Circuit Court for Montgomery County
Case No.: C-15-CR-23-000131

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1925

September Term, 2023

TODD E. IMMEL

v.

STATE OF MARYLAND

Arthur,
Beachley,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 13, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Todd E. Immel, was indicted in the Circuit Court for Montgomery County, Maryland, and charged with solicitation of a law enforcement officer posing as a minor to engage in sexual activities. After he was convicted by a jury, Appellant was sentenced to five years' incarceration with all but 305 days' time served suspended, to be followed by three years of supervision by the COMET supervision program and the requirement that Appellant register as a Tier II sexual offender.[1] On this timely appeal, Appellant asks us to address the following questions:

> 1. Did the circuit court err in permitting the State to introduce irrelevant and unfairly prejudicial evidence?
>
> 2. Did the circuit court err in permitting the State to make a speculative closing argument that relied upon facts not in evidence?

For the following reasons, we shall affirm.

BACKGROUND

Detective Lindsay Greene of the Montgomery County Police Department, Special Investigations Division and Intelligence Unit, set up an undercover profile on social media sites she identified as "Scout" and "MeetMe," posing as a fifteen-year-old girl named "Nikki." Detective Greene testified, without objection, that "Scout is a social networking application. Generally, it's used to network. It's used to facilitate sexual encounters, casual or otherwise." Further, over objection, the detective testified that "in my experience as a Police Officer, and in working in my capacity as a Detective, it has also been used to

[1] The COMET supervision program, created by Chapter 4 of the Acts of 2006, 1st Special Session, "mandated the establishment of sexual offender management teams for the supervision of sexual offenders." *Russell v. State*, 221 Md. App. 518, 523 (2015).

facilitate sexual encounters with minors as well." She further testified that "MeetMe" was a similar application and that "Scout" and "MeetMe" shared profiles of users with each other.[2]

Detective Greene testified that she created a fictional profile of a "light skinned female," listing the age as eighteen years old, and then providing a location area of Rockville, Maryland. She explained that she used the age of eighteen because Scout will not allow minors to create profiles. She included three photographs of an unidentified female in creating the fictional profile for the alias she named "Nikki."

On January 18, 2023, the profile for "Nikki" received a message from a person later identified as Appellant. Appellant included photographs of himself, noted his age as fifty, and provided his general address in Mt. Airy, Maryland. Detective Greene responded.

During the ensuing conversations, Appellant inquired as to "Nikki's" age, and Detective Greene answered that "Nikki" was fifteen. Because the social media site prohibited contact with a minor, "Nikki's" account was then disabled by the site. Before that occurred, Appellant provided his Instagram profile so that he and "Nikki" could continue their conversations over Instagram. At this point in their conversations, there were

[2] Although the transcript spells the site as "Scout," we did find a social networking site with similar characteristics but spelled "Skout". *See* https://www.skout.com/en/ (last visited December 20, 2024); *see also* https://www.meetme.com/#home (last visited December 20, 2024). Skout indicates that users will "meet authentic people – and make real connections." Skout includes a number of community guidelines, including, but not limited to, restrictions on adult content and posting any content by minors under the age of eighteen years old. *Id*. We shall continue to use the spelling "Scout" as provided in the record.

no explicit discussions about sex, but there were mutual discussions about having a "casual encounter."

Detective Greene then created a new profile for "Nikki" on Instagram and sent Appellant a friend request and the conversations continued.[3] Appellant also provided several more photographs of himself, and Detective Greene provided two photographs of the fictional profile, "Nikki." In her first few messages to Appellant, "Nikki" informed Appellant "as soon as I told you I'm 15, my account [on Scout] got deleted[.]" At one point, Appellant replied that it was "best not to say age anymore."

Over the course of January 18th and 19th, 2023, the conversations between the two became graphic and sexual in nature. At numerous times during that conversation, the profile for "Nikki" clearly indicated she was a fifteen-year-old girl. And, "Nikki" spoke about being a sophomore in high school, her homework, and speaking with her mother. In fact, at one point, Appellant stated he was worried "Nikki" was a "cop," stating, "I hope, saying cop thing didn't piss you off. You're 15, I'm 50. You can understand my situation." Appellant then asked to meet "Nikki" in person. "Nikki" replied that she had school and that "maybe I can probably skip class Friday."

On January 19, 2023, the conversations began early in the morning and Appellant proposed they have sex in his car. "Nikki" suggested they meet at a CVS drugstore parking

[3] In social media after creating a profile, a user may attempt to establish connections with other users by sending them a friend request. If the "friended" user accepts the request, then the two become friends. Friends have the ability to view and interact with each other's profiles. *See In re Paternity of B.J.M.*, 925 N.W.2d 580, 585 (Wis. Ct. App. 2019).

lot on Rockville Pike, located near "Nikki's" school.[4] Detective Greene testified that "Nikki" told Appellant that she would need to "get back to class and catch the bus home after[.]" Appellant stated he would be there and that he would be driving a green Kia.

Detective Greene and other detectives then set up surveillance near the CVS in question. At a certain point, a Kia being driven by a person matching Appellant's description and social media profile arrived. As the vehicle parked near an IHOP located in the same shopping center as the CVS, Appellant and "Nikki" exchanged additional messages to coordinate the meeting and confirm the color of Appellant's Kia. After a short delay, Appellant messaged, "[s]omething seems wrong[,]" and that "I need more info now or leaving[.]"

Ultimately, Detective Greene and other officers blocked in Appellant's vehicle and placed him under arrest. Appellant had condoms in his jacket pocket. When the police searched the vehicle incident to arrest, Detective Greene saw a cell phone in plain view. To verify that this was the phone Appellant used during their conversations, the detective called from the number associated with "Nikki," and Appellant's cell phone displayed a notification from "Nikki."

Appellant was transported to the Rockville police station, waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and gave a statement to Detective Greene. The interview was played for the jury and included the following:

[4] Detective Green later testified Richard Montgomery High School was located nearby.

> Det. Greene: Okay. So, you know, obviously I know you were trying to get with somebody. So do you know that person's name or at least what they told you?
>
> Mr. Immel: The profile was Nikki.
>
> Det. Greene: Nikki, okay. And how old was Nikki?
>
> Mr. Immel: Her profile said 18. As we were talking, she said she was 15.

Appellant agreed he and "Nikki" spoke in "sexual terms," and that included "[o]ral sex, anal was a maybe but not definite. She was willing but was hesitant. Just regular casual sex. Oral sex both ways." Appellant agreed he brought condoms and indicated that "Nikki" wanted to be "tied up" when they met. He also agreed he asked "Nikki" to send him nude pictures. Towards the end of the conversation, there was the following exchange:

> Det. Greene: All right, obviously you understand that 15 you're not supposed to, as an adult you're not supposed to be having sex with somebody that age? You understand that, right?
>
> Mr. Immel: Correct.
>
> Det. Greene: So, why did you end up doing that?
>
> Mr. Immel: I've been alone and desperate. Some excitement in my life for once.
>
> Det. Greene: Do you understand what kind of situation you got put in, right?
>
> Mr. Immel: Not yet, but I'm learning.

After the interview, Detective Greene obtained a search warrant for Appellant's phone and his vehicle. In addition to the phone, police seized a "roll of condoms[,]" a "grocery bag with several different restraints[,]" as well as a number of other items. Photographs of these items were published to the jury, including the phone, various types

of restraints, including nylon ties, shackles, handcuffs, a blindfold, multiple bandanas, a ball gag, and lubricant. The police also recovered a letter addressed to Appellant in the back seat of the vehicle. And, as will be discussed further, the jury learned over a continuing objection that the police recovered an expandable baton and a pair of brass knuckles.

Appellant testified on his own behalf at trial. He testified that he believed the person he was exchanging messages with was between thirty and forty years old based on "the writing style, the words, the letters, it showed it was an adult." He also thought that many of the pictures provided "looked old" and were of different people. He also did not believe the person was in school because the school schedule would not allow a meeting at that time of day.

Appellant conceded that he wanted to meet this person "to have sex" and that he questioned "Nikki" asking if she was "really 15 and not 13," but maintained that "[i]t was all role play, fantasy." We shall include additional details in the following discussion.

DISCUSSION

I.

Appellant first contends the trial court erred in admitting evidence that the police recovered a collapsible baton and brass knuckles from his car on the grounds that the evidence was irrelevant and unfairly prejudicial. The State disagrees.

The issue presented occurred during the direct examination of Detective Greene. The pertinent objections and testimony follow:

[DEFENSE COUNSEL]: Some of the photos I don't have a problem with. But some of the photos include two brass knuckles and a baton. Which I think are irrelevant and unfairly prejudicial.

THE COURT: Okay, what do you say.

[PROSECUTOR]: Well, they were items recovered from the vehicle at the time under search warrant. And there was some testimony that, about submissiveness and domination. So, I think these are relevant in this case.

THE COURT: Yes, they could be.

[DEFENSE COUNSEL]: I would just say that there are other photos that I think are more relevant for that.

THE COURT: Well, who's to say that they're not relevant to the area or the practice of submission and dominance?

[DEFENSE COUNSEL]: I don't think there's any testimony that they are relevant.

THE COURT: Why would anybody need testimony? Nobody's testified restraints are relevant. And I guess I don't understand. Why couldn't the State argue that these were brought to engage submissive or dominant sex acts? Brought to the, in the automobile to the scene?

[DEFENSE COUNSEL]: I just don't think they're going to make that argument. Because these are more weapons than –

THE COURT: So well, then if you're not going to make that argument what do you, why do you need them in then?

[PROSECUTOR]: Well, I didn't say I wouldn't make that argument. I mean, I personally think that, you know, there were some conversations in the text messages about tying up and again being dominant and submissive. And you know, I think that the weapons are, go hand-in-hand in that type of thing. So, I would make the argument, you know.

THE COURT: Where are they found?

[PROSECUTOR]: They are found in the backseat of the vehicle.

THE COURT: So are they in the bag that the restraints were found in? The shopping bag?

> [PROSECUTOR]: There were two bags found in the car. One contains like handcuffs and a gag, and some nylon cord. And then the other one contained the baton and the brass knuckles.
>
> THE COURT: And were next to each other in the backseat of the car? The bags?
>
> [PROSECUTOR]: I believe that they were in close proximity, yes.
>
> THE COURT: I just don't know how I can distinguish one is for domination and the other isn't. Simply because there are weapons doesn't be [sic] used for this, what he was thinking he might engage in. So, your objection's overruled.

The evidence was admitted over a continuing objection. Detective Greene testified that the police "located an ASP, an ASP baton, and a pair of brass knuckles." She further testified "[w]e did not seize those as evidence but rather as safekeeping."[5]

During his direct testimony, Appellant addressed the baton and the brass knuckles, explaining that he used them as a form of protection because his job, car maintenance for hire, took him to several different locations around the state and that "I want to make it home to my family every day." He testified that he was a military police officer when he was in the military and that he was trained in the use of a collapsible baton. He also testified that the item identified as brass knuckles was a belt buckle but conceded it could be used in that manner.

[5] Appellant informs us: '"ASP' stands for 'Armament Systems and Procedures, Inc.,' which is a 'manufacturer providing equipment to law enforcement and private security companies.' In addition to making pepper spray, handcuffs, and flashlights, the company manufactures 'telescoping batons' that 'are widely used by law enforcement agencies worldwide.' *See Asp, Inc.*, https://en.wikipedia.org/wiki/ASP,_Inc."'

Generally, "all relevant evidence is admissible." Md. Rule 5-402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Maryland courts have consistently noted that "[h]aving 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (citing *State v. Simms*, 420 Md. 705, 727 (2011)).

But if evidence fails to clear this hurdle, it is inadmissible, and trial judges have no discretion to decide otherwise. *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."). As the Maryland Supreme Court has explained, "'[t]rial judges do not have discretion to admit irrelevant evidence.'" *Fuentes v. State*, 454 Md. 296, 325 (2017) (quoting *Simms*, 420 Md. at 724). "'[T]he determination of whether evidence is relevant is a matter of law, to be reviewed *de novo* by an appellate court.'" *Id*. (quoting *DeLeon v. State*, 407 Md. 16, 20 (2008)).

However, a trial court's weighing of the probative value of the evidence against its harmful effects is subject to the more deferential abuse of discretion standard. *Id.* at 326 n.13. As the rules set forth, even if the proffered evidence was relevant, that would not prevent exclusion:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Maryland Rule 5-403. As this Court has stated:

> Evidence is unfairly prejudicial "when it tends to have some adverse effect beyond tending to prove the fact or issue that justified its admission."

> *Hannah v. State*, 420 Md. 339, 347 (2011) (cleaned up). In deciding whether a piece of evidence is "unfairly prejudicial" under the rules of evidence, this Court weighs "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014). When evidence is of "a highly incendiary nature," its admissibility hinges on whether it "greatly aid[s] the jury's understanding of why the defendant was the person who committed the particular crime charged." *Id*. (quoting *Gutierrez v. State*, 423 Md. 476, 495 (2011)).

Montague v. State, 244 Md. App. 24, 39-40 (2019), *aff'd*, 471 Md. 657 (2020), *reconsideration denied* (2021).

In applying a *de novo* review to whether the challenged evidence was relevant, the Maryland Supreme Court has stated that "a party seeking to establish the relevancy of proffered evidence does not have to demonstrate that the evidence is weighty enough to carry that party's burden of persuasion." *Snyder v. State*, 361 Md. 580, 591 (2000). Further:

> Relevance is a relational concept. Accordingly, an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case. In order to find that such a relationship exists, the trial court must be satisfied that the proffered item of evidence is, on its face or otherwise, what the proponent claims that item to be, and, if so, that its admission increases or decreases the probability of the existence of a material fact. Moreover, the relevancy determination is not made in isolation. Instead, the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable.

Id. at 591-92 (citations omitted).

In addition, our Supreme Court "has instructed that relevance has two components: materiality and probative value." *Molina v. State*, 244 Md. App. 67, 127 (2019) (citing *Smith v. State*, 423 Md. 573, 590 (2011)). "A material proposition is also called a 'consequential fact.' Materiality looks to the relation between the proposition for which the

evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove." *Id*. (quotation marks and citation omitted).

Here, there was evidence that Appellant planned to meet "Nikki" for sex in his vehicle at around noon on January 19, 2023. He admitted in his statement to Detective Greene, shortly after his arrest, that "Nikki" was "interested in being tied up." He also agreed that he messaged her and told her that he could "tie her up." And he thought he was engaging in "role play" and "fantasy." We are persuaded that the baton and handcuffs were material, probative, and relevant to the case.

We also conclude the trial court did not abuse its discretion in its consideration of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We are not persuaded the baton and the handcuffs were so provocative as to likely cloud the jurors' judgment or prevent them from rationally assessing the evidence fairly and impartially. Notably, the conversations between Appellant and "Nikki," the profile of a fifteen-year-old high school student created by Detective Greene, were highly graphic and sexual in nature. Although evidence that Appellant had a collapsible baton and handcuffs in his car when he planned to meet "Nikki" for sex during school hours was prejudicial, so to was much of the other evidence recovered from his vehicle, including other ropes and restraints. These items were of a similar nature as a means to dominate. Under the circumstances, we are unable to conclude that the admission of the baton and handcuffs was unfairly prejudicial. *See Odum v. State*, 412 Md. 593, 615 (2010) ("[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case,

is not the undesirable prejudice referred to in [Md.] Rule 5-403." (quotation marks and citation omitted)). There was neither error nor abuse of discretion.

II.

Appellant next asserts the court erred by overruling his objection to a portion of the prosecutor's rebuttal closing argument. Appellant continues that the error was not harmless beyond a reasonable doubt because "the State's case was not overwhelming[.]" The State responds that, to the extent preserved, the prosecutor's argument was directly based on testimony from the State's expert and that any error was harmless beyond a reasonable doubt. Although we disagree with the State's preservation argument, we agree that the trial court did not err. And, even if there was an error, it was harmless beyond a reasonable doubt given the substantial evidence of guilt in this case.

In its case-in-chief, the State called Montgomery County Police Detective Joshua Ledoux of the Electronic Crimes Unit and he was accepted without objection as an expert in digital forensics. Detective Ledoux extracted information from Appellant's cell phone and determined that there was an Instagram account and two social media accounts associated with that phone, namely, Scout and MeetMe. The pertinent testimony was as follows:

> Q. Now, in your analysis of the cell phone or the cell phone data extraction, did you have occasion to look for any data associated with the Scout app or the MeetMe app?
>
> A. Yes, I did.
>
> Q. And what, if anything, did you find?

A. There was data pertaining to those apps, but no user data was recovered pertaining to those apps.[6]

Based on this, during rebuttal closing argument, the prosecutor argued the missing user data suggested a consciousness of guilt over defense objection as follows:

[PROSECUTOR]: Also, in this case, we're talking about possibly deleted messages. The defendant testified that Nikki wasn't the only person that he had messaged on MeetMe. There was at least one other person that he had messages with by his own admission. Detective Ledoux testified that, yeah, he found information that the app was there, but there was no data on the app. Wouldn't it stand to reckon that, you know, there may be something there?

[DEFENSE COUNSEL]: Objection.

THE COURT: Basis?

[DEFENSE COUNSEL]: I think it's arguing facts not in evidence.

THE COURT: Overruled. The jury can, their recollection of what's in evidence will control, and I don't think it is. Overruled.

[PROSECUTOR]: Or are they missing because something has been deleted? Again, I'd proffer to you that's evidence of guilt or evidence of consciousness of guilt.

Initially, we disagree with the State's preservation argument that there was no objection following the prosecutor's subsequent comment that the missing evidence suggested a consciousness of guilt. Based on our review, defense counsel was objecting not only to the specific question, but also the inference the State was seeking to draw that the missing data suggested a consciousness of guilt. The court's comment when overruling the objection reveals that the issue raised on appeal was raised in and decided in the trial

[6] Also pertinent to our discussion was Appellant's testimony conceding that he used MeetMe and communicated with both Detective Greene and another unidentified user.

court, thus, it is preserved. *See Hall v. State*, 233 Md. App. 118, 129 (2017) ("In this instance, no testimony or evidence could have altered the court's ruling or the context in which the court made it—the decision was final and purely legal, and the objection to that ruling preserved under the circumstances.").

As for the merits, "[g]enerally, a party holds great leeway when presenting their closing remarks." *Cagle v. State*, 462 Md. 67, 75 (2018). '"Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way[.]'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). "[T]he prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces." *Id*. (quotation marks and citation omitted).

"However, this leeway is not without limitation." *Cagle*, 462 Md. at 75; *see Jones v. State*, 217 Md. App. 676, 691 ("A prosecutor's artistic license is not unlimited: notwithstanding the wide latitude afforded prosecutors in closing arguments, a defendant's right to a fair trial must be protected." (cleaned up)), *cert. denied*, 440 Md. 227 (2014). For instance, the State may not vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153-54 (2005), appeal to the prejudices or passions of the jurors, *Mitchell*, 408 Md. at 381, or argue facts not in evidence or materially misrepresent the evidence introduced at trial, *Whack v. State*, 433 Md. 728, 748-49 (2013).

But "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm*, 272 Md. at 415. Whether a reversal of a conviction based upon improper closing argument is warranted '"depends on the facts in each case."' *Whack*, 433 Md. at 742 (quoting *Wilhelm*, 272 Md. at 415). Ultimately, "[t]he permissible scope of closing argument is a matter left to the sound discretion of the trial court." *Cagle*, 462 Md. at 74 (quotation marks and citations omitted). To determine whether there was an abuse of discretion, the question is "whether the jury was actually or likely misled or otherwise 'influenced to the prejudice of the accused' by the State's comments." *Whack*, 433 Md. at 742 (quoting *Wilhelm*, 272 Md. at 415-16). "Only where there has been 'prejudice to the defendant' will we reverse a conviction." *Id.* at 742-43 (quoting *Rainville v. State*, 328 Md. 398, 408 (1992)).

We are persuaded that the trial court did not err in overruling Appellant's objection. The argument was a fair inference based on Detective Ledoux's testimony that Appellant's cell phone retained some information with respect to the social media apps, but that the data associated with those apps was missing. Considered along with Appellant's own admission that he used the MeetMe app to communicate with Detective Greene, posing as "Nikki," and an unidentified user, the prosecutor's closing argument was not based on facts not in evidence but instead was a rational inference based on the facts admitted at trial.

Moreover, even if we were to conclude the argument was improper, any error was harmless beyond a reasonable doubt. As our Supreme Court explained:

> Not every improper comment by the prosecutor requires reversal, as error in closing argument is subject to harmless error review. The State bears the burden of proving that an error is harmless and must prove beyond a

> reasonable doubt that the contested error did not contribute to the verdict. Moreover, an error will be deemed harmless only if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict. Here, to determine whether overruling defense objections to improper statements during closing argument constitutes reversible, or harmless, error, we focus our attention on three factors: first, the weight of the evidence against the accused; second, the severity of the remarks, cumulatively; and third, the measures taken to cure any potential prejudice.

Fuentes, 454 Md. at 321 (cleaned up).

Applying these three factors in reverse order, although no efforts were made to "cure any potential prejudice" by the argument, the prosecutor's remark was an isolated instance occurring in the rebuttal closing argument. And the weight of the evidence against Appellant for the solicitation of a law enforcement officer posing as a minor was clearly overwhelming. Appellant conceded in his own testimony that "Nikki" informed him she was underage and that he nevertheless intended to meet her for sexual purposes. This concession at trial was cumulative to Detective Greene's testimony, the messages between "Nikki" and Appellant, and Appellant's statement made during the police interview after he voluntarily waived his *Miranda* rights. We conclude that any error in overruling the defense objection to the prosecutor's argument was harmless beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.