Bowers* Court continued:

> Put another way, a parent was not permitted under the common law to resort to punishment which would exceed that properly required for disciplinary purposes or which would extend beyond the bounds of moderation. Excessive or cruel conduct was universally prohibited.

Id.

This standard remains the law of this State, *State v. Taylor*, 347 Md. 363, 370–71 (1977), and is reflected in the definition of "child abuse" in CR § 3-601.

The State presented evidence that, at the time that the Victim's femur was fractured, the Victim was six years old, and the femur "had broken . . . in two halves" with "significant displacement." Dr. Huber testified that "a very forceful, direct impact" was required to cause such a fracture. Waters told Detective Schultz that he struck the Victim hard enough to cause his hand to swell. The Victim testified that Waters "stomped" on his leg three times. We conclude that a rational trier of fact, viewing this evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that, in light of the Victim's age, condition, and disposition, Waters resorted to punishment that exceeded that properly required for disciplinary purposes or which extended beyond the bounds of moderation.

Waters contends that "the evidence at trial demonstrated that [his] intent was to discipline his child for not obeying instructions." But, the Court of Appeals has stated that a jury has the "ability to choose among differing inferences that might possibly be made from a factual situation," and we must "defer[] to the inferences a fact-finder may draw." *Smith*, 374 Md. at 534 (citations omitted).

Based upon the evidence, the jury could have rationally concluded that Waters's actions "exceed[ed] that properly required for disciplinary purposes," in other words, that he was guilty of second degree assault. Moreover, the jury could infer that Waters inflicted corporal punishment upon the Victim with a malicious desire to cause pain. We

defer to this inference, and hold that the evidence was sufficient to sustain the convictions.

II.

Following the close of the evidence, the court instructed the jury:

> Opening statements and closing arguments of lawyers are not evidence in this case. They are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

During the prosecutor's closing argument, the following colloquy occurred:

> [PROSECUTOR: E]ven if you credit the defendant's minimized version, ladies and gentlemen, it is human nature to minimize our poor conduct. It is – that's why Detective Schultz so aptly, it's an interrogation technique. Was it an accident? Was it an accident? Was it an accident? To get an admission. This defendant didn't even, couldn't even say it was an accident. That's an interview technique that investigators use in child abuse cases because –
>
> [DEFENSE COUNSEL]: I object.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: People will admit to murder before they admit to child abuse.
>
> Because it's horrific, because it's awful, because it's never justified, and it certainly wasn't in this case.
>
> So the defendant minimized his conduct. He had two weeks to come up with a version that would have caused the injury but made him not look so bad.

> Even if you believe his version, there was no – he struck that child with such force to break a femur, to break a femur. That happens in car accidents, ladies and gentlemen.
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Overruled.

Waters contends that the court erred in overruling defense counsel's objections, because the prosecutor argued facts not in evidence. He claims that "the prejudice caused by these remarks" was "severe," because "the prosecutor sketched some sort of psychological profile of a child abuser, then declared that [Waters] fit that profile."

Whether a prosecutor's comments are unfairly prejudicial or "simple rhetorical flourish" is a question that lies "within the sound discretion of the trial court." *Spain v. State*, 386 Md. 145, 158–59 (2005). Among the factors that appellate courts should consider in deciding whether the trial court abused its discretion include "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* at 159.

When we apply the *Spain* factors to the case before us, we conclude that there is no basis for reversal. The trial court in the present case instructed the jury before closing argument that opening and closing statements "are not evidence in the case." The prosecutor's comparison of Waters to a child abuser is legitimate argument—after all, Waters was charged with child abuse. We reach the same conclusion regarding the

prosecutor's characterization of Detective Schultz's interview of Waters. The prosecutor's statement that broken femurs "happen[] in car accidents," is closer to the line, although Dr. Huber did testify that broken femurs of the type suffered by the Victim are unusual for children of the Victim's age. Serious automobile accidents are unusual also. Assuming, *arguendo*, that the challenged remarks were improper, the remarks were isolated events that did not pervade the entire trial. Finally, and most important in our view, the evidence against Waters was extremely strong.

We are convinced beyond a reasonable doubt that any suppositional abuse of discretion by the court in overruling defense counsel's objections to the prosecutor's remarks in no way influenced the verdict.

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