Circuit Court for Frederick County
Case No. C-10-CR-19-001251

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1011

September Term, 2022

WILLIAN ALEXANDER REYES-REYES

v.

STATE OF MARYLAND

Beachley,
Shaw,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 7, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Willian Alexander Reyes-Reyes ("appellant") was convicted by a Frederick County jury of second degree rape, third degree sexual offense, and second degree assault. After sentencing, appellant noted this appeal and raises two questions, which we quote:

1. Did the trial court err in overruling defense counsel's objection to, and refusing to strike, the testimony by Officer Marlon Alvarez that[,] based on information obtained from [the victim's] mother[,] he "determined that a rape had occurred"?

2. Did the trial court abuse its discretion by failing to grant a mistrial after the prosecutor grossly distorted Appellant's defense?

For the following reasons, we shall affirm.

I.

BACKGROUND FACTS

The charges against appellant arose from an incident that occurred on October 10, 2019. At trial, the victim, "O.",[1] testified that she was drinking beer and smoking marijuana in a wooded area near her home with her friend, her friend's boyfriend, and appellant. O. had previously met appellant through her friend's boyfriend. O. said that appellant brought Percocet, but that she did not take any.

O. was 14 years old at the time. Appellant told O. that he was 20. Although appellant's exact age does not appear in the record of the trial, according to the date of birth on appellant's commitment record, he was 26 years old at the time.

[1] To protect the victim's identity, we use a randomly selected letter to refer to her.

O. began to feel dizzy from the effects of the beer and the marijuana. She sat down for about 10 minutes, but then had to leave, because her mother told her to be home by 6:00 p.m. About a minute after O. left for home, appellant followed her. He said that he was going to walk her home so that she would not get lost. O. agreed.

O. and appellant "walked all the way to the end of the woods" and "got lost." Appellant put his jacket on the ground and told O. to sit down. He said he was going to find "a way for [them] to leave."

When O. sat down, appellant sat down next to her and tried to touch her "chest area." O. tried to get up but appellant pushed her to the ground and got on top of her. O. told appellant to get off of her. Appellant put his hand over O.'s mouth and nose with one hand, pulled down his pants and O.'s pants with his other hand, and put his penis into O.'s vagina. Appellant "got out a little blade" and began to cut O. on her legs to stop her from struggling.

Appellant told O. to moan. O. was in a lot of pain and could not breathe, and she was crying. Appellant got "angrier" and "started doing it with more force." O. testified that appellant "finally decided to let [her] go after he saw that [she] wasn't enjoying it."

O. got up from the ground and pulled up her pants. She was covered in branches and burrs. She had bruises on her body, cuts on her legs, and a cut on her "private area" that was "open and bleeding."

Appellant threatened O. that he would hurt her family if she told anyone what happened. He instructed her that, if her friend or her friend's boyfriend asked what happened, she should tell them that "all [they] did was have sex[.]" He then left.

O. found her way out of the woods. She was bleeding from her legs and her "private area" and had difficulty walking. When she got home, O. apologized to her mother for being late. She told her mother that she had fallen in the woods and then took a shower.

A friend of O.'s, who was living with O. and her family at the time of the incident, "kept pressuring" O. to tell her "what was wrong" and why O. "came home like that." O. responded that she and appellant "slept together" and that she was "okay." O. told her friend not to tell anyone.

O.'s mother testified that, when O. came home that evening, she was "not well at all." O. was crying, her clothes were dirty and covered in "thorns," and she had difficulty walking. O.'s mother went into the bathroom to help O. get the thorns out of her hair and saw that O. had cuts all over her body and was bleeding. She started to cry and asked O. what happened. She did not believe O.'s account of having fallen in the woods because of the extent of her injuries.

The next day, after speaking with O.'s friend, O's mother called the police. O. was transported to the hospital to be examined. The clothing that she had been wearing at the time of the rape was collected as evidence.

O. testified that she told the nurse who examined her that she agreed to have sex with appellant, but that she then changed her mind, because it hurt, and that appellant "got off after that." She said that the cuts and bruises on her body were from falling in the woods.

At trial, O. stated that she did not tell the nurse that she had been raped because she did not want anything to happen to her family. She said that she never planned to report

the rape to police because appellant had threatened her, and she knew that her friend's boyfriend, through whom she had first met appellant, "had been involved with a few gangs[.]"

Rodnara Allen testified for the State as an expert in the field of forensic nursing. Ms. Allen, who participated in the examination of O., stated that O. gave her the following account of what happened:

> [appellant] ask[ed] [O.] to have sex with him. She said, yes, and then, realized that that's not what she wanted. She told him, no, please stop. It hurts. He continued and told her he would continue until he was done. Then, she said she started crying. . . . He eventually just stopped and she got her clothes back on, pulled her pants back up and then[] left.

Ms. Allen explained that a genital exam could not be performed because O. "could not tolerate the exam." O. "cr[ied] out in pain" when touched. A vaginal swab was done "blind," meaning without the use of a speculum, because O. could not tolerate the insertion of the speculum. A swab was taken of O.'s breast because she had reported that appellant had licked her breast. Photographs of O.'s cuts and bruises were taken during the examination and were admitted into evidence.

The vaginal and external genital swabs were tested and found to be negative for blood and sperm. There were no sperm cells detected on O.'s underwear. A swab from the inside of the bra that O. was wearing at the time of the incident yielded a DNA profile "consistent with the combined known profiles" of O. and appellant.

The samples were also tested for Y-STR DNA.[2] A swab from the crotch of the underwear O. was wearing at the time of the incident yielded a Y-STR profile from "at least two male contributors, including a major male contributor." Appellant could not be excluded from the major contributor Y-STR profile from that sample. A swab from the inside of O.'s bra yielded a Y-STR profile from "one or more" male contributors. Appellant could not be excluded from that Y-STR profile, either. Defendant did not testify nor did the defendant introduce any evidence.

As stated above, the jury convicted appellant of second degree rape, third degree sexual offense, and second degree assault. Additional facts will be introduced in the discussion.

II.

DISCUSSION

A. Officer Alvarez's Testimony

The first witness to testify at trial was Officer Marlon Alvarez. Officer Alvarez testified that he responded to an address in response to a "rape complaint," and spoke with O.'s mother. O. was not home at the time.

[2] According to the State's expert in forensic serology and forensic DNA analysis, Y-STR analysis "ignore[s]" female DNA and focuses on the Y, or male, chromosome. It is used to determine the presence of male DNA in samples collected from a female sexual assault victim, which usually contain an "overpowering" amount of female DNA. Unlike "regular" or "autosomal" DNA analysis, a Y-STR profile is not unique to one male person. The State's expert explained that "[a]ll of the males in the same paternal line will, potentially, have that same Y-STR profile."

In the middle of Officer Alvarez's answer to a question from the prosecutor, defense counsel objected to and moved to strike the officer's statement that he "determined that a rape had occurred," on grounds that it was non-responsive. The court overruled the objection and denied the motion to strike:

> [PROSECUTOR]: . . . [B]ased on your conversation with [O.'s] mother[,] what did you do?
>
> [OFFICER ALVAREZ]: Based on the information I got from the mother, [I] determined that a rape had occurred. And then - -
>
> [DEFENSE COUNSEL]: Objection, Your Honor, not responsive to the question. The question was what did you do?
>
> THE COURT: What did you do? Right.
>
> [OFFICER ALVAREZ]: And then I enlisted the - -
>
> THE COURT: Okay. Go ahead and say what did you do next.
>
> [OFFICER ALVAREZ]: I called for - -
>
> [DEFENSE COUNSEL]: Your Honor, I would move to strike the answer.
>
> * * *
>
> [PROSECUTOR]: Your Honor, I think the reason why he called out for who he did was because of what the nature of the allegations are. It's not being offered for the truth.
>
> THE COURT: Thank you. I'll overrule the objection.
>
> [DEFENSE COUNSEL]: Your Honor, I would ask for a motion to strike.
>
> THE COURT: Okay. Denied. Thank you.
>
> [OFFICER ALVAREZ]: Then I requested the assistance from our investigative division.

Appellant contends that the court committed reversible error in overruling his objection to Officer Alvarez's testimony and denying his motion to strike. Appellant asserts that the testimony was inadmissible hearsay and that it encroached on the fact-finding role of the jury.

The State contends that appellant's arguments were not preserved for appellate review because the only objection raised at trial was that the answer was not responsive. Alternatively, the State asserts that, if preserved, appellant's arguments fail because Officer Alvarez's testimony (1) was not inadmissible hearsay because it was not offered for the truth of the matter but "simply provided the basis" for Officer Alvarez's request for assistance from the investigative division, and (2) the probative value of the evidence was not outweighed by the potential for prejudice because it was a "brief, isolated reference to the nature of the complaint," and the jury was aware that Officer Alvarez had not conducted any investigation.

"In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5–611[3] as to whether particular questions are repetitive, probative, harassing, confusing, or the like." *Peterson v. State*, 444 Md. 105, 124 (2015). The court may also "strike that part of a witness' answer which was nonresponsive to the question[.]" *Ingoglia v. State*, 102 Md. App. 659, 666 (1995) (quoting

[3] Maryland Rule 5-611(a) provides: "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

6 Lynn McLain, Maryland Evidence, § 611.2 at 131 (1987)). "Given that the trial court has its finger on the pulse of the trial while an appellate court does not," we review such a decision for abuse of discretion. *Peterson*, 444 Md. at 124.

We perceive no abuse of discretion in the court's evidentiary rulings. "'Only questioning counsel . . . has the right to object on the ground solely that an answer is nonresponsive.'" *Booth v. State*, 327 Md. 142, 189 n.13, *cert. denied* 506 U.S. 988 (1992); *accord Ingoglia*, 102 Md. App. at 666 (both quoting McLain, *supra*). The rationale is that "unresponsiveness [is] not . . . a matter of concern to the opposite party if the answer is otherwise admissible." Graham, Handbook of Federal Evidence, § 611:23, 9th ed. 2020 (discussing Federal Rule of Evidence 611, which is virtually identical to Maryland Rule 5-611).

Although the opposing party may move to strike a non-responsive answer, it must be on grounds that the answer is otherwise inadmissible. *See Devincentz v. State*, 460 Md. 518, 543 n.9 (2018) ("'it is not a matter of right to have answers stricken out because [they are] not responsive, if otherwise unobjectionable, except at the instance of the questioner.'") (quoting *Standard Gas Equip. Corp. v. Baldwin*, 152 Md. 321, 325 (1927)). *See also* 6 Lynn McLain, Maryland Evidence, § 611:2 at 712-13 (3rd ed. 2013) ("Opposing counsel may move to strike a nonresponsive answer to their opponent's question, but on the ground that the answer is improper for another reason, e.g., that it contains irrelevant information or inadmissible hearsay.")

Here, the only objection to Officer Alvarez's testimony was that it was not responsive to the prosecutor's question. The objection was properly overruled because the

prosecutor alone had the right to object on that ground. Moreover, because appellant did not assert that the purportedly nonresponsive testimony was inadmissible for any reason, the court did not abuse its discretion in denying the motion to strike.

We agree with the State that appellant failed to preserve for appellate review his arguments that the testimony was inadmissible hearsay and that it usurped the jury's function. Therefore, we do not address them. *See* Md. Rule 8-131(a) (Ordinarily, except for issues of subject matter jurisdiction, or in an instance where the issue is waived under Md. Rule 2-322, 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[.]")[4]

B. Motion for Mistrial

In closing argument, defense counsel suggested that O. was not credible because she was a "troubled" child who drank beer and used drugs. Defense counsel told the jury:

> [S]ometimes children get sort of caught up in the stories and especially if they're somewhat troubled children. It doesn't mean that they're bad

[4] We note that, although defense counsel did not make a hearsay objection, the prosecutor explained that Officer Alvarez's statement was "not being offered for the truth." Even if trial counsel had made an objection based on hearsay, it is doubtful that appellant would be entitled to relief. "[A]n interviewee's statements to an investigating police officer are not 'hearsay' unless and until they are offered into evidence for their truth." *Daniel v. State*, 132 Md. App. 576, 589, *cert. denied*, 361 Md. 232 (2000). It is evident that, at this very early stage in the trial, Officer Alvarez's testimony was not offered to prove that a rape had occurred, but merely to explain why he requested assistance from the investigative division. *See also Parker v. State*, 408 Md. 428, 438-39 (2009) (noting the "general rule that 'a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true[,]'" and further noting that the rule is "frequently applied in criminal cases when police reliance on extrajudicial statements is 'relevant on issues of probable cause, lawfulness of arrest[,] and search and seizure where evidence is offered that was obtained as a result of the search for evidence.'") (quoting *Graves v. State*, 334 Md. 30, 38 (1994)).

> people, but it does mean that we have to question what they're saying and we can't necessarily trust beyond a reasonable doubt what they're saying. And that is the situation here with [O.]
>
> I don't know why [O.] had been smoking pot since she was 10 years old. . . . I don't know why she drinks alcohol and goes out with these people that are supposedly bad actors. I don't know why she smokes cigarettes. I don't know why she takes Percocet.
>
> But on the day this supposedly happened, if you take all the different stories[,] you got her smoking a bunch of cigarettes, drinking four beers, smoking pot, and taking Percocet. . . . It's impossible for you to know what is the truth and what is not the truth here.

In rebuttal, the prosecutor told the jury that "the most offensive part of defense counsel's argument [is] that apparently if you have a teenager who drinks some beer, who smokes some marijuana[,] they could never be believed, they're a slut and they deserve to be raped." Defense counsel lodged a general objection, which the court overruled. Defense counsel then moved for a mistrial, on the basis that the prosecutor had mischaracterized the defense closing argument, and the prosecutor proposed that the court strike the statement:

> [DEFENSE COUNSEL]: Your Honor, I'm going to move for a mistrial with respect to the State's last comments to the jury that[,] because I had argued that she drank and smoked pot[,] that I was arguing that she was a slut and deserved to be raped. That is not what my argument - - my argument was with respect to all the inconsistencies [in] her testimony[.]
>
> THE COURT: What did you actually say? I heard slut. . . . Did you say deserved to be raped?
>
> [PROSECUTOR]: I may have, Your Honor. We can strike that.

The court stated that it would deny the motion for mistrial but would instruct the jury to disregard the prosecutor's statement. After the instruction was given, defense counsel expressed satisfaction with the court's instruction, and no further relief was requested:

> THE COURT: You heard there was an objection during closing arguments. I overruled the objection but now I'm going to sustain it and I'm going to direct you to disregard the last part of the State's rebuttal argument. Can you all do that?
>
> [JURORS]: Yes.
>
> THE COURT: Thank you. Okay?
>
> [DEFENSE COUNSEL]: Thank you.

Appellant contends that the court abused its discretion in denying his motion for mistrial. He claims that it is "very likely" that the jury was misled by the prosecutor's "egregious[] distort[ion]" of the defense theory of the case. Before this Court, appellant claims that the court's curative instruction was "imprecise," "delayed," and "insufficient to address the prejudice[.]" The State maintains that the trial court gave a proper curative instruction in response to the prosecutor's statement and did not abuse its discretion in denying appellant's motion for mistrial.

"A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court." *Walls v. State*, 228 Md. App. 646, 668 (2016) (citing *Carter v. State*, 366 Md. 574, 589 (2001)). "[U]nless the trial court's ruling is far away from 'any center mark imagined' or is considered 'beyond the fringe of what [the reviewing] court deems minimally acceptable,' a trial court's ruling

generally will not be deemed to be an abuse of discretion by the appellate court." *Quinones v. State*, 215 Md. App. 1, 18 (2013) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

"The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594–95 (1989)). "In assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Id.* "Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Id*. Where, as in this case, the court "decides that the prejudice can be remedied by a curative instruction, and denies the mistrial motion and gives such an instruction, appellate review focuses on whether 'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.'" *Walls*, 228 Md. App. at 668-69 (quoting *Kosmas*, 316 Md. at 594).

As an initial matter, it appears that appellant's claim of error was waived.[5] Defense counsel did not object when the court announced its intention to deny the request for a mistrial and give a curative instruction instead. Defense counsel thanked the court after the instruction was given and did not argue that the instruction was insufficient for any reason, nor did counsel request further relief, such as a different curative instruction or a renewed motion for mistrial. *See Gilliam v. State*, 331 Md. 651, 691 (1993) ("As [defendant] did not object to the course of action proposed by the prosecution and taken by

[5] The State does not raise waiver.

the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong."); *Parker v. State*, 402 Md. 372, 405 (2007) ("A litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling[.]") (internal quotation marks and citation omitted)). *See also* Md. Rule 4-325(f) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.")

Even if not waived, however, appellant's argument lacks merit. "[N]ot every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Wilhelm v. State*, 272 Md. 404, 415 (1974)). Indeed, "[i]f every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Georges v. State*, 252 Md. App. 523, 526 (2021) (quoting *Dunlop v. United States*, 165 U.S. 486, 498 (1897) (emphasis omitted). "In the environment of the trial[,] the trial court is peculiarly in a superior position to judge the effect" of any improper remarks. *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Wilhelm*, 272 Md. at 429). "'Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158 (2005)).

The State concedes that the prosecutor's mischaracterization of defense counsel's closing argument was inappropriate. We cannot say, however, that, under the facts of this case, the prosecutor's isolated statement, which was promptly followed by a curative instruction, had such an effect as to deny appellant his right to a fair trial. It is unlikely that the jury was misled or influenced by the prosecutor's remark, especially after expressly agreeing to follow the court's curative instruction to disregard it. *See also McIntyre v. State*, 168 Md. App. 504, 525 (2006) (when the trial court gives timely and accurate curative instruction, the jury is presumed to have followed it). We are not persuaded that the trial court's decision to instruct the jury to disregard the prosecutor's remark, rather than order a mistrial, constituted an abuse of discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.