Circuit Court for Montgomery County
Criminal Case No. 128935

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 132

September Term, 2017

JORDAN RAPHEAL COATES

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Berger, J.

Filed: November 9, 2017

Following a jury trial in the Circuit Court for Montgomery County, Jordan Rapheal Coates, appellant, was convicted of eleven out of fourteen charges of physical and sexual child abuse. On appeal, appellant presents the following questions, which we have slightly rephrased, for our review:

1. Whether the docket entries and commitment record must be corrected to reflect that the sentence for count 5 runs concurrently with the remaining sentences and not consecutively, and whether the 10-year sentence upon a merged count be vacated.

2. Whether the trial court erred in admitting evidence that the victim woke up screaming for the appellant to "stop."

3. Whether the trial court erred in admitting hearsay evidence through Dr. Katherine Deye that failed to satisfy the statement for purposes of medical treatment exception to the hearsay rule.

4. Whether the trial court erred in failing to intervene where the prosecutor repeatedly referred to appellant as a "monster."

For the reasons that follow, we shall vacate appellant's sentence for third-degree sex offense (Count 13), but otherwise affirm the judgments.

BACKGROUND

In 2014, appellant met Ashley T. online, and in January of 2015, they began dating. In May of 2015, appellant began living with Ashley in her apartment in Silver Spring, along with her son, A.T., who was almost four years-old. Because Ashley worked and appellant did not, appellant would occasionally watch A.T. while Ashley was at work. Appellant and A.T. played basketball and video games together, and went to the playground.

Beginning in August of 2015, A.T. began sustaining frequent injuries. In early August of 2015, Ashley returned home from the store to find A.T. crying. A.T. told her that appellant had beaten him with a shoe, but appellant denied the allegation. On August 16, 2015, Ashley brought A.T. to the hospital for a "swollen arm." She stated that A.T. did not tell her how the injury to his arm occurred. Around this time, Ashley began noticing changes in A.T.'s behavior; he did not want to return home when appellant was there, and he began following Ashley around the house rather than playing independently.

On August 23, 2015, Ashley was at home with A.T. and appellant when she heard A.T. crying in his room. She found A.T. bleeding from his mouth with a "busted lip." Appellant told her that A.T. "fell from the closet shelf to the floor." Ashley called 911 and A.T. was transported to the hospital. A.T. told Ashley that appellant was "throwing him up in the air," and that he "missed him when he came down."

On September 14, 2015, Ashley responded to A.T. crying loudly in his room and discovered that the back of his head was bleeding. 911 was called again. At the hospital, A.T. told Ashley that appellant had pushed him. Appellant denied the accusation and told her that A.T. was lying, and that he was "always lying." Appellant told the hospital staff that A.T. fell and hit his head on his bed. A.T. received two staples to close the wound.

On September 27, 2015, a few days after A.T.'s staples were removed, he began running a fever and his arm remained swollen with a "knot" in his upper arm. The physician on call instructed Ashley to bring A.T. to the emergency room. Ashley's mother, Denise T., accompanied her and A.T. to the hospital. At the hospital, doctors noticed "adult human bite marks" on A.T.'s left arm. Denise testified that A.T. told the doctor that

appellant had bitten his arm and neck, hit him in the stomach and ribs with a stick, threw him in the air and let him fall, and threw him against a closet door. Appellant briefly moved out of Ashley's home, and when he returned, A.T. acted fearful and withdrawn.

A.T. spent the weekend of October 17-18, 2015 at Denise's house. Denise noticed that A.T. had a black eye, and he screamed when he was picked up, stating that "his sides hurt." Over the weekend, A.T. had a high fever, "did a lot of sleeping," and generally "wasn't himself." Denise and Ashley testified that A.T. was reluctant to return home on Sunday, asking if appellant would be there.

The following Monday morning, Ashley and appellant argued, and she purported to "kick him out," but when she could not reach her daycare provider, she left for work and asked appellant to bring A.T. to daycare before A.T. went to school. When Ashley's brother, Andrew, went to pick A.T. up from school that day, he learned that A.T. had never arrived at school. Andrew went to Ashley's home and found appellant there with A.T., who was wearing a tee shirt and underwear. Andrew observed that A.T. had a mark under his eye that had not been there previously. Over defense counsel's objection, Andrew stated that on the following night at Denise's house, A.T. woke up screaming, "[Appellant] stop."

On October 21, 2015, Denise and Andrew brought A.T. to his pediatrician, who determined that due to a fever and elevated heart rate, A.T. needed to be transferred to Children's National Hospital in Washington, D.C. When asked by hospital staff what had happened to his eye, A.T. responded, "[Appellant] hit me." Denise testified that A.T. told the doctors that appellant had bitten him and struck him with a stick and a shoe, and that

appellant had "touched" him. Denise also recounted that A.T. reported to the doctors that appellant had played with his own and A.T.'s "bean bean," which was later established as meaning "penis," while making masturbating gestures with his hand.

Emily Lincoln, a Montgomery County social worker who investigates child abuse complaints, interviewed A.T. at Children's National Hospital on October 21, 2015. She was accompanied by two Montgomery County police detectives who recorded the interview. Ms. Lincoln explained that her interview of A.T. was "challenging" because A.T. had already been examined by multiple doctors that day, and, as a result, he gave "a lot of one-word answers." The State played the audio recording of Ms. Lincoln's interview of A.T., and the recording was admitted into evidence over defense counsel's objection. In the interview, A.T. stated that appellant hit him in the eye and back with his fist; bit his neck; burned him; hurt his mouth; and touched his "bean bean," and that appellant did not do anything to his knee or his stomach.

Dr. Katherine Deye, a child abuse pediatrician at Children's National, was accepted by the court as an expert in the fields of child abuse pediatrics and general pediatrics. On October 22, 2015, Dr. Deye was consulted by the hospital team to evaluate A.T.'s injuries for possible child abuse. Consistent with her standard protocol, Deye first took a thorough history of A.T. by speaking with Denise. Deye testified that Denise had relayed the following information to her regarding A.T.: that he had stated during the preceding weekend that his genitals hurt and that his mother's boyfriend, appellant, had been pulling on his "bean bean," which is the term he used for his private parts; that Andrew had reported that he found A.T. at home with appellant when A.T. was scheduled to be at

school, and that A.T. was running with no pants on with a bruise under his eye; that A.T. woke up in the middle of the night screaming "[Appellant's] here, he's coming to get me;" that A.T. had stated that over the past several months, appellant had struck him with a stick and a shoe, punched him in the stomach and face, bit him on the stomach, back, and left arm, and thrown him in the air and let him drop to the floor.

Deye then examined A.T. and ordered extensive blood work and imaging studies. Deye stated that during her examination of A.T., he told her the following: that "his tummy hurt … because [appellant] punched him there;" that appellant had bit him on his left neck, left arm, right flank; that appellant had hit him in the face with a closed fist; and that appellant had pulled on A.T.'s and his own "bean beans."

Deye consulted with a forensic dentist who examined A.T.'s bite mark and determined that it was "an adult human bite mark." Deye stated that A.T.'s blood test results revealed elevated liver enzymes, indicating an injury to his liver, and elevated skeletal muscle enzymes, indicating an injury such as blunt force trauma or crush injury. A.T.'s imaging results showed multiple lacerations in his liver, fractures of his fifth, sixth, eighth, ninth and tenth ribs, bleeding in the lung tissue, and calcifications in the left femur (thigh) and left humerus (upper arm) resulting from blunt force trauma injury. Deye concluded that "the constellation of past and present findings are consistent with ongoing severe physical abuse."

Dr. Eglal Shalaby-Rana, a board-certified pediatric radiologist at Children's National hospital, reviewed A.T.'s imaging studies and determined that his injuries were the result of non-accidental trauma.

A.T. testified briefly. He stated that no one had ever hurt him or done anything that he did not like. He stated that he remembered appellant because "him bad," but when asked why appellant was bad, A.T. responded that he did not know why. When asked if he saw appellant in the courtroom, A.T. said that he did not. A.T. further stated that he did not remember going to the hospital; nor did he remember what he did last weekend or what he did yesterday.

We shall provide additional facts as necessitated by our discussion of the issues presented.

DISCUSSION

I.

Appellant argues that his sentence on Count 5 was erroneously recorded as a consecutive sentence, but because the sentencing transcript "is silent as to whether Count 5 runs concurrently or consecutively," the sentence on Count 5 must be deemed concurrent, and the docket and commitment record must be amended accordingly. The State submits that "it seems likely based on the other sentences that the court intended to make count 5 consecutive, but, under the circumstances, the sentence imposed on Count 5 must be corrected in the docket entries and commitment order to reflect that Coates is to serve the sentence concurrently with the consecutive sentence imposed on Counts 1, 2, 3, and 4."

In analyzing whether there is ambiguity in a sentence, we look to three sources of information: (1) the transcript of the sentencing proceedings; (2) the docket entry; and (3) the order for commitment or probation. *Dutton v. State*, 160 Md. App. 180, 193 (2004) (citing *Jackson v. State*, 68 Md. App. 679, 687-88 (1986)). We review the transcript of the

proceedings in conjunction with the docket entries and commitment orders to determine the terms of the sentence. *See Dutton,* 160 Md. App. at 191-92.

In the present case, the transcript of the sentencing hearing reflects that the sentences were announced as follows:

> THE COURT: With respect to Count 1, the sentence is 15 years, I'll suspend all, but 12. With respect to Count 2, second degree child abuse causing a liver laceration, the sentence is 10 years, suspend all but 5. That's going to be consecutive because that is a completely different injury.
>
> With respect to second degree child abuse causing a fracture to [A.T.]'s left 9th rib, the sentence is 8 years, suspend all but 5, consecutive.
>
> [APPELLANT]: Oh, man.
>
> THE COURT: With respect to Count 4, the sentence is 8 years, suspend all but 5 years, consecutive.
>
> [APPELLANT]: Kill me, dog, kill me --
>
> THE COURT: With respect to Count 5, fracturing the rib, sentence is 8 years, suspend all but 5. With respect to Count 6, fracture of the 5th and 6th ribs, second degree child abuse, the sentence is 8 years, suspend all but 4, consecutive. With respect to second degree child abuse, biting [A.T.]'s left arm, the sentence is 8 years, suspend all but 5, consecutive.
>
> [APPELLANT]: Oh, man.
>
> THE COURT: With respect to second degree child abuse, biting [A.T.]'s left neck area, the sentence is 8 years, suspend all but 5, consecutive. With respect to Count 11, charging second degree child abuse, biting [A.T.]'s right flank, the sentence is 8 years, suspend all but 5, consecutive. With respect to punching [A.T.]'s left eye, the sentence is 8 years, suspend all but 7, consecutive. **With respect to Count 13, third degree sex offense, fondling [A.T.]'s penis first time, the sentence is 10 years, I'll merge that with Count 1.**

He is going to be on probation for 5 years[.]

Critically, following defense counsel's explanation of appellant's rights to review of his convictions and sentences, the court stated the following:

> THE COURT: I waived costs in this matter. I find that the defendant is not likely to be able to pay any significant part of those costs within the succeeding 12 years, **as he just got a 58-year sentence.**

While any ambiguity in sentencing should be resolved in favor of lenity, *Robinson v. Lee*, 317 Md. 371, 380 (1989), we perceive no ambiguity here. The court indicated that appellant's total sentence was 58 years, which necessarily required that the five year sentence on Count 5 was to be served consecutive to the preceding sentences, in order for the unsuspended portions of the sentences on all eleven charges to add up to 58 years as follows:

Count 1:	12
Count 2:	5
Count 3:	5
Count 4:	5
Count 5:	5
Count 6:	4
Count 8:	5
Count 10:	5
Count 11:	5
Count 12:	7
Count 13:	0[1]
Total:	58

[1] As discussed below, the circuit court sentenced appellant to ten years on Count 13, but merged that count for sentencing purposes with Count 1, and did not include the ten year sentence within its total calculation of 58 years.

Moreover, the docket, commitment record, and order of probation all consistently reflect what the sentencing hearing transcript demonstrates, i.e. that Count 5 was to be a consecutive sentence, and that appellant's total sentence was 58 years. The court's docket entry for March 21, 2017 states "Count #5 - 8 years suspend all but 5 **consecutive** to count #1, 2, 3 and 4[.]" The first page of the commitment record provides: "**All but 58 years are suspended** … **The total time to be served is 58 years.**" The second page of the commitment record states: "Count No. 005 … Sentence 8 Years **Consecutive** to Count No. 1, 2A, 3, 4…" and the "additional sentencing information" section reiterates: "Count #5 - 8 years suspend all but 5 years **consecutive** to Count #1, 2, 3, and 4[.]" And finally, the probation order states: "Ct 5: 8 yrs (SAB 5-consec)[.]"

To be sure, there is a "presumption that, unless the Court explicitly notes that one sentence is consecutive to another, the sentences will be deemed concurrent." *See Gatewood v. State*, 158 Md. App. 458, 479-81 (2004). But, we have recognized that "[w]here the duration of a sentence is otherwise discernable from the record, it will be upheld without resort to the presumption of leniency." *Collins v. State*, 69 Md. App. 173, 197 (1986).

In *Dutton*, *supra*, the transcript reflected that the court imposed a sentence of "15 years to run consecutive to the sentence you are currently serving." *Id.* at 184. Defendant challenged the sentence as ambiguous because at the time of the sentence, he was serving a sentence of 18 months as well as another sentence of four years, and therefore, he claimed that there was an ambiguity as to which of those two sentences his 15 years sentence was to follow. *Id.* at 185. We reviewed the sentencing transcript and, based on an earlier

colloquy between the court and the prosecutor, determined that the sentence identified as "the sentence you are currently serving" was a four-year sentence for violation of probation. *Id.* at 192.

The *Dutton* Court expressly noted that: "[I]f there was any potential ambiguity in the sentence as announced orally, such ambiguity was removed by the contemporaneous commitment record that stated [the sentence] more explicitly[.]" *Id.* at 193. This Court reasoned that "the commitment record was fully consistent with . . . [the] oral sentence and did not contradict [it] but, rather, clarified [it]." *Id.* at 194.

Here, although the court did not orally articulate that the sentence on Count 5 was to be consecutive, as it had with the sentences on the other counts, there is no conflict whatsoever between the transcript and the sentencing record. We conclude that there was no ambiguity in the transcript, and that any potential ambiguity was resolved when reviewed with "the contemporaneous commitment record," the docket, and the order for probation, all of which reflect that appellant's sentence on Count 5 was to run consecutive to the sentences on the preceding counts, for a total sentence of 58 years.

Appellant also challenges his sentence on Count 13, claiming that the circuit court erroneously imposed a 10-year sentence on Count 13, third-degree sex offense, after it had merged that sentence with Count 1, sexual abuse of a minor. The State agrees that appellant is entitled to relief on this claim, and so do we.

Once Count 13 was merged with Count 1 for purposes of sentencing, no additional sentence on Count 13 was permitted. *See In re Montrail M.,* 325 Md. 527, 534 (1992) ("Although a merger does not wipe out the merged adjudication," it "serves, ordinarily, to

preclude a separate sentence on each offense"). As the State acknowledges, the court was not required to merge appellant's sentence on Count 13 for third-degree sex offense with Count 1, *see* Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), Criminal Law Article, §3-602(d) ("A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for: (1) any crime based on the act establishing the violation of this section[.]"), but the record indicates that it was the court's intent to do so.

Accordingly, we shall vacate the 10-year sentence for Count 13, third-degree sex offense. *See Carroll v. State,* 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged[.]"), *aff'd*, 428 Md. 679 (2012).

II.

Appellant argues that the trial court erred as a matter of law in permitting two witnesses to provide "highly dramatic testimony that A.T. responded to dreams by shouting out his fear of Appellant," and that this testimony was inadmissible due to its lack of reliability. The State responds that appellant failed to preserve this claim for review, and even if preserved, the statements were admissible as non-hearsay and any error in admitting the statements was harmless beyond a reasonable doubt.

With respect to the first statement that appellant challenges, Andrew testified during direct examination as follows:

> [By the Prosecutor]:
>
> Q. And when, so did you wake up at any point with [A.T.] while he was sleeping at your house?

A. Yes.

Q. Why?

A. Because he woke up screaming [appellant] stop.

Q. Okay, and –

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

When Deye testified later in the trial regarding statements made to her by Denise during A.T.'s medical history intake, the following transpired:

[By the Prosecutor]:

Q. And do you also ask caregivers for a family medical history --

A. Yes.

Q. -- at the hospital? And does all of that information help you form a diagnosis, a treatment plan for the patient?

A. Yes.

Q. Okay. So the information that you received from [Denise] helped you form the diagnosis that you ultimately came to for [A.T.]?

A. Yes.

Q. And his treatment plan?

A. Yes.

Q. Okay. What did [Denise] tell you when you interviewed her on October 22 of 2015?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: Your Honor, may we approach?

THE COURT: Yes.

(Bench conference follows):

[PROSECUTOR]: Dr. Deye just testified about all of the information that she received from [Denise], helped her form her diagnosis and treatment of [A.T.], and is an exception to the hearsay rule.

THE COURT: What is? The patient?

[PROSECUTOR]: The statements made for purposes of medical diagnosis and treatment.

THE COURT: But that's not the patient's statement.

[PROSECUTOR]: It doesn't matter.

THE COURT: It doesn't?

[PROSECUTOR]: I don't believe so.

THE COURT: And you said –

[DEFENSE COUNSEL]: I think the patient's statements, we haven't objected to.

THE COURT: Here it is. This case here, Roe v. State, looks like the grandmother talked to a physician in a circumstance such as this, so overruled.

(Bench conference concluded.)

THE COURT: I don't remember the question. Do you?

[PROSECUTOR]: I'll ask it again.

THE COURT: Okay.

> [By the prosecutor]:
>
> Q. What did [Denise] tell you on October 22nd, 2015, during your conversation with her?
>
> A. Well, she gave me a long –
>
> **[DEFENSE COUNSEL]: We would renew and ask for a standing objection.**
>
> THE COURT: Okay. I believe the statements are admitted for the limited purpose of showing the expert's reasons for her opinion. So that's what these, technically hearsay grandmother statements are allowed, are permitted to show, as why the expert relied on whatever grandma said, in forming her opinion. Okay.

Deye further testified during her direct examination that Denise told her that A.T. "woke up at 1:00 a.m., screaming, "[Appellant's] here, he's going to get me[.]"

The State contends that although appellant objected to Andrew's testimony regarding A.T.'s statement, appellant failed to object to Deye's report containing A.T.'s statements to Denise, and that appellant's continuing objection during Deye's testimony failed to preserve the issue for review. *See Ridgeway v. State,* 140 Md. App. 49, 66, (2001) ("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed."). According to the State, appellant's request for a continuing objection during Deye's testimony was limited to statements made to Deye by Denise, but it did not encompass statements made by A.T. (to Denise).

We disagree with the State's assertion that appellant's objection during Deye's testimony was made solely on the basis that Denise was not Deye's patient. Appellant

objected generally to the admission of Deye's testimony regarding statements made to her by Denise, and provided no further explanation, nor did the court request one. "If a general objection is made, and neither the court nor a rule requires otherwise, it 'is sufficient to preserve all grounds of objection which may exist.'" *State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Grier v. State*, 351 Md. 241, 250 (1998)); *accord Boyd v. State*, 399 Md. 457, 476 (2007).

After the court sustained appellant's objection, the prosecutor requested a bench conference and argued that Denise's statements to Deye were admissible as the basis of Deye's opinion and as statements made for purposes of diagnosis and treatment. Defense counsel responded only by saying, "the patient's statements we haven't objected to." We do not deem defense counsel's statement to be a qualification or limitation on appellant's otherwise general objection to Deye's testimony regarding statements made to her by Denise. When the prosecutor resumed questioning Deye regarding her conversation with Denise, appellant requested a continuing objection and provided no further explanation, thereby making it a general continuing objection. Appellant's objection was sufficient to preserve the claim for appeal. *See Johnson v. State*, 408 Md. 204, 223 (2009)(If a party appeals a trial court's ruling on a general objection to the admission of evidence, that party is free to argue any ground against its admissibility) (citations omitted); *accord Wilder v. State*, 191 Md. App. 319, 355 (2010).

Appellant contends that, because the statements made by A.T. in his dream, or upon waking from his dream, were unreliable, "highly dramatic and prejudicial," they were inadmissible and should have been excluded. Appellant cites to a series of cases from other

jurisdictions in support of his argument that "what one says in one's dreams is insufficiently reliable to serve as evidence." The State responds that the statements were admissible, and contends that the cases cited by appellant are distinguishable from the facts of the present case because, here, A.T. was "awake" rather than asleep when he made the statements, and therefore, the statements are not inherently unreliable.[2]

In assessing the admissibility of A.T.'s statements, we first review the statements for relevancy. "[E]vidence that the trial judge deems unreliable or untrustworthy is not probative to any fact that is of consequence to the determination of the case, and hence, is not relevant evidence." *Pappaconstantinou v. State*, 352 Md. 167, 181 (1998). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Maryland Rule 5-401. *See also* Md. Rule 5-402 **(**Relevant evidence is generally admissible; irrelevant evidence inadmissible).

Nevertheless, evidence that may be admissible under Rule 5-402 as having logical relevance may be excluded under Rule 5-403 if "its *probative value is substantially outweighed by the danger of unfair prejudice,* confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Snyder v. State*, 361 Md. 580, 592-93 (2000)(citing Rule 5-403) (emphasis in original). "The more probative the evidence, ... the less likely it is that the

[2] The parties cite no Maryland appellate case addressing the issue of the admissibility of statements made while sleeping, or upon awakening from sleep. We are also aware of no such authority.

evidence will be unfairly prejudicial." *Burris v. State*, 435 Md. 370, 392 (2013)(internal quotations and citation omitted).

A ruling that evidence is legally relevant is a conclusion of law, which we review *de novo*. *See Smith v. State*, 218 Md. App. 689, 704 (2014). We review a court's determination regarding potentially unfairly prejudicial evidence for abuse of discretion. *Id*; *see e.g.*, *Webster v. State*, 221 Md. App. 100, 113 (2015) (citation omitted). A court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Id.* at 112 (citations and quotation marks omitted).

Under the circumstances in this case, Andrew's testimony regarding A.T.'s statement, "[appellant] stop," was relevant to show A.T's mental and physical state during the time of the alleged abuse, specifically, that he awakened during the night, seemingly in response to some upsetting issue involving appellant. Evidence is not necessarily unduly prejudicial because it is of a dramatic nature. *See e.g., Khan v. State*, 213 Md. App. 554, 577-78 (2013) (holding that trial court did not abuse its discretion in allowing prosecutor to question defendant concerning his racial prejudice where questioning was attempt to clarify defendant's testimony). "All competent and trustworthy evidence offered against a defendant is prejudicial. If it were not, there would be no purpose in offering it." *Oesby v. State*, 142 Md. App. 144, 166-66 (2002).

Moreover, the fact that the State introduced other evidence regarding A.T.'s physical and mental state, does not necessarily render A.T.'s statement unfairly prejudicial because it was cumulative, or otherwise unnecessary. As we observed in *Oesby*, the

probative value of potentially prejudicial evidence does not depend on whether the evidence is necessary, as "there is no downside to making a strong case even stronger," as "the State is not constrained to forego relevant evidence and to risk going to the fact finder with a watered down version of its case." *Id.* at 166.

We recognize that under our highly-deferential standard of review, the trial court's determination that evidence is not unduly prejudicial should only be reversed in "those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so." *Id.* at 167-68. We discern no error or abuse of discretion in the circuit court's admission of A.T.'s statement regarding appellant.

III.

Appellant also challenges the admissibility of Deye's testimony regarding her interview of Denise as inadmissible hearsay, not subject to the exception for statements made for purpose of medical diagnosis or treatment pursuant to Rule 5-803(b)(4). Although the prosecutor argued that the testimony was admissible both as information relied on by the expert, and as statements made to a medical provider for purposes of diagnosis or treatment, the court ruled that the statements were admissible "for the limited purpose of showing the expert's reasons for her opinion."

At the conclusion of the jury instructions, appellant requested that the court instruct the jury as to the limited purpose of Denise's statements to Deye pursuant to Rule

5-703(b).[3] The court declined to do so, instead finding that Denise's statements were admissible as statements made to a medical provider pursuant to Rule 5-803(b)(4). On appeal, appellant does not challenge the court's denial of his request for a limiting instruction; he contends that the court erred in admitting the Denise's statements under Rule 5-803(b)(4) because Deye was an examining physician, not a treating physician, and neither Denise nor A.T. made the statements for purposes of medical diagnosis and treatment.

Rule 5-803(b)(4) provides a hearsay exception for statements made for diagnosis and treatment, which are defined as:

> [S]tatements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

In determining whether this hearsay exception is applicable, the trial court must decide whether the statements were both "taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes[.]" *Webster v. State*, 151 Md. App. 527, 537 (2003) (emphasis omitted).

Deye identified herself as a "child abuse pediatrician" who is Board-certified in general pediatrics and child abuse pediatrics. Deye explained that her role as a child abuse pediatrician involves consulting on cases of suspected child abuse in patients admitted to

[3] Rule 5-703(b) provides that upon request, a court is required to instruct the jury to consider the evidence admitted under the rule "only for the purpose of evaluating the validity and probative value of the expert's opinion or inference."

the hospital. She obtains a "thorough history" of the patient, assesses the injuries and uses a differential diagnosis to rule out various possible explanations for the child's condition. She coordinates with subspecialists to evaluate patients and order tests.

In A.T.'s case, Deye stated that she spoke with Denise to obtain a medical history of A.T. because she "can't get everything from a 4-year-old." Deye stated that the information she obtained from Denise helped her to form a diagnosis and treatment plan for A.T. After examining A.T., she ordered tests to screen for injuries that are not visible on a physical examination, including extensive bloodwork and imaging studies.

The rationale for the medical treatment exception is that a "patient's statements [to his or her doctor are likely to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided." *State v. Coates*, 405 Md. 131, 145 (2008) (citation and internal quotation marks omitted). In *Coates*, the case relied upon by appellant, the Court found that a seven-year-old child's question to a SAFE nurse following the interview, "are you going to go out and find him now?" suggested that the child "believed she was being interviewed primarily for an investigatory, and not a medical, purpose," and lacked "the indicia of sincerity that underlie the hearsay exception." *Id*. at 145-46.

In the present case, unlike the reported case involving Frederick Roscoe Coates, there was no evidence to suggest that Deye's examination of A.T. was conducted for a purpose other than to obtain medical treatment for A.T. *See Griner v. State*, 168 Md. App. 714, 745–47 (2006) (holding that a four-year-old child's statements to a pediatric nurse that his injuries were the result of being hit by the defendant were admissible as statements

made for purposes of medical diagnosis or treatment); *see also Webster*, 151 Md. App. at 536 (explaining that the Rule 5-803(b)(4) "specifically contemplates the admission of statements describing how the patient incurred the injury for which he is seeking medical care.")

We conclude that Denise's statements to Deye were not inadmissible simply because Denise was not the "patient" or the victim. In fact, the Court of Appeals has observed that statements by a parent about a child's care are often relied on by physicians:

> [T]here are periods of sleep or other unconsciousness or mental incapacity which make it impossible to resort to the patient for information. It should be immaterial whether the informant is a professional person, or is the wife or other member of the household, so long as the information is based on attendance and personal observation.

Yellow Cab Co. v. Henderson, 183 Md. 546, 553 (1944)(holding that statements made by the patient's mother concerning the medical history of her three-year-old child were admissible because they were made for the purpose of diagnosis and treatment of the child) (citation omitted).

Moreover, Denise's statements were taken by Deye in her role as a treating physician, and in contemplation of medical diagnosis and treatment for A.T. The fact that Deye acted as part of a medical team does not diminish her role as a treating physician of A.T. We reached this same conclusion on similar facts in the case of *In re Rachel T.*, 77 Md. App. 20 (1988). There, we determined that a doctor who evaluated the child victim, and who was an expert in both pediatric gynecology and the evaluation of sexually abused children, qualified as a treating physician under the exception for statements made for

diagnosis and treatment, where he was consulted to determine the cause of the child's medical condition, not to provide expert testimony in the future. *Id*. at 35. *See also Choi v. State,* 134 Md. App. 311, 321-22 (2000)(concluding that the medical treatment exception extends to statements made in seeking medical treatment from other providers, such as paramedics). Accordingly, the trial court did not err or abuse its discretion in concluding that Denise's statements to Deye were admissible as statements made for diagnosis and treatment.

Even assuming that A.T.'s out-of-court, sleep-related statements or Deye's testimony about what A.T. and Denise told her was improperly admitted, we are persuaded that the admission of that evidence was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (stating that an error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)); *accord Potts v. State*, 231 Md. App. 398, 408 (2016).

The State presented a compelling case, even without the contested testimony, that A.T.'s injuries were the result of physical and sexual abuse inflicted by appellant, including A.T.'s repeated statements to his mother, Ashley, that appellant was abusing him. In addition, Denise and Andrew provided first-hand observations of A.T.'s injuries, and Denise described a change in A.T.'s behavior during the time of the alleged abuse, recounting A.T.'s reluctance to return home with Ashley when appellant was there.

Moreover, much of Deye's testimony relating the information that she received from Denise about A.T.'s injuries was cumulative of testimony provided by Denise and Ms. Lincoln, including A.T.'s complaints that appellant had pulled on A.T.'s penis, and that appellant had hit, bitten, and hurt A.T. The improper admission of any one of A.T.'s or Denise's statements, therefore, would not affect the rendition of the jury's verdict. *See Snyder v. State*, 104 Md. App. 533, 564 (1995) (citing *Changing Point, Inc. v. Maryland Health Resources Planning Comm'n,* 87 Md. App. 150, 172 (1991) (holding that whether testimony admitted was hearsay was not important because the testimony was merely cumulative)); *McClurkin v. State,* 222 Md. App. 461, 484-85 (2015) (holding that the erroneous admission of evidence was harmless where the evidence was cumulative of other more prejudicial evidence in an "overall" strong case against appellant).

IV.

Appellant contends that the trial court erred in allowing the State to make improper and prejudicial comments during its opening statement and closing arguments, in which the State referred to appellant multiple times as a "monster." Appellant failed to object to these comments by the prosecutor, and accordingly, this issue was not preserved for review. *See* Maryland Rule 8-131(a)("Ordinarily, the appellate court will not decide any other issue unless it plainly appears . . . to have been raised in or decided by the trial court[.]"). Recognizing that his arguments were not preserved, appellant asks this Court to exercise plain error review "for the salutary purpose of sending a message to prosecutors throughout the State that there are limits beyond which adversarial rhetoric may not go."

The State acknowledges that the prosecutor's repeated references to appellant as a "monster" were improper, but contends that the comments did not affect the outcome of his trial in light of the overwhelming evidence against appellant, and therefore plain error review is not warranted. We agree that the prosecutor's comments were improper. We decline, however, to invoke plain error review.

We undertake plain error review only if the mistake "'vitally affect[ed] a defendant's right to a fair and impartial trial,'" *Diggs v. State*, 409 Md. 260, 286 (2009)(quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), which we reserve for those circumstances that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011) (citation omitted). "Appellate review under the 'plain error' doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Hammersla v. State*, 184 Md. App. 295, 306 (2009) (citing *Morris v. State*, 153 Md. App. 480, 507 (2003); accord *Perry v. State*, 229 Md. App. 687, 710-11 (2016).

Although prosecutors are afforded "great latitude" in opening statements and closing argument, they should refrain from making appeals "to passion or prejudice." *Lawson v. State,* 389 Md. 570, 589-90 (2005). We have recognized that prosecutorial references to the defendant as "an animal" and "pervert" exceeded the bounds of proper comment, *see Walker v. State*, 121 Md. App. 364, 381 (1998), and that implying in closing argument that the defendant is a monster, even if not said directly, is inappropriate. *See Lawson*, 389 Md. at 601. But error alone is not sufficient to warrant plain error review. *See, e.g., Morris*, 153 Md. App. at 511-12 ("If every material (prejudicial) error were *ipso*

facto entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless.... The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed." (emphasis in original)).

We note that defense counsel responded to the State's reference to appellant as a "monster" in the first line of his opening statement when he characterized the State's use of the "phrase of monster" as "nice drama." The State's improper comments were readily correctable by the trial court upon a timely objection, but appellant declined to do so, opting instead to address the comment in his remarks. To permit appellant to refrain from objecting at trial in order to raise the issue for the first time on appeal would run counter to the considerations of fairness and judicial efficiency. *See Chaney v. State,* 397 Md. 460, 468 (2007).

Appellant fails to demonstrate how the trial court's lack of curative action in response to the prosecutor's remarks was so "compelling, extraordinary, exceptional or fundamental" as to deny him a fair trial. Although the prosecutor's remarks were improper, they did not rise to a level that was so prejudicial as to affect appellant's fundamental rights to a fair trial. Plain error review is reserved for those circumstances of "truly outraged innocence[,]" *see Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Jeffries v. State,* 113 Md. App. 322, 325–26 (1997)), which do not exist here. Accordingly, we decline to exercise our discretion to engage in plain error review.

CASE REMANDED WITH INSTRUCTIONS TO VACATE THE TEN-YEAR SENTENCE FOR COUNT 13. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.