Circuit Court for Montgomery County
Case No. 462457-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 502

September Term, 2021

DEANNA ONGWELA

v.

LUIS ERNESTO FLORES-MARZAL, *ET AL.*

Nazarian,
Friedman,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 8, 2022

This appeal arises out of an automobile accident that occurred in June 2016, when Luis Ernesto Flores-Marzal struck the rear of Deanna Ongwela's vehicle. Ms. Ongwela filed suit in the Circuit Court for Montgomery County against Mr. Flores-Marzal.[1] He admitted liability and the suit proceeded only on damages. After a two-day jury trial, the jury awarded Ms. Ongwela her past medical expenses plus $35,000 in non-economic damages. On appeal—Ms. Ongwela prevailed in the trial court but suggests, without quite saying so, that trial errors caused the jury to reduce the damages award—she asserts that the circuit court erred when it failed to give a curative instruction to the jury and when it told jurors that it wasn't encouraging questions during deliberations. We see no error and affirm.

I. BACKGROUND

On June 3, 2016, as Ms. Ongwela drove to the grocery store, she came to an intersection and made a complete stop. As she sat waiting to enter the intersection, Mr. Flores-Marzal collided into the rear of her vehicle, and she sustained numerous injuries. Although Mr. Flores-Marzal accepted full responsibility for the accident, the extent of Ms. Ongwela's injuries and damages, especially the extent to which she had lost wages and needed future medical care, remained in dispute.

On February 1, 2019, Ms. Ongwela filed a complaint alleging she suffered injuries and damages as a result of Mr. Flores-Marzal's negligent driving. Mr. Flores-Marzal filed a motion to appear virtually; his insurer, Liberty Mutual Insurance, moved to intervene,

[1] Mr. Flores-Marzal passed away on June 20, 2021.

and the court granted both motions.

The case proceeded to trial in May 2021. At the onset of jury selection, the court gave a summation of the underlying events. The court identified Ms. Ongwela and her attorney to determine whether any member of the jury knew them. When the court identified the defendants, Mr. Flores-Marzal and Liberty Mutual, the circuit court asked whether Mr. Flores-Marzal was present. His counsel responded that Mr. Flores-Marzal was not present because "he has cancer and his health did not allow him to make it today." Ms. Ongwela's counsel did not object.

The topic of Mr. Flores-Marzal's absence did not arise again until opening statements, when Ms. Ongwela's counsel referred to him: "[a]ll of this because . . . Mr. Flores, for whatever reason wasn't paying time and attention to the roadway. We don't know why. We may never know why. I don't think he is here. So, we may not even hear from him." Mr. Flores-Marzal's counsel then addressed his absence during her opening statement:

> [COUNSEL FOR MR. FLORES-MARZAL]: Good afternoon, ladies and gentlemen . . . I represent the defendant Luis Flores-Marzal. He wanted to be here today, but he has terminal cancer—
>
> [COUNSEL FOR MS. ONGWELA]: Objection.
>
> [COUNSEL FOR MR. FLORES-MARZAL]:—and his health could not allow him to be here today.
>
> [THE COURT]: Sustained.

Ms. Ongwela's counsel then asked to approach the bench. During the bench conference, Ms. Ongwela's counsel reiterated her objection, but the circuit court noted that Mr. Flores-

Marzal's absence had been raised in her opening:

> [THE COURT]: You did raise the issue about him not being here. So—
>
> [COUNSEL FOR MS. ONGWELA]: But my issue that is what the jury instruction says. It is a UN case. That is—
>
> [COUNSEL FOR MR. FLORES-MARZAL]: But you are not allowed to bring that up.
>
> [THE COURT]: You made a point of him not being here. Why shouldn't she address it?
>
> [COUNSEL FOR MS. ONGWELA]: She can certainly address it, but say it is terminal cancer. I mean that is certainly if you are evoking sympathy, right?
>
> [THE COURT]: It is a good reason for him not to be here to address why. In fact I am going to allow you to do that. Go ahead.

Counsel stepped back, and Ms. Ongwela's counsel didn't ask for a curative instruction or any other relief. Indeed, and despite mentioning that it would allow the reference to Mr. Flores-Marzal's absence, the court didn't overrule the objection or say anything further to the jury about his whereabouts. Mr. Flores-Marzal's counsel then continued with opening statements and Mr. Flores-Marzal's absence or health condition did not arise again during the remainder of the trial.

At the end of trial and before the jury began deliberating, the court instructed the jury on how to forward questions and notes, although the court discouraged them:

> Just knock if you have a question. I'm not encouraging questions or notes. In fact, I'm discouraging questions or notes, but if you have one send it, okay, and just bring it to my law clerk, and she'll bring it to me. I have to gather the attorneys. I might be in a crucial point of my other motions, so you might not get an answer right away is what I'm saying, okay, but do not ask for—you've got everything you're going to have, okay? Evidence-wise, law-wise? All right?

Neither Ms. Ongwela's nor Mr. Flores-Marzal's counsel objected to the circuit court's comment.

The jury awarded damages in the amount of $24,384.65 in past medical expenses and $35,000 in non-economic damages, for a total of $59,384.65. The jury declined to award Ms. Ongwela damages for lost wages or future medical expenses. Ms. Ongwela timely noted her appeal.

II. DISCUSSION

Ms. Ongwela presents four questions on appeal,[2] and they fall into two categories.

[2] Ms. Ongwela phrased the Questions Presented in her brief as follows:

1. Did the trial court err in "opening the door" for defendant's counsel to improperly remark during Voir Dire defendant has cancer and his health did not allow him to make it when Defendant's Motion to Appear to Trial Virtually had been granted?
2. Did trial court err or abuse its discretion by initially sustaining plaintiff's objection to defendant's counsel remark during opening statement that defendant had terminal cancer, then during the bench conference that immediately followed, allowing defendant's counsel to address why defendant was not present when Rules 5-402 states: ". . . Evidence that is not relevant is not admissible"[?]
3. Did the trial court abuse its discretion by sustaining plaintiff's objection in front of the jurors after defendant's counsel remarked during opening statement that defendant was not present because he has terminal cancer without curative instructions to jury?
4. Did trial court err or abuse its discretion when the court included in instructions to jurors [the Court] is not encouraging questions or notes. In fact, [the Court] is discouraging questions or notes?

First, did the circuit court err in the way it handled two references to Mr. Flores-Marzal's health condition, one during jury selection and the other during opening statements? *Second*, did the circuit court abuse its discretion when it instructed the jury that it was not encouraging questions or notes?

Trial judges are afforded "'broad discretion in the conducts of trials[,]'" including decisions relating to the admissibility of evidence and the management of trial court proceedings. *Void v. State*, 325 Md. 386, 393 (1992) (*quoting McCray v. State*, 305 Md.

Mr. Flores-Marzal adopts the Questions Presented in Ms. Ongwela's brief.

Liberty Mutual presented its Questions Presented as follows:

1. Did the Circuit Court err in 'opening the door" for Defendant's counsel to improperly remark during Voir Dire Defendant has cancer and his health did not allow him to make it when Defendant's Motion to Appear to Trial Virtually had been granted?
2. Did the Circuit Court err or abuse its discretion by initially sustaining Plaintiff's objection to Defendants' Counsel's remark during opening statement that Defendant had terminal cancer, then during the bench conference that immediately followed, allowing Defendant's Counsel to address why Defendant was not present when Rule 5-402 states: ". . . Evidence that is not relevant is not admissible."
3. Did the Circuit Court abuse its discretion by sustaining Plaintiff's objection in front of jurors after Defendant's Counsel remarked during opening statement that Defendant was not present because he has cancer without curative instructions to the jury?
4. Did the Circuit Court err or abuse its discretion when the Court included in instructions to jurors [the Court] is not encouraging questions or notes. In fact, [the Court] is discouraging questions or notes?

126, 133 (1985)). We disturb decisions falling within the discretion of the trial courts only when it is clear that "some serious error or abuse of discretion or autocratic action has occurred." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007) (cleaned up). This is a high threshold: a trial court abuses its discretion "where no reasonable person would take the view adopted by the trial court" or "when the court acts without reference to any guiding principles," *id.* (cleaned up), and "'should only be found in the extraordinary, exceptional, or most egregious case.'" *Id.* at 419 (*quoting Wilson v. John Crane, Inc.*, 385 Md. 185, 199 (2005)).

A. The Circuit Court Did Not Abuse Its Discretion In The Way It Handled References To Mr. Flores-Marzal's Medical Condition.

Mr. Flores-Marzal admitted liability early in the life of this case, but he was not present for the damages trial because his health didn't permit him to be there, even remotely. His absence was excused—indeed, agreed upon—and there's no issue about whether he should have been there. Three of Ms. Ongwela's issues on appeal arise from references to his illness.

The *first* came during *voir dire*, when the defense mentioned to the panel that Mr. Flores-Marzal's cancer precluded him from attending trial. Ms. Ongwela characterizes this statement as inadmissible and highly prejudicial. Mr. Flores-Marzal and Liberty Mutual respond that this issue is not properly before us because Ms. Ongwela failed to object contemporaneously. In the alternative, Mr. Flores-Marzal argues that even if the issue was preserved for appellate review, the circuit court didn't abuse its discretion by asking defense counsel where Mr. Flores-Marzal was.

We review trial court rulings during *voir dire* for abuse of discretion. *Pearson v. State*, 437 Md. 350, 356 (2014) (*citing Washington v. State*, 425 Md. 306, 314 (2012)). Maryland utilizes a "'limited voir dire'" approach in which the sole purpose "'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Id.* (*quoting Washington*, 425 Md. at 313, 312). The trial court has broad discretion in conducting *voir dire*, especially as it pertains to the scope of questions it asks potential jurors. *Dingle v. State*, 361 Md. 1, 13 (2000). But under Maryland Rule 8-131(a), "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." This ensures that the trial court has the opportunity to rule on and correct any errors. *State v. Bell*, 334 Md. 178, 189 (1994) (*citing Clayman v. Prince George's Cnty*., 266 Md. 409, 416 (1972)). A party who seeks appellate review of a circuit court's ruling normally must have made a timely objection at trial. *Robinson v. State*, 410 Md. 91, 103 (2009).

Ms. Ongwela acknowledges that she didn't object to Mr. Flores-Marzal's counsel's remark during *voir dire* but contends that she objected promptly when counsel repeated the "terminal cancer" remark during opening statements. Although we can, in rare circumstances, exercise our discretion to reviewing an unpreserved issue, we do so only when reviewing the unpreserved issue "'will not work an unfair prejudice to the parties or to the court.'" *Robinson*, 410 Md. at 104 (*quoting Jones v. State*, 379 Md. 704, 714 (2004)). Here, the circuit court asked the prospective jurors several preliminary questions, among them whether they knew the parties or their respective attorneys. To determine whether

any juror knew Mr. Flores-Marzal, the circuit court asked if he was present. Mr. Flores-Marzal's counsel responded that Mr. Flores-Marzal "has cancer" and wasn't present, and the circuit court read Mr. Flores-Marzal's name for the panel to ascertain whether any juror knew him.

The absence of a timely objection to this remark waived any challenge to it, and this passing reference during *voir dire* is not the sort of rare circumstance that justifies appellate review of an unpreserved issue. There was no further mention of Mr. Flores-Marzal's illness during *voir dire* by the parties or the court, and there's no basis on this record to find that the reference influenced jury selection at all. To be sure, there was no need to reveal the reason for Mr. Flores-Marzal's absence perhaps beyond noting that it was excused by the court. But without any contemporaneous objection, the circuit court never had the opportunity to address the issue, and we will not consider it for the first time on appeal.

Second and *third*, Ms. Ongwela takes issue with the way the circuit court handled a single mention, during Mr. Flores-Marzal's opening statement, that he was absent because he had terminal cancer. She argues that the statement was irrelevant and inadmissible, especially since the court had granted Mr. Flores-Marzal's motion to appear virtually at trial months before the trial began. And although the court sustained her objection to the remark, she contends that the court erred by failing *sua sponte* to give a curative instruction to the jury. We see no abuse of discretion here.

During her opening statement, Ms. Ongwela's counsel told the jury that Mr.

Flores-Marzal had failed to pay attention to the road on the day of the accident and speculated that "[w]e don't know why. We may never know why. I don't think he is here. So, we may not even hear from him." In response to that statement, defense counsel stated during their opening statement that Mr. Flores-Marzal "wanted to be here today, but he has terminal cancer . . . and his health could not allow him to be here today." Ms. Ongwela objected, the court sustained the objection, and Ms. Ongwela's counsel asked to approach the bench. During the bench conference, the court noted that Ms. Ongwela had opened the door as to Mr. Flores-Marzal's absence in her opening, that counsel had "made a point of him not being here," and agreed that the defense should be allowed to address it. And after the parties stepped back, the court didn't say anything further to the jury on the subject—it didn't go back and overrule the objection it had sustained, nor did it offer any further ruling or curative instruction.

We agree that Ms. Ongwela's opening statement remarks opened the door to an appropriate response about Mr. Flores-Marzal's whereabouts. "The 'opening the door' doctrine expands relevancy in an attempt to quell confusion regarding previously admitted other evidence. It renders otherwise irrelevant evidence admissible as relevant through an opposing party's prior admission of evidence relating to the same subject matter." *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 464 Md. 474, 497 (2019). The doctrine can arise in opening statements, witness examination, and closing arguments. *Little v. Schneider*, 434 Md. 150, 161 (2013). In applying the "opening the door" doctrine, we follow a two-step analysis: we determine whether the "door" in fact was opened, then evaluate whether

the trial court's response abused its discretion. *Busch*, 464 Md. at 496 (*citing Little*, 434 Md. at 170). The court still must balance whether the probative value of the responsive evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay . . . ." Md. Rule 5-403.

As far as the jury could tell, the circuit court *sustained* Ms. Ongwela's objection when Mr. Flores-Marzal's counsel mentioned his cancer diagnosis. That was the ruling before counsel approached the bench, and although the court appears to have changed its mind about allowing the testimony, and even seemed to conclude that Mr. Flores-Marzel's counsel had responded appropriately, it never reversed itself formally. The court never undermined its earlier decision in front of the jury—what they heard was the reference to Mr. Flores-Marzal's illness, Ms. Ongwela's objection, and the court's ruling in her favor. So, if anything, this sequence was more favorable to Ms. Ongwela than it might have been—based on its colloquy at the bench, the court could have informed the jury that it meant to overrule the objection and that the reference was proper. The court didn't do that, and we see no abuse of discretion in its decision to sustain the objection without further comment.

From there, though, Ms. Ongwela asserts that the court should have gone one step farther: after the bench conference, she says, the court should have given the jury a curative instruction. We can't see from the record that she ever asked for one, but since neither Mr. Flores-Marzal nor Liberty Mutual complains that the issue is waived, we'll address it briefly.

Ms. Ongwela contends that Mr. Flores-Marzal's counsels remarks resulted in substantial prejudice which warrants a new trial to remedy the prejudice. Again, she never explains exactly how she was prejudiced; she seems to assume, we think, that the jury felt sympathy for Mr. Flores-Marzal after learning that he had cancer and, as a result, reduced its damages verdict. That would be a big leap if Mr. Flores-Marzal's illness had featured prominently in his case. But it didn't, and we agree that the passing mentions didn't prejudice Ms. Ongwela, let alone enough to warrant a curative instruction, let alone a *sua sponte* one.

When a jury is presented with "inadmissible evidence or improper information . . . the [circuit court] 'must assess [its] prejudicial impact . . . and assess whether the prejudice can be cured'" by instruction. *Walls v. State*, 228 Md. App. 646, 668 (2016) (*quoting Carter v. State*, 366 Md. 574, 589 (2001)). For instance, as stated in *Goldberg v. Boone*:

> [I]mproper or prejudicial statements, remarks or arguments of counsel generally are cured by reproof by the trial judge; to his discretion customarily is left the choice of methods to protect the fair and unprejudiced workings of the judicial proceedings and his decision as to the effect of that choice upon the jury and only in the exceptional case, the blatant case, will his choice of cure and his decision as to its effect be reversed on appeal.

396 Md. 94, 115 (2006) (citation omitted). To find such a "blatant case," the court must determine whether the opposing party's conduct or comments imputed prejudice on the moving party. *Id.* (citation omitted). Next, it requires an assessment of whether the trial judge took sufficient "curative measures to overcome that prejudice," or whether the prejudice unduly burdened the moving party by preventing a fair trial. *Id.* In *Goldberg*, the

Court of Appeals identified cases where an abuse of discretion occurred. *Id.* at 118. The Court noted that objectionable questions or comments which referred to either inadmissible evidence or were repeatedly proffered could rise to create substantial prejudice. *Id.*

But this exchange didn't even trigger this analysis because Ms. Ongwela wasn't prejudiced by counsel's statement that Mr. Flores-Marzal had "terminal cancer." Cancer was mentioned only twice during the trial, the second time after she opened the door to an explanation of his whereabouts. And although the court "made no curative instructions to the jury to correct the remark and ensure a fair trial" for Ms. Ongwela, the jury only heard the court sustain her objection to the statement. There was no basis here to require a curative instruction and counsel never asked for one, and no abuse of discretion in the court's handling of this issue.

B. Ms. Ongwela Didn't Object To The Circuit Court's Comment About Not Encouraging Questions Or Notes.

Finally, Ms. Ongwela contends that the circuit court abused its discretion when it instructed the jury that it was "not encouraging questions or notes" before deliberation. Again, however, she didn't preserve this issue for appellate review.

We agree that "[t]he main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." *Chambers v. State*, 337 Md. 44, 48 (1994). Ms. Ongwela contends, citing *United States v. Criollo*, 962 F.2d 241 (2d Cir. 1992), that the circuit court "erred in its blanket prohibition of readbacks." This argument encounters two fatal problems. *First*, she never objected or otherwise preserved any challenge to the court's

direction. *See Robinson,* 410 Md. at 103. *Second*, the court didn't *prohibit* anything. The court did discourage the jury from asking questions or forwarding notes—perhaps, although it never said so directly, to encourage the members to try and work out issues among themselves first—but also explained how to forward a note or question. The record reflects that the jury knew how to ask questions if it had them and, ultimately, it didn't have any.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.