

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 429

September Term, 2010

RICHARD CARLOS SANCHEZ

v.

STATE OF MARYLAND

Meredith,
Hotten,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 2, 2011

Richard Carlos Sanchez, appellant, was convicted by a jury in the Circuit Court for Charles County of second-degree rape. Appellant raises four issues, which we have slightly reworded¹:

1. Did the trial court err in accepting the State's forensic nurse examiner as an expert witness?
2. Did the trial court commit reversible error in denying appellant's motion for an independent medical examination of the complainant?
3. Did the trial court err in limiting appellant's cross-examination of the complainant and the forensic nurse examiner?
4. Did the trial court err in failing to sustain appellant's objections to certain arguments made by the prosecutor during the State's rebuttal closing?

¹ Appellant framed the questions presented as follows:

1. Whether the trial court erroneously accepted the State's forensic nurse examiner as an expert qualified to render an opinion regarding the existence and cause of internal trauma to female anatomy (i.e., a tear in hymenal tissue purportedly not caused by normal activities)?

2. Whether the trial court erred when it denied the Appellant's motion for an independent medical examination where the State put the physical condition of the Complainant at issue, and where it was the State's own forensic nurse examiner's errors that generated the need for the second, independent examination?

3. Whether the trial court erred when it denied Appellant an opportunity to cross-examine the Complainant or the forensic nurse examiner about specific prior instances of sexual conduct of the Complainant that reasonably could have been the source for the internal injury that the State's nurse testified existed and was not caused by normal activities?

4. Whether the trial court erred when it failed to correct the improper remarks of the prosecutor in rebuttal closing argument to the jury that the role of defense counsel is to confuse and mislead the jury, and to fabricate a *defense to the crime charged*?

With respect to the third question, we conclude that the trial court erred in refusing to permit appellant to conduct some inquiry into whether the prior sexual intercourse the complaining witness reported to the examining nurse could have possibly explained the hymenal trauma which the nurse observed. Because this error was not harmless beyond a reasonable doubt, we vacate the judgment and remand the case for further proceedings. We also answer “yes” to the fourth question. In view of our ruling on the third and fourth questions, we need not address appellant’s first and second questions.

FACTS AND PROCEDURAL HISTORY

Sometime in the early morning hours of August 19, 2008, after having an argument with her mother, 12-year-old Shaylah P. left her Ft. Washington home and walked to a nearby McDonalds at the corner of Livingston Road and Indian Head Highway. In the McDonalds parking lot, she encountered 28-year-old Sanchez. Sanchez asked Shaylah how old she was, and she responded that she was 17. Sanchez agreed to give Shaylah a ride to Indian Head, where her aunt lived. Shaylah got into Sanchez’s car, which he drove in the general direction of Indian Head initially, but then headed toward Waldorf. Shaylah testified that Sanchez began touching her in the car, and that they did not engage in conversation. Sanchez drove first to a Waldorf hotel that had no rooms available. He then drove to the nearby Comfort Suites hotel, and registered for a room for 2 adults at 2:11 a.m.

Shaylah testified that Sanchez registered with the front desk before bringing her up to the room via a back staircase. Sanchez stayed in the room briefly, and then left Shaylah

there alone. Shaylah stayed up all night watching television. She also called her friend, Arsha Ford, and told Ford where she was. At 7 a.m., Sanchez returned. He began touching Shaylah before getting in the shower, and instructed Shaylah to take a shower, too. When Shaylah came out of the shower, Sanchez was wearing a condom, and had sex with her.

At trial, Shaylah's description of the sexual encounter was as follows:

[THE STATE]: Alright. And then what do you do after you finish taking your shower?

[SHAYLAH]: I sit on the bed and then he starts taking my clothes off, and I asked him why he was taking them off, and he didn't say anything.

Q Okay. Well, let me, when did you notice that he had a condom on?

A Like he had like a towel on and that's when I saw it and then that's when he started taking my clothes off.

Q Okay. And how long was it before you were, between when you came out of the bathroom from taking your shower that he took the towel off?

A Like maybe like two or three minutes.

Q Okay. And when he started taking your clothes off, and you said you had asked him why he was taking your clothes off, what was his response?

A Nothing.

Q Alright. And what happened next?

A And then like he gets, I'm laying on the bed and he gets on top of me and then, then he start doing it.

Q [. . .] How much of your clothes did he remove?

A He removed my shirt, my pants, my underwear and I just had my bra on.

Q Okay. And once he did that, what is the first thing he does after he removes those clothes?

A He sticks his thing in me.

Q Okay. Which part of you did he stick his thing in?

A My, down there.

Q Okay. When you say, down there, what part of your body are you referring to?

A My private part.

Q Okay. Which private part?

A Like between my legs.

Q Okay. Which part?

A Oh, he like, the — I don't understand the question, like.

Q [. . .] When you say, his thing, what are you referring to?

A His penis.

Q Okay. And where, what does he do with his penis?

A He sticks it in me.

Q Okay. What part of you?

A My private area, like between my legs, like. Yeah.

Q Okay. Do you know what that area is called?

A No.

Q Okay. In addition to, did he put it, in addition to your private area, between your legs, did he put his penis anywhere else?

A No.

Q Okay. Now, what position, when he first starts where are you on the bed?

A I'm laying down with my legs open and he's on top.

Q Okay. And what part of the bed are you on?

A Like on the end where the comforter's at, the sheets are pulled back, but we like on the comfort. [*sic*]

Q Okay. And what, and then what is he doing while he's on top of you?

A He like starts moving like around, and I'm just laying there.

Q Okay. And moving around where?

A Like just, like pushing it in me.

Q When you say, it, are you referring to his penis?

A Yes.

Q Okay. So you felt his penis inside you?

A Yes.

Shaylah testified that, after 35-45 minutes, she started to bleed. Shaylah cleaned herself and put her clothes back on. Sanchez then went into the bathroom at this time, removed his condom, and she heard the toilet flush. After he dressed, he again lay on top of Shaylah and asked, "Do you want to do it again?" She told him no, and he fell asleep.

Meanwhile, Maryland State Trooper First Class Michael Armstrong happened to be in the area of the Comfort Suites hotel on the morning of August 19, 2008, looking for a reported car accident. His attention was drawn to a group of people standing in the parking lot of the Comfort Suites. He approached the group and made contact with Angela Mansfield, Shaylah's mother, who told Tfc. Armstrong that she believed her 12-year-old daughter was in the hotel. At around the same time, Officer Kristian Syvertsen of the Charles County Sheriff's Office, responded to the Comfort Suites in search of Shaylah. The two police officers went to the hotel's front desk, and someone there suggested to them that they might want to start their search at Room 229, which was Sanchez's room.

Tfc. Armstrong and Off. Syvertsen knocked on the door of Room 229. No one answered. Off. Syvertsen testified that he and Tfc. Armstrong could see movement inside the room via the peephole. Tfc. Armstrong knocked again and identified himself as a police officer, and ordered the door opened. A maid working nearby approached the officers, and swiped her key card. The door unlocked, but the security bar was engaged, and that prevented the door from being fully opened. Eventually, Sanchez opened the door and let the officers in the room. Tfc. Armstrong observed and secured two wrapped condoms from the floor, and also noted "some items that appeared to have blood on them, in the bathroom." Tfc. Armstrong took Shaylah out of the room to interview her, while Off. Syvertsen took Sanchez to the sheriff's office.

Shaylah was taken to Civista Hospital, where she was examined by Shellee Stine, R.N., a certified Sexual Assault Nurse Examiner (“SANE”). Stine’s examination revealed a tear in Shaylah’s hymenal tissue and “a little bit of blood in the area.” We will discuss Nurse Stine’s testimony at greater length later in this opinion.

On September 8, 2008, Sanchez was indicted by a Charles County grand jury, and charged with second-degree rape, second-degree sex offense, third-degree sex offense, and fourth-degree sex offense. All charged offenses were based on the difference in age between Sanchez, who was 28 at the time of the incident in question, and Shaylah, who was 12. Sanchez made a pre-trial motion for an independent medical examination of Shaylah, which the court denied.

Trial began on February 2, 2010. At the close of the State’s case, Sanchez made an oral motion for judgment of acquittal as to all charges. This motion was denied as to the charge of second-degree rape, but granted as to all other counts. The jury found Sanchez guilty of second-degree rape on February 4, 2010, and, after sentencing, this timely appeal followed.

DISCUSSION

Question 3 -The Rape Shield law

When Nurse Stine was questioned about her qualifications to render an expert opinion, she testified that she had been a registered nurse for nine years, and a SANE since 2005. Her underlying training to become a registered nurse involved two years of college

and successful passage of the National Council Licensure Examination (NCLEX exam). To become a SANE, Stine took two 40-hour classes (one for the adult nurse examiner, and one for examinations of pediatric patients), did a preceptorship with another nurse, and demonstrated her proficiency by having a doctor observe her perform ten cervical exams. Stine had personally performed 25 to 30 SANE exams by the time of trial. Additionally, as part of her job as an emergency-room nurse, Stine had observed “well over a hundred” vaginal exams. She testified that she witnesses at least one vaginal exam every shift she works. She had also taken three to four refresher classes since becoming SANE-accredited.

Stine’s report of Shaylah’s examination was marked as defense exhibit 2 in connection with appellant’s oral motion to exclude Stine’s testimony, but the report was never admitted in evidence as a trial exhibit. The contents of the report were nevertheless discussed at various points during the trial proceedings.

Pertinent to this appeal was Stine’s finding that Shaylah had a tear in the hymenal tissue at 5 o’clock, with “a little bit of blood in the area.” The report also included Shaylah’s response to the question asking her last date of sexual intercourse. Shaylah responded: “maybe years ago.”

During opening statements, counsel for Sanchez attempted to make reference to the statement recorded in Nurse Stine’s report:

[DEFENSE COUNSEL:] So she eventually gets to the sexual assault center. And she tells the sexual assaults [sic] nurse, when she’s asked, ‘When was your last intercourse –

The State's objection was sustained. When defense counsel argued that he was merely stating what he expected the evidence to show with respect to the date of last intercourse, the court responded: "That's not coming in[.]"

The following day, the prosecutor asked the court to declare a mistrial because of the reference defense counsel had made during opening statement about "last intercourse." Before the court denied the motion, there was extensive discussion about Nurse Stine's report. Defense counsel argued that the statement about the date of last intercourse was not being offered as reputation evidence, but rather, was offered to provide an alternate explanation for the hymenal tear described in the nurse's report. The prosecutor complained that, "what [defense counsel] was attempting to do is go and talk about [Shaylah's] conversation with the nurse about the last time she had intercourse." The judge admonished counsel: "That's not gonna happen. That's not gonna, let me make it clear. That's not gonna happen when the nurse testifies, Mr. [Defense Counsel]. You're not gonna get into that." The court nevertheless agreed to hear further argument from defense counsel as to the possible relevance of the report to explain trauma. The colloquy continued:

[DEFENSE COUNSEL]: Your Honor, there are positive findings contained within [Nurse Stine's] report, and I'll read them to you. "Redness noted at the fossa navicularis, hymenal tear noted at 5 o'clock." Then there's a diagram of the hymenal tear at 5 o'clock, area of redness. "Positive findings, attempted to use speculum, metal smaller size, patient unable to tolerate speculum for very long, did not visualize vaginal tearing or injury, only bleeding, noted as dark red from 5 o'clock vaginal tear noted prior to speculum use." And that's what I find as the positive findings in this case. If there are some others that I haven't noted I will be objecting to opinions that are not contained within this report that the State may offer.

I wanted to bring you back to the hymenal tear. This particular hymenal tear at 5 o'clock, in terms of this report and in terms of testimony will be used to show that there was sexual trauma by something. Sexual intercourse I guess. I had asked again for an independent medical examination to be able to see the tear, if it existed as - - -

[THE COURT]: Yeah I recognize all of that. I didn't rule on that motion, did I?

[DEFENSE COUNSEL]: And I understand that. But now I'm putting it in context. The context being that the [CL §] 3-319[b](4)(ii) is rather specific as to when you can use the prior sexual contact. And it says, "The evidence is of a specific incident of sexual activity showing the source [or] origin of semen, pregnancy, disease or trauma." Trauma is what we're talking about here in terms of the hymenal tear. The reason that they asked that particular question is to determine whether or not there has been other sexual intercourse that could have caused the hymenal tear, I assume, if one existed. It's a direct quote, and it's a history that was taken in this particular case.

The court agreed to defer ruling on the issue until Nurse Stine testified as a witness for the prosecution, stating: "Alright. We'll continue with this one as we go along." The colloquy among court and counsel continued:

THE COURT: . . . When is your nurse going to testify?

[STATE]: She's not gonna be the next witness.

* * *

THE COURT: Not. Okay. We'll continue with this.

* * *

[STATE]: But as I understand the Court, but until that time there is not gonna be any, the Court is ruling that he cannot ask anything regarding her previous intercourse until there is some ruling by the Court as to whether he can.

THE COURT: Correct.

[DEFENSE COUNSEL]: I'll alert the Court when I think a question is appropriate.

THE COURT: Correct. But I mean, he's gonna be permitted to ask cross examination as to the redness, as to the trauma. All of that is fair game, but.

[STATE]: The State understands that. As I understand he's seeking to get into that question and her response regarding that.

THE COURT: Yeah, I'm not gonna get into that until, and you're gonna let me know because I'm gonna be mindful of it as a result of opening statement.

[DEFENSE COUNSEL]: Your Honor, I'm very clear on it and I'll let you know, and I'll ask to approach the bench.

Notwithstanding the court's invitation to revisit the issue during the testimony of the relevant witnesses, Sanchez made no further effort during the State's case to introduce the statement about prior sexual intercourse, and, when the prosecutor called Shaylah and Nurse Stine as witnesses, Sanchez made no effort to cross examine either Shaylah or Nurse Stine about Shaylah's admission of prior sexual activity.

When Nurse Stine was called as a witness for the prosecution, she described her examination of Shaylah's hymen, and her investigation of whether its "borders are intact." She explained that a "hymen is a thin piece of tissue that surrounds the border of the vaginal opening." Nurse Stine observed that Shaylah "had a tear in the hymenal tissue at 5 o'clock." The nurse did not note anything of concern inside the vaginal area. Nurse Stine testified that the hymenal tear would not be something caused by normal washing or use of a tampon. She was not able to photograph the tear because the available camera was "fairly new," and her "skills as a photographer are not . . . as adequate as they need to be" On cross

examination, Nurse Stine noted that she also examined Shaylah's anus because Shaylah said Sanchez had put his penis "in her butt."

Although Sanchez made no effort to cross examine either Shaylah or Nurse Stine about Shaylah's report of prior sexual intercourse, Sanchez sought to return to the issue after the State rested its case in chief. At that time, the following colloquy ensued:

[DEFENSE COUNSEL]: Your Honor, I'd ask you to revisit the issue of the prior sexual intercourse that we discussed earlier, in the SANE report, on whether or not she had sexual intercourse prior to this. I'd ask you to revisit that. And I'd ask that I be able to ask a question about that because, obviously, the Government is going to make an argument about this hymenal tear.

[THE COURT]: What exactly are you asking me to do?

[DEFENSE COUNSEL]: To allow me to ask questions about the question in the SANE report.

[THE COURT]: No.

[DEFENSE COUNSEL]: So the answer is, I'm not gonna allow you to do that?

[THE COURT]: No.

[DEFENSE COUNSEL]: Okay.

[THE COURT]: I'm not gonna let you do that.

[DEFENSE COUNSEL]: Fine.

[THE COURT]: I assume you would ask her, to the witness, the, [Shaylah], you would call her. That's what you're -

[DEFENSE COUNSEL]: Either [Shaylah] or the SANE nurse.

[THE COURT]: No. I'm not gonna allow you to do that.

[DEFENSE COUNSEL]: Okay.

[THE COURT]: Based on the Rule and the Statute.

After the jury verdict was returned, Sanchez raised this issue again in his motion for new trial. He argued:

The Court erred when it refused the Defendant the right to question [Shaylah] and Ms. Stine about [Shaylah's] alleged statement to Ms. Stine during the emergency forensic examination concerning the statement "Last Intercourse: Pt states [']maybe years ago['] uncertain of date." Cross-examination on this issue might have illuminated the jury concerning the veracity of the alleged victim and the "hymenal tear at 5 o'clock."

Sanchez now argues that the trial court erred in denying his request to recall either Shaylah or Nurse Stine for the purpose of eliciting testimony about Shaylah's past sexual intercourse. He argues that such inquiry was permissible because such testimony would have provided an alternative explanation for the source of the "trauma," *i.e.*, the hymenal tear observed by Nurse Stine. We agree with Sanchez that further inquiry on this subject should have been permitted for the limited purpose of establishing whether the hymenal tear could have been attributable to a prior act of sexual intercourse.

The Maryland Rape Shield statute, Md. Code (2002), Criminal Law Article ("CL"), § 3-319, reads, in pertinent part:

§ 3-319. [Rape and sexual offense]-Admissibility of evidence.

* * *

(b) *Specific instance evidence admissibility requirements.* - Evidence of a specific instance of a victim's prior sexual conduct may be

admitted in a prosecution for rape [...] only if the judge finds that:

1. the evidence is relevant;
2. the evidence is material to a fact in issue in the case;
3. **the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and**
4. **the evidence:**
 - (i) is of the victim's past sexual conduct with the defendant;
 - (ii) **is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;**
 - (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
 - (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

- (c) *Closed hearing.*-(1) Evidence described in subsection (a) or (b) of this section may not be referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing under paragraph (2) of this subsection and determined that the evidence is admissible.

(Emphasis added.)

In this case, the court declined to conduct any in camera hearing as contemplated by CL § 3-319(c). Given the sexual assault nurse examiner's inconclusive testimony about the possible sources of the hymenal tear, further inquiry into the question of whether the observed trauma might have been caused by a prior incident of intercourse was in order, and should have been permitted under CL § 3-319(b)(4)(ii). In the absence of such further inquiry, the jury was left with the impression — which may be a mis-impression — that the only possible source of the hymenal tear was vaginal intercourse with Sanchez.

Although the trial court was understandably concerned about protecting the young witness in this case from being the subject of an embarrassing and abusive fishing expedition, a narrowly limited inquiry should have been conducted in a closed hearing conducted in accordance with CL § 3-319(c). Given the issue, we envision that the first, and perhaps only, inquiry would have been of Nurse Stine regarding what, exactly, Shaylah said to her regarding the prior act of intercourse and whether, in Stine's expert opinion, a prior act of vaginal intercourse at such a tender age could have caused the hymenal tear that Nurse Stine observed. Depending on her answer, that may have ended the inquiry. Even if she acknowledged that the tear could have occurred earlier, she may have pointed out that the redness in the immediate area and the bleeding indicated recent trauma. This kind of clarification from Nurse Stine would not necessarily have subjected Shaylah to any embarrassing cross-examination or to the disclosure of any sexual activity beyond that which she already admitted to Nurse Stine and that was recorded in the nurse's report. Its relevance, however, was clear. As we observed, Sanchez had initially been charged as well with a sexual offense, presumably based on some evidence that the sexual activity between him and Shaylah had been anal intercourse. That charge was dismissed, however, at the close of the State's case in chief, leaving only the charge of rape based on vaginal intercourse. If Sanchez could show that the hymenal tear may have occurred earlier, he may have been able to cast reasonable doubt as to whether he and Shaylah engaged in vaginal intercourse.

Under the circumstances of this case, we conclude that the trial court erred in denying Sanchez the opportunity to explore Shaylah's sexual history in this limited manner. Because the prosecutor urged the jury to rely upon Nurse Stine's testimony about the hymenal tear as providing corroboration for Shaylah's testimony, the error was not harmless.

Question 4 - The State's Rebuttal Argument

Sanchez claims on appeal that the trial court abused its discretion by overruling his objections to certain statements made by the State during its rebuttal closing argument. Sanchez urges this Court to adopt a "straightforward rule" that provides: "It is *always* prosecutorial misconduct for the State to disparage the institutional role of defense counsel at closing arguments, and such misconduct will *always* constitute reversible error."

The general rule is that "[t]he regulation of argument rests within the sound discretion of the trial court." *Grandison v. State*, 341 Md. 175, 224 (1995). We see no reason to analyze this particular category of closing arguments pursuant to a standard that deprives the trial court of discretion to manage the conduct of trials. Nevertheless, we conclude that the trial court erred in this case in overruling the objections made by Sanchez when the prosecutor disparaged all defense counsel.

This Court recently examined the issue of when a prosecutor's comments cross the line. In *McFadden and Miles v. State*, 197 Md. App. 238 (2011), the Court noted that the State is generally "allowed liberal freedom of speech and may make any comment that is warranted *by the evidence* or inferences reasonably drawn therefrom." *Id.* at 255 (emphasis

added) (quoting *Whaley v. State*, 186 Md. App. 429, 452, 974 A.2d 951 (2009)). But the State's "great leeway" in making its arguments is not unfettered. *Donaldson v. State*, 416 Md. 467, 489 (2010). As we observed in *James v. State*, 191 Md. App. 233, 258-259 (2010):

[A]lthough prosecutors "are given 'great leeway' during opening and closing arguments[,] they must "remain within the bounds of the evidence presented at trial and *refrain from appealing to the jury's passions and prejudices.*" *Lawson v. State*, 389 Md. 570, 608, 886 A.2d 876 (2005).

(Emphasis added.)

In *Reidy v. State*, 8 Md. App. 169 (1969), we reversed a conviction in a capital case because "the trial judge[] fail[ed] to take appropriate corrective action," *id.* at 179, when the prosecutor argued that the claim of self-defense was "a fiction manufactured by the defense counsel." *Id.* at 172. We stated: "It is fundamental to a fair trial that the prosecutor should make no remarks calculated to unfairly prejudice the jury against the defendant." *Id.*

When an appellant complains on appeal that improper argument prejudiced his case, we review the record for an abuse of discretion. And even if we detect some impropriety in the State's comments, reversal is not necessarily required. As this Court observed in *McFadden and Miles*, *id.* at 256:

Even if we determine that counsel's comments were improper, we will not reverse a conviction "unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Donaldson*, *supra*, 416 Md. at 496 (quoting *Henry v. State*, 324 Md. 204, 231 (1991)(emphasis omitted). "We must determine, upon 'our own independent review of the record,' whether we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'"

[Donaldson] *Id.* [at] 416 Md. at 496 (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). Thus, a prosecutor's improper comments will require reversal, "if it 'appears that the . . . remarks actually misled the jury to the defendant's prejudice . . .'" *Id.* (quoting *Hill v. State*, 355 Md. 206, 224 (1999))

During the appellant's closing argument in this case, defense counsel argued as follows:

[DEFENSE]: This is not new for Shaylah, not telling the truth. It[']s not new for her. Here's her MySpace page, her profile page, that she says is not open to the public. And it[']s dated February 4, 2010, printed out today. Here it is. Here's her picture and here's what she says about who she is. She says she's 17 years old. And she is obviously not telling the truth.

When the State responded, the court overruled appellant's objections during the following portion of the State's rebuttal closing:

[STATE]: You know, the State has, counsel is right, the State has the burden of proof. We do. But one things [*sic*] that happens from the defense's job is to make everything seem complicated. It's their job.

[DEFENSE]: Objection.

[THE COURT]: Overruled.

[STATE]: ["Let me muddy the waters so that we engineer doubt."]

[DEFENSE]: Objection.

[THE COURT]: Overruled.

[STATE]: It's the defense's job. So the defense wants to go on this thing about, well, she has this MySpace page and the MySpace page she has, and you're gonna have it, she

says she's 17. Well she said, she tells you she tells him that she's 17. So what. It has nothing to do with the crime. She said 17. He [defense counsel] asked [Shaylah], well, can anybody see your profile, she says, no. And lo and behold, on this document it says the profile is set to private. Now who knows if Shaylah understands MySpace. I have no idea. I don't understand MySpace. But also, last time there was a login to the MySpace, May 14, 2007. The last time she logged into her MySpace. She's not really checking it. She's not using it. She's not, doesn't use it. But it is thrown in to muddy the waters.

[DEFENSE]: Objection.

[STATE]: ["We want you to ignore the fact of what we have here. I want to distract you from the evidence that is there.["] I want you to focus on Shaylah and the fact that she's telling people that she's 17, because now she's lying. You know, ["I'm gonna throw all these things in about a 12-year-old and her decision making to confuse or muddy the fact["] that the date in question, on August 19, 2008, when you go back there and you balance the evidence and you use your common sense you have a 28 year old man in a hotel room with a 12 year old. He spent \$99.99 to get a hotel room. He doesn't need to have sex with her that night, he knows where she's gonna be at 7 o'clock in the morning. And Shaylah so, but she's lying.

(Emphasis added.) Sanchez did not request a curative instruction or object further until he raised the issue again in his motion for new trial.

We agree that the prosecutor's argument was an improper appeal to the jury's prejudice against criminal defense attorneys. The prosecutor's comments attacked the entire segment of the bar who provide defense services to criminal defendants, suggesting to the

jury that, as a group, criminal defense counsel must “engineer doubt” and “muddy the waters” in order “to distract [the jurors] from the evidence.” Ironically, this argument focused the jury’s attention away from the evidence in this particular case, and urged the jury to discount all arguments made by defense counsel in this case because of gamesmanship on the part of defense counsel generally. It is not appropriate for a prosecutor to make such an appeal to the jury’s prejudice.

To be clear, it may be appropriate in a particular case for a prosecutor to argue that the defense counsel *in that case* has made a misleading argument or is muddying the water, if in fact there is a basis to make such an argument. *Cf Reidy, supra*, 8 Md. App. at 172-77 (reviewing examples of prosecutors’ arguments). But that is far different from an argument that disparages defense counsel generally and urges the jury to disregard this defendant’s attorney’s arguments because defense counsel are an untrustworthy group whose “job” it is to deceive the jury about the facts. Such was the essential implication of the prosecutor’s argument which was objected to in this case. The court’s failure to sustain the defendant’s objections served as an endorsement and seal of approval for this improper argument. *Cf Reidy*, 8 Md. App. at 172 (“And by declining defense counsel’s request that the prosecutor apologize, and in finding nothing ‘improper’ in the prosecutor’s remarks, the court’s action may have been considered by the jury as tantamount to judicial approval of the propriety of such argument.”).

In a case that turned on the credibility of a single witness, we cannot say that we are persuaded beyond a reasonable doubt that this error was harmless. Consequently, even if we had not concluded that the conviction had to be vacated for the reasons set forth in the previous section of this opinion, we would vacate the conviction and remand for further proceedings on the basis of this error.

**JUDGMENT OF THE CIRCUIT
COURT FOR CHARLES COUNTY IS
VACATED; CASE REMANDED FOR
FURTHER PROCEEDINGS NOT
INCONSISTENT WITH THIS
OPINION; COSTS TO BE PAID BY
CHARLES COUNTY.**