UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 760

September Term, 2016

CHRISTOPHER B. FLEMING

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 21, 2017

Following a trial in the Circuit Court for Wicomico County, a jury convicted appellant, Christopher B. Fleming, of first-degree burglary, theft of property with a value under $1000, fourth-degree burglary, and malicious destruction of property.[1] The trial court sentenced appellant to ten years in prison, after which he filed a timely notice of appeal, presenting the following questions for our consideration:

1. Did the trial court err in admitting evidence?

2. Did the trial court err in permitting the State to instruct the jury on the law during closing argument?

3. Did the trial court commit plain error in instructing the jury on an offense after finding that the State failed to introduce sufficient evidence to survive a motion for judgment of acquittal?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

In May 2014, the property located at 27849 Cross Creek Drive, Wicomico County, was the subject of a foreclosure action. The Federal Home Loan Mortgage Company ("Freddie Mac") purchased the property at auction in October 2014, and the circuit court ratified the purchase in December 2014.

Freddie Mac contracted with Sheri Smith, an agent with Condominium Realty, to manage and maintain the property and to undertake any needed repairs until its eventual sale. On January 7, 2015, Ms. Smith posted the property with, and mailed to the property address, a notice of eviction giving occupants or anyone with a claim of ownership 15 days

[1] The State *nolle prossed* charges of second-degree burglary, trespassing, and theft.

to contact her office. No one responded to either letter, so on January 22, 2015, Ms. Smith had the locks rekeyed and lock boxes installed on the exterior doors of the property.

Ms. Smith employed Ray Nack to inspect and photograph the unoccupied house every two to four weeks; to enter the house, Mr. Nack used the key in the lock box on the front door. Upon his inspections on February 3, 2015 and March 18, 2015, Mr. Nack found the house locked, in good repair (although the heat did not appear to be functional on March 18), and empty.

Ms. Smith dispatched a heating repairman, Bruce Truitt, to evaluate and repair the heating system on March 23, 2015. After replacing the control board to fix the heating system, Mr. Truitt reported that the house was empty and locked, with no appearance of anyone living there.

On April 21, 2015, a plumber Ms. Smith hired to undertake repairs arrived at the property to find that someone had apparently moved into the house. When Wicomico County Sheriff's Office Deputy First Class Cameron Gardner ("DFC Gardner") responded to the ensuing call for suspicious activity in the supposedly unoccupied house, he encountered Vaughn Parker, appellant's cousin, who said he had been living in the house for approximately two weeks.

Mr. Parker told DFC Gardner that appellant, claiming to own the house, had offered to let Mr. Parker live there while he was going through some domestic difficulties. Mr. Parker said he entered and locked the house by use of a key or garage door opener code provided to him by appellant. Although appellant had not asked Mr. Parker to pay rent, Mr.

Parker had made some improvements to the home, including the addition of furnishings and the installation of a new hot water heater.

After speaking with the officer, Mr. Parker phoned appellant, who advised DFC Gardner that he had filed a *lis pendens* action to obtain title by adverse possession of the property in the Circuit Court for Wicomico County and believed himself to be the owner of the property.[2] DFC Gardner asked appellant to come to the house to discuss the matter. Appellant arrived at the house and provided the officer with paperwork he retrieved from a kitchen drawer inside the house.

DFC Gardner observed furniture, a grill and cooler, food, clothing, security cameras, and curtains in the home and a blue magnet with "Fleming Construction" written on it on the garage door. Notices to vacate the property and no trespassing signs that Ms. Smith advised she had placed on the door had been removed. There were no signs of forced entry, but the locks had been changed; the broken lock box and door knobs installed by Ms. Smith's locksmith were located inside a closet in the house, where Mr. Parker said he found them when he moved in.

The police ordered appellant and Mr. Parker to gather their belongings and vacate the premises, and they did so without incident. Following 30 days of patrols by members of the sheriff's office, it did not appear that appellant or Mr. Parker returned to the premises.

[2] Indeed, on March 20, 2015, appellant had filed with the Circuit Court for Wicomico County a complaint for adverse possession of the property, claiming he had lived there for five years.

Appellant was later arrested, tried, and convicted of first-degree burglary, theft, and other charges stemming from his actions related to the property. This appeal followed.

DISCUSSION

I. Admission of Evidence

A. Parties' Contentions

Appellant first argues that the trial court erred in admitting into evidence a notice issued to appellant by the circuit court on July 23, 2015. The notice advised appellant that his adverse possession suit would be dismissed in 30 days if no action were taken on the case. Appellant argues that this evidence is irrelevant under several Maryland Rules, discussed below, because he "likely" did not receive the notice and therefore did not respond to it. Because he was, unbeknownst to the jury, in jail after his arrest in this case and unable to receive or respond to the notice, appellant claims that the jury likely misinterpreted the notice as evidence that he abandoned his suit. This misinterpretation, he continues, lent support to the State's theory that his adverse possession suit was fraudulent and that he knew he did not have ownership or possessory interest in the property**.**

Appellant argues alternatively that assuming relevance, the notice's probative value "was vastly outweighed by the danger of unfair prejudice given the false impression it was likely to give the jury." The admission of the notice, appellant concludes, was therefore irrelevant and highly prejudicial.

The State first advances a preservation argument, on the ground that the reasons advanced for appellant's objection to the evidence before the trial court differ from those

made on appeal.[3] Assuming preservation, the State contends that the trial court acted within its discretion in admitting the evidence as proof of theft of the property, as it lent credence to the assertion that appellant's claim of ownership by adverse possession was fraudulent and that he intended to "commit a theft of the house." The State also maintains that any error in this case was harmless.

B. Standard of Review

The determination of whether evidence is relevant is a matter of law, to be reviewed by an appellate court *de novo*. *DeLeon v. State*, 407 Md. 16, 20 (2008). If the evidence is relevant, a reviewing court "grants wide latitude to trial judges' decisions on its admissibility." *Id.* at 21. If the trial judge has made a finding of relevancy, we are loath to reverse the trial court unless the evidence is plainly inadmissible or there is a clear showing of an abuse of discretion. *Id.* (citing *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

C. Analysis

Md. Rule 5-401 defines relevant evidence as "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 that it would be without the evidence." In general, "[e]xcept as otherwise provided by constitutions, statues, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible." Md. Rule 5-402.

[3] We quickly dispatch the State's preservation argument. When the State sought to introduce its exhibit 11, defense counsel objected on the ground of relevance, which was a sufficiently clear argument for the trial court to rule upon. Therefore, notwithstanding the fact that trial counsel did not invoke the same words appellate counsel does in the brief, trial counsel's objection satisfied the mandate of Rule 8-131(a), requiring an issue to be raised in or decided by the trial court before an appellate court will decide the issue.

Nonetheless, a court may exclude relevant evidence "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." Md. Rule 5-403; *see also Parker v. State*, 408 Md. 428, 437 (2009). Evidence may be unfairly prejudicial to a criminal defendant "if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged." *Odum v. State*, 412 Md. 593, 615 (2010) (citation and internal quotation marks omitted).

The State sought to introduce into evidence its exhibit 11, a notice issued by the Circuit Court for Wicomico County on July 23, 2015, entitled "Notification to Parties of Contemplated Dismissal" and relating to appellant's adverse possession lawsuit. The notice read as follows:

> Pursuant to Maryland Rule 2-507 this proceeding will be "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE," 30 days after service of this notice, unless prior to that time a written motion showing good cause to defer the entry of an order of dismissal is filed.

Defense counsel objected to the admission of the notice and the following ensued:

> [Prosecutor]: State's Exhibits 11 and 12. State's Exhibit Number 11 is notice with the Court of dismissal of this suit, 22-C15-421.
>
> THE COURT: Do you have any objection?
>
> [Defense Counsel]: I'm not sure of the relevance of that document. It's just a notice from the Court that if something doesn't happen, that it would be dismissed.

THE COURT: Right.

[Prosecutor]: Ultimately, what I believe is that I need to show closure of Mr. Fleming's initial filings. And there is no Order from the Judge and the Court because when this notice was sent out, he had 30 days to respond, and he never responded. And so unlike what the ratification of the house through foreclosure where Judge Jackson signed it, and I have a legal piece of paper to now say, this is the owner of the house, there is nothing in the court file that I can show other than this, you need to take action or else we are dismissing the case. And I believe that that's what I can show the jury that the defendant abandoned this claim.

[Defense Counsel]: Well, he also thinks there is a problem that—I don't know the reason that was sent. I don't know if—I suspect from what I remember seeing in the court file that that were never able—in one of the court files, the proper person hadn't been served for some period of time.

THE COURT: They're sent once the Clerk's Office of the Judges make a determination that the case is not properly moving forward.

[Defense Counsel]: Right.

THE COURT: And then they are given 30 days to, in effect, say, yes, these are the steps I'm taking to move the case forward. And if nothing is done then, in effect, the case is dismissed is what happens.

[DEFENSE COUNSEL]: And I would note what my client is advising me is that he was incarcerated when that notice went out, although I don't know.

THE COURT: Right, that was July 2015.

[DEFENSE COUNSEL]: For these charges. Right. He was arrested not at the time of this offense. They arrested him on this offense. He was held on some period of time before he was able to bond out. So that's. . .

> THE COURT: Okay. Well, I'm going to admit it. State's Exhibit will be admitted.

Appellant argues that the notice comprising State's exhibit 11 was irrelevant to the jury's determination of whether he had a good faith belief in his ownership interest in the property. We disagree.

Even assuming that appellant was indeed in jail when the court sent its notice of impending dismissal of his adverse possession claim, there is nothing in evidence to suggest that he did not receive it.[4] Appellant has a devoted wife and a family, and there is no reason to assume that his wife would not have brought an important court document to his attention in jail, had it been mailed to his home address, or that appellant was not otherwise made aware of the notice. Indeed, in his brief, appellant hedges his own argument about his non-receipt of the notice, stating only that he "*likely* did not receive the notice and had no ability to act on the suit." (Emphasis added)

Moreover, appellant's receipt of the notice and potential reaction thereto do not furnish the only relevance of the notice itself. Regardless of appellant's actual receipt of the notice, the very fact that the notice was issued by the court is relevant to appellant's lack of pursuit of his adverse possession claim and, therefore, his belief in his ownership of the property; the notice indicated that appellant had not pursued the action for a sufficient period of time so as to risk dismissal. The notice of potential dismissal of appellant's adverse possession claim made clear to the jury that appellant had not been granted title to

[4] Appellant represented to his attorney that he was in jail when the notice was mailed, but she admitted to lack of knowledge of the timing of his incarceration, and no other specific evidence of the dates of his incarceration were presented to the court.

the property by adverse possession by July 23, 2015, which belied the legitimacy of his claim of ownership to DFC Gardner on April 21, 2015.

For similar reasons, we also conclude that the admission of the evidence was not more unfairly prejudicial to appellant than probative. In our view, the jury was more likely to have accepted defense counsel's statement in closing argument—that appellant did not pursue his adverse possession claim through the July 23, 2015 date of the contemplated dismissal notice because he had been placed on notice of Freddie Mac's assertion of its ownership interest in April 2015—than it was to ascribe a prejudicial motive to him. In addition, appellant's claim that the notice was "particularly prejudicial" because he was "essentially precluded from responding to it without eliciting other prejudicial evidence—that he had been in jail," is also refuted, as noted above, by the lack of any evidence tending to prove that he did not receive the notice or was precluded from responding to it as a result of his incarceration.

Even if the court abused its discretion in admitting the notice, any such error would be harmless. *See Dorsey v. State*, 276 Md. 638, 659 (1976). The other evidence that appellant did not have a good faith belief in his ownership interest in the Cross Creek Drive house was overwhelming. Although establishment of title by adverse possession requires the claimant to show possession that is "'actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted'" for the statutory period of 20 years, *Hillsmere Shores Improvement Ass'n, Inc. v. Singleton*, 182 Md. App. 667, 691 (2008) (quoting *White v. Pines Cmty. Improvement Ass'n*, 402 Md. 13, 36 (2008)), appellant claimed only to have possessed the property for four or five years, and even that

claim was disputed by the testimony of Ms. Smith, Mr. Nack, and Mr. Truitt, all of whom testified that the house was vacant through at least March 23, 2015. As a result, there is no reasonable possibility that the jury believed that appellant was, or believed himself to be, in legal possession of the property when confronted by the police in April 2015, regardless of the admission of the circuit court's notice of impending dismissal of his adverse possession suit, and any error in the admission of the notice was therefore harmless.

II. Closing Argument

A. Parties' Contentions

Appellant next contends that the trial court erred when it permitted the prosecutor either to misstate the law regarding the charged crimes or to discuss legal principles that went beyond the court's jury instructions during closing argument. The improper statements of law, he concludes, likely misled or confused the jury on issues central to the case and should not have been permitted.

B. Standard of Review

As we explained in *Anderson v. State*, 227 Md. App. 584, 589-90 (2016),

> [A]ttorneys are afforded great leeway in presenting closing arguments to the jury. *Degren v. State,* 352 Md. 400, 429, 722 A.2d 887 (1999). Closing argument typically does not warrant appellate relief unless it "exceeded the limits of permissible comment." *Lee v. State,* 405 Md. 148, 164, 950 A.2d 125 (2008). . ."What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith and Mack v. State,* 388 Md. 468, 488, 880 A.2d 288 (2005). Thus, the propriety of prosecutorial argument must be decided "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381, 969 A.2d 989 (2009). Because "[a] trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case[,]" the exercise of its broad discretion to regulate closing argument will not be overturned "unless there is a clear

> abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726, 50 A.3d 1127 (2012).

Despite an attorney's great leeway in making a closing argument, there are certain techniques that are not permitted. One prohibited technique is an argument discussing the law.

Counsel may only argue law to the jury when a dispute exists as to the law of the charged crime. *White v. State*, 66 Md. App. 100, 118 (1986). Otherwise, argument on the law, including "'stating, quoting, discussing, or commenting upon a legal proposition, principle, rule, or statute'" is improper even if it is consistent with the court's jury instructions. *Id*. (quoting *Bonner v. State*, 43 Md. App. 518, 524 (1979)). The rationale behind the rule is that "[c]ounsel are provided input as to the content of the instructions before they are given, and also may object if an instruction is not to counsel's satisfaction." *Id*. "To allow counsel to embellish the trial court's instructions is fraught with the danger that the trial judge's binding instructions will be manipulated by counsel, resulting in the jury applying law different than that given by the trial court." *Id.*

C. Analysis

During his motion for judgment of acquittal, appellant argued that the State had "presented absolutely no evidence of an intent to commit a theft or a theft that actually occurred," as nothing had been shown to be missing from the house, much less property over $1000 in value, as charged. When the court questioned whether the exertion of unauthorized control over the house itself was a theft, the prosecutor responded by referring the court to *Hobby v. State*, 436 Md. 526 (2014), in support of his argument that one using

a vacant property without the owner's consent owes the fair market value of that property to the owner, or suffers potential charges of first-degree burglary and theft. Defense counsel attempted to distinguish appellant's case from *Hobby* by reminding the court that the State had not shown that appellant ever lived in the Cross Creek Drive house; only Mr. Parker had been shown to live there. Accepting the State's reasoning, the court denied appellant's motion but amended the charge of theft to a value under $1,000, as the evidence had proved only that Mr. Parker had lived in the house for approximately two weeks, with the house having a fair rental value of $1400 to $1500 per month.

Later, the court instructed the jury on the charged crimes:

> The defendant is charged with burglary in the first degree. Burglary in the first degree is the breaking and entering of someone else's dwelling with the intent to commit theft. In order to convict the defendant of burglary in the first degree, the State must prove: One, that there was a breaking; two, that there was an entry; three, that the breaking and entry was into someone else's dwelling; four, that the breaking and entering was done with the intent to commit theft inside the dwelling; and five, that the defendant was the person who broke and entered.
>
> * * *
>
> The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove: one, that the defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner; and two, that the defendant had the purpose of depriving the owner of the property; and three, the value of the property was over [sic] $1,000.
>
> Owner means a person other than the defendant who has possession of or any other interest in the property and without whose consent the defendant has no authority to exert control over the property.

> Deprive means to withhold property of another permanently for such a period as to appropriate a portion of its value with the purpose of restoring it only upon payment of a reward or other compensation or to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.
>
> Exert control means to take, carry away, or appropriate to a person's own use or to sell, convey, or transfer title to an interest in or possession of property.

During the State's closing argument, as the prosecutor was discussing the elements of theft, the following transpired:

> [Prosecutor]: Next, he has to intend to deprive the owner of the property, but you do not need to succeed in depriving the owner of the property. You have to intend to do it. And we can't get into somebody's mind, so we look at the circumstances around the case to determine how somebody intended to deprive the owner. And it's ultimately your decision. But here are some quick ones. He files a fraudulent lawsuit . . . He changes all the locks. He rips down the notices on the door . . . There is a Fleming Construction sign on the garage, and he never pays Sheri Smith to this day. Because even if you are an adverse possessor, until the Court orders you saying this is your land, you have to pay the rightful owner of the land.
>
> [Defense Counsel]: Objection.
>
> THE COURT: Sustained.[5]

The prosecutor continued his closing argument:

> [Prosecutor]: We already talked about his intent to commit theft and how—and you might be saying, wow, your argument is that he intended to steal the house. And you can convict on

[5] The court did not offer any corrective instruction. In the general instructions to the jury, however, the court stated: "At times during the trial, the lawyers may make objections, and I will rule on them. Do not concern yourself with these objections or my rulings on them." The court gave no other instructions regarding the objection to the closing argument.

> burglary in the first degree in one of two ways. You could believe that he did all this with the true intent to steal the house, that by filing the fraudulent lawsuit, changing all the locks, putting in a no trespassing sign on his own, ripping down the notices on the door, advertising Fleming Construction on the sign, and never paying Sheri Smith that he intended to steal the house. The other way that he steals the house is that he never pays Sheri Smith. And it's very simple. The law requires that you are using somebody else's –
>
> [Defense Counsel]: Objection.

A lengthy bench conference ensued where counsel debated over the objection. The court ultimately overruled the objection and allowed the State to discuss the law as it pertained to burglary. The State then continued:

> [Prosecutor]: So as I was saying, when you exert influence, whether by allowing your blind cousin who is going through a messy domestic situation to live there or you live there, yourself, there is an obligation to pay the true owner money for using the time. And that's all the different ways in which the defendant can commit burglary of this house. Remember, the defendant has legally represented to Vaughn Parker, when he asks how can I live here, the defendant represented it's legal. He says it's his property.

A review of the prosecutor's closing argument persuades us that he did not impermissibly argue the law. This distillation of the argument actually made to the jury makes clear that the first instance in which the prosecutor made any mention of the law, that is, that payment of the value of the property is required by an unauthorized user of property to the rightful owner, was met with an objection, which the court sustained, thereby precluding the jury from considering it. When the prosecutor continued his argument, he properly applied the evidence presented to the charge of theft, as explained

by the court. When he attempted to explain an alternate theory of theft, based on what the law requires when using someone else's property, he was unable to complete the sentence as a result of another objection from defense counsel, and the jury did not hear the remainder of that argument.

The only arguable reference to the law occurred when the prosecutor continued his argument after the lengthy bench conference, stating that "there is an obligation to pay the true owner money for using the time." We are not persuaded that this general statement improperly commented on the law or created a danger of manipulation of the court's binding instructions such that the jury applied law other than that instructed by the trial court.

III. Jury Instruction

A. Parties' Contentions

Finally, appellant claims that the trial court erred in its jury instructions when it advised the jury it could convict him of theft only if the value of the property taken was *over* $1000, as the court had determined that the State had not proved a theft of that amount and permitted the amendment of the indictment to charge him with theft *under* $1000. The result, he claims, is that he was convicted of a crime that the court had determined the State failed to prove.

Acknowledging that he did not object to the erroneous jury instruction during trial, thus waiving appellate review, he asks us to invoke our discretion to consider the issue for plain error. We decline his request.

B. Standard of Review

We acknowledge that "we have discretion under Md. Rule 4–325(e) to address an unpreserved issue."[6] *Yates v. State,* 202 Md. App. 700, 720 (2011), *aff'd,* 429 Md. 112 (2012). Maryland's case law has made abundantly clear, however, that our appellate courts review for plain error only errors that are "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Savoy v. State,* 420 Md. 232, 243 (2011) (quoting *State v. Hutchinson,* 287 Md. 198, 203 (1980)). Because of the difficulty of demonstrating facts that are sufficiently compelling to invoke plain error review, it remains "a rare, rare, phenomenon," especially when the alleged error involves an erroneous jury instruction. *Steward v. State*, 218 Md. App. 550, 566 (2014) (quoting *Morris v. State,* 153 Md. App. 480, 507 (2003)), *cert. denied*, 441 Md. 63 (2014).

C. Analysis

Appellant was charged, *inter alia*, with theft of property with a value over $1000. The only evidence of the value of the property "stolen," however, was Ms. Smith's testimony that, although the Cross Creek Drive house had not been placed on the market for sale or rental, the fair market value to rent the house would be $1400 to $1500 per month. Given Mr. Parker's testimony that he had lived in the house for approximately two weeks before being asked to leave, thereby arguably proving theft of $750 at the most, the

[6] Rule 4-325(e) reads, in pertinent part: "An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."

trial court permitted the State to amend the charge in the indictment to theft under $1000, although it declined to grant appellant's motion for judgment of acquittal on the charge of theft over $1000.

Notwithstanding the amendment to the indictment, the court instructed the jury:

> The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove: one, that the defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner; and two, that the defendant had the purpose of depriving the owner of the property; and three, the value of the property was *over* $1,000. (Emphasis added)

Both the prosecutor and defense counsel declared themselves satisfied with the court's instruction.

Although the court incorrectly instructed the jury on an element of the charged crime of theft, that is that the value of the property was over, rather than under, $1000, in our view, the instruction was an inadvertent misstatement by the court after an amendment to the indictment than an instructional error affecting the outcome of the trial. First, the court made clear to the jury "for the record" that the verdict sheet contained charges of "burglary first degree," "theft less than $1,000," "burglary fourth degree," and "malicious destruction." Second, the court formally instructed the jury that the "only charges" it was to consider were first-degree burglary, theft less than $1000, fourth-degree burglary, and malicious destruction of property. Third, the prosecutor, in discussing the State's proof on the charge of theft, clarified, "the value of the property is under $1,000," as the fair rental value of Mr. Parker's two weeks' residence was "700, $750. . . [t]hat's the $1,000 that is

taken." Finally, the jury, upon rendering its verdict, was asked how it found on the charge of "theft less than $1,000," and its verdict was harkened as to that charge.

Therefore, appellant was hardly denied a fair trial by the misstatement in the jury instruction when he was convicted of the exact crime of theft under $1000 with which he was actually charged. There is nothing to suggest the jury was affected, to appellant's detriment, by the court's misstatement in the instruction, particularly when the attorneys themselves, who are tasked with searching for error in the instructions, did not notice the mistake. Clearly, the error here was not compelling, extraordinary, exceptional or fundamental to assure the defendant's fair trial. As such, we cannot say that the court's misstatement rose to the level of plain error.

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