Circuit Court for Wicomico County
Case No. C-22-CR-19-000723

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1769

September Term, 2021

JOHN OLIN LEWIS

v.

STATE OF MARYLAND

Nazarian,
Ripken,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 28, 2022

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

Following a jury trial in the Circuit Court for Wicomico County, John Olin Lewis, appellant, was convicted of second-degree sex offense, sex abuse of a minor by a family member, third-degree sex offense, and four counts of fourth-degree sex offense. He raises two issues on appeal: (1) whether the court abused its discretion by restricting the testimony of one of the defense witnesses regarding the basis for her opinion as to the victim's character for truthfulness, and (2) whether the trial court plainly erred in allowing improper prosecutorial closing argument. For the reasons that follow, we shall affirm.

Appellant first contends that the court abused its discretion by prohibiting Diane Lewis from testifying about the basis for her opinion as to the victim's character for truthfulness. We disagree. At trial, the State presented evidence that the victim moved in with appellant in 2018. The victim testified that appellant sexually abused her on multiple occasions, both before and after she moved into his house. In his defense, appellant called his sister Diane Lewis as a witness to testify about the victim's character for truthfulness. During her direct examination, the following exchange occurred:

> [DEFENSE COUNSEL:] What is your opinion as to [the victim's] honesty?
>
> LEWIS: She's, she's, she's, she don't tell the truth. I've caught her –
>
> [PROSECTUOR]: Your Honor –
>
> THE COURT: Wait. Sustained.
>
> [DEFENSE COUNSEL:] Do you feel you've had sufficient interactions with her to come to that, to have that opinion.
>
> [LEWIS:] Yes, I have.

Following this exchange, defense counsel did not make an offer of proof as to what Lewis's testimony would have been or ask her any additional questions about the victim's honesty or reputation for truthfulness.

Appellant asserts that Ms. Lewis should have been allowed to testify about the basis of her opinion as to the victim's character for truthfulness. The problem with this claim, however, is that it is not clear that Ms. Lewis was going to offer such testimony. Appellant surmises that she might have testified that the victim "had a history or pattern of lying to Ms. Lewis or lying about a particular matter[.]" However, it is also possible that she was about to testify about a specific instance of untruthfulness, which appellant concedes would not have been admissible pursuant to Maryland Rule 5-608(b).

Maryland Rule 5-103(a)(2) provides that appellate error may not be predicated upon a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Thus, "a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence." *Merzbacher v. State*, 346 Md. 391, 416 (1997). Here, the record is devoid of any indication as to how Ms. Lewis would have responded had the court let her finish her answer. In other words, it is not clear whether she was attempting to clarify the basis of knowledge for her opinion or attempting to testify regarding a specific instance of misconduct. Because defense counsel did not make an offer of proof, this issue is not preserved for our review. *See id.* (holding that where the witness did not answer the question after the trial court sustained the State's

objection, a proffer was required to preserve the propriety of the trial court's decision to exclude the evidence because the witness "could have answered the question in any number of ways," and the Court of Appeals was "in no position . . . to discern what that answer may have been, whether favorable or unfavorable to the defense").

Appellant also claims that the court erred by allowing the prosecutor to make improper closing arguments. Specifically, he claims that the following statements made by the prosecutor regarding the reasons for the victim's delayed disclosure of the abuse were objectionable because they relied on facts not in evidence as a way to vouch for her credibility:

- "[A] lot of these offenses do happen within the safety of the child's home with people that they trust and they have that relationship to the offender. So a lot of times, because of that relationship, children don't necessarily disclose right away. They don't necessarily run home and tell their parents about something happening, because a lot of times they live with the offender who is committing these acts."

- "I think it's pretty well-known that delayed disclosure happens in a lot of these situations."

- "So a lot of times people go their entire lifetime without reporting[.]"

- "[W]e always say for sex abuse cases, disclosure is a process. So to expect a child who has sort of kept this to themselves for an extended period of time, to just come up to this stranger, in this case it would have been a police officer, and tell everything is unrealistic."

- "So everyone sort of processes trauma in different ways. Sometimes trauma blacks out parts of what you remember, and sometimes you don't want to remember everything that happened[.]"

Appellant acknowledges, however, that this claim is not preserved because he did not object at trial. He therefore requests that we engage in plain error review.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "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) (citation omitted). Therefore, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Savoy v. State,* 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Under the circumstances presented, we decline to overlook the lack of preservation and thus do not exercise our discretion to engage in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation" (emphasis omitted)).. Consequently, we shall affirm the judgments of the circuit court.

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