Circuit Court for Montgomery County
Case No. 130236C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1924

September Term, 2019

ANTHONY VICTOR GOMEZ

v.

STATE OF MARYLAND

Friedman,
Wells,
Zic,

JJ.

Opinion by Friedman, J.

Filed: February 18, 2021

Anthony Victor Gomez was convicted of second-degree child abuse by a jury. The court sentenced Gomez to ten years imprisonment with all but three years suspended. In this appeal, Gomez presents three questions for our review:

1. Did the trial court err in limiting defense counsel's cross-examination of a State's witness?

2. Did the trial court err in refusing defense counsel's request for a jury instruction on the absence of flight?

3. Did the State engage in improper closing argument requiring reversal?

We hold that the trial court did not err in limiting defense counsel's cross-examination of the State's witness. We also hold that the trial court did not err in refusing to present the requested jury instruction. Finally, we hold that Gomez's claims regarding the propriety of the State's closing argument are not preserved, and that, even if preserved, reversal is unwarranted. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

Gomez began dating Stephanie G. in 2014 and moved into her apartment with her four-year-old son, A.G., that same year.

Ms. G. testified that on July 7, 2016, she and A.G. arrived home between 7:00 and 7:30 p.m. Gomez was not home at the time. Ms. G. put A.G. to bed after dinner and A.G. fell asleep between 9:00 and 9:30 p.m. After A.G. fell asleep, Ms. G. "took her medications," which included "a sleep aid," and went to bed. Ms. G. fell asleep between 10:00 and 10:30 p.m.

Ms. G. testified that at approximately 2:00 a.m., she was awakened by Gomez, who told her to call 911 because A.G. "had broken a bone." Ms. G. testified that she could hear A.G. crying loudly "like he was hurting." Ms. G. went into A.G.'s room and found him lying on the floor. Ms. G. went over to A.G., manipulated his leg, and felt "his bone move." Ms. G. put a splint on A.G.'s leg, and she and Gomez took A.G. to the hospital. At the hospital, Gomez told Ms. G that he had found A.G. "sleeping with one of his tools," so he woke A.G. up and took the tool away from him. According to Gomez, when A.G. tried to get out of bed, he "fell over and grabbed his leg and then his leg was broken." Ms. G. testified that she was not aware that anything was wrong with A.G. until Gomez woke her up.

Dr. Amy Gavril, the physician who treated A.G. at the hospital, testified that A.G. had suffered a "displaced fracture" of his femur. Dr. Gavril, who was admitted as an expert in the area of pediatrics and child abuse pediatrics, testified that the injury was "an unusual break in a 4-year-old" because it required "a lot of energy." Dr. Gavril testified that such an injury may be expected from someone who had been hit by a car or had fallen out of "like a fifth story window." Dr. Gavril testified that it was "highly unlikely" that a 4-year-old child would be able to walk or bear weight after suffering such a fracture. Dr. Gavril concluded that "there was a high likelihood of inflicted injury causing this fracture which indicated this was child physical abuse."

Gomez was convicted of second-degree child abuse.

DISCUSSION

I.

Gomez's first claim of error concerns certain testimony he wished to elicit from Ms. G. during cross-examination. Ms. G. testified on direct examination that she had initially met Gomez at an Alcoholics Anonymous meeting, which had been part of her "required military training." The State asked Ms. G. to elaborate on that experience:

[STATE]: And why were you required to go to A.A.? You were required by the military?

[MS. G.]: Yes.

[STATE]: All right and why was that?

[MS. G.]: Due to an incident from my previous relationship.

[STATE]: Was that an incident between the two of you?

[MS. G.]: No, it was due with a different -

[STATE]: That's what I mean, between your previous boyfriend.

[MS. G.]: Yes.

[STATE]: Okay, just the two of you.

[MS. G.]: Yes.

[STATE]: And the military asked you, well, let me ask you, who was the aggressor in that incident?

[MS. G.]: He was.

[STATE]: Okay, but despite that, you had to go to this ordered A.A. program?

[MS. G.]: Yes.

During cross-examination, defense counsel asked Ms. G. about the A.A. meeting at which she met Gomez:

> [DEFENSE]: You told us that you were in the meeting because the military had told you [that] you had to go to that meeting?
>
> [MS. G.]: Yes.
>
> [DEFENSE]: And that was because you had a conviction for alcoholic beverage endangerment?
>
> [STATE]: Objection, Your Honor. May we approach?

At the bench, the State argued that defense counsel's question about Ms. G.'s conviction was improper because it was "not an impeachable offense" and "not relevant." The State also argued that the question was improper because defense counsel's knowledge of the conviction came solely from "the CPS records," which the trial court had previously sealed.

Defense counsel argued that the State had "opened the door" by asking Ms. G. about the A.A. meeting and insinuating that Ms. G. had gone to A.A. "because there was an abuse or an incident." Defense counsel maintained that the State "was trying to say it was something other than what it was, it had nothing to do with her or her drinking habits."

Although the trial court ultimately agreed that the State had "brought it up," the court ruled that defense counsel's question was improper:

> THE COURT: All right, [defense counsel], I am concerned about her judicial value. It was brought up, I acknowledge that. It was described when the witness and the defendant met, and they met at an A.A. meeting and I am concerned by asking the question you just asked that it would have a prejudicial value that I think is too far. She said she had

> to attend the meeting through a military directive because of an incident with a prior boyfriend. I am going to leave it at that.
>
> [DEFENSE]: Do I get to ask her about drinking? I mean, the State has left it that it had nothing to do with her actions at all. So, if I can't ask about the conviction, can I ask because you were drinking at the time of the incident. I mean, the State shouldn't get to leave it there.
>
> THE COURT: Ma'am, I'm not going to allow you to, it's prejudicial.

Gomez claims that the trial court violated his constitutional rights to confront witnesses and present a defense by not allowing defense counsel to question Ms. G. about whether she had consumed alcohol during the 2014 incident and had been convicted of alcoholic beverage endangerment. Gomez argues that the evidence was relevant because it gave credence to the defense's theory that the injury to A.G. occurred sometime before Gomez arrived home, and that Ms. G. was too deeply asleep to hear A.G. hurt himself. Gomez also argues that the evidence was relevant to impeach Ms. G's credibility. Gomez contends that even if the evidence was not relevant on any of the grounds he raises here, the State generated an issue with respect to the circumstances surrounding Ms. G.'s attending A.A. meetings. Finally, Gomez argues that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. He asserts that the State should not have been allowed to introduce evidence that Ms. G. was required to attend A.A. meetings, and then claim that evidence that Ms. G. was drinking on the occasion that led to the A.A. meeting is unfairly prejudicial. The State disagrees.

"A criminal defendant's right to cross-examine a prosecution witness is guaranteed by the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights."[1] *Holmes v. State*, 236 Md. App. 636, 671 (2018). Rooted in the Confrontation Clause is a defendant's right to face his accusers, and that includes "the right to attack that accuser's credibility in court by means of cross-examination[.]" *Churchfield v. State*, 137 Md. App. 668, 682-83 (2001) (citations and quotations omitted). "To comply with the Confrontation Clause, a trial court must allow a defendant a 'threshold level of inquiry' that 'exposes to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses.'" *Peterson v. State*, 444 Md. 105, 122 (2015) (citations omitted).

A defendant's constitutional right to cross-examine is not boundless. Trial courts "retain wide latitude in determining what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias." *Parker v. State*, 185 Md. App. 399, 426 (2009) (quoting *Merzbacher v. State*, 346 Md. 391, 413 (1997)). "Moreover, trial judges are entitled to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is only marginally relevant." *Id.* (citations and quotations omitted); MD. RULE 5-611(a) ("The

[1] Although Gomez cites to Article 21 of the Maryland Declaration of Rights, he does not present any argument that he is entitled to different or broader protection under the state constitution than he is under the federal. In the absence of such an argument, we choose to address his claims only under the Sixth Amendment.

court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

The Court of Appeals has outlined the standard by which an appellate court should assess the propriety of a trial judge's restriction on a defendant's cross-examination of a witness when the defendant claims that the restriction violated the Confrontation Clause:

> In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the 'threshold level of inquiry' required by the Confrontation Clause.

Manchame-Guerra v. State, 457 Md. 300, 311 (2018) (quoting *Peterson*, 444 Md. at 124)).

We hold that the trial court did not err in limiting Gomez's cross-examination of Ms. G. regarding the 2014 incident. Ms. G. had already testified that she had fallen asleep prior to A.G.'s injury and that she did not awake until Gomez woke her up and informed her that A.G. had broken his leg. Thus, Ms. G.'s direct testimony already supported the defense's theory of the case that she was too deeply asleep to hear A.G. crying. We fail to

see how the circumstances of the 2014 incident, including whether Ms. G. may have been drinking at the time of the incident, would have had any bearing on that issue.

We likewise fail to see how questioning Ms. G. about the 2014 incident would have had any bearing on her credibility. The extent of Ms. G.'s direct testimony regarding the 2014 incident was that her former boyfriend was the aggressor during the incident and that she was subsequently required to go to A.A. Requiring Ms. G. to answer questions about whether she had been drinking during the incident would have had no relation to the veracity of that testimony, particularly given that her attendance at the A.A. meeting already supported a reasonable inference that the 2014 incident was, at least in part, alcohol-related. Similarly, the circumstances of the 2014 incident would have had no relation to Ms. G.'s account of the circumstances that led to A.G.'s injury, as the two incidents were wholly unrelated. Moreover, there was no indication that Ms. G. had consumed alcohol prior to A.G.'s injury, which rendered her use of alcohol during the 2014 even less relevant. Whether Ms. G. had been drinking during the 2014 incident was not probative of whether she had been drinking on the night of A.G.'s injury, nor was it probative of whether she had a motive to testify falsely about what happened to A.G.

For those reasons, the trial court did not abuse its discretion in determining that defense counsel's questions regarding the 2014 incident were improper. The trial court imposed a reasonable limit on defense counsel's cross-examination regarding an issue that was minimally relevant and unduly prejudicial to the witness. As noted by the State, defense counsel's inquiry into the 2014 incident "ran the risk of unfairly prejudicing Ms.

G. by portraying her as a person with a chronic drinking problem." Taking such a risk was not warranted, given that the evidence had little or no probative value. The court, in protecting Ms. G. from that unfair portrayal, exercised reasonable control over defense counsel's cross-examination. *See* MD. R. 5-611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to … protect witnesses from harassment or undue embarrassment.").

We hold that the court did not deny Gomez the opportunity to reach the "threshold level of inquiry' required by the Confrontation Clause.[2]

II.

Gomez's next claim of error concerns the trial court's refusal to give a jury instruction on the "absence of flight." Defense counsel asked the court to give the following instruction to the jury:

> The absence of flight or concealment immediately after what is claimed to be a crime, or after being accused of committing a crime, is not enough by itself to establish innocence, but it is a fact that may be considered by you as evidence of innocence. The absence of flight under these circumstances may be motivated by a variety of factors. It is up to you to decide whether the Defendant's conduct shows a consciousness of having done nothing illegal or if it shows under the circumstances some consciousness of guilt.

Defense counsel argued that the requested instruction should be given because it was a correct statement of law, applicable under the facts of the case, and not fairly covered

[2] Because we affirm on these grounds, we need not address the argument whether the evidence concerning Ms. G.'s drinking was admissible, because the evidence was correctly excluded. Likewise, we need not engage in a harmless error analysis. We've identified no error in the court limiting defense counsel's inquiry, and thereby excluding the evidence of Ms. G.'s drinking, thus there was no error for us to find harmless.

by the other instructions. The State objected, and the court ruled that the instruction would not be given. Because the State did not present any evidence of flight or request a flight instruction, the court said, there was no need for a contrary instruction on the absence of flight.

Gomez claims that the trial court erred in refusing to give his instruction on the absence of flight. He contends that just as flight immediately after the commission of a crime is not enough by itself to establish guilt but is a fact that may be considered as evidence of guilt, the absence of flight immediately after the commission of a crime is not enough by itself to establish innocence but is a fact that may be considered as evidence of innocence. Gomez maintains that there was no reason for the court to reject this parity of reasoning and that "due process compels its adoption."

Maryland Rule 4-325(c) states, in relevant part, that a "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." A requested instruction shall be given when (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given. *Dickey v. State*, 404 Md. 187, 197-98 (2008).

"In contrast to the judge's duty to instruct the jury as to the applicable law…there is generally no duty for a trial court to give instructions that emphasize particular facts in evidence." *Janey v. State*, 166 Md. App. 645, 654 (2006). Rule 4-325(c) requires that instructions be given on the applicable law, but that "does not apply to factual matters or

inferences of fact." *Patterson v. State*, 356 Md. 677, 684 (1999). In *Patterson*, the defendant sought an instruction allowing the jury to infer that, because the State could not produce certain evidence, its admission into evidence, if produced, would have been unfavorable to the State. *Id*. at 682. The Court of Appeals held that the trial court did not err by refusing to give this so-called missing evidence instruction. *Id*. at 694. A missing evidence instruction is different than an evidentiary presumption instruction, because "the law recognizes [evidentiary presumptions] but, without an instruction, a jury would not." *Id*. at 684. An evidentiary presumption is part of the "applicable law" that a jury needs to be instructed on. A missing evidence instruction is not. The Court later held that the decision to give a missing evidence instruction was committed to the trial court's discretion. *Cost v. State*, 417 Md. 360, 382 (2010).

Here, the trial court did not abuse its discretion by refusing to give the requested absence of flight jury instruction. There is no legally-recognized evidentiary presumption regarding the absence of flight, nor is there any legally-recognized right to an evidentiary instruction that is the "reciprocal" of an accepted evidentiary instruction.[3] In fact, unlike

[3] Gomez relies on *Wardius v. Oregon*, 412 U.S. 470 (1973) in support of his reciprocal instruction theory, but that reliance is misplaced. That case involved the constitutionality of Oregon's discovery rules, which required a defendant to disclose the name of an alibi witness but did not provide any discovery rights to criminal defendants, including the right to "reciprocal discovery." *Id.* at 473-75. The United States Supreme Court held that Oregon's "notice-of-alibi" rule violated due process because it forced defendants to disclose key evidence without requiring the State to do the same. *Id.* at 475-79. Here, by contrast, we are not dealing with any sort of requirement, discovery or otherwise, that has been unfairly imposed on a defendant, nor are we dealing with any sort of right that is given to the State but not given to a defendant. Even so, the State did not put forth any evidence of flight, and the trial court did not give any instruction on flight. Thus, the State did not exercise any "right," so there was nothing to "reciprocate."

evidence of flight, evidence concerning the absence of flight is generally *inadmissible* unless it is offered to rebut the inference created by evidence of flight that is admitted against a defendant. *Wooten-Bey v. State*, 76 Md. App. 603, 623 (1988).

III.

Gomez's final claim of error concerns the propriety of remarks made by the prosecutor during closing arguments.

"[A]rguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel[.]" *Lawson v. State*, 389 Md. 570, 591 (2005) (citations omitted). Counsel "is afforded generally wide latitude to engage in rhetorical flourishes and to invite the jury to draw inferences," however "a trial judge has broad discretion to control the scope and duration of counsel's closing argument in order to ensure fairness." *Ingram v. State*, 427 Md. 717, 727-28 (2012). The trial court is in the best position to "determine whether counsel has stepped outside the bounds of propriety during closing argument, [and] we do not disturb [that judgment] unless there is a clear abuse of discretion that likely injured a party." *Whack v. State*, 433 Md. 728, 742 (2013) (cleaned up).

Even if counsel exceeds the bounds of permissible argument, reversal is unwarranted unless "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." *Spain v. State*, 386 Md. 145, 158 (2005). "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider

several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *State v. Newton*, 230 Md. App. 241, 255 (2016) (quoting *Spain*, 386 Md. at 159).

A.

The first set of remarks at issue came at the outset of the prosecutor's rebuttal argument. Prior to that, defense counsel had argued during her closing argument that, on the night of A.G.'s injury, Gomez had asked Ms. G. to call 911 because he "wanted the police to be involved" and that Ms. G. did not want to call 911 "because she didn't want the police to come." The prosecutor thereafter made the following comments in rebuttal:

> First, the issue of whether or not the police came - why the police didn't come to the home after [A.G.] was injured and the insinuation that [Ms. G.] didn't want them to come. Well, number one, what would the information have been had they called 911? My son woke up, his leg is hurt, he needs an ambulance, nothing else because that was information that they had at that time, that [Ms. G.] had at that time.
>
> The police wouldn't have come. There was no indication that a crime occurred at that time. There wasn't an indication that a crime had taken place until the hospital when the doctors started having suspicions. [Ms. G.] had no reason to believe at the time that she ran into [A.G.'s] room that the defendant had hurt him.
>
> She trusted him, she loved him. She didn't want the police to come, and she wanted to get to the hospital as fast as possible, and the police wouldn't have come because it was a medical emergency. Police don't come during a medical emergency, ambulances come, so that makes sense and really is designed to mislead you, to make you focus on things that aren't important.
>
> Even if the police did, for some reason, come when 911 was called due to this medical emergency, they wouldn't have come inside the home at that point. Like I said, there was no indication at the time that [Ms. G.] was awoken from her sleep that a crime had occurred.

Gomez claims that the prosecutor improperly argued that "the police wouldn't have come" and that, if they did, "they wouldn't have come inside the home at that point." Gomez argues that there was "absolutely no evidence that the police would not have responded to a 911 call or that, had they responded, they would not have gone inside." He asserts that the prosecutor's comments were "egregious misstatements of the evidence designed to undermine a critical part of the defense case, namely, [Ms. G.'s] suspicious unwillingness to have an encounter with police over the injury to A.G."

The State contends, and we agree, that Gomez's argument is unpreserved. Gomez did not object at trial to any of the statements he claims were improper. Accordingly, his appellate argument regarding the propriety of those statements is not preserved for our review. *See Shelton v. State*, 207 Md. App. 363, 385 (2012) ("We have repeatedly held that … a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal."); *see also* MD. R. 8-131(a).[4]

B.

Gomez next complains about a set of remarks that came during the State's rebuttal argument. At trial, Ms. G. testified that her apartment was "on the second floor story" and that "it had two bedrooms in the back and then it had the master bedroom and then the

[4] Even if preserved, Gomez's claim is without merit. The prosecutor's comments came in response to defense counsel's argument that Gomez, unlike Ms. G., wanted to call 911 because he wanted the police to come. The prosecutor countered that argument by stating that the police would not have responded to the apartment because, at the time, there was no indication that a crime had been committed. The prosecutor's comment was therefore a reasonable inference from the evidence and a reasonable response to defense counsel's argument.

kitchen and the living room." During closing arguments, defense counsel intimated that A.G.'s injury could have been caused by a fall, such as a fall down the stairs. The State argued in rebuttal that there was nothing in the apartment from which A.G. could have fallen and sustained his injury:

> We know it's a one-story apartment. There are no stairs. There's absolutely no indication in that apartment of anything that would be anything but a short fall, especially in [A.G.'s] room. He didn't fall out of the building. We know that because he was in bed asleep when the defendant got home.

Gomez claims that the prosecutor's comment that there were no stairs in the apartment was improper. Gomez asserts that "there was no testimony that there were no stairs in the apartment." He argues that the prosecutor's "misrepresentation of this important fact directly undermined the defense theory regarding other causes of the injury."

The State argues, and we agree, that Gomez's argument is unpreserved. At the time, Gomez did not object to the prosecutor's statements, thus his appellate argument regarding the propriety of those statements is not preserved for our review. *See Shelton*, 207 Md. at 385 (2012).[5]

C.

Gomez next brings our attention to a set of remarks made in the prosecutor's closing argument:

> So these are the pieces of the puzzle that we have, all right? It's your job when you go into the deliberation room to put them all together. You

[5] Even if preserved, this argument is without merit. It was reasonable for the prosecutor to infer from Ms. G.'s testimony that her apartment was one floor and thus contained no stairs A.G. could've fallen down. We see nothing improper about the comment, much less anything that may have misled or influenced the jury against Gomez.

> haven't seen all of the evidence yet, so maybe there are some questions in your mind. Hopefully, all of the evidence back there answers those questions, but it doesn't have to erase all of the doubt in your mind, okay?
>
> The instructions will tell you, and you heard them earlier, a reasonable doubt is not beyond all doubt. It's beyond a reasonable doubt. It's not a great explanation of what a reasonable doubt [is.] It just says it's a doubt founded upon reason. That's not helpful. I like to describe it as common sense.
>
> Does it make sense with all the evidence that this child, this 4-year-old boy would be able to go to sleep with this type of injury and not have anybody in the home, including his own mother, be aware of it?
>
> Does it make sense that the only person who's in the room at the time that [A.G.'s] injury becomes apparent is the person that inflicted that injury?

Gomez claims that the prosecutor improperly argued that the definition of reasonable doubt provided in the court's instructions was "not helpful" and that the jury should use "common sense." By telling the jury that the court's instruction on proof beyond a reasonable doubt was "not helpful," the prosecutor essentially told the jury to ignore it, Gomez argues. He also argues that the prosecutor's application of "common sense" was not proper to the resolution of the ultimate question of guilt beyond a reasonable doubt.

Again, Gomez's arguments are unpreserved. Gomez did not object to any of the statements he now claims were improper. Accordingly, his appellate arguments regarding the propriety of those statements are not preserved for our review. *See Shelton*, 207 Md. at 385 (2012).

Recognizing that he failed to object properly to the prosecutor's statements, Gomez asks that we exercise plain error review.[6] We decline his request. The Court of Appeals has cautioned that plain error review should only be exercised when the reasons are "compelling, extraordinary, exceptional or [it is] fundamental to assure the defendant a fair trial," and where the error would "vitally affect a defendant's right to a fair and impartial trial[.]" *State v. Brady*, 393 Md. 502, 507 (2006) (cleaned up). Plain error review "is a discretion that appellate courts should rarely exercise, 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[.]" *Chaney v. State*, 397 Md. 460, 468 (2007).

Here, although the prosecutor's comments regarding the reasonable doubt standard were questionable, they were not so egregious as to warrant plain error review. After the prosecutor stated that the explanation of reasonable doubt in the court's instructions was "not helpful" and that she "like[d] to describe it as common sense," she went on to rhetorically ask the jurors whether it "made sense" that A.G. could have injured himself and whether it "made sense" that the only person in A.G.'s room at the time the injury became apparent was Gomez. The prosecutor was not urging the jury to disregard the trial court's instructions but rather was asking the jurors to use their common sense in evaluating

[6] Gomez also asks that we exercise plain error review over his unpreserved arguments regarding the State's other comments, which we discussed in Parts A. and B. Because, as noted, none of those comments were improper, we decline his request.

the evidence and determining Gomez's guilt. Nevertheless, the comment was isolated and was not repeated. As such, plain error review is unwarranted.

D.

Gomez's final issue challenges a remark made by the prosecutor just after the aforementioned argument regarding reasonable doubt:

> [STATE]: Now, based on that, [defense counsel] will most likely come up here and talk a lot about reasonable doubt, and if there is, you know, an inkling of doubt about how this could have happened, then you must not -
>
> [DEFENSE]: Objection as to what I will argue, Your Honor. I move to strike.
>
> THE COURT: Overruled. You'll be able to respond.
>
> [STATE]: I don't know what she's going to say, but I imagine she's going to address reasonable doubt, all right, much like I am. And, again, look at the instructions, look at the evidence.

Gomez claims that the trial court erred in overruling defense counsel's objection. He argues that the prosecutor's comment as to the content of defense counsel's argument was improper because it was made for the purpose of "further reducing the legal standard to a matter of 'sense.'" He contends that the comment was "severe given the standard-denigrating context in which the remark was made" and that the court "legitimized the prosecutor's argument" by overruling defense counsel's objection. The State contends that Gomez's argument was not preserved, but we disagree. [7]

[7] The State contends that Gomez's argument was not preserved because he objected on different grounds than those raised here. Although Gomez provides a more detailed

That said, we hold that the trial court did not err in overruling defense counsel's objection. The prosecutor simply noted that defense counsel was likely to also address the reasonable doubt standard, and after making the comment, advised the jurors to "look at the instructions." We see nothing improper there, nor are we persuaded that the prosecutor's comment was made to perpetuate some "standard-denigrating" theme.

In sum, the prosecutor's arguments, whether considered individually or collectively, did not mislead the jury, nor were they likely to have misled or influenced the jury to Gomez's prejudice. Thus, the prosecutor did not engage in improper argument requiring reversal.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment and uphold Gomez's conviction.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

argument on appeal than he did at trial, the basis for the argument, which is that the State improperly commented on the content of defense counsel's impending argument, is essentially the same. The issue was sufficiently preserved.