UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1610

September Term, 2014

CURTIS RYAN MORRIS

v.

STATE OF MARYLAND

Kehoe,
Hotten,
Reed,

JJ.

Opinion by Reed, J.

Filed: June 26, 2015

A jury in the Circuit Court for Anne Arundel County convicted Curtis Ryan Morris, appellant, of second degree murder, child abuse in the first degree resulting in death, and assault in the first degree. He was sentenced to 30 years, with all but 20 years suspended for second degree murder and first degree assault, which merged with second degree murder, 40 years consecutive term, with all but 20 years suspended, followed by five years of supervised probation for first-degree child abuse. Appellant timely appealed, and presents two questions for our review, which we rephrased[1]:

1. Did defense counsel render ineffective assistance of counsel?

2. Did the circuit court's failure to curtail the State's alleged improper questioning during trial amount to plain error, requiring reversal?

3. Did the circuit court's failure to curtail the State's alleged improper closing argument remarks during trial amount to plain error, requiring reversal?

For the following reasons, we answer all questions in the negative, and affirm the circuit court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's jury trial started on May 30, 2014, and concluded on June 4, 2014. The following facts are from trial testimony.

[1] Appellant presented the following questions:

1. Was appellant denied his Sixth Amendment Right to Counsel?

2. Should this Honorable Court exercise plain error review and reverse Appellant's conviction based on the State's references to facts not in evidence?

Appellant and Erika Lutz met while working at the National Security Agency ("NSA") together. They started dating in 2011 when Ms. Lutz was three-months pregnant, with Kairi Lutz, now deceased. Appellant is not the biological father of Kairi. Appellant and Ms. Lutz moved into appellant's parents' home for about five months. The couple later moved into their own home, a split-level home, and occupied the lower level of the home. Shortly thereafter, Kairi was born.

The State's witness, Sumner Steere, lived in the upper level of the split-level home with her husband Zachary Steere, and roommate, Kynoah Perryman. Mrs. Steere testified that she heard Kairi crying frequently and "video games being played." She also heard appellant and Ms. Lutz "arguing about whose turn it was" to attend to crying Kairi. At 2:00 am on June 10, 2012, Mrs. Steere returned home from a friend's home, and she heard Kairi crying. She placed ear plugs into her ears and went to sleep. She woke up at 7:00 am that morning, and heard Kairi crying. At about 11:00 am, Mrs. Steere "heard arguing and then doors slamming[,]" which caused a picture frame in Mrs. Steere's home to fall off the wall. Mrs. Steere noticed that Ms. Lutz's vehicle was gone. She then "went downstairs to confront [appellant] about the doors being slammed." She testified that appellant answered the door, and appeared "pretty upset." She asked that they "not slam" the door "because the picture frames had just come off the wall." Appellant, agitated, responded "whatever" and "slammed" the door shut. Mrs. Steere heard the baby crying in the background during the confrontation.

Mrs. Steere's husband returned home that day at or about 4:00 pm. Kairi continued to cry, so at 8:00 pm Mrs. Steere and her husband went to the movies. Upon returning at

approximately 10:30 pm, a police officer arrived and asked them "if [they] knew what had happened to [appellant and Ms. Lutz]."

Mr. Steere also testified for the State that he heard Kairi crying "often," and that he heard video games or loud music playing. He also "sometimes" heard the couple "bickering."

Dr. Andrea Sarchiapone, Pediatric Hospitalist of the Baltimore Washington Medical Center, testified for the State. She was the doctor that treated Kairi upon her arrival to the hospital. She obtained Kairi's medical history from another physician, which indicated that Kairi "had been fussy but was otherwise well. [She] had no fevers, no cold symptoms, no vomiting or diarrhea." Dr. Sarchiapone testified that Kairi was "not breathing[,]" but "[s]he had a heart rate because the paramedics had given her some medication to get her heart rate up" and "appl[ied] oxygen" to Kairi. Dr. Sarchiapone attempted to "resuscitate" Kairi by "intubat[ing]" her, using a breathing tube. Kairi did not survive and was pronounced dead at 11:27 pm. Dr. Sarchiapone testified that there was no visible bruising from the baby's frontal view, but Kairi "was never flipped over to look at the back side[.]"

Benjamin Keck, was admitted as an expert in computer forensic analysis of a hard drive, and testified for the State. He testified that he was asked to look for information from June 10, 2012, on the hard drive found at appellant and Ms. Lutz's home. He analyzed the hard drive and found information relating to "Guild Wars 2" and a web history. The user name "captured by the Windows operating system . . . was Ryan." The user searched for "sings[sic]+of+autism+in+babies" at 6:25 pm on June 10, 2012. The user clicked on a link, and the HTML header displayed as: Autism Symptoms and Early Signs: What to look for

in Babies, Toddlers and Children. At 6:49 pm, there was another search for "lock jaw," and the user clicked on the link "help.ny.gov" and the HTML header displayed: Tetanus (Lock Jaw).

Russell Alexander, the assistant medical examiner at the Office of the Chief Medical Examiner for the State of Maryland, was admitted as an expert in forensic pathology, and testified for the State. Dr. Alexander testified that he conducted an autopsy on Kairi on June 12, 2012, and while conducting an external investigation he noted "that there was some bruising on the outside of her body. In particular, [he] saw a 1/2 x 3/8th inch purpose contusion on the left side of her forehead." He "also saw additional bruising. . . . two bruises on the left side of the back of her head. In addition, there was some reddish discoloration just above the right eye, which may be a bruise, but [he] couldn't confirm that definitively." After observing all of the external injuries, Dr. Alexander made a surgical incision and conducted an internal examination. He further testified:

> that there was bleeding beneath the scalp. . . . So there was a bruise on the surface, as well as evidence of bruise on the inside of the scalp. And that's in essence, an impact site. That's where she received the blow to her head. Also, on the left side of the back of the head, as I told you, I saw bruises. And when I reflected the scalp there again, I was able to see bleeding beneath the scalp, confirming that there were impacts or blows to the left side of the back of her head. As I went further on in my examination, we did remove a portion of her skull to examine the brain tissue and I was able to see extensive bleeding on the surface of the brain.

Together with an expert in neuro pathology, Dr. Alexander testified that they found additional injuries to Kairi, including a bruise on the surface of the brain. He also found injuries of different ages in Kairi. There were "extensive acute or fresh subdural

hemorrhage and fresh subarachnoid hemorrhage or bleeding on the surface of the brain that we[re] confirmed microscopically." There was also a bruise that appeared to be "two to three days old" and there was evidence of an old subdural membrane, an "old injury," which Dr. Alexander testified may have "been due to birth," and "at least a few weeks old[.]" He further testified that subdural membranes can re-bleed, but he did not think that "a new episode of bleeding [] caused her death[]" because of the absence of "new fragile blood vessels" that would indicate a re-bleed, and in Kairi's case there was scar tissue present.

Furthermore, Dr. Alexander testified that there was "massive bleeding, a large traumatic brain injury all over the surface of the brain." He concluded that he did not think it was "reasonable at all to say that that old membrane would have bled again to cause the injuries [] [seen] in Kairi" and such a re-bleed "certainly, [] would not explain the fact that she had a bruise or contusion on the surface of her brain" or "impact sites or blows to the front and back of her head." Dr. Alexander also testified that an expert examined Kairi's eye tissue and saw "extensive bleeding at various sites within both eyes[.]" Dr. Alexander testified that things such as "cardio pulmonary resuscitation" or "accidental trauma" can cause bleeding in the eyes, but he concluded that the bleeding in Kairi's case was due to "traumatic brain injury[,]" specifically "blows to her head."

Dr. Alexander further testified that Kairi would not "have been able to act normally having sustained these types of traumatic injuries[]" and she could have been experiencing symptoms including sleepiness, tiredness, unconsciousness, and she could have stopped

breathing. He concluded that the "fresh injury" to Kairi's head, was a fatal injury and ruled her death a "homicide" with a reasonable degree of medical certainty.

Appellant's mother, Vicky Morris, testified for the defense. She testified that Kairi was "typically a very easy baby to take care of. She wasn't one to cry. She . . . would just . . . sit. Her and I would lay on my bed sometimes and she would just coo and talk to me for a half hour at a time." Kairi behaved normally five days before her death. But the next day, while she babysat Kairi, Vicky noticed that "[Kairi] was not herself[,] as she "was a bit fussy." She also testified on the night of Kairi's death, she went to the hospital and saw appellant and Ms. Lutz "distraught." Appellant was "sobbing, shaking, in shock as to what was happening."

Brittany Wagoner, a friend of Ms. Lutz and former godmother to Kairi, testified for the defense. She testified that Kairi "was hardly ever fussy" and "pretty much a happy baby." Brittany babysat Kairi on the day before she died. She also testified that Kairi was "fussy." She also thought it was "odd" that Kairi "slept a lot that day[]" and "her breathing seemed very soft." She asked her fiancé to come home early from a drill to check Kairi's vitals, and "everything was fine." She did not think the baby needed to go to the hospital.

Corporal Connell, the responding officer on the night of Kairi's death, was called by the defense. Corporal Connell testified that he arrived at appellant and Ms. Lutz's home, and asked appellant "what happened?" Appellant "was crying" and "quite upset" and did not respond to Corporal Connell's question. Kairi was transported to the Baltimore Washington Medical Center, and Corporal Connell followed.

Corporal William Daughters also testified for the defense. He responded to the hospital to relieve Corporal Connell. He testified that appellant was "shock[ed]" and "very reserved." Appellant also "started crying a [] few times." Appellant explained "that the mother was at work, that he was home alone with Kairi, and that he had fed Kairi some prepared breast milk with a bottle . . . And that shortly after he fed her he went to lay her down and she started choking and then he called 911 after that."

Appellant's father, Curtis Ray Morris, testified for the defense. He testified that appellant "cherished being a father, he loves children, and to have one of his own was just remarkable for him." Three days prior to Kairi's death, Mr. Morris had been with Kairi and noticed she was "not herself[,]" "very lethargic," and "wanted to sleep." He testified that Kairi was typically "very animated," but on that day, she "just sat there and . . . looked out not really focused on anything." He testified that upon his arrival to the hospital on the night of Kairi's death, appellant was "devastated" and "crying." Mr. Morris saw CPR being administered on Kairi, and that it seemed her chest was being compressed "into her backbone[,]" which appeared "extreme" in his opinion.

Marshall Adam Maravelis III, firefighter paramedic, was the first responder at appellant's home on the night of Kairi's death, and testified for the defense. Marshall Maravelis testified that Kairi was "not breathing, [and] lifeless." He "initiated CPR" and subsequently administered "advanced life support patient care with CPR." Marshall Maravelis observed "secretion smeared around [Kairi's] mouth[,]" which seemed "like an attempt to clear the airway was made." He did not see any bruising or swelling on Kairi.

Although the resuscitation efforts established a stable pulse, Kairi did not start breathing again.

Finally, Dr. Ronald Uscinski, was admitted as the defense's expert in the field of neurosurgery. Dr. Uscinski testified that he disagreed with Dr. Alexander's opinion that blunt force trauma was the cause of Kairi's death. He testified that Kairi's birth records indicated that she had a "deformation of the head" and "overriding sutures." The overriding sutures are "bones . . . bending at the point of juncture, [and] the sutures are actually pushed [] over the other." Dr. Uscinski explained that "[Kairi's] head really had to get deformed to fit through the birth canal." He also explained that appellant's description of how Kairi stopped breathing, paramedic's observation of vomit around the baby's mouth and the absence of external evidence of trauma allowed him to conclude to a reasonable degree of medical certainty that re-bleeding of a chronic subdural membrane, and not blunt force trauma to the head, was the cause of Kairi's death. In addition, he testified that the autopsy report concluded that iron was present, which indicated that there had been bleeding in the past and that the injury was not fresh. He further testified the presence of macrophages, which are large eating cells, also indicated that the injury was older.

Dr. Uscinski testified that retinal hemorrhaging does not give rise to blunt force trauma to a reasonable degree of medical certainty. He testified that a retinal hemorrhage is a "non-specific finding" and "reflect[s] [] an abrupt increase in retinal venous pressure which may be seen with abrupt increases and intracranial pressure." He concluded that based on Kairi's bleeding, "her intra cranial pressure had gone up[,]" which can be caused by a "sudden outpouring of blood and a fixed volume." He testified that the bruises

described in the autopsy report did not "really invoke trauma as a causative factor" and that with the amount of blood present, the bruises did not "appear to be the degree of magnitude . . . that [one] would expect to see [with] this kind of intracranial bleeding."

On cross-examination, the State's attorney showed pictures of a bruise underneath Kairi's scalp, and Dr. Uscinski acknowledged the bruising. He also could not point to any peer review case of an infant who went into a "catastrophic coma or died from a re[-]bleed very quickly[.]" He testified that he relied solely on reports and observations of others in the case to reach his conclusions.

When the prosecutor began to question Dr. Uscinski about his sanctions by the American Association of Neurological Surgeons for providing biased testimony in six other cases, the defense counsel asked to approach, in which the following exchange took place:

> [Defense counsel]: I believe I know where I'm going with this. Can I -- at this time- I just wanted to make a -- see if the State can make a proffer as to -- I know they're intending on impeaching him about something. Can I see what it is so that I know what is coming because it may be irrelevant.
>
> . . .
>
> [Defense counsel]: I believe the subject matter of what she's about to say is irrelevant to this case.
>
> [Prosecutor]: He's censured for bias in his testimony -- in cases involving re[-]bleeds.
>
> [Defense counsel]: And I -- my understanding was it was in cases involving Shaken Baby Syndrome which what we're not allowed to talk about.

> THE COURT: No. If there's bias -- if he was censured for bias in his testimony, . . . I think she can cross him on that. I don't think it's --
>
> [Defense counsel]: Does that mean that --
>
> THE COURT: -- the subject matter that was irrelevant. -- I mean, the bias part is irrelevant.
>
> . . .
>
> [Defense counsel]: If she gets into that am I allowed to then ask him his opinions as to what (indiscernible 10:56:19) Shaken Baby Syndrome all of a sudden?
>
> THE COURT: No, I think he can respond to the findings of bias but I don't think we're going to get into the area of Shaken Baby syndrome. And actually I (indiscernible 10:56:29) [told] [the prosecutor] not to get into the area of Shaken Baby Syndrome --
>
> [Prosecutor]: I'm not going to.
>
> THE COURT: I think you can -- if there's an actual finding of bias, I think she can ask about that.

Dr. Uscinski admitted to being censured by the American Association of Neurological Surgeons for giving biased testimony on chronic re[-]bleeding in chronic subdural hemorrhages in six other criminal cases. The prosecutor admitted a statement from Dr. Uscinski to the American Association of Neurological Surgeons, at which point, defense counsel objected on the ground that prior bad acts that are unrelated to the conviction at issue could not be proven through extrinsic evidence. The trial court overruled because under Rule 5-616, extrinsic impeachment evidence of bias may be admitted. The prosecutor also admitted a decision issued by the Board of Directors of the

American Association of Neurological Surgeons, which sustained Dr. Uscinski's censure. Dr. Uscinski also admitted that the appeal was presented to the general membership for vote, and the group voted to uphold the Board of Directors' decision. Upon further questioning, Dr. Uscinski acknowledged that Kairi had external bruising to the exterior of her head, that such bruising can be evidence of blunt force trauma, and that blunt force trauma can cause subdural hematomas and subarachnoid hemorrhage. He also agreed that Kairi had subdural hematomas and subarachnoid hemorrhage, which can result in death. On re-direct, Dr. Uscinski testified that he was not suspended or expelled from the organization as result of the censure. He also testified that he had testified on the same issue since his censure.

After the close of all evidence, defense counsel moved for judgment of acquittal, which was denied. The jury found appellant guilty of second-degree murder, first-degree child abuse, and first-degree assault. Appellant filed a motion for a new trial, which was denied. After sentencing, appellant noted his timely appeal.

We shall include additional facts as necessary to our discussion.

DISCUSSION

A. Parties' Contentions

Appellant claims the record is clear that defense counsel was aware of defense expert's sanction for providing similar testimony in six other criminal cases. Appellant contends that defense counsel's failure to file a motion *in limine* to determine whether the trial court would allow the State to cross-examine the expert with respect to the censure amounted to ineffective assistance of counsel. Appellant claims the censures completely

destroyed the expert's credibility, and because this case was entirely circumstantial, the result would have been different if the motion had been filed. Appellant also claims that defense counsel's failure to object during impermissible questioning during cross-examination of appellant's mother relating to an alleged break-up between appellant and Ms. Lutz also amounted to ineffective assistance of counsel. He claims that any attorney acting under the norms of professional reasonableness, would have objected, thereby preserving appellate review or most likely moved for a mistrial.

Finally, appellant also claims that defense counsel's failure to object during the State's closing arguments, which appellant asserts contained facts not in evidence was also ineffective assistance of counsel. Appellant claims that his defense counsel's cumulative errors warrant a new trial.

The State counters that appellant's claims of ineffective assistance of counsel should not be reviewed by this Court because "the trial record fails to demonstrate the sort of conceded, blatant, and egregious ineffectiveness that Maryland courts have held is necessary for review on direct appeal." The State counters that defense counsel's decision to object, rather than to seek a pretrial ruling fails to show professional error, because the bias evidence was properly admitted. In addition, the State argues that the record fails to show that defense counsel would not have called Dr. Uscinski to testify if he had known Dr. Uscinski was going to be impeached with his prior censure. In addition, the State argues that Dr. Uscinski's credibility was not "completely destroy[ed]," because defense counsel belittled the censure and emphasized that he was never suspended or expelled from the

organization. The State also argues that appellant's trial counsel's performance does not meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

The State counters that defense counsel's decision not to object to the State's cross examination of appellant's mother was not ineffective. It argues that the jury was left with appellant's mother's response that she did not know about any breakup between appellant and Ms. Lutz. The State counters that appellant's last ineffective assistance claim is also without merit, because the prosecutor's remarks during closing argument were legitimate inferences drawn from the facts in evidence. As a result, the State also argues that the prosecutor's remarks "did not constitute error, much less plain error."

B. Analysis

i. Ineffective Assistance of Counsel

Appellant claims that he received ineffective assistance of counsel for the first time on direct appeal. Because the record fails to establish why defense counsel acted as she did, we will not review this issue on direct appeal.

"The right to counsel includes the right to the effective assistance of counsel." *Tetso v. State*, 205 Md. App. 334, 377 (2012), *cert. denied*, 428 Md. 545 (2012) (citations omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.[2]

[2] *Strickland*, 466 U.S. at 687:

(continued…)

"Judicial scrutiny of counsel's performance must be highly deferential . . . [and, for fairness, must] evaluate the conduct from counsel's perspective at the time [of the alleged deficient representation]." *Id.* at 689.

A defendant's claim of ineffective assistance of counsel generally takes place at post-conviction review, where the opportunity for further fact-finding exists. *Mosley v. State*, 378 Md. 548, 558-59 (2003) ("[A] post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act, Maryland Code, § 7-102 of the Criminal Procedure Article (2001), is the most appropriate way to raise the claim of ineffective assistance of counsel.") (footnote omitted) (citations omitted).

In *Johnson v. State*, 292 Md. 405, 434-35 (1982), the Court of Appeals explained:

> In essence, it is because the trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel, that a claim of ineffective assistance is more appropriately made in a post conviction proceeding[.] Moreover, under the settled rules of appellate procedure, a claim of ineffective assistance of counsel not presented to the trial court generally is not an issue which will be reviewed initially on direct appeal, although competency of counsel may be raised for the first time at a [ ] post conviction proceeding. Upon such a collateral attack, there is presented an opportunity for taking testimony, receiving evidence, and making factual findings concerning the allegations of counsel's incompetence.

(…continued)

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

> By having counsel testify and describe his or her reasons for acting or failing to act in the manner complained of, the post conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence.

(citations omitted). In *Mosley,* 378 Md. 548, 566 (2003), this Court discussed the exceptional instances in which an ineffective assistance of counsel claim may be raised on direct appeal, stating:

> The rare instances in which we have permitted direct review are instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel. As we explained in *In re Parris W.*, [363 Md. 717, 727 (2001),] direct review is an exception that applies only when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim."

Here, the defense counsel did not file a motion *in limine*. Although defense counsel did not file such a motion, defense counsel, however, did object to the line of questioning. The trial court sustained the objection under Md. Rule 5-616.[3] Thus, the evidence was properly admitted, and defense counsel may have been aware that filing a pre-trial motion *in limine* would have been unsuccessful.

[3] Maryland Rule 5-616 (b)(3) provides:

> (b) Extrinsic Impeaching Evidence
>
> (3) Extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it.

Dr. Alexander, the medical examiner, concluded that Kairi's death was a homicide caused by blunt force trauma to the head. Defense counsel's expert, Dr. Uscinski disagreed with that conclusion, and rather concluded that her death was caused by a re-bleeding of an old subdural membrane, which may have been a birth trauma. When the prosecutor attempted to discuss Dr. Uscinski's censure in 2012, defense counsel immediately objected. During the bench conference, defense counsel stated that she thought his previous bias censure was related to testimony given on the Shaken Baby Syndrome. The State easily ascertained documents related to Dr. Uscinski's censure, which revealed his censure was for testimony given in other criminal cases related to re-bleeding of the subdural membrane. It is apparent from defense counsel's immediate objection and statements that she knew the prosecutor was attempting to impeach Dr. Uscinski. It is not clear from the record, however, why defense counsel did not file a motion *in limine*.

We can speculate that there was no other medical expert willing to testify that re-bleeding of the subdural membrane was the cause of Kari's death, as Dr. Uscinski did. Defense counsel's trial strategy to have an expert who was censured may have outweighed the absence of one, as the latter would substantially weaken their defense. We can also speculate that defense counsel did not file a motion *in limine*, because she knew that it lacked grounds and that it would be denied, given that extrinsic evidence of biased testimony can be admitted. Attorneys in at least four other cases used Dr. Uscinski as an expert while knowing about his censures. The record does not sufficiently illuminate why defense counsel acted as she did. *See Crippen v. State*, 207 Md. App. 236, 251-52, 255 (2012) (holding allegation of ineffective assistance of counsel that "requires an

examination of [] attorney's actions" was not "plain on the trial record[,]" requiring examination of attorney's conduct in post-conviction proceeding).

Direct review by this court leaves us to speculate and would involve "the perilous process of second-guessing, perhaps resulting in an unnecessary reversal in a case where sound but apparent reasons existed for counsel's actions." *Johnson*, 292 Md. at 435 (citation and internal quotation marks omitted). A post-conviction proceeding, if filed, would give defense counsel the opportunity to testify and explain the reasons for her decision. We, therefore, leave consideration of appellant's ineffective representation claim to the circuit court where it can develop a sufficient record and fairly evaluate the claim. Accordingly, we will not review the issue on direct appeal.

Furthermore, defense counsel's objection and bench conference clearly answered appellant's contention that a motion *in limine* would have "determine[d] whether the trial court would actually allow the State to cross-examine the expert with respect to the censure." Upon requesting the bench conference, and her multiple objections, the trial court clearly ruled that the State was permitted to cross-examine Dr. Uscinski with respect to the censure.

Appellant also argues that defense counsel's failure to object to the following questioning during cross-examination, amounted to ineffective assistance of counsel.

> [Prosecutor]: Ms. Morris, some time during -- while Erica was pregnant and your son and her were in the relationship they had a short break up, didn't they?
>
> Witness: I'm not aware of that.

> [Prosecutor]: Do you recall them breaking up because your son was having a hard time dealing with the fact that Erica was pregnant with someone else's baby and he wasn't sure that []he was going to be able to handle that?
>
> Witness: I'm -- I -- truly I do not. I was not aware of that.

Appellant argues that defense counsel's failure to object to this questioning, failed to preserve the issue for appellate review - other than plain error, and that trial counsel also failed to move for mistrial.

Appellant also claims that defense counsel's failure to object to the State's remarks made in closing arguments was again ineffective assistance of counsel. Appellant takes issues with the following remarks made by the State:

> Use your common sense, ladies and gentlemen. When you walk into a courtroom you don't throw that out the door. You use it to make decisions. And when you use your common sense what 19 year old young man wants to be tied down as a father or a babysitter even if it was his own child. This is another man's child, not the defendant's. The child is the result of someone else sleeping with his girlfriend. This child is a constant reminder of her relationship with another man. This is a burden.

He argues that there was no evidence that appellant viewed his child as a burden. Appellant claims that his defense counsel's cumulative errors warrant a new trial.

The Court of Appeals stated that:

> Simply failing to preserve an issue for appellate review is not, per se, prejudicial or ineffective assistance of trial counsel. We need not go further in our analysis of this claim because petitioner does not argue that had this particular claim been preserved for appellate review, appellate counsel would have

> chosen to raise the issue, and if raised, that petitioner would have had a reasonable possibility of success.

Gross v. State, 371 Md. 334, 356 (2002).

Similar to *Gross*, appellant does not argue that he was prejudiced because there was a "reasonable possibility that the result of the trial would have been different" had defense counsel objected. *See id.* at 355-56 (holding regarding Sixth Amendment prejudice, "[i]f there is no reasonable possibility that the appellate court would have ruled in his favor, there can be no *Strickland* [, 466 U.S. at 687] prejudice").

It is not clear why defense counsel did not object to the cross-examination questions or the State's closing argument statements. As the State points out, the prosecutor may have had a good faith basis for asking such questions, and defense counsel may not have objected because he also knew about the temporary break-up. Again, we decline to speculate the reasons behind defense counsel's inaction. Because the trial record does not contain sufficient facts to address appellant's ineffective assistance of counsel claim, we affirm his conviction. Appellant may proceed with post-conviction to address his claim.

ii. State's Cross-examination Questions

Defense counsel's questions that insinuated facts not in evidence were improper, but it was not prejudicial to appellant's fundamental rights to a fair trial, thus there was no plain error.

Because there was no objection made during trial, we review under a plain error standard of review. *See Martin v. State*, 165 Md. App. 189, 195-96 (2005), *cert. denied*, 391 Md. 115 (2006) ("The failure to object before the trial court generally precludes

appellate review, because [o]rdinarily appellate courts will not address claims of error which have not been raised and decided in the trial court. [I]t is the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." (alterations in original) (citations and internal quotation marks omitted)).

"Plain error is error which vitally affects a defendant's right to a fair and impartial trial." *Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502 (2011), *cert. denied*, 131 S. Ct. 2119 (2011) (citations and internal quotation marks omitted). An appellate court's plain error review of unpreserved instructional errors is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011) (citations and internal quotation marks omitted). It involves four prongs: (1) the error must not have been "intentionally relinquished or abandoned"; (2) the error must be "clear or obvious," not "subject to reasonable dispute[;]" (3) the error "affected [] appellant's substantial rights," which "means he must demonstrate that it affected the outcome of the [] court proceeding[;]" (4) the appellate court "has discretion to remedy the error[,]" but this ought to be exercised "only if the error affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (citations and internal quotation marks omitted). "[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Kelly*, 195 Md. App. at 432 (alteration in original) (citations and internal quotation marks omitted).

In *Elmer v. State*, 353 Md. 1, 15 (1999), the Court of Appeals explained the undue weight a jury may give to the prosecutor's questions that imply facts not in evidence:

> Questions alone can impeach. Apart from their mere wording, through voice inflections and other mannerisms of the examiner—things that cannot be discerned from the printed record—they can insinuate; they can suggest; they can accuse; they can create an aura in the courtroom that the trial judge can sense but about which we could only speculate. The most persistent denials, even from articulate adult witnesses, may not suffice to overcome the suspicion they can engender. . . .

(citation omitted).

In this case, the prosecutor's questions suggested the existence of facts that were not in evidence. The prosecutor's questions conveyed the impression to the jury that he had information that appellant and Ms. Lutz had broken up for a period of time. The questioning was improper because it insinuated that Ms. Lutz and appellant had broken up while Ms. Lutz was pregnant, "[because] [Ms. Lutz] was pregnant with someone else's baby[,] [and] [appellant] wasn't sure that []he was going to be able to handle [it.]"

Although the statement was improper, we will not reverse appellant's conviction unless the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011). Here, although defense counsel's questions were improper, we do not think it arose to a level that was prejudicial to appellant's fundamental rights to a fair trial.

During cross-examination, appellant's mother had an opportunity to respond to both questions. She responded that she was not aware of any alleged break-up between appellant and Ms. Lutz. She also responded that she was not aware of appellant's inability to handle

Ms. Lutz being pregnant with another man's baby. Appellant's father also testified that appellant was extremely happy to be a father to Kairi, regardless of the fact that she was not his biological daughter.

Appellant's characterization of the case as circumstantial is also not supported by the record. This was not a "he say, she say" case. There was substantial evidence implicating appellant. Here, appellant was alone with Kairi on the night of Kairi's death. Dr. Alexander, concluded with a reasonable degree of medical certainty, that blunt force trauma to Kairi's head was the cause of her death. Dr. Alexander's testimony and autopsy reports were substantial evidence, which supported his conclusion. Also, contrary to appellant's argument that there was no evidence that appellant was not Kairi's biological father, there was ample testimony from both appellant's mother and father that appellant was not Kairi's biological father.

Furthermore, general jury instructions have a curative effect, as "Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." *Spain v. State*, 386 Md. 145, 160 (2005) (citations omitted); *But see Lawson v. State*, 389 Md. 570, 601 (2005) (holding that general jury instructions, given before closing arguments cannot "address . . . objectionable remarks[,]" because they have "not yet been made").

After the prosecutor's questions at issue, but before closing arguments, the instructions given to the jury told the jury to base its decisions on "evidence in this case . . . [which include]: One, testimony from the witness stand; Two, physical evidence or

exhibits admitted into evidence. In evaluating the evidence you should consider it in light of your experiences. You may draw any reasonable conclusion from the evidence that you believe to be justified by common sense and your experiences." Thus, these instructions had a curative effect as to the prosecutor's line of questioning. Jurors could fairly draw on their common sense and experience of human nature in evaluating the circumstances appellant found himself in.

Accordingly, the prosecutor's questions did not prevent appellant from receiving a fair trial.

iii. State's Closing Argument Remarks

We find that the circuit court did not err in permitting the State's remarks in closing arguments, as they were supported by the evidence. Accordingly, we find no error and decline to exercise our discretion for plain error review on that issue.

We do not agree with appellant's argument that defense counsel's statements made during closing argument denied appellant a fair trial. We find there was no error, because defense counsel's statements were supported by the evidence and there was substantial evidence against appellant. *See Rubin v. State*, 325 Md. 552, 589 (1992) (holding that unobjected to improper argument not supported by the evidence did "not rise to the level of the deprivation of a fair trial[,]" and thus "[wa]s not a basis for reversal in view of the overwhelming proof of guilt"); *Lawson*, 389 Md. at 605 (2005) ("This Court is reluctant to find plain error in closing arguments" particularly "where there was ample evidence against the defendants and the arguments did not vitally affect their right to a fair trial" (citations omitted)).

"[C]ounsel is afforded considerable latitude in making closing argument, provided that argument takes substance from the evidence or draws reasonable inferences supported by the record." *Martin*, 165 Md. App. at 208 (citing *Degren v. State*, 352 Md. 400, 431 (1999)). The Court of Appeals further explained:

> There are no hard-and-fast limitations within which the argument of earnest counsel must be confined-no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Degren, 352 Md. at 430 (citation omitted). Not all statements are permissible during closing arguments. "For instance, counsel may not comment upon facts not in evidence or . . . state what he or she would have proven. It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell v. State*, 408 Md. 368, 381 (2009) (citations and internal quotation marks omitted). Even should counsel stray over the line of propriety, "[r]eversal is [nevertheless] 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." *Degren*, 352 Md. at 430 (citation and internal quotation marks omitted).

Here, the prosecutor's statements in closing argument that appellant was burdened by Kairi is a reasonable inference supported by the record. Appellant was nineteen years old when Kairi was born. Mrs. and Mr. Steere both testified that Kairi cried frequently, and that they heard video games being played in the background. Mrs. Steere also often heard

appellant and Ms. Lutz "arguing about whose turn it was" to attend to Kairi when she was crying. Kairi was a healthy baby and had normal check-ups.

On the night of Kairi's death, appellant was watching Kairi alone, while Ms. Lutz was at work. Mrs. Steele had heard appellant playing video games while Kairi was crying. Appellant's computer activity also revealed information relating to a computer game. At 2:00 am on June 10, 2012, Mrs. Steere returned home from a friend's home, and again, she heard Kairi crying. Mrs. Steere testified that she had to wear ear plugs because of Kairi's crying. She woke up at 7:00 am that morning, and heard Kairi crying, again. At about 11:00 am, Mrs. Steere "heard arguing and then doors slamming[,]" which caused a picture frame in Mrs. Steere's home to fall off the wall. Mrs. Steere noticed that Ms. Lutz's vehicle was gone. She then "went downstairs to confront [appellant] about the doors being slammed." She testified that appellant answered the door, and appeared "pretty upset." She asked that they "not slam" the door "because the picture frames had just come off the wall." Appellant, agitated, responded "whatever" and "slammed" the door shut. Mrs. Steere heard the baby crying in the background during the confrontation.

The testimony provided the prosecutor with a plausible theory that appellant was aggravated on the night of Kairi's death, and that he felt burdened by Kairi, perhaps because she was another man's child. *See Donaldson v. State*, 416 Md. 467, 488-89 (2010) ("Closing arguments are an important aspect of trial, as they give counsel an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument." (citation and internal quotation marks omitted)); *Smith v. State*, 388 Md. 468, 490 (2005) ("Counsel is

free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way . . . .” (citation and internal quotation marks omitted)). Accordingly, the circuit court did not err in not curtailing the prosecutor’s remarks.

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