Circuit Court for Baltimore City
Case No. 819319009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 196

September Term, 2020

FRANK SYDNOR

V.

STATE OF MARYLAND

Fader, C.J.,
Berger,
Arthur,

JJ.

Opinion by Fader, C.J.

Filed: June 15, 2021

A jury in the Circuit Court for Baltimore City found Frank Sydnor, the appellant, guilty of second-degree assault of Keona Tate. Mr. Sydnor contends that the circuit court erred in: (1) permitting Ms. Tate to testify concerning the reason she was afraid of him and his family; and (2) not sua sponte precluding the prosecutor from making certain statements during rebuttal closing argument. We conclude that the circuit court did not abuse its discretion in its evidentiary ruling during Ms. Tate's testimony, and we decline to engage in plain error review of Mr. Sydnor's unpreserved objections to the prosecutor's rebuttal argument. Accordingly, we will affirm.

BACKGROUND

On August 22, 2019, at around 3:30 a.m., Ms. Tate left her brother's house in Baltimore. On her way home, she encountered Ziona Farmer, a former friend with whom she was not on good terms, and Terrence Roberts, Ms. Farmer's nephew. Ms. Tate attempted to avoid the pair but was intercepted by Ms. Farmer's mother and Mr. Sydnor. Ms. Tate claimed that an altercation ensued, during which Ms. Farmer, Mr. Roberts, and Mr. Sydnor punched, kicked, and stomped on her.

Mr. Sydnor was subsequently arrested and indicted for second-degree assault and conspiracy to commit second-degree assault in the Circuit Court for Baltimore City. He elected a jury trial, which took place in January 2020. At the conclusion of the trial, the jury acquitted Mr. Sydnor of conspiracy to commit second-degree assault but convicted him of second-degree assault. This timely appeal followed. We will discuss the background relevant to each of Mr. Sydnor's specific contentions below.

DISCUSSION

We typically review a trial court's ruling to admit or exclude evidence under an abuse of discretion standard. *Wheeler v. State*, 459 Md. 555, 560-61 (2018). When reviewing objections based on relevance and prejudice under Rules 5-401 and 5-403, the Court of Appeals has explained that the applicable standard of review is a two-step process.

> First, we consider whether the evidence is legally relevant which is a conclusion of law that we review *de novo*. *Portillo Funes v. State*, 469 Md. 438, 478 (2020) (citing *Ford v. State*, 462 Md. 3, 46 (2018)) ("An appellate court reviews *de novo* a trial court's determination as to whether evidence is relevant."). After determining whether the evidence in question is relevant, we consider whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial. Thus, the trial judge's ruling on the admissibility of evidence under Rule 5-403 is reviewed for abuse of discretion. *Id.* The standard of review for "[a]n abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court." *Williams v. State*, 457 Md. 551, 563 (2018) (citing *Fuentes v. State*, 454 Md. 296, 325 (2017)). Appellate "courts 'are generally loath to reverse a 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.'" *Portillo Funes*, 469 Md. at 479 (quoting *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

Montague v. State, 471 Md. 657, 673-74 (2020) (alteration in original).

A trial court's ruling regarding the propriety of statements in a closing argument also will not be overturned "absent a clear abuse of discretion[.]" *Mitchell v. State*, 408 Md. 368, 380-81 (2009). Attorneys have a great deal of leeway in presenting closing arguments to the jury. *See Spain v. State*, 386 Md. 145, 152-53 (2005).

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be

> confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. [Counsel] may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. [Counsel] may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Id. at 153 (quoting *Degren v. State*, 352 Md. 400, 430 (1999)).

Furthermore, it is the trial court, not the reviewing court, which stands in the best position to assess the propriety of both evidentiary rulings and closing arguments. That is because a trial court is "physically on the scene, able to observe matters not usually reflected in a cold record," and "has [its] finger on the pulse of the trial." *Frazier v. State*, 197 Md. App. 264, 282 (2011) (quoting *State v. Cook*, 338 Md. 598, 615 (1995)).

I. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN OVERRULING MR. SYDNOR'S OBJECTION TO MS. TATE'S TESTIMONY EXPLAINING WHY SHE WAS AFRAID.

There are three types of second-degree assault in Maryland: intent-to-frighten, attempted battery, and battery. *State v. Frazier*, 469 Md. 627, 644 (2020). At trial, the State contended that Mr. Sydnor was guilty of both the battery and intent-to-frighten types of second-degree assault. As the court instructed the jury at the close of all the evidence, using MSBA Criminal Pattern Jury Instruction (2d ed. 2018), 4:01A, to convict Mr. Sydnor of intent-to-frighten assault, the State was required to prove:

> One, that the Defendant committed an act with the intent to place the complaining witness in fear of immediate offensive physical contact or physical harm;
>
> Second, that the Defendant had the apparent ability at that time to bring about offensive physical contact or physical harm; and
>
> Thirdly, that the complaining witness reasonably feared immediate offensive physical contact or physical harm; and

Fourthly, that the Defendant's actions were not legally justified.

See State v. Stewart, 464 Md. 296, 299 n.2 (2019) (stating that the Court of Appeals "has recognized this formulation as a correct statement of Maryland law on second-degree assault of the intent-to-frighten type").

During the State's case-in-chief, presumably with the aim of establishing the third of those requirements, the prosecutor asked Ms. Tate whether she was afraid during the encounter. Ms. Tate answered that she was. The following exchange then took place:

> [Prosecutor]: Why were you afraid?
>
> [Ms. Tate]: Because I know what they're capable of, the type of things that they do. So –
>
> [Defense counsel]: Objection, Your Honor.
>
> The Court: Overruled.
>
> [Prosecutor]: You may continue.
>
> [Ms. Tate]: I know how they are. I know the types of things that they do. I've been around them.

After clarifying that the "they" to whom Ms. Tate was referring included Mr. Sydnor, Ms. Farmer, and Mr. Roberts, she continued:

> [Ms. Tate]: I know that they hurt people. They like to hurt people.

Mr. Sydnor contends that the court erred in permitting the State to elicit that testimony from Ms. Tate because it constituted impermissible "other crimes" evidence that did not meet the standard for admission under Rule 5-404(b), was not relevant evidence under Rule 5-402, and was more prejudicial than probative under Rule 5-403. We disagree.

As an initial matter, Mr. Sydnor's claims on appeal are only partially preserved. He identifies three of Ms. Tate's answers that he contends the court erroneously admitted: (1) her statement that she knew what Mr. Sydnor and his family were "capable of, the type of things that they do"; (2) her testimony that she knew "how they are" and "the types of things that they do"; and (3) her statement that "they hurt people" and like doing so. As reflected above, Mr. Sydnor objected to only the first of these statements. In his brief, Mr. Sydnor argued preemptively that his counsel was not required to make another objection "when the court, not seconds before, had overruled the first objection to remarks of substantially similar character . . . and the subsequent comments were a continuation of the original answer."

Rule 4-323(a) requires objections to evidence be made contemporaneous to the entry of that evidence to preserve those objections for our review. To preserve an objection for appellate review, "a party should object to each question or assert a continuing objection to an entire line of questioning." *State v. Robertson*, 463 Md. 342, 366 (2019). If a party fails to object contemporaneously or assert a continuing objection, "the objection is waived and the issue is not preserved for review." *Fone v. State*, 233 Md. App. 88, 113 (2017). The contemporaneous objection requirement permits a trial court to "pass upon, and possibly correct any errors in the proceedings," and "prevent[s] the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation." *Paige v. State*, 226 Md. App. 93, 121-22 (2015) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). If a litigant fails to object, the trial court is deprived of the opportunity to correct any errors in the proceedings. *Jordan v. State*, 246 Md. App. 561, 587, *cert. denied*, 471 Md. 120 (2020).

Here, Mr. Sydnor relies on an exception to the contemporaneous objection requirement pursuant to which counsel is "not required to make a second objection when the court, not seconds before, ha[s] overruled [counsel's] first objection to remarks of substantially similar character."[1] *Donaldson v. State*, 416 Md. 467, 494 n.6 (2010). However, Mr. Sydnor assumes, without any analysis, that all of the remarks to which he refers were of "substantially similar character." We agree that the first two statements were substantially similar in character, as both contained generic references to Ms. Tate's awareness of the "types of things" Mr. Sydnor and his family do. We know from the question to which Ms. Tate was responding that whatever "types of things" she had in mind made her afraid, but the statements lacked any specificity concerning what types of things those were or why they made her afraid. It could have been that she knew that they carried weapons, that they performed martial arts, that they were often intoxicated, or a variety of other "things" that might scare someone in her situation but would not necessarily reflect engagement in unlawful or otherwise wrongful activities.

On the other hand, her third statement—"that they hurt people" and like to do so—went beyond the other two. It was thus not of a substantially similar character to the first two statements. By failing to object to the third statement, Mr. Sydnor prevented the trial court from considering whether it was different in character from testimony the court had already allowed and, if so, whether to permit it. As a result, to the extent that Ms. Tate's

[1] The State does not argue on appeal that this objection is unpreserved. However, the State's failure to raise a preservation issue in its brief does not prevent the Court from addressing it. *See Brzowski v. Maryland Home Improvement Comm'n*, 114 Md. App. 615, 637 n.10 (1997).

third statement went farther than the first two, Mr. Sydnor failed to preserve his objection to it. We will thus proceed to address Mr. Sydnor's objection to the extent preserved.

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. Here, as noted, the State charged Mr. Sydnor with, among other things, second-degree assault of the intent-to-frighten type, which required the State to prove that Ms. Tate "reasonably feared immediate offensive physical contact or physical harm." Evidence *that* Ms. Tate was fearful of Mr. Sydnor was thus relevant to whether she "feared immediate offensive physical contact or physical harm," and evidence of *why* she was fearful was relevant to whether that fear was reasonable. The circuit court thus did not err in determining that the testimony was relevant.

Mr. Sydnor contends that even if relevant, the evidence still should have been excluded as improper "other crimes" evidence pursuant to Rule 5-404(b) or because the risk of unfair prejudice from the testimony outweighed any probative value. We will address each argument in turn.

Rule 5-404(b) states:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

As the State points out, Ms. Tate's testimony does not properly fall under the rubric of Rule 5-404(b) because she did not testify that Mr. Sydnor had committed any particular "other crimes, wrongs, or other acts"—what are frequently referred to collectively as "bad acts." *See Burral v. State*, 118 Md. App. 288, 297-98 (1997) (holding that statements that the defendant had "been on the streets" and "been to prison" were "oblique, ambiguous reference[s] to previous criminal activity, at best, and not the kind of direct and unequivocal evidence that [Rule 5-404(b)] contemplates excluding"), *aff'd*, 352 Md. 707 (1999); *see also Klauenberg v. State*, 355 Md. 528, 547 (1999) (stating "that a bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit").

To the extent that Ms. Tate's testimony concerning what Mr. Sydnor and his family are "capable of" and the "type of things that they do" falls under the rubric of Rule 5-404, it is more akin to character trait evidence, which is governed by Rule 5-404(a).[2] *See generally Vigna v. State*, 470 Md. 418, 450 (2020) (discussing character trait evidence). Under Rule 5-404(a)(1), with certain exceptions, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." However, if evidence of that character trait is offered for another purpose, "[s]uch evidence is admissible so long as it is relevant and its

[2] Had it been preserved, the same is true of Ms. Tate's testimony that "they like to hurt people," which did not identify any particular past act or occasion on which Mr. Sydnor and his family had hurt anyone.

probative value is not outweighed by the risk of undue prejudice[.]" *Ford v. State*, 235 Md. App. 175, 197 (2017), *aff'd*, 462 Md. 3 (2018).

Here, Ms. Tate's testimony came in response to a request that she explain why she was afraid of Mr. Sydnor and his family. It was offered not to prove that Mr. Sydnor acted in accordance with any particular character trait, but rather to identify the basis for Ms. Tate's fear, which the State was required to prove was reasonable.[3] *See Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (noting that one manner of proving assault is to show that a victim was "in reasonable apprehension of an imminent battery" (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992))); *accord United States v. Volpendesto*, 746 F.3d 273, 293 (7th Cir. 2014) (holding that a witness's testimony that "[b]ecause of who he is," the defendant did not need to directly threaten him, did not violate Federal Rule of Evidence 404(a)(1) because the testimony was offered to show the witness's state of mind, not action

[3] The State contends that Ms. Tate's testimony would also have passed muster under Rule 5-404(b). In doing so, the State correctly identifies the three-step analysis that a court must undergo to admit evidence under Rule 5-404(b):

> First, the evidence must fall within one of the exceptions listed in Rule 5-404(b), or otherwise have special relevance to some contested issue in the case. [*State v. Westpoint*, 404 Md. 455, 489 (2008).] Second, . . . the court must find that the accused's involvement in the other crimes is established by clear and convincing evidence. *Id.* Third, . . . the trial court then must weigh the necessity for, and probative value of, the other crimes evidence against any undue prejudice likely to result from its admission. *Id.*

Donati v. State, 215 Md. App. 686, 738 (2014). However, although the State discusses the first and third steps in this analysis as applied to this case, it omits the second step, which is not satisfied here. The State did not even *identify* any particular prior bad act by Mr. Sydnor, thus leaving nothing for the State to prove involvement in by clear and convincing evidence. That reinforces our conclusion that Rule 5-404(b) does not apply to Ms. Tate's testimony.

in conformity with a character trait). The evidence was thus not precluded under Rule 5-404(a).

Furthermore, we cannot say that the trial court abused its discretion in declining to exclude Ms. Tate's testimony under Rule 5-403, which requires that the risk of unfair prejudice not substantially outweigh the probative value of evidence. The "balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge." *Oesby v. State*, 142 Md. App. 144, 167 (2002). "We reverse only egregiously bad calls as abuses of discretion." *Newman v. State*, 236 Md. App. 533, 557 (2018). Here, as noted, testimony about Ms. Tate's fear was relevant to prove a required element of assault of the intent-to-frighten type. And, as the State points out, the testimony concerned only generalities without identifying any specific bad acts, which minimized the potential for unfair prejudice. *Cf. United States v. Waloke*, 962 F.2d 824, 830 (8th Cir. 1992) (upholding a trial court's ruling admitting evidence of the victim's reputation for violence but excluding evidence of the victim's specific violent acts under Federal Rule of Evidence 403).

Mr. Sydnor observes that the evidence in the case was not overwhelming because Ms. Tate's testimony was contradicted by two witnesses who averred that Ms. Tate initiated the confrontation and Mr. Sydnor played no role in it. He thus appears to suggest that the statements at issue were prejudicial because they bolstered Ms. Tate's account of the confrontation. If the testimony had been offered by a different witness, Mr. Sydnor's point may have been more persuasive. Coming from Ms. Tate herself, however, it is difficult to discern how the testimony could have bolstered her credibility vis-à-vis the

other witnesses. Under these circumstances, and considering the deference owed to the trial court's determination, we cannot say that the court abused its discretion.

II. MR. SYDNOR'S OBJECTIONS TO THE PROSECUTOR'S STATEMENTS IN REBUTTAL ARE NOT PRESERVED.

Mr. Sydnor also challenges two statements that the State made during rebuttal argument. Although he concedes that he did not contemporaneously object to the statements, and that his objections are thus unpreserved, he asks us to engage in plain error review. We decline to do so.

The first statement to which Mr. Sydnor objects, on the ground that it misstated the law, is:

> Ladies and gentlemen, I'll have you know, when it comes to assault, whether somebody pokes you in the face, puts their finger in your face, gets in your face, close proximity, that is offensive. You are offended if you walk out of here today and somebody got so close to you without your consent, without your permission. You're offended. That is assault.

He also contends that the prosecutor impermissibly invoked the possibility of future criminality in the following statement:

> [Ms. Tate] did what she was supposed to do by coming here, doing her best to hold him accountable. She asks that of you. Hold him accountable. She's asking for your protection. She doesn't want this to happen again. She doesn't want to have to walk into her mother's house with a swollen face, blood on her clothes, "Mommy, I was just beat up. Mommy, I was just attacked." She doesn't want that to happen again.

Mr. Sydnor did not lodge a contemporaneous objection to either statement.

This Court ordinarily "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). If an issue is not preserved, we may choose to review the issue for plain error; "that is, error

which vitally affects a defendant's right to a fair and impartial trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). The choice "to conduct plain error review . . . is within our 'unfettered discretion.'" *Mines v. State*, 208 Md. App. 280, 303 (2012) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Four factors are involved in plain error review: (1) the identification of "an error or defect" that has not been affirmatively waived by the appellant; (2) the error or defect "must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights"; and (4) the court must determine, in its discretion, that the error should be remedied, which ordinarily is reserved for errors that "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Far from being a mere formality, the requirement of contemporaneous objections during closing to preserve an argument for appellate review is vital. Objections "permit [the trial judge] to consider the legal propriety of the particular question, piece of documentary evidence, or argument and, if appropriate, whether a curative measure may be fashioned to overcome or substantially ameliorate the possible prejudice of a legal misstep." *Lawson v. State*, 389 Md. 570, 609-10 (2005) (Harrell, J., concurring). "Appellate refusal to take notice of an unpreserved objection is not an exclusionary or cathartic measure. . . . It is first, last, and always an insistence that the trial court has been given the opportunity to correct its own error." *Jordan*, 246 Md. App. at 587. A failure to adhere to preservation requirements for challenges to statements made during closing

argument, where corrective action could have been taken in response to a timely objection, risks creating a perverse incentive for counsel to make a strategic decision not to object at trial, only to raise the court's failure to intervene sua sponte as a ground for later reversal. *See Robinson v. State*, 410 Md. 91, 104 (2009) (noting that engaging in liberal plain error review could encourage counsel to engage in gamesmanship). Accordingly, "[p]lain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v. State*, 429 Md. 112, 130-31 (2012) (quoting *Savoy v. State*, 420 Md. 232, 243 (2011)). Plain error review thus "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris*, 153 Md. App. at 507.

With that standard in mind, we conclude that neither of the challenged statements merit plain error review under the circumstances presented. Even if we assume that the other prongs for consideration in plain error review were satisfied, we do not choose to exercise our discretion here because we do not believe, in the circumstances of this case and in light of the risks inherent in expansive plain error review, that the errors alleged "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."[4] *Rich*, 415 Md. at 578 (quoting *Puckett*, 556 U.S. at 135). That is so whether we consider the two statements individually or, as Mr. Sydnor requests, for their cumulative effect. *See*

[4] With respect to Mr. Sydnor's contention that the prosecutor misstated the law regarding assault, we observe that the trial court correctly instructed the jury concerning the elements of assault, that the court's instructions were binding, and that the jurors were required to "apply the law as I explain it to you in arriving at your verdict."

Lawson, 389 Md. at 604-05 (engaging in review of "the cumulative effect of all errors on the ability of a jury to render a fair and impartial verdict" after identifying plain error).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.