Circuit Court for Anne Arundel County
Case No. C-02-CR-23-000272

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1544

September Term, 2023

DAVON LAMONT FERGUSON

v.

STATE OF MARYLAND

Arthur,
Shaw,
Zic

JJ.

Opinion by Shaw, J.

Filed: July 14, 2025

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

Appellant Davon Ferguson was found guilty of two counts of first-degree rape, two counts of second-degree rape, and two counts of second-degree assault by a jury in the Circuit Court for Anne Arundel County. The court merged the second-degree rape and assault convictions with the first-degree rape convictions and sentenced Appellant to two concurrent sentences of life without parole. Appellant noted this timely appeal, and he presents three questions for our review:

1. Did the court err in refusing to ask potential jurors whether they had biases related to female accusers?

2. Did the court err in admitting evidence of prior sexually assaultive conduct?

3. Did the court err in removing the defendant from the courtroom during the announcement of the jury's verdict?

For reasons discussed below, we affirm the judgments of the circuit court.

BACKGROUND

In September 2023, Appellant was indicted in the Circuit Court for Anne Arundel County on two counts of first-degree rape, two counts of second-degree rape, and two counts of second-degree assault, and he elected to be tried by a jury. The State filed a pretrial motion seeking to admit the testimony of two witnesses, who had previously accused Appellant of sexually assaulting them in order to establish lack of consent. In 2010, Appellant pleaded guilty to sexually assaulting one of the witnesses, S.J. The other witness, E.M., accused Appellant of sexually assaulting her in 2009. He was criminally

charged, but the case was later dismissed.[1] The State provided notice to Appellant, the police reports, and the names and addresses of the witnesses.

On August 15, 2023, the court held a hearing. The State called S.J., as a witness, and she testified that, in 2010, when she was twenty-two, she was locked out of her home and Appellant "came rolling up in a car." He told S.J. that she could sleep at his house "around the corner[.]" S.J. agreed to go with Appellant, but soon realized that his house was not around the corner. She testified that she fell asleep at his residence in a bed. She awoke during the night as Appellant was duct-taping her mouth, hands, and ankles. S.J. stated that Appellant then sexually assaulted her. S.J. testified that she "licked the duct tape off [her] lips," "reached behind [her] back and banged him in his head" and screamed. Appellant's mother entered the room, and S.J. ran to Appellant's neighbor's house across the street. Appellant pled guilty to first-degree rape in 2011, and he was sentenced to eight years' incarceration. A police report and a certified copy of Appellant's first-degree rape conviction were admitted at the hearing.

Defense counsel cross-examined S.J., asking why the 2010 police report stated that she walked to Appellant's house when she testified that Appellant drove her to his house. S.J. stated that she remembered him driving. Defense counsel noted that S.J. did not remember many details about the night she was assaulted, such as the date, the location of his house, and the type of car Appellant drove. Defense counsel cross-examined S.J. about

[1] The record does not indicate what charges were brought against Appellant.

whether she consented to sleeping in the bed with Appellant. S.J. maintained that Appellant was not in the bed when she fell asleep.

E.M. testified that, in 2009, she met Appellant on a chatline. She stated that she invited Appellant to her home, and he arrived at approximately 10 or 11 p.m. E.M. stated that she and Appellant watched a movie and smoked marijuana. E.M. fell asleep and testified that she awoke to Appellant on top of her and semen on her leg. E.M. stated that when she woke up, Appellant was attempting to penetrate her. E.M. recalls feeling disoriented and going to her bathroom. After leaving her bathroom, she stated that she told Appellant to leave, and he tried to get on top of her again, which led to a struggle. E.M. testified that Appellant "ripped off his tank top and he wrapped it around [her] neck and [she] started crying." E.M. testified that Appellant told her he felt remorseful for his behavior and told her that he was going to leave. E.M. stated that when she inched toward the bathroom, Appellant lunged at her and dragged her onto the bed. She fought off Appellant and ran to the kitchen, where she obtained a knife. E.M. testified that Appellant chased her into the kitchen, and she began pushing him away. E.M. managed to push Appellant out of the door and saw blood on the walls outside her door. E.M. testified that she then called the police, a report was made, and she was seen at a hospital and was given a Sexual Assault Forensic Exam, or a SAFE. The case was later dismissed in the District Court for Baltimore County. At the pretrial hearing, the State presented the police report for E.M.'s case, but the prosecutor indicated that he was unable to locate her SAFE records.

Defense counsel cross-examined E.M. and noted that she testified that she was "drugged or something happened because [her] body didn't feel right, and [she] just felt so confused." She asked E.M. why that information was not included in her original police report, and she could not recall. E.M. stated that she remembered making two police reports, one at her home after the incident and one after she completed the SAFE exam. She stated that the report that defense counsel showed her contained inconsistencies. Defense counsel asked E.M. if she believed the detective "made up" facts, to which she responded no. Defense counsel also asked E.M. why the police report did not mention a tank top, and E.M. responded that the report did refer to her being choked, but did not state how it was done. E.M. was asked if she was aware that her case against Appellant had been dismissed, to which she responded no. Defense counsel presented to E.M. a letter addressed to her from the then-state's attorney that notified her that the case against Appellant was dismissed. E.M. stated that she "[a]ctually [] was aware that . . . it was dismissed" but she did not know why the case was dismissed.

Following the testimony of both witnesses and arguments of counsel, the court stated:

> [L]et me first let the parties know what I'm planning on doing which is taking about a half-hour here in just a moment to consider (e)(4), namely whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. But before I do, I will essentially give an opinion in two parts. And that is addressing very briefly (e)(1) through (3). And, of course, (a)(1). I think it is uncontroverted that [S.J.]'s testimony and the nature of the conviction that occurred falls under a qualifying crime under (a)(1). And then referring to [E.M.], even though the case was ultimately dismissed the Court if it were to find her testimony to be credible by clear and convincing evidence then the facts and circumstances that she testifies

to unequivocally falls under crimes the elements of which fall under the rubric of (a)(1), meaning that anyone who was forcibly choked about the neck and further attempts at forced vaginal intercourse unequivocally would fall under an attempted rape.

Framework in there for the Court deems (a)(1) to be satisfied. And then in the case of [E.M.] subject to connection with regard to (e)(3).

Turning my attention to (e)(3), the Court finds that – I'm sorry, to subjection [sic] (e) generally – the Court finds first off that the evidence is, indeed, being offered to prove lack of consent. I put that question I think to the State. And I think that it is clear that that's largely the issue du jour that will be presented in front of the jury over the next three or four days which is whether there was consent. And I think that especially arises when it's a contractual sort of sexual encounter that is being proposed. In this case it was a sex worker who through technology a date [sic], which is commonly the phrase at least that I've seen in cases over which I have presided is referred to as established. And that's when the allegation is that she was forced to engage in activity that she didn't want to because of the presentation of a knife.

And so the concern the Court had was that recognizing whose burden of proof it is that consent doesn't really – lack of consent doesn't become an issue notwithstanding the paradigm of client and john and sex worker. It still at least theoretically would have been possible for Ms. Stewart-Hill[2] to just sit there and say I don't want to make an opening statement and see if the State can meet its burden of proof and essentially do nothing, and then get up at the end of trial – or at least the State's case in chief – and argue that the State hadn't proven their case beyond a reasonable doubt.

But the fact that the Defendant made a statement that is to be introduced at trial where he indicates that it was a consensual encounter largely addresses that concern. And so I find that (e)(1) is satisfied by virtue of the statement that the Defendant made which was sort of what I'll call a latent defense. In other words, a defense that the Defendant neither has to explain away or adopt at trial. And, therefore, the Court finds that (e)(1) subsection (i) is satisfied.

Turning to (e)(2), obviously both persons were just present in person here in court over the last couple of hours and Ms. Stewart-Hill had an opportunity to confront and then cross-examine them. So that is unequivocally satisfied.

[2] The court's mention of Ms. Stewart-Hill refers to Appellant's trial counsel.

Not that Ms. Stewart-Hill has not preserved the issue that she has raised on multiple occasions of whether she received adequate discovery to cross-examine them I deem that argument to have been preserved by Ms. Stewart-Hill. But the gist of (e)(2) is fully and wholly satisfied because the persons were here in the witness box and were subject to cross-examination in person.

With regard to subsection (3), that's the one I want to speak to most significantly right now especially as it pertains to E.M. It really amplifies to me a lot of principles that we use in our court. Number one, why is such deference given by the higher courts to sort of what we sometimes refer to as first level facts, credibility facts, when you see witnesses in the witness box. And the reason for that is because generic transcripts, even audio recordings, sometimes don't fully encapsulate the credibility or lack thereof as a witness.

But having seen E.M. in the courtroom I really can't think of a witness in recent memory whose testimony I found so readily convincing. And it was based on the manner in which she testified, the assurance and the sort of intonation in her voice that that's what happened, but it was also in response to questions put to her not only by the State but in cross-examination where she really demonstrated the certainty of her answers and her responses. There was no equivocation even when presented with what would be arguably material omissions. Her responses to those were immediate, they were forthright, they were sincere. An example would be being shown three police reports, the third of which indicated mere choking but not the facts suggesting – or not suggesting – but where she had relayed earlier that the Defendant had ripped off a tank top and used it as an implement, as a ligature of some kind. And she was just a hundred percent confident that that's what indeed happened notwithstanding the fact that the police report only indicated choking.

But in addition to that, the manner in which she testified with such certainty in terms of the Defendant's arrival, the fact that she expected it to be a limited encounter, the fact that they smoked weed together, the fact that she didn't know why when she was previously not even sleepy she had sort of become passed out so quickly. And then when she emerged that she had seen semen on her leg and then – but – and went to the bathroom. You know, if she wanted to frame this Defendant then she's not a very good liar because she could have made it – she could have said that unequivocally I knew that his penis actually reached my vagina. She could have said that he did more serious crimes, crimes that if she were making it up could have she could have recalled with greater clarity and certainty. But sometimes the hallmarks of the truth are when you indicate when you don't remember certain things

or you don't know certain things. And I found that she was very candid when she indicated there were certain parts of the narrative that escape her not only because of the passage of time, but also because of the fact that many of her interviewers in the immediate aftermath were male. But she was also under the trauma of the event and I found her testimony credible that she had collapsed at the door when she succeeded in getting him outside. I found her testimony credible that she called someone, what's commonly referred to as a prompt outcry individual. And if she were making that up then she would ostensibly be doing so without any fear that someone would come along because she's not any wiser about what information related to these cases was procured by either the State or the Defense and they could say well, that's not true, there was no such call or there was no such trip to the hospital, or there was no SAFE kit given.

And in addition to that, the other indicia of reliable or credibility was that she procured protective orders or peace orders, I think she wasn't sure which or what nomenclature it fell under after the news was delivered to her that the district court case didn't go forward for whatever reason that was. And so I will say also that her responses to Defense counsel as it pertains to the defensive mechanism she used in terms of not knowing what knife she grabbed and that it was from a kitchen block, and the certainty with which she described the fact that she got the knife from the kitchen block and maybe it's possible that there was some other knife that some detective later spoke of or said. But the absolute certainty with which she said, no, I know that's the knife that I got and I didn't have the time to judiciously pick which knife was best suited to the job and the fact that she unabashedly indicated that she used it to try to ward off and actually stab or cut the assailant as she would describe him, lent to even greater credibility in this case.

And so I don't think she was histrionic. I think she could have indicated if she had greater injuries she could have sensationalized it and I found that she didn't sensationalize it, she kind of did the opposite of that in my opinion which is recall an event that lent itself to significant credibility notwithstanding the fact that the case didn't go forward either in district court or circuit court for reasons that I think escape everybody, including this jurist.

And so for those reasons as it pertains to her I find (e)(3) satisfied as it pertains to [E.M.]

I also find (e)(3) satisfied as it pertains to [S.J.] That's an easier decision matrix. It's partly because of the conviction that was entered but even if there were not the conviction, the Court also finds similar indicia of reliability with

> [S.J.]'s testimony. I'm not going to explore it with the same detail but I found the fact that she was so convinced in her responses that she had gotten in a vehicle and not walked to the location that the police had indicated, or that there was one interpretation of a police report that says it would be nearby and maybe that's something she said. She was very clear in response to Ms. Stewart-Hill's questions that no, that's what he said. In other words res gestae, verbal acts of the Defendant. And that that was some of the information she was relying upon when she went to his home.
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> In addition to that, I find that she was also not attempting to dramaticize what happened. In fact, she indicates that she doesn't know how long certain assaultive behaviors were taking place including the forced penetration of her anus. And when she talked about having screamed and having alerted the Defendant's mother, I think that that also is indicia of reliability. Because, again, if these were attempts to falsely describe something that happened more than ten years ago or to frame the Defendant, then she would be doing so without any fear that someone was going to come along and say well there was no one else present and that sort of thing. And those are not the typical trappings or hallmarks of someone who is making something up, presenting facts that could be debunked if they were not otherwise true. And so I find that her case has been proven by clear and convincing.
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> I have to take about I said a half hour, I'm concerned about everyone's time. But I am going to take at least twenty minutes and think about some of the arguments I've heard from both sides as they pertain to (e)(4) which is the most challenging part of the statute remaining for the Court.

Following a brief recess, the court addressed whether the probative value of the evidence outweighed the danger of unfair prejudice. The court stated:

> The Court heard today from two witnesses, both of whom are purported victims of sexual assaults from the Defendant from more than ten years ago, specifically from 2009 and 2010 respectively. And the Court taking its instruction from Woodland recognizes that there are no enumerated factors that the Court has determined that the Court must consider. Rather, it is a may paradigm, meaning the Court may consider those factors. And they list the factors that the Ninth Circuit has used and required of its federal jurists and they highlight that those are certainly some important and relevant considerations but not incumbent upon circuit courts here in Maryland. Indeed, they point back to Rule 5-403 whereby the Court has a balancing obligation in order to determine whether the probative value of the evidence

is not substantially outweighed by the danger of unfair prejudice. And those factors are certainly some of the factors that the Court considered. And those are the factors that the Court considered to conclude that subsections (e)(1) through (4) have been satisfied and only then can the Court pivot to the need on the part of the prosecution or the clarity in the manner of presenting that evidence, et cetera.

So the Court right now is focused squarely on 10-923 subsection (e)(4). And the Court having heard from these witnesses today wants to highlight some of the factors that the Court may consider in arriving at its decision.

And the first one is the temporal component. And there has been an argument before the Court today that there is a serious lapse of time between the 2009, 2010 incidents one of which led to a 2011 conviction. And certainly the allegations in this case which flow from 2023 at the very beginning – meaning January of 2023.

But this Court recognizes that there is a certain tolling perspective that the Court is free to apply to that sort of reasoning. And the Court does. Namely, there has been a proffer and an admission, if you will, that Mr. Ferguson was not released until 2018 I think it was. And then 2018 is when the Court sort of begins to from a temporal standpoint line up the allegations in this case juxtaposed to the 2009, 2010 because it was a significant period of time that Mr. Ferguson was incarcerated. And so it's kind of what I sometimes colloquially refer to as a Rip Van Winkle analysis, meaning there's a long period of time that someone's asleep and then returning and they expect that sort of time continuum to pick up from when they fell asleep. And that's kind of how I look at a longer period of incarceration like this.

And I find that 2023 is not so distant from the time in 2018 when Mr. Ferguson was released from incarceration to say that there was overwhelmingly significant attenuation or distancing from a temporal standpoint that would force this Court to not consider, move on to sort of other factors in its analysis. In fact, it's really quite the opposite because if you look how quickly in succession the 2009, 2010 incidences appear to have occurred from a time standpoint meaning one year after the other, and then overlay that with a time perspective starting in 2018 – in other words, disregarding or discounting the tolling of the amount of time that the Defendant was incarcerated, I actually find that the 2023 is actually not so distant. In fact, there is a strong argument to be made from a temporal component that they are near in time. That points to the probative value of the proffered evidence.

But looking at the factors that all courts seem to highlight in which the Supreme Court of Maryland said that the Court is encouraged to consider or may consider that is similarities or differences. The Court spent the lion's share of the time that it's been thinking quietly about the arguments that it heard to try to create a sort of a proverbial list of the similarities and differences. And some of the similarities that really have presented themselves to the Court in the form of the testimony and the evidence today is that in all three cases, that is the case at bar compared with the two prior incidents involving [S.J.] and [E.M.], it was the first encounter with Mr. Ferguson. These are not individuals who had been dating for a lengthy period of time or had a prior history of direct in-person contact or have coffee together, maybe knew each other from social circles. But rather, a first encounter. And I'll say not only just a first encounter but a first encounter that the Defendant largely initiated or dictated in all three instances. The third one being alleged, and the first two being proven by clear and convincing evidence. Meaning the Defendant as it pertains to [S.J.] approached her while she was a stranger to him trying to get into a residence and she was unable to do so and he presented her with a narrative offering some kind of succor where she could go and have a place to sleep. The second encounter with [E.M.] being one where she was approached via chatline that she had posted an interest to get to know persons and he reached out to her and facilitated an encounter. And then the third one being the proverbial date – I'm not trying to trivialize it – but date, again, as a kind of term of art that the Court is taking judicial notice of that some persons refer to where a sex worker agrees to meet a john or a prospective client.

And so these were first encounters largely at the Defendant's design assuming that the jury finds beyond a reasonable doubt in the third instance that the alleged victim in this case is being truthful.

I have already addressed the temporal component. But then I think the State appropriately mentioned the demographics of the persons as they came into contact is similar. Young, African-American female with a very close deviation in age, young twenties. And certainly that is a similarity that this Court in its discretion cannot overlook.

The most glaring similarity, of course, is the forcible nature of the interactions. Often in statutes you talk about force and coercion to impart one's will on someone in a sex act, a criminal sex act. And in the first instance vis-à-vis [S.J.], we have some level of legerdemain where he used a ruse to have her return to his residence. And then she finds herself asleep and

emerges having been forcibly restrained with the implement of duct tape. And that has certain similarities to [E.M.]'s narrative where she indicates that for reasons unbeknownst to her that she was asleep even though that was her [sic] not her disposition when she opened the door and let the Defendant into her apartment.

And then he used external implements to impose his will on them. In the case of duct tape being something that's widely understood to be probably the strongest tape there is other than maybe Gorilla tape, but a tape that you use to restrain persons and individuals. And that's certainly what [S.J.] testified to. And then in the case of [E.M.] she indicated that he attempted to use a ready implement that he had as a form of ligature which was his tank top. And in the case at bar from what I understand based on the proffers of the parties it was immediately a forcible encounter through the use of a knife.

And certainly the threat and fear of being lacerated or stabbed by a knife is what gives rise to someone's willingness to engage in forcible acts if they believe that their life is in danger or subject to serious physical bodily harm.

And that is a segway to another similarity that the Court recognizes between the incidents, which is the similarity of a donnybrook or some sort of altercation or fight ensuing which the Defendant is willing to engage in. What I mean by that is [S.J.] indicated that she was forced to try to remove the duct tape from her mouth and try to forcibly punch the Defendant sort of backwards and over her head. She actually made that demonstration in the courtroom here today. But also she believes that the screaming was what was the catalyst to bring someone to that place.

And the Court finds that the Defendant's willingness to engage in some form of an altercation with all three persons is another similarity. [E.M.] indicates that his first attempt if the jury were to believe her testimony was to sort of persuade her to return to the bedroom through kissing, caressing, nudging, urging to go that direction. And when she indicated that was not something that she was willing to engage in is when it became a forceful encounter and he was willing to engage her in that capacity namely by trying to subdue her forcibly based on her testimony. But then also to stand opposite her with a knife that she testified that she retrieved from the kitchen.

And then in the case at bar I understand that there was a period of time that it is alleged that the Defendant didn't maintain the same knife that he had maintained during the sex acts. And that the alleged victim in the case at bar was able to get a hold of the knife and threaten the Defendant. And what is

similar about that is not necessarily the responses of those individuals because there is no playbook on how to be a victim, but rather the fact that he was willing to engage them directly opposite that versus just flight would be an example of another course of action someone could take when they are being confronted by an alleged victim or a known victim depending on who we're talking about in our three sort of scenarios.

The other similarities are that they occur very late at night, all three incidents, or at least much later than the intended encounters. And that they happened inside closed rooms without other witnesses' presence. And then there are some common denominators that exist between [E.M.] and [S.J.] which is namely that they don't know, necessarily, how they are asleep and there's certainly a heavy implication I think based on their testimony that the Defendant either included something in the joint that he provided them or provided something and perhaps there is a common denominator there between the case at bar.

But notwithstanding all of that, the Court finds that these are particularly vulnerable females that the Defendant is alleged to have targeted. The one is a vulnerable person insofar as she can't get into her residence late at night. And the other one is a known vulnerable situation which is a sex worker where the vulnerabilities are latent in that line of work. And then the vulnerabilities of [E.M.] were simply that this is someone unknown to her that she decided to let into her apartment after the Defendant indicated that he had expended a lot of energy to get there. Whether that's true or not I don't think anyone has made any arguments to that effect but that he had gotten there by bus. And so she lets him in and she is vulnerable insofar as she is alone with an individual that she doesn't know.

So the Court finds that there is a predatory dimension to all three acts that are common denominators that certainly prove a lack of consent. And the Court in its discretion finding that the Defendant being the one that's alleged to have initiated contact and chosen the purported victims in this case, and having acted in a way that is consistent with being a willingness to use force and to actually rebut force when it's presented to him by the victims, creates a common thread that creates a similarity among the cases that this Court finds implicates the call of the statute namely of 10-923 which is sufficiently similar or the Venn diagrams overlap in sufficient ways. In some ways they are similar, in some ways are really coterminous with all three cases. That this Court finds that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. I find that the nature of the allegations of the two prior cases are not more shocking to the conscience

than the nature of the allegation in this case. I think simply because someone is a sex worker it doesn't create any less or more ire that someone would be willing to put a knife to someone's neck in order to force fellatio or vaginal intercourse. And the Court finds that the allegations of coerced sexual encounters either through taking advantage of someone when they're asleep by whatever means and/or using force to try to gain vaginal intercourse, they are of a nature that is not wildly disparate in terms of the affect [sic] it might have upon the jury and shocking the conscience.

So I find that the Court in weighing the factors and the similarity of the acts is satisfied that the two prior cases do not overshadow the crime charge but rather on some imaginary scale or within a standard deviation that a jury wouldn't be any more or less alarmed by the nature of the allegation than that which is present in the case at bar.

And so for those reasons the Court then turns it attention to whether there is a need for this. And the Court finds that the Defendant, of his own volition, presented a statement. And from what I understand there is a credible proffer to the Court that he made jail calls that was consensual in nature, coupled with the fact that an argument will arise from those statements that it was consensual because this person – the victim in this case or alleged victim – was working in the sex trade. That she herself was the one that initiated the violent conduct by pulling a knife on the Defendant because he was too long in his sexual performance as it were. And so the other two cases that have been presented to me under the 10-923 context certainly serve to rebut that presumption which is what gives rise to the need.

In terms of the clarity of the manner I believe that there is no more clear and straightforward manner than giving the jury themselves the ability to assess the credibility of an individual which is very different from introducing a transcript or prior testimony or even a video. They get to see the persons in the flesh meaning testifying here right in front of them, subject to cross-examination.

I will give or I have given thought to what's appropriate with regard to some of the instruction and guidance given by the Supreme Court of Maryland with regard to the issue of a conviction. And I will allow the Defendant to decide whether or not he wants to elicit from [E.M.] whether or not the case went forward and led to a conviction or not. I think as I said earlier there was some counterintuitive logic that was incorporated into the Court of Appeals' decision that really, quite honestly, I'm not sure if I hadn't read that case today I would have even thought of it from that perspective. Which is that

> there might be sort of a makeup inclination on the part of a visceral component of the jurors to want to punish someone for an unrequited criminal act. But I also think there is a strong argument to be made for the converse of that which is, well, if you hear that there were court processes and convictions that were sought but for whatever reason the case dissipated there could be an inference that cuts against the grain.
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> So a long way of saying I will allow you to consult with your client and decide whether when [E.M.] testifies whether you want to elicit from her that it led to a court case that ultimately did not lead to a conviction, or whether you want the parties to remain silent on that in which case I would instruct the State that they have to take their witness aside before she takes the stand and instruct her she is not to testify to any of that. Both sides would be given latitude to lead through that point in the testimony to avoid any pitfalls that don't comport with the Court's instruction on that front.
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> So if you'll let the State know by tomorrow what your plan is or at least before she takes the stand that would be helpful. I do think that the parties should at least discuss it before opening statements so that neither side misspeaks in their opening statement.
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> On this issue, that is this 10-923 motion, you have my oral opinion. But the hearing sheet will also reflect it.

Voir dire was conducted on August 16, 2023, and the State and defense counsel proposed that the court ask the jury panel:

> 9. Would any member of the jury panel feel that it would be difficult or impossible for you to be unbiased, specifically because the case involves a female accuser?

The judge declined their request, stating:

> If you turn to question 9 that's the first time I have an edit. They're going to hear that there's a female accuser. I'm going to ask it more generally and then each – and this applies to all questions – but each side is entitled to ask more granular questions at the bench for anyone who has an affirmative answer. But I'll ask it in a form that's, would any member of the jury panel feel that it would be difficult or impossible for you to be unbiased, unprejudiced, or have emotion impact your verdict in this case. And then certainly if they say yes you can ask if it's because it's a female accuser or

> what have you. If you go down to question 11 I'm going to break up part D from A, B, and C. If you've been a victim, witness, or accused of a crime. I'll ask the subpart D but it'll now be question 25 because I'm not asking 25. So I have to be careful of asking – it's the Court's provenance to determine fairness and impartiality. So I have to – to not create reversible error I do have to tweak how that question is asked. And I have to ask it in a way which might impact your ability to sit as a juror, or would impact your verdict is one way I can say it that is legally permissible. The Court of Appeals or whatever it's called – Supreme Court I guess now – said that jurors shouldn't be tasked with assessing their own fairness and partiality because they might think they are but that's the provenance of the Court. So you have to kind of be careful not to ask it that way. So I'll ask if it would just impact their verdict.

Counsel did not note any exceptions or otherwise object to the court's ruling.

At trial, M. F.-B. testified that, on January 22, 2023, she posted on MegaPersonals and advertised sexual services. Appellant responded and agreed to meet M. F.-B. at a hotel room at approximately 2:00 a.m. M. F.-B. stated that once Appellant entered the hotel room, he pulled out a knife, threatened her, and proceeded to sexually assault her. M. F.-B. said that she was able to grab Appellant's knife, and they fought over possession of the knife, injuring themselves. During the struggle, M. F.-B. dumped a bottle of alcohol on Appellant, ran from the hotel room without clothing, and shouted for help. M. F.-B. contacted police, who conducted an investigation of the crime scene, and M. F.-B. was examined by a nurse.

The State called several other witnesses, including Jaclyn Grzywna, who heard M. F.-B. screaming in the halls that night, Officer Walker, who responded to M. F.-B.'s 911 call, Erica Colaluca, the forensic nurse who examined M. F.-B., Katie Ladue, the crime scene technician for the case, and Rebecca Schlisserman, an employee for Anne Arundel

County Forensic Services Crime Lab who processed the samples in this case. Both E.M. and S.J. testified about their previous encounters with Appellant.

Detective Wittman, the investigator from the Anne Arundel County Police Sex Offense Unit, also testified. He interviewed Appellant following the incident, and audio recordings of the interview were admitted into evidence. Appellant denied M. F.-B.'s allegations and maintained that they had consensual sex. He stated that there was a disagreement over the pricing and timing of M.F.B.'s services. He alleged that she threatened him with his knife, and that led to a struggle between them.

Following the court's instructions, closing arguments of counsel, and deliberations, the jury entered the courtroom to read its verdict. The foreperson announced the jury's verdict finding Appellant guilty of first-degree rape, second-degree rape and second-degree assault, and the record reflects that there was "commotion in the courtroom":

> THE DEFENDANT: That's some bullshit. How the fuck – yo, stop fucking playing, yo.
>
> COURT CLERK: As to question number four –
>
> THE COURT: Mr. Ferguson – Mr. Ferguson, I'm warning you to remain silent. Please – please continue, Madam Clerk.
>
> THE DEFENDANT: (Indiscernible.)
>
> COURT CLERK: As to question four, do you the jury find the defendant not guilty –
>
> THE COURT: Madam Foreperson, you can have a seat if you want. We'll get back to the verdict sheet in just a moment. Deputy Sheriffs, let me just address Mr. Ferguson. Mr. Ferguson you're – you're entitled to be present for your verdict, but we're going to continue. The Court finds that he's

> voluntarily waived his – his right to be present for the rendering of the verdict.
>
> (At 3:15 p.m., the defendant is removed from the courtroom.)

The foreperson was then instructed to read the remainder of the verdict. Appellant was ultimately found guilty of two counts of first-degree rape, two counts of second-degree rape, and two counts of second-degree assault. The court allowed counsel to confer with Appellant about returning for his post-trial rights, stating that counsel could "go downstairs and chat with him, encourage him to come up on the record. It has to be done on the record, of course. I can't commission you to do it. And then hopefully gain his assurances that he'll, you know, obviously, comport with what's expected in the courtroom." Appellant did not return to the courtroom that day.

At a hearing, the following Monday, where Appellant was present, the judge stated:

> THE COURT: We have this on the docket and on the record, we're on the record today because the jury returned a verdict late Friday afternoon and there was some emotion in the courtroom that interrupted the proceedings. I'm not weighing in on that or anything like that, just making a record of it.

The trial judge then informed Appellant that he was found guilty of all six charges, stated that some charges would be merged, and directed defense counsel to inform him of his post-trial rights. At sentencing, the second-degree rape and assault convictions were merged with the first-degree rape convictions, and Appellant was sentenced to two concurrent sentences of life without parole. Appellant noted this timely appeal.

STANDARD OF REVIEW

The phrasing of questions presented during voir dire typically falls within the discretion of the trial court. *Washington v. State*, 425 Md. 306, 313 (2012). When determining whether evidence is admissible pursuant to Md. Code Ann., Cts. & Jud. Proc. § 10-923, we review such rulings for an abuse of discretion. *Cagle v. State*, 462 Md. 67, 78 (2018). Whether a judge is permitted to remove a defendant for disruptive behavior is reviewed under an abuse of discretion standard. *Shiflett v. State*, 229 Md. App. 645, 669 (2016).

DISCUSSION

I. The court did not err in declining to ask the jury panel Question 9.

Appellant argues the court erred in refusing to ask the jury panel, during voir dire, whether "it would be difficult or impossible for you to be unbiased, specifically because the case involves a female accuser?" Appellant asserts that because the State's case was based on the testimony of three women who had accused a man of a crime, the court was required to ask the proposed question to reveal potential bias. He contends that the issue should be examined by this court under the plain error doctrine. Appellant also contends that this issue must be considered because trial counsel rendered ineffective assistance.

The State counters that trial counsel failed to object, and thus, the issue is not properly before this Court. The State argues that plain error review is not warranted as there was no clear or obvious error by the court. The State also argues that the issue of ineffective assistance should be determined in a post-conviction proceeding.

"Ordinarily, an 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[.]" Md. Rule 8-131(a). "An appellant preserves the issue of omitted *voir dire* questions under Rule 4–323 by telling the trial court that he or she objects to his or her proposed questions not being asked." *Smith v. State*, 218 Md. App. 689, 700–01 (2014). When an appellant fails to preserve an issue in the trial court, an appellate court will not review it unless the issue involves a plain error, which is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009).

> Four conditions must be satisfied before we will consider exercising such discretion:
>
> (1) "there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant";
>
> (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute";
>
> (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the [trial] proceedings'"; and
>
> (4) the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings."

Newton v. State, 455 Md. 341, 364 (2017) (quoting *State v. Rich*, 415 Md. 567, 578 (2010); then quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)) (cleaned up). While Maryland Rule 8-131(a) permits the exercise of discretion to review unpreserved errors, the Maryland Supreme Court has explained that an exercise of such discretion should be

rare as "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (internal citation omitted).

Here, the court did not ask Appellant's proposed question, and his counsel lodged no objection to the court's refusal. As a result, Appellant has waived our review, unless we exercise our discretion to examine the voir dire issue for plain error. Md. Rule 4-325(f). We observe that, prior to questioning the panel, the court informed counsel that they could ask more specific questions to individual jurors, stating "each side is entitled to ask more granular questions at the bench for anyone who has an affirmative answer."

During voir dire, the court told the jurors that the "[d]efendant is alleged to have forced [M. F.-B.] to have sexual intercourse with him and to perform fellatio on him." The court asked the panel directly, "[i]s there any member of the jury panel who believes they would have difficulty listening to the facts of a sexual assault nature and discussing them with their fellow jurors during deliberations?" It then asked "[i]s there any member of the jury that believes that [sic] have a bias or prejudice or emotion that would impact their verdict in this case?" The court continued to ask a series of questions to the potential jurors, including:

> Is there any member of the jury panel or their immediate family or close friend who has either been a witness to a crime, convicted of a crime, or accused of a crime? You, a family member, or a very close friend accused of a crime, victim of a crime, or witness to a crime.
>
> * * *

> Does any member of the jury panel or an immediate family member or close friend have any special experience or expertise in dealing with the issue of sexual assault or assisting sexual assault victims?
>
> * * *
>
> Is there any member of the jury panel or an immediate family member or very close friend associated with or related to anyone that works in a rape crisis center, the Child Advocacy Network, a hospital emergency room, a sexual assault hotline, or any type of clinic that administers emergency medical care or victims' rights group?
>
> * * *
>
> Is there anyone believes [sic] that an alleged victim of a sex crime is more likely or less likely to tell the truth than, say, another person just because he or she is said to be the victim of a sex crime?
>
> * * *
>
> Is there any reason that I have not already explained or put to you in the form of a question that you believe you could not render a fair and impartial verdict?

When a proposed voir dire question is directed to a specific cause for disqualification, "the question must be asked and failure to do so is an abuse of discretion." *Smith*, 218 Md. App. at 699 (citations and quotations omitted). We hold that while a court is bound to ask questions to reveal a cause for disqualification, the court is not bound to ask such questions in the precise manner and mode requested by counsel. Here, the court simply used a series of broader questions in order to elicit whether the potential jurors were biased. We find no clear or obvious error by the court, and if the court did err, it did not affect Appellant's substantial rights, or seriously affect the fairness, integrity, or public

reputation of judicial proceedings. Appellant has failed to satisfy the four conditions necessary for our consideration. We, therefore, decline plain error review.

Appellant argues, nevertheless, that we should examine this issue because trial counsel rendered ineffective assistance of counsel in failing to object, citing *Strickland v. Washington*, 466 U.S. 668 (1984). The State argues the court did not err and, thus, defense counsel could not have been ineffective for his failure to object.

When an appellant asserts that he was prejudiced by his attorney's deficient performance, "[t]he record is usually inadequate for appellate review and devoid of a response from defense counsel concerning the allegations." *Id.* Claims of ineffective assistance of counsel are ordinarily left for review on post-conviction. *Lettley v. State*, 358 Md. 26, 32 (2000). There are some circumstances, when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *Bailey v. State*, 464 Md. 685, 703 (2019).

The record, here, does not contain any information from trial counsel regarding his decision not to object, and thus, we cannot analyze whether counsel's actions were an oversight or a trial strategy. We cannot assess whether the actions of trial counsel were deficient and whether Appellant was unfairly prejudiced by counsel's inaction. We, therefore, decline an examination of this issue.

II. The court did not err in allowing witnesses to testify about prior instances of sexual assaults involving Appellant.

Md. Code Ann., Cts. & Jud. Proc. § 10-923(b) states that "[i]n a criminal trial for a sexual offense . . . evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible[.]" According to Section § 10-923(c):

> (c)(1) The State shall file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause.
>
> (2) A motion filed under paragraph (1) of this subsection shall include a description of the evidence.
>
> (3) The State shall provide a copy of a motion filed under paragraph (1) of this subsection to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.
>
> (d) The court shall hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.

Section § 10-923(e) provides:

> (e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:
>
> (1) The evidence is being offered to:
>
> (i) Prove lack of consent; or
>
> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
>
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;

> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
>
> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

"The admissibility of evidence under CJP § 10-923 depends on two necessary, sequential events: (1) the State proving at a required hearing (the) four criteria and (2) the circuit court then exercising its discretion in favor of admissibility." *Woodlin v. State*, 484 Md. 253, 262 (2023).

Appellant argues that the court erred in allowing S.J. and E.M. to testify about prior instances of assault involving Appellant. He contends the State failed to comply with the discovery requirements of Md. Code Ann., Cts & Jud. Proc. § 10-923 and the lack of discovery "made it impossible to effectively cross-examine S.J. and E.M." Appellant argues that the error was not harmless beyond a reasonable doubt because the witnesses' credibility was critical to Appellant's case. According to Appellant, the State failed to perform its due diligence in obtaining records in S.J. and E.M.'s cases, and thus, Appellant did not have sufficient discovery to cross-examine the witnesses. We note that Appellant does not, otherwise, dispute the court's ruling.

The State contends that it provided Appellant all of the information that was within its possession and/or control regarding the criminal cases involving S.J. and E.M. The State asserts that it acted with due diligence by making several attempts to gather additional information, but the information was unavailable due to the passage of time. The State notes that Appellant's counsel was aware of potential impeachment material in the

discovery documents made available, and that she was also aware that Appellant's previous defense counsel no longer maintained his records.

Maryland Rule 4-263 provides, "the State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule." Subsection (c)(2), states that:

> [t]he obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and **that are in the possession or control of the attorney**, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

(emphasis added). Rule 4-263 requires the State to disclose any impeachment information in its possession. Md. Rule 4-263(d)(6).

Prior to the pre-trial hearing, the State provided Appellant with the police reports for the two witnesses' cases, a certified copy of Appellant's conviction in S.J.'s case and both women's names, addresses and telephone numbers. The 2009 police report in E.M.'s case, stated that she received a sexual assault examination. The prosecutor informed the defense and the court that he was unable to obtain any records from that examination. Both cases were more than ten years old, and the State proffered that the information sent to Appellant was all that was in its possession.

Defense counsel cross-examined S.J., during the hearing and trial, about certain details in the police report that she did not remember, including, the date, the location of Appellant's house, whether she walked or drove to the house, the type of car Appellant drove, and whether she consented to sleeping in the bed with Appellant. E.M. was cross-

examined about aspects of her testimony that were not included in the police report, such as her belief that she was drugged and the use of Appellant's tank top to choke her. Defense counsel also questioned E.M. regarding whether she was aware of the outcome of the criminal case and referenced a letter from the then-state's attorney informing her that the case was dismissed. At the conclusion of the hearing, as noted previously, the court gave a detailed analysis of its findings and determined that the witnesses would be allowed to testify.

In our view, the State acted with due diligence in attempting to gain all records and reports regarding E.M.'s and S.J.'s cases. While Maryland Rule 4-263(c)(2) compels the State to turn over any information that is "in the possession or control of the attorney," the State cannot be penalized for the absence of potential impeachment records that may have existed more than ten years prior to the hearing. Here, Appellant's counsel had the opportunity to cross-examine both witnesses during the hearing and again, at trial, and she was able to use the reports provided as a basis for impeaching the witnesses. We hold that the court did not err in determining that the State complied with its discovery requirements and in ultimately admitting the testimony of E.M. and S.J.

III. The court did not err in removing Appellant from the courtroom.

Appellant argues that the court erred in removing him from the courtroom during the jury's reading of the verdict because the Confrontation Clause of the Sixth Amendment guarantees him the right to be present in the courtroom during all stages. He contends the judge failed to give him a warning prior to removing him, and he was not given the

opportunity to return prior to the full reading of the verdict. Appellant asserts that these errors were not harmless, as "face-to-face contact with the defendant may cause some of the jurors to change their position[.]"

The State argues that no objection was lodged during or after Appellant was removed from the courtroom and thus, Appellant's argument is not preserved for appeal. If considered, the State agrees that Appellant had the right to be present but contends that Appellant's right is not without restrictions. The court properly removed Appellant because of his behavior. Further, even if the court erred in removing Appellant, the State contends that the error was harmless.

This Court typically "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). Here, counsel did not object to the removal of Appellant and, thus, Appellant did not properly preserve this issue. We note that the four conditions that must be satisfied before this Court will exercise its discretion to consider an unpreserved issue under plain error review have not been met. We find no clear or obvious error by the court, and if the court did err, it did not affect Appellant's substantial rights, or seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Maryland Rule 4-231(b), in accordance with the U.S. Constitution, provides that, a defendant is entitled to be present in the courtroom at "every stage of the trial[.]" Subsection (c)(2) states that a defendant may waive the right to be present when the

defendant "engages in conduct that justifies exclusion from the courtroom[.]" Md. Rule 4-231(c)(2).

In *Illinois v. Allen*, 397 U.S. 337 (1970), petitioner Allen elected to represent himself at trial, and he was convicted by a jury of armed robbery. *Allen*, 397 U.S. at 339. While examining prospective jurors, a disagreement occurred between the judge and Allen. *Id.* The judge then appointed counsel to proceed with the examination, and Allen continued to cause a disturbance. *Id.* at 339–40. The judge warned Allen stating, "One more outbreak of that sort and I'll remove you from the courtroom[.]" *Id.* at 340. Allen continued to argue with the judge, and he was removed from the courtroom for the remainder of voir dire. *Id.* When the trial began, Allen was brought back into the courtroom and continued to argue after the judge instructed the witnesses to leave the room. *Id.* at 341. He was removed again. *Id.* Allen remained outside the courtroom for the State's case-in-chief but was permitted to return for the remainder of the trial. *Id.*

The U.S. Supreme Court explained:

> we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. at 343.

In 2016, this Court addressed whether a trial court abused its discretion in removing a disruptive defendant from the courtroom during trial in *Shifflet v. State*, 229 Md. App.

645 (2016). *Shifflet*, 229 Md. App. at 656. Shifflet was tried for first and second degree murder, and he argued that the judge abused her discretion when she ordered him to wear a stun cuff and "then by proceeding with trial in his absence when he refused to wear it." *Id.* Much of the trial was conducted in his absence because of his behavior. *Id.* at 652. We explained that "[w]here a defendant is disruptive, contumacious, stubbornly defiant in a manner that interferes with the dignity, order, and decorum of the courtroom, the trial court has the discretion to order constitutionally permissible accommodations." *Id.* at 667–68 (quoting *Illinois v. Allen*, 397 U.S. 337 (1970)) (internal quotation marks omitted). We held that the court did not abuse its discretion in requiring Shifflet to wear a stun cuff because he "consistently used angry, vulgar, and violent language with the court." *Id.* at 671. We also held that the court did not abuse its discretion in removing Shifflet from the courtroom because he was offered multiple opportunities to return after his removal and refused them. *Id.*

We referenced *Biglari v. State*, 156 Md. App. 657, 671 (2004), where Biglari, a *pro se* defendant, was removed from the courtroom because of his disruptive behavior. *Biglari*, 156 Md. App. at 662–65. The trial court did not provide Biglari an opportunity to return to the courtroom, and thus, the defense was "unrepresented during the instructions and closing argument phases of the trial." *Id.* at 673. We reversed the judgment of the circuit court, finding that Biglari "should have been advised that he would be permitted to deliver a closing argument if he promised to comply with the applicable rules of evidence and criminal procedure." *Id.* In Footnote Seven, we stated:

> Our holding in this case does not require that a disruptive defendant be given the opportunity to return every time a different witness is called to testify, or every time there is a recess in the proceedings. We are persuaded, however, that such a defendant should be given the opportunity to return whenever a particular phase of the proceedings has concluded (e.g. the State's case-in-chief) and a new phase is about to begin.

Id. at 674 n.7.

During the reading of the verdict, in the present case, specifically, the third count, Appellant started using profanity, stating, "That's some bullshit. How the fuck – yo, stop fucking playing, yo." The court remarked, "Mr. Ferguson, I'm warning you to remain silent[.]" Appellant continued to make statements, which, according to the record, were indiscernible after the court's warning. The judge then removed him from the courtroom, announcing that Appellant had voluntarily waived his right to be in the courtroom.

Maryland Rule 4-231 does not specify that a judge is required to give a warning to a defendant before removing him or her from the courtroom, but here, the judge did, in fact, warn Appellant. Appellant's language was clearly inappropriate and disruptive, and it appears from the record that he continued to be disruptive after the judge's warning.

Appellant argues that the court erred in failing to provide him with an opportunity to return to the courtroom for the remainder of the reading of the verdict. We do not agree. The court was not required to do so. The court acted in accordance with *Biglari,* and provided Appellant's attorney the opportunity to have him return to the courtroom at the conclusion of the rendering of the verdict. The court stated to his attorney, "go downstairs and chat with him, encourage him to come up on the record" and "hopefully gain his assurances that he'll, you know, obviously, comport with what's expected in the

courtroom." Counsel consulted with Appellant, but Appellant did not return to the courtroom that day. Appellant was brought into the courtroom that following Monday, and the court was able to proceed with advising him of the verdict and his post-trial rights.

We hold that the court did not abuse its discretion in allowing the jury to complete the reading of the verdicts. The court properly allowed that phase of the trial to be completed prior to giving Appellant the opportunity to return to the courtroom.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.