Circuit Court for Prince George's County
Case No. CT170028X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 811

September Term, 2021

MIA JULIANA MARTINEZ

v.

STATE OF MARYLAND

Graeff,
Leahy,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: July 20, 2022

A jury in the Circuit Court for Prince George's County convicted Mia Martinez ("Martinez"), appellant, of child sex abuse, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. The circuit court merged the third- and fourth-degree sexual offenses with child sex abuse. For child sex abuse, the circuit court sentenced Martinez to twenty-five years' incarceration with all but eight years suspended, five years' supervised probation, and registration as a sex offender. For second-degree assault, the circuit court sentenced Martinez to five years' incarceration, to run concurrently with the other sentence. A post-conviction court vacated the third-degree sexual offense conviction and granted Martinez the right to a belated appeal.

Martinez presents two questions on appeal: whether the State elicited improper lay opinion testimony from the lead detective and whether the State made improper remarks in closing argument.[1] For the reasons explained below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2016, Martinez was living with a family that included Martinez's boyfriend, the boyfriend's parents, aunt, and younger brother. One morning, Martinez called the boyfriend's fifteen-year-old brother ("the victim") to the downstairs bedroom where Martinez was staying. When the victim entered the bedroom, Martinez pushed the victim towards the bed and removed the victim's pants and underwear. Martinez, who

[1] Martinez's questions presented for review are:

I. Did the trial court err in allowing impermissible lay opinion testimony?

II. Did the trial court err in allowing closing argument on facts not in evidence?

according to testimony is a transgender woman, anally penetrated the victim with her penis. The victim told Martinez to stop and unsuccessfully attempted to push himself up. The victim estimated that the assault lasted between one and three minutes. The victim reported the assault to his mother three or four weeks later by showing his mother a note he composed on his cellular phone. The victim's mother alerted the police.

Martinez was charged with sex abuse of a minor and second-degree sex offense. The victim and his mother testified as well as the assigned detective, Detective Devaney. During the State's direct examination of Detective Devaney, the following colloquy ensued:

> [Prosecutor]: Now, as a detective what type of evidence are you looking to, I guess, obtain in these type of cases?
>
> [Detective Devaney]: We obtain statements from victims, any potential DNA or physical evidence that may or may not be available to us.
>
> ***
>
> [Prosecutor]: Now, in the course of these type of investigations do you ever obtain or send victims to the hospital?
>
> [Detective Devaney]: Yes.
>
> [Prosecutor]: Okay. Why would you do that?
>
> [Detective Devaney]: Under certain circumstances we may be able to obtain DNA evidence or sign of sexual assault.
>
> [Prosecutor]: Were you able to do that in this case?
>
> [Detective Devaney]: No, we were not.
>
> [Prosecutor]: Why?
>
> [Detective Devaney]: There was a delay in the reporting, therefore any evidence was lost by the time that I was notified of the case.
>
> [Defense counsel:] Objection
>
> [The court:] Overruled
>
> [Prosecutor]: Now, when you say a delay what do you mean?

> [Detective Devaney]: This incident happened approximately three to four weeks prior to the police being notified.
>
> [Prosecutor]: And so any potential DNA would not be there?
>
> [Defense counsel:] Objection, Your Honor
>
> [The court:] Sustained to the form of the question
>
> [Prosecutor]: And so why didn't you take the victim in this case to the hospital?
>
> [Detective Devaney]: Due to the delay in reporting we did not feel there would be any evidence available.

On cross-examination, defense counsel questioned Detective Devaney about the thoroughness of the investigation. In response to multiple questions, the detective confirmed that he did not take the victim for a sexual assault exam or otherwise consult with any doctors. The detective also stated that he asked Martinez to provide a DNA sample, and Martinez complied. The detective asked for the sample despite there being "no . . . indication that Mia Martinez's DNA was anywhere in [the] sheets[,] in the bedroom[,] or [in] any underwear of [the victim]." On redirect, the detective explained that he requested the DNA sample from Martinez "as an investigative tactic to attempt to elicit a confession from the defendant."

Martinez's defense counsel challenged the adequacy of the police investigation in closing argument, stating as follows:

> You also had the opportunity to hear from Detective Devaney. He is the lead detective in this case. You would think, and he even said I'm the lead detective, I'm going to investigate it thoroughly. You would think he would investigate it thoroughly. Let's talk about what he did, his testimony, his investigation into this.
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> ***
>
> I asked him about [sexual assault exams]. He's the lead detective in the Sexual Assault Unit. He told you in these cases he orders, usually orders [sexual assault] exams.

***

> Wouldn't you think to let me send [the victim] for a [sexual assault] exam to see if that's there? Didn't do that.
>
> DNA. This is where you can use your everyday life experience common sense. You have seen trials. You know DNA is present, it stays around. The detective got Mia's DNA voluntarily. Did the detective—according to the notes, no DNA found of Mia around in that house. Did he submit it? We don't know.
>
> Wouldn't you think that would have been an important thing to do to see whether or not the DNA is present? I would think so. You're the lead detective in the case.
>
> So what we have here is the detective with no evidence whatsoever other than testimony of [the victim], who is clearly not credible, charged Mia Martinez with these charges.

The State responded in its rebuttal argument:

> [Prosecutor:] The defense made mention of a [sexual assault] exam. I believe the detective cleared that up. Because of the length of time from the report there would be no evidence left.
>
> [Defense counsel:] Objection, Your Honor.
>
> [The court:] Remember, this is argument. Go ahead counsel.
>
> [Prosecutor:] Common sense. A month, the body heals. He knew that. How long have you been doing this? For years. He is an experienced detective. He won't go looking for something he knows isn't there because of the length of time that has elapsed.

The jury found Martinez guilty of child sex abuse, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. The jury acquitted Martinez of second-degree sexual offense. Martinez was granted a belated appeal following post-conviction proceedings.

DISCUSSION

"We review a circuit court's decision[] to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015). "[O]nce a

trial court has made a finding of relevance, we are generally loath to reverse [the] trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* at 643 (quoting *Decker v. State*, 408 Md. 631, 649 (2009) (alterations in original)).

"We review a trial court's allowance of allegedly improper remarks by a prosecutor under an abuse of discretion standard." *Pietruszewski v. State*, 245 Md. App. 292, 318 (2020).

I. THE DETECTIVE'S TESTIMONY WAS NOT OPINION EVIDENCE.

Martinez argues that the circuit court erred by permitting Detective Devaney to offer impermissible lay opinion testimony and that the detective's testimony "assumed facts not in evidence." The State responds that the detective's testimony was admissible, akin to testimony that was approved in *Fullbright v. State*, 168 Md. App. 168 (2006), and, even if inadmissible, any resulting error was harmless.

Lay witness testimony is governed by Maryland Rule 5-701, which limits opinion testimony to "those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue." Expert testimony, on the other hand, is "testimony that is based on specialized knowledge, skill, experience, training, or education" and "need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005).[2]

[2] Maryland Rule 5-702 provides factors that the trial court must examine to determine whether expert testimony will assist the trier of fact, including "(1) whether the witness is

The nature of the testimony, rather than the status of the witness, determines whether that testimony is lay or expert. *In re Ondrel M.*, 173 Md. App. 223, 244 (2007). "Expert testimony is required only when the subject of the inference . . . is so particularly related to some science or profession that [it] is beyond the ken of the average layman[.]" *Johnson v. State*, 457 Md. 513, 530 (2018) (emphasis and internal quotation marks omitted); *see Prince v. State*, 216 Md. App. 178, 200 (2014) (holding that police officer's testimony concerning placement of trajectory rod in bullet holes was lay testimony); *In re Ondrel M.*, 173 Md. App. at 245 (holding that officer's testimony identifying odor as marijuana was lay testimony). Accordingly, "[t]he mere fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." *Prince*, 216 Md. App. at 201.

In *Ragland v. State*, police officers testified—based on their observation of events—that the defendant had engaged in a drug transaction. 385 Md. at 713–14. The Court of Appeals determined the officers' opinions were based on "specialized knowledge, experience, and training." *Id.* at 725. The Court reasoned:

> These [officers] had devoted considerable time to the study of the drug trade. They offered their opinions that, among the numerous possible explanations for the events [they observed], the correct one was that a drug transaction had taken place. The connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning.

qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient basis exists to support the expert testimony."

Id. The Court determined that admission of the officers' testimony under Rule 5-701 without expert qualification constituted an abuse of discretion. *Id.* at 726.

In *Fullbright v. State*, this Court recognized a distinction from the type of expert testimony discussed in *Ragland*. 168 Md. App. 168 (2006). There, a police officer testified that he did not attempt to obtain fingerprints from a bloody knife because it was hard to recover good latent fingerprints from wet objects. *Id.* at 176. We concluded that the testimony was properly admitted. *Id.* at 185–86. We reasoned, first, that the officer's testimony explaining his conduct—the decision to not submit the bloody knife for fingerprint analysis—was not offered for its truth and, therefore, was not opinion evidence. *Id.* at 182. Second, the officer's testimony was not offered as proof of an essential element of the crime: it was "introduced simply to counter any defense argument to the jury of reasonable doubt arising out of an alleged inadequate police investigation." *Id.*[3]

Here, we conclude that Detective Devaney's testimony was akin to the testimony in *Fullbright*. Detective Devaney stated that at the relevant time in his eleven-year police career, he was in the Child and Vulnerable Adult Abuse Unit, where he investigated sexual

[3] We also noted:

> We do not intend to allow entering in the back door what *Ragland* forbids coming in the front door. A defendant can always request a limiting instruction so that the jury is advised that the officer's opinion is not offered for its truth, but only as explanation for the officer's conduct of the police investigation.

Fullbright, 168 Md. App. at 185. Here, no limiting instruction on the challenged testimony was requested and none was given.

and physical abuse. The detective stated that he was the lead detective on this case.[4] He testified about his general process for investigating sexual assaults and explained his reasons for not pursuing a sexual assault examination in this case. He began by explaining that police generally seek to obtain "any potential DNA or physical evidence that may or may not be available to us" and that investigators "may be able to obtain DNA evidence or signs of sexual assault" through a sexual assault examination. When he indicated that such an examination was not performed in this case, the prosecutor asked "Why?" The detective responded that "There was a delay in reporting, therefore any evidence was lost by the time that I was notified of the case." He clarified that because of the three-to-four-week delay in reporting, "we did not feel there would be any evidence available." Therefore, just as in *Fullbright*, the testimony explained the detective's conduct in the investigation and anticipatorily refuted Martinez's argument that the police investigation was inadequate. 168 Md. App. at 182. The testimony did not pertain to an essential element of the offense. *Id.* at 182.

We are not persuaded by Martinez's contrary arguments or characterization of Detective Devaney's testimony. According to Martinez, "the truth of the underlying assertion that the evidence had actually previously existed was implicitly argued by the State in its attempt to explain away its absence," *i.e.*, the detective implied that there was actual evidence of sexual assault that was lost due to the passage of time. We consider the detective's testimony "in the context [the jury] heard it." *Brooks v. State*, 439 Md. 698, 734

[4] The detectives background provided an adequate foundation for him to testify about his conduct in the police investigation.

(2014). First, in the lead up to the objected-to testimony, the detective stated that investigators generally search for any *potential* DNA or physical evidence and that a sexual assault examination *may* lead to DNA or physical evidence. The detective then stated, drawing a defense objection that was overruled, "*any evidence* was lost by the time I was notified[.]" The detective's phrasing suggested that he did not know whether obtainable physical evidence had ever existed. Second, Detective Devaney clarified that "we," presumably referring to co-investigators, "did not *feel* there would be any evidence available" from a sexual assault examination, emphasizing the subjective nature of his assessment. In context, the detective's testimony was appropriately qualified to explain his conduct in the investigation. To the extent that there was a risk that the jury might have interpreted the detective's testimony differently, Martinez could have requested a limiting instruction but did not do so. *See* supra note 3.

Because we hold that the circuit court did not err in permitting this testimony, we need not consider the State's harmless error argument on this issue.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE STATE'S CLOSING ARGUMENT REFERENCING THE DETECTIVE'S STATEMENTS.

Martinez contends that the State's rebuttal closing arguments improperly argued (1) that there was evidence of the sexual assault that had been lost due to the passage of time and (2) that Detective Devaney knew that it had been lost. According to Martinez, the State "improperly bolster[ed] its case by claiming that [the] 'lost' evidence was not inconsistent with the victim's story." The State argues that the prosecutor's statements in rebuttal argument were supported by the detective's testimony and otherwise "appealed to

'common sense.'" The State alternatively argues that any error was harmless because the objected-to statement in closing arguments was cumulative of subsequent statements to which Martinez did not object.

"[T]he propriety of prosecutorial argument must be decided contextually, on a case-by-case basis." *Anderson v. State*, 227 Md. App. 584, 589 (2016) (internal quotation marks omitted) (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)). "Courts have consistently deemed improper [any] comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial." *Spain v. State*, 386 Md. 145, 156 (2005). "[C]ounsel is not permitted to comment on facts not in evidence or state what *could* have been proven, and that '[p]ersistence in such course of conduct may furnish good grounds for a new trial.'" *Hill v. State*, 355 Md. 206, 222 (1999) (alteration in original) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1974)).

We find no abuse of discretion in the circuit court's ruling. Here, again, we do not agree that the challenged comments amounted to argument that physical evidence existed or was lost to the passage of time. The prosecutor and defense counsel made clear to the jury from the outset that the only evidence of the assault would be provided by victim testimony. As the State put it in opening arguments: "There is no camera footage. There is no DNA evidence. There are no eye witnesses. Just the victim telling you what happened to him on that day." Or, as the defense put it: "[I]n this case all you have is simple, [the victim] and Mia Martinez." The detective's testimony stated that no DNA or physical evidence was recovered from Martinez's bedroom, from the victim's underwear, or from the victim. Neither party made any reference to definitively "lost" or "missing" evidence

or any allusion to what such evidence might show. As explained in Section I, the detective's statement that "any evidence" was lost, referred to hypothetical evidence.

The State's rebuttal closing argument followed defense counsel's substantive challenge to the thoroughness of Detective Devaney's investigation. Defense counsel argued in closing that the detective should have thought to send the victim for a sexual assault exam. Defense counsel also argued that the jurors could "use [their] everyday life experience, common sense[,]" concerning DNA evidence and that "[y]ou know DNA is present, it stays around." Defense counsel concluded "[w]ouldn't you think that would have been an important thing to do to see whether or not the DNA is present? I would think so. You're the lead detective in the case." As a rebuttal to these arguments, the prosecutor referred to the detective's testimony on the conduct of the investigation, stating "Because of the length of time from the report there would be no evidence left." The prosecutor added, "[h]e won't go looking for something he knows isn't there because of the length of time that has lapsed."

These comments did not go so far as to convey that there had been some other evidence of a sexual assault. Rather, they suggested that whether or not there had been other evidence, it would not be detectable three weeks or more after the fact. The prosecutor's statements were appropriately responsive to addressing the allegation of an inadequate investigation and rebutting defense counsel's appeal to "common sense" about DNA evidence. We cannot say that the challenged comments invited the jury to draw an

inference about information not in evidence. *Spain*, 386 Md. at 156. Discerning no abuse of discretion, we have no occasion to address the State's argument for harmless error.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.