Circuit Court for Harford County
Case No. 12K15000701

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1514

September Term, 2016

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SETH A. GRINNAGE, SR.,

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, Deborah S., J.

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Filed: August 10, 2017

A jury in the Circuit Court for Harford County convicted Seth Grinnage, the appellant, of second degree assault against Chardey Gilliam; identity fraud; and resisting arrest. The court sentenced him to a total of fourteen years and six months in prison, all but four years suspended, and five years' supervised probation.[1]

On appeal, Grinnage presents two questions for review, which we have slightly reworded:[2]

I. Did the trial court err by failing to make a determination of whether Grinnage was competent to stand trial?

II. Did the trial court err by allowing the prosecutor to make improper remarks during closing argument?

For the following reasons, we shall affirm the judgments.

## FACTS AND PROCEEDINGS

Grinnage's jury trial took place on August 15 and 16, 2016. Deputies Joseph Matys, Amanda McCormack, Michael Wilsynski, and Steven Riportella, all of the

[1] The court sentenced Grinnage to ten years' incarceration, all but three years suspended, for the second degree assault conviction; eighteen months' incarceration, all suspended, for the identity fraud conviction; and three years' incarceration, all but one year suspended, for the resisting arrest conviction. His sentences for identity fraud and resisting arrest are to run consecutive to the sentence for second degree assault. The court also imposed five years' supervised probation upon Grinnage's release.

[2] In his brief, Grinnage presented the following questions for review:

I. Did the trial court err in failing to make a competency determination after Appellant's competency was explicitly called into question?
II. Did the trial court err in allowing the State to make improper and prejudicial comments at closing argument?

Harford County Sheriff's Office, testified for the State. Gilliam did not testify. Grinnage testified in his defense. The following facts were adduced.

At around 11:00 p.m. on March 23, 2015, the Harford County Sheriff's Office received an anonymous telephone call reporting a "domestic" incident at Grinnage's townhouse at 515 Crownwood Court, in Edgewood. Grinnage and Gilliam had been living together there for the past year. At that time, Gilliam was six months' pregnant with Grinnage's child. Gilliam's son also was living at the townhouse, but he was not there on the night in question.

Deputy Matys responded to the call and was the first to arrive at the townhouse. Deputy McCormack arrived a minute later. As the deputies approached the front door, they heard the "raised" voices of a man and a woman coming from inside. The voices ceased when Deputy McCormack knocked on the door. After several minutes, two people, later identified as Grinnage and Gilliam, appeared near the front door. Neither one answered the door until the deputies announced that they could see them from outside.

Eventually, Gilliam opened the door. Deputy McCormack observed that she "appeared breathless" and "upset." She "seemed a little hesitant to talk to" the deputies. She had "a small abrasion" on her chest and left elbow, and the sleeve of her shirt was torn. (Photographs of Gilliam's injuries taken that night were admitted into evidence). Grinnage was shirtless and "had scratches" on his chest and back "which appeared

consistent with that of an assault." He told Deputy Matys that he had received his injuries in a fall and "didn't want any further assistance."

The deputies entered the townhouse. Shortly thereafter, they overheard Grinnage tell Gilliam, "I told you not to open the door for them." Deputy McCormack went upstairs with Gilliam to speak with her separately. Deputy Matys and Deputy Wilsynski, who had arrived in the meantime, remained downstairs with Grinnage. Deputy Matys asked Grinnage for identification. Grinnage provided him with a driver's license for a "Jeremy Grafton Grinnage." (A photograph of the driver's license was admitted into evidence.) Deputy Wilsynski went upstairs to speak with Deputy McCormack and Gilliam. From that conversation, he learned that Grinnage's real name was "Seth Aaron Grinnage." Deputy Wilsynski went to his police vehicle and ran a search for that name, which produced a driver's license photograph of a person who matched Grinnage's physical appearance. The search also revealed that Grinnage had two open arrest warrants from Baltimore City. Deputy Wilsynski returned to the townhouse and informed Grinnage that he was under arrest.

Deputy Wilsynski placed Grinnage in handcuffs. He complied at first, but then became violent. According to Deputy Matys, Grinnage "began yelling towards the upstairs area of the house[,] saying[,] [A]re you really going to do this to me?" When Gilliam came downstairs with a shirt for Grinnage, Grinnage "started to violently flail and pull away from" Deputy Matys and Deputy Paul Markowski (who had arrived in the meantime). As Grinnage was flailing, the "back of his head struck the front of [Deputy

Matys's] forehead." Deputy Matys testified that the head butt did not cause a visible injury.

Deputy Wilsynski and Deputy McCormack also testified that Grinnage became "agitated" and "irate" after Gilliam came downstairs, that he tried to "flail out of [the deputies'] grasp and buck his body around to try and resist the arrest[,]" and that he was "twisting [his body] back and forth trying to get out of [Deputy Matys and Deputy Markowski's] arm's grasp[.]" Deputy McCormack saw Grinnage "headbutt[,]" Deputy Matys. Deputy Wilsynski did not witness any contact but did see Deputy Matys "step back and [hold] his head at some point" while Grinnage was "flail[ing]." According to both deputies, Grinnage's outburst was in reaction to being refused a cigarette to smoke before being escorted outside.

After Grinnage was subdued, he was transported to the Harford County Detention Center. He was released on bail the next day.

Deputy Riportella, with the Domestic Violence Unit of the Sheriff's Office, conducted a "follow-up investigation" of the March 23, 2015 incident the next day. He listened to recordings of two telephone calls Grinnage made from the detention center before he was released. In one call, Grinnage told his mother that he "grabbed [Gilliam's] dumb ass" "because she was running her fucking mouth." In another, speaking to an unidentified party, Grinnage said the following about Gilliam: "[Y]eah, I'm going to beat her ass when I get out of here"; "She played dumb as she wants. The second I bail out I'm going to be on her ass"; "Get me out of here so I can get to this

bitch because I'm going to blow her shit off, yo, I'm telling you." (Portions of both calls were played to the jury and admitted in evidence.)

Based on the contents of these calls, a domestic violence protective order for Gilliam's benefit was issued and served on Grinnage. Deputy Riportella called Gilliam and told her about the protective order and the substance of Grinnage's statements, which he perceived as "threats[.]" Gilliam emailed Deputy Riportella additional photographs of her injuries. (These photographs were not moved into evidence.)

Grinnage testified that he had given Deputy Matys his brother's driver's license, instead of his own, to avoid being arrested for the open warrants in Baltimore City. He denied assaulting Gilliam or Officer Matys, or resisting arrest. Initially, he testified that he could not "recall" what he and Gilliam had been doing before the deputies' arrival at the townhouse and he did not know how Gilliam received the injuries shown in the photographs. Later he testified that he and Gilliam had been having a "personal" conversation that evolved into an "argument" and that Gilliam had begun "zapping out" and "attack[ed]" him. He claimed that he had had to "grab her arms" to stop her from "coming towards" him.

On re-cross examination, Grinnage testified that Gilliam had made physical contact with him during the argument, but he could not remember where. When the prosecutor suggested that the "argument" had been prompted by Gilliam's telling him that she wanted to end their relationship and that in response Grinnage had become angry and "knocked her off of the bed and pinned her in the corner with [his] arm across her

neck and chest area[,]" Grinnage replied that he could not "recall" whether that was true. Grinnage testified that he was "simply venting" when he made the threatening statements toward Gilliam in the recorded jail calls and that he did not "intend to act on" them.

Grinnage acknowledged that he had become upset after he was arrested when the deputies refused to hand him his "car keys, [his] phone and [his] cigarettes[.]" He claimed he had asked for those items because he knew he was going to jail and he needed to "be able to call somebody" when he was released, because he was from Baltimore City and had "just started learning how to get home[.]"[3] He recalled "cussing a little bit" while handcuffed but denied flailing or trying to pull away from the deputies holding him. He said it would have been impossible for him to "move" at all after he was handcuffed because he was outnumbered by "four [deputies] bigger than [him]." He later changed his testimony, claiming he did not remember whether he had flailed or attempted to break free of the deputies holding him. He testified that he never "intentionally cause[d] any contact" with Deputy Matys.

Additional facts will be included as necessary to our discussion of the issues.

[3] He had testified that he had been living with Gilliam at the townhouse for a year, however.

## DISCUSSION

### I.

### Competency Determination

On the first day of trial, while the court was conducting *voir dire* of the jury venire, the following ensued:

> THE COURT: It is anticipated that the length of this trial would be approximately three days and that's going into Wednesday or hopefully finishing up Wednesday. Obviously you can never with certainty predict these things, but that is our best estimate. Is there anybody who has a pressing personal or business matter which would make it very difficult for you [to] have to participate in a trial of that length?
>
> GRINNAGE: Me, Your Honor. I work every day.
>
> THE COURT: Sir –
>
> GRINNAGE: I'm going to lose my job.
>
> JUROR: 17.
>
> GRINNAGE: Three days? We need to get on now.
>
> DEFENSE COUNSEL: May we approach, Your Honor?
>
> THE COURT: You may.
>
> GRINNAGE: There is no way. I'm going to lose my job. That's the only way I can support my family.
>
> THE COURT: Sir, sit down.
>
> DEFENSE COUNSEL: Your Honor, obviously [Grinnage's] behavior is problematic at best. I would have to make a motion for mistrial. The jury pool is tainted at this point.
>
> THE COURT: I can't hear.

GRINNAGE: I can't do three days.

THE COURT: Take the Defendant out of the courtroom.

After Grinnage was removed from the courtroom, defense counsel requested a mistrial:

> DEFENSE COUNSEL: I would make a motion for mistrial, Your Honor. Obviously the jury pool has been tainted to a great extent, especially given the nature of the charges which involve assaulting a police officer and another individual. His behavior is rather unacceptable I would agree, but I think it has tainted the jury pool to the extent that we cannot get a fair jury at this point.
>
> THE STATE: Unfortunately I don't have the case name on me because I didn't anticipate that this would happen, but the case law is clear that [Grinnage] cannot cause his own mistrial if he acts out in court. That is to his own detriment, but he cannot cause his own mistrial by his behavior.
>
> THE COURT: I think it is appropriate for me to make a general inquiry to the jury panel at this point as to whether or not anything that [Grinnage] has said would prejudice them or make it impossible for them to be fair and impartial considering the evidence in the case and then deal with that in the course of individual voir dire, but I'm not inclined to grant a mistrial at this point. I will ask a general question if he continues to act out. At this point given that we haven't impaneled the jury, I'm not sure that we're even talking about a mistrial.
>
> DEFENSE COUNSEL: That's true.
>
> *THE COURT: It may be an issue of his competence if he is just going to be difficult. That's a different problem.*
>
> *DEFENSE COUNSEL: That's a very, very realistic possibility. He has been very difficult for me to communicate with. I have not been able to express what I am trying to express to him.*
>
> *THE COURT: You need to express this to him. My practice, if I have to pull this trial for a competency evaluation, I'm holding him.*
>
> *DEFENSE COUNSEL: I understand.*

> *THE COURT: So, to the extent that that [a]ffects his behavior in the courtroom, you may want to share that tidbit with him and we'll see where we go from there.*
>
> *DEFENSE COUNSEL: Certainly.*
>
> *THE COURT: See if you can get him back in the courtroom and see if he is going to behave himself. I will ask one more [voir dire] question and then we'll proceed. I still need to get [to] the rest of the names on this question.*

(Emphasis added.)

Grinnage contends the trial court erred by failing to make a competency determination after his competency to stand trial was "openly questioned" both by defense counsel and the court during the colloquy quoted above. He argues that Md. Code (2001, 2008 Repl. Vol.), section 3-104 of the Criminal Procedure Article ("CP"), and Maryland case law impose an "affirmative duty" on the trial court to determine a defendant's competency once it is put at issue; that his competency was put at issue; and that the trial court erred by failing to follow the procedure set forth in CP section 3-104 once that happened. Grinnage argues that defense counsel's remarks triggered the court's duty under CP section 3-104, and, independently, the court's own remarks triggered that duty as well.

The State responds that defense counsel's vague statements, made in the context of a motion for mistrial, were insufficient to trigger the court's duty under CP section 3-104(a). It points out that this case is similar to *Kennedy v. State,* 436 Md. 686, 688 (2014), in which the Court of Appeals held that an unspecified request by defense counsel to have the defendant "evaluated" was "inadequate" to "trigger" CP section 3-

104. The State further responds that "[n]othing in . . . the circuit court['s] . . . remarks suggested that [it] believed that Grinnage was unable to understand the trial proceedings." Nor, it argues, was there "[]sufficient evidence in [the] record to find that the court was required to engage in a *sua sponte* assessment of Grinnage's competence." Moreover, the State maintains, the "totality of the circumstances" before the court "suppor[t] the conclusion that Grinnage was, in fact, competent to stand trial."

"'It is well established that the Due Process Clause of the Fourteenth Amendment [to the United States Constitution] prohibits the criminal prosecution of a defendant who is not competent to stand trial.'" *Roberts v. State*, 361 Md. 346, 359 (2000) (quoting *Medina v. California*, 505 U.S. 437, 439 (1992)). *See also Trimble v. State*, 321 Md. 248, 254 (1990) ("If a state fails to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent, it denies him due process."). Although a defendant is presumed competent to stand trial, *Wood v. State*, 436 Md. 276, 285 (2013), the court has an affirmative duty to inquire into, and make a determination of, the defendant's competency if and when it is put at issue. *Peaks v. State*, 419 Md. 239, 251 (2011) ("Once the issue of competency is raised, the General Assembly places the duty to determine the defendant's competency on the trial court[.]"). *See also Gregg v. State*, 377 Md. 515, 538 (2003) ("'Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.'" (quoting *Hill v. State*, 35 Md. App. 98, 108 (1977)) (additional citations omitted)).

The court's affirmative duty to determine a defendant's competency to stand trial is codified at CP section 3-104(a), which provides:

> *In general*.— If, before or during a trial, the defendant in a criminal case or a violation of probation proceeding appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.

In *Thanos*, 330 Md. 77 (1993), the Court of Appeals clarified that the mandate of CP section 3-104(a) may be "triggered" in "one of three ways: (1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Id.* at 85 (citing *Johnson v. State*, 67 Md. App. 347 (1986)). Because we conclude that Grinnage's competency was never put in issue by a motion of defense counsel or *sua sponte* by the court, we agree with the State that the court did not err.

As noted, under CP section 3-104(a), if defense counsel makes a motion alleging that the defendant is incompetent to stand trial, the court must make a competency determination. *Id*. While it is not "always . . . necessary for defense counsel to recite the specific words 'competency determination[,]'" *Kennedy*, 436 Md. at 695, an "allegation" of a defendant's incompetency must be "sufficient" to "alert the trial court to its duty to determine whether the defendant is competent to stand trial." *Id.* at 694. "In the interest of fairness," the "onus" is on "the defendant or defense counsel to make a request for a competency evaluation with sufficient clarity." *Id.* at 700.

In *Hill v. State*, 35 Md. App. at 100, we held that the trial court erred by refusing to make a competency determination after, on the second day of trial, defense counsel informed the court that his client wished to "interpose a plea of not guilty by reason of insanity at the time, not guilty by reason of insanity at the time of the alleged commission of the offense *and is not competent to stand trial at this time*." *Id.* at 99 (emphasis in original). We found "[t]he language used" sufficient to "activat[e]" the court's duty to determine the defendant's competency under the predecessor statute to CP section 3-104(a) as it "unequivocally directed the attention of the trial court to the dual issues (a) of insanity as a defense to the crimes charged and (b) of the competency of the accused to stand trial." *Id.* at 104.

More recently, in *Roberts*, 361 Md. at 356, the Court of Appeals held that the trial court erred in denying, "without a hearing," defense counsel's motion for a competency evaluation of the defendant. The motion, titled Motion to Request a Mental Examination, included the following language:

> [The defendant] had been evaluated and treated by a number of physicians *and found not to be competent.* . . .The information counsel has received from the aforementioned individuals *raises a question as to the issue of competency.* . . .[The defendant], through counsel[,] asks this Court to issue an order *that she be evaluated by a suitable licensed or certified examiner* at the expense of the [S]tate. . . .Counsel believes that this examination is very necessary and should be done as soon as possible since the trial in this case is scheduled to begin on March 30, 1999. If the Court believes that *a hearing on the issue of competency is necessary* or if any additional information is required, counsel would be more than happy to provide same.

*Id.* at 354–55 (emphasis added). The Court held that the motion was sufficient to "trigger[] the requirement for a competency determination" under the predecessor statute to CP section 3-104(a) because it clearly "called [the defendant's] competency into question" throughout. *Id.* at 369.

By contrast, in *Kennedy*, *supra*, the Court of Appeals held that defense counsel's request to "have [the defendant] evaluated" was not sufficient to activate the trial court's duty to make a competency determination under CP section 3-104(a). 436 Md. at 691, 702. In *Kennedy*, the defendant elected to testify and on cross-examination was asked by the prosecutor to demonstrate a struggle over a gun that he claimed had taken place at the time of the murder. The prosecutor used a magic marker in place of the gun, and the defendant pulled it so forcefully that the prosecutor flew backward, hitting an easel and causing it to fall. Defense counsel moved for a mistrial, which the court denied.

Defense counsel then approached the bench and reported that he was having "problems communicating with [the defendant,]" that the defendant appeared to have "a lack of understanding of things [defense counsel] say[s] to him[,]" and that he had not "been able to talk to [the defendant] about the case[.]" *Id.* Defense counsel stated, "and I would just ask the Court for a mistrial and have [the defendant] evaluated." *Id.* The court denied the second motion for mistrial and did not address defense counsel's request for an evaluation of the defendant. Defense counsel made a third and final motion for a mistrial, which the court again denied. He made no mention then or for the remainder of the trial about having the defendant "evaluated."

In holding that defense counsel's request did not constitute "a motion or request triggering the trial judge's duty to make a competency determination under [CP] §3-104(a)[,]" *id.* at 702, the Court noted that the request and preceding statements about his inability to communicate with the defendant "were made in the context and in support of a motion for mistrial," *Id.* at 695:

> The motion made by defense counsel that is at issue here was made following the defendant's botched re-enactment of his struggle to take away the gun that allegedly took place when the underlying crimes occurred. The trial judge's focus was clearly on whether this re-enactment was so prejudicial that the proceedings should be aborted. This is an entirely different analysis than the analysis a trial judge engages in to decide whether to grant a request to delay proceedings in order to evaluate the defendant's competency to stand trial.

*Id.* at 696. Accordingly, there was "no clear indication that the comments were offered as" a motion or "basis" for "challenging [the defendant's] competency to stand trial." *Id.* at 695. Further, defense counsel's request was too "vague" in "nature[,]" *id.* at 696, to be "sufficiently clear that he was requesting a competency evaluation." *Id.* at 700. Moreover, "despite ample opportunities to do so[,]" defense counsel failed to "pursue his request for a competency evaluation when it became clear that the trial judge was only aware of the motion for mistrial[.]" *Id.*

We return to the case at bar. Unlike the motions in *Hill* and *Roberts,* defense counsel's remarks did not "unequivocally" raise the issue of Grinnage's competency to stand trial. They were similar to the defense counsel's statements in *Kennedy*, and indeed were even less sufficient to trigger a competency determination than what was said in that case. There was "no clear indication" that defense counsel's comments to the court were

in reference to Grinnage's competency. It was just as likely that he was responding to the court's musings over whether Grinnage might continue to be "difficult." And, despite three separate comments from the court about the potential issue of Grinnage's competency, defense counsel never requested a competency determination. At most, he suggested that there was a "very, very realistic possibility" that Grinnage's competency might become an issue later on. Moreover, defense counsel's remarks came at the end of argument on his motion for a mistrial when, like the situation in *Kennedy*, the court was focused on whether Grinnage's behavior had prejudiced the "jury pool" to such an extent that a fair trial could not be had. The court made this clear by noting that the "issue" of Grinnage's "competence" would be a "different problem" if it arose. Finally, as in *Kennedy*, there was never any mention of competency by defense counsel (or anyone else) for the remainder of the trial. Accordingly, defense counsel did not put the issue of Grinnage's competency to stand trial before the court by motion or allegation, as required to trigger the court's duty under CP section 3-104(a).

As the Court of Appeals held in *Thanos*, the court's duty to determine the competency of the defendant under CP section 3-104(a) may be triggered by the court itself. In *Johnson v. State*, 67 Md. App. 347, which the *Thanos* Court cited, this Court explained that "the trial court's duty to determine the competency of an accused to stand trial is triggered . . . upon the court's *sua sponte decision that the accused appears to be incompetent*." *Id.* at 358–59 (emphasis added). CP section 3-101(f) defines "[i]ncompetent to stand trial" as a person who is "not able . . . to understand the nature or

object of the proceeding" or to "assist in one's defense." CP § 3-101(f)(1)–(2). *See Thanos,* 330 Md. at 85 ("[I]n other words," a defendant is incompetent if he lacks the "'present ability to consult with his lawyer with a reasonable degree of rational understanding'" or a "'rational as well as factual understanding of the proceedings against him.'") (quoting *Dusky v. United States,* 362 U.S. 402, 402 (1960)).

Grinnage argues that the colloquy between defense counsel and the court after Grinnage's outburst during *voir dire* shows that the court decided at that time that Grinnage might be incompetent, and that decision triggered its duty under CP section 3-104(a). It is clear from the circumstances surrounding the colloquy between the court and defense counsel that the court's comments were made in passing and were intended to curb Grinnage's purposefully disruptive behavior. They do not evidence a "decision" that Grinnage appeared to be incompetent.

At the outset of the proceedings, just before Grinnage's outburst, defense counsel had informed the court that Grinnage wanted a postponement and to discharge counsel in favor of a private attorney. When the court questioned Grinnage about his request, he responded that he had been waiting "for over a year and a half" to go to trial because of "three or four" postponements by the State; that he was "due for one" and it was his "turn now" for a postponement; and that he wanted to "resolve [his case] without us having to pick twelve [jurors] and going all the way through [with a trial]." He acknowledged that defense counsel was "representing [him] right" and that he had not retained private counsel because that "means paying money." The court ruled that there was no good

cause for Grinnage to discharge his counsel and informed Grinnage that whether he chose not to discharge his counsel or to discharge counsel and proceed *pro se*, the trial was going forward that day. Grinnage chose to continue with defense counsel instead of representing himself. It was shortly after this exchange that Grinnage interrupted the *voir dire* of the potential jurors, prompting the mistrial motion by his defense counsel.

It was in this context—Grinnage just having been denied a meritless, eleventh-hour postponement immediately after which he attempted to cause a mistrial by acting out on *voir dire*—that the court commented: "It may be an issue of [Grinnage's] competence if he is just going to be difficult. That's a different problem." The court was communicating its cognizance of Grinnage's purposeful efforts to disrupt the trial. That is made even more abundantly clear in its next remarks, directing defense counsel to "share" with Grinnage that it would "hold[]" him in the event of a competency evaluation in case that information might "[a]ffect his behavior in the courtroom." These remarks also made clear that the court was of the view that Grinnage was capable of controlling his behavior. As we previously explained regarding defense counsel's statements, the most that can be said is that the court considered aloud whether Grinnage's competency *might* become an issue at a later time. That is not the same thing as making a decision that Grinnage may, at that time, be incompetent.[4]

[4] *Cf. Peaks*, 419 Md. at 248, in which the trial court *sua sponte* ordered another competency evaluation of the defendant after stating that it was "not certain" that the defendant was "competent to assist [his] attorney in [his] defense."

The record of the trial as it unfolded reinforces our conclusion that the court never seriously questioned Grinnage's competency. Throughout the trial, the court engaged in candid discussion with Grinnage about his behavior and the proceedings, during which he exhibited an understanding of the law and the workings of trial. He stated that he had "been in a few trials"; asked how long the trial would last; disputed the impartiality of the jury; and recognized that his liberty was at stake and that his incarceration was a possible consequence of the trial. Before electing to testify, Grinnage affirmed that he "underst[ood] the nature of the proceedings" against him, "assist[ed] [defense counsel] in [his] defense[,]" did not "suffer from any kind of mental health issue[,]" was not "taking any drugs, alcohol, or medication[,]" and his "head [was] clear[.]" Grinnage testified capably in his own defense, questioning why there was no evidence of Deputy Matys' alleged injuries from his head-butt and, on cross-examination, taking the position that he "shouldn't even be in trial" for assaulting Gilliam when she was not present to testify. On the second day of trial, the court commented to Grinnage that he had "conducted [him]self very professionally" and had "interacted with [defense counsel] in an appropriate manner[,]" including "taking notes and consulting with [defense counsel]."

Accordingly, we find no error on the part of the court in failing to make a competency determination.

## II.

## Closing Argument

In closing argument, defense counsel made the following remarks:

> First of all, the State indicated that when [Grinnage] was placed in handcuffs he was not under arrest. That just isn't so. . . . Whenever someone is in handcuffs, you better believe they are under arrest. . . .
>
> The State said if you recall back in their opening this is a simple case, a simple case of assault, you won't have any problem finding him guilty. As I said in our opening, none of these cases are simple. Ladies and gentlemen, when you deal with relationships, when you deal with intimate relationships, when you through [sic] a kid in the mix and maybe throw some financial issues in the mix as well, that is a very volatile, difficult situation. It is an emotional situation. This is not a simple situation at all.

In rebuttal closing, the prosecutor responded as follows:

> First, the defense mischaracterized two things that the State has said here today and yesterday. First, that [Grinnage] was not under arrest when he was handcuffed. That is not what I said, ladies and gentlemen. What I said was the arrest was not complete. . . .
>
> [Defense counsel] spoke a lot about this is not a simple case. Of course it's not simple. No court case is simple. We have juries because there are issues to be resolved. . . . It is simple in terms of the types of evidence, that's all. *The defense wants to turn these into things, the things the State said, into problems. It is all smoke and mirrors, ladies and gentlemen. They are just trying to confuse you with the things that have been said.*

(Emphasis added.)

Later in the State's rebuttal closing argument, the prosecutor discussed the standard of proof beyond a reasonable doubt:

> Lastly, proof beyond a reasonable doubt. I'm going to end with this. The jury instructions tell you it is not mathematical, there is no number that we can put on it and it is not some percentage. *It is just that you would be willing to act upon it in your ordinary life. Would you be willing to walk out of these doors and be comfortable with it to make a decision in your life? Would you be comfortable with it? That is what reasonable doubt is.* It is not all doubt or to a mathematical certainty. That is what reasonable doubt is.

(Emphasis added.)

Grinnage contends the prosecutor's remarks "denigrated defense counsel and his role at trial" and "plainly reduced the [State's] burden of proof to a simple feeling of comfort" and that "the cumulative effect" of the prosecutor's statements "deprived [him] of his right to a fair trial[.]" He acknowledges that no objections were made to these remarks and therefore this issue is not preserved for review. He asks that we engage in plain error review. The State responds that plain error review is not warranted, that the comments were permissible in any event, and, if they were not, any error was harmless.

An appellate court "[o]rdinarily . . . will not decide any other issue [aside from jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Thus, "a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). *See also Conner v. State*, 34 Md. App. 124, 135 (1976) (noting a "failure to object and to request the Court's correction [of comments by the prosecutor during closing argument] is a waiver of the contention for appellate review").

The plain error doctrine grants an appellate court the discretion to consider unpreserved issues. *Kelly v. State*, 195 Md. App. 403, 431 (2010). However, plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon," *Morris v. State*, 153 Md. App. 480, 507 (2003), reserved "'only for blockbuster [] errors.'" *Martin v. State*, 165 Md. App. 189, 196 (2005) (quoting *United States v. Moran*, 393 F.3d 1, 13 (1st Cir. 2004)) (additional citation and internal quotation

marks omitted). Un-objected to errors that are "purely technical, the product of conscious design or trial tactics or the result of bald inattention" are "inconsistent with circumstances justifying" the exercise of plain error review. *State v. Hutchinson*, 287 Md. 198, 203 (1980).

Importantly, "[o]n the question of overlooking non-preservation, the appellate discretion" is "ultimate[,]" "unfettered[,]" and "plenary." *Austin v. State*, 90 Md. App. 254, 262, 268 (1992). "'[E]ven the likelihood of reversible error is no more than a trigger for the exercise of discretion [to review for plain error] and not a necessarily dispositive factor.'" *Martin*, 165 Md. App. at 196 (quoting *Morris*, 153 Md. App. at 513). A misstatement of the reasonable doubt standard does not escape the preservation requirement in Rule 8-131(a). *Morris*, 153 Md. App. at 513–14 (explaining that a "[r]easonable [d]oubt [i]nstruction [d]oes [n]ot [e]njoy [a]ny [s]pecial [s]tatus" in regard to the "foreclosing effect of non-preservation").

We see no error, let alone plain error, in the remarks at issue in the case at bar. *State v. Rich*, 415 Md. 567, 578 (2010) (noting plain error review first and foremost requires a legal "'error or defect'") (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

"[I]n presenting closing arguments to the jury[,]" attorneys "are afforded great leeway[,]" *id.* at 429, "'allowed liberal freedom of speech[,] and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Degren v. State*, 352 Md. 400, 429-30 (1999) (additional citations and internal quotation marks

omitted). In addition, "prosecutors may address during rebuttal issues raised by the defense in its closing argument." *Id.* at 433.

Here, in the first remarks Grinnage complains about, the prosecutor clearly was responding to defense counsel's statements in closing argument chastising the prosecutor for stating that Grinnage was not under arrest when he was handcuffed and for characterizing the case as "simple." To be sure, a prosecutor may not "make remarks calculated to . . . infer that the defense counsel suborned perjury or fabricated a defense[.]" *Hunt v. State*, 321 Md. 387, 435 (1990). That was not the case here. The prosecutor's comments were not "calculated" to suggest defense counsel was lying or to undermine a theory of the defense; they were made in an effort to combat defense counsel's volunteered criticisms and mischaracterizations of the prosecutor's earlier statements to the jury and to clarify the State's position. *Cf. Reidy v. State*, 8 Md. App. 169, 171 (1969) (holding remarks of prosecutor during closing argument that the theory of self-defense proffered by the defense was "a fiction manufactured by the defense counsel" were reversible error).

With respect to the comments about reasonable doubt, Grinnage complains that the prosecutor "misstated the law as to" the "critical" standard of reasonable doubt, and allowing the statements to stand was an abuse of discretion by the court. We agree that the prosecutor's description of the standard of reasonable doubt was likely improper, as neither prosecutor nor defense counsel is "permitted to argue law" that is not in dispute, "even where the argument is 'consistent' with the court's instructions." *White v. State*,

66 Md. App. 100, 118 (1986). In particular, "'[i]nstructions on [the reasonable doubt standard] . . . cannot be the subject of debate by counsel before the jury.'" *Id.* at 120 (quoting *Montgomery v. State*, 292 Md. 84, 91 (1981)). *See Carrero-Vasquez v. State*, 210 Md. App. 504, 510-11 (2013) (holding prosecutor's remark during closing that "[i]f your gut says I think he's guilty, that's reasonable [doubt]" was "clearly improper for the simple reason that it misstates the law as to reasonable doubt").

Nevertheless, the prosecutor's misstatement of reasonable doubt does not constitute reversible error. "'Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Degren*, 352 Md. at 431 (additional citation and internal quotation marks omitted). In that vein, in *Spain v. State*, 386 Md. 145 (2005), the Court outlined "several factors" to consider in "assessing whether reversible error occurs when improper statements are made during closing argument," including "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* at 159 (citing *United States v. Melendez*, 57 F.3d 238 (2nd Cir. 1995)).

In this case, the prosecutor's remark was unlikely to have "misled or influenced" the jury. Her description of proof beyond a reasonable doubt as proof that the jury would "be comfortable . . . to make a decision in [their] life" on, although likely incorrect, was not nearly as minimizing as the prosecutor's statements in *Carrero-Vasquez*, 210 Md. App. at 510, in which the prosecutor equated "reasonable doubt" to a "gut" feeling. In

addition, the court had given the following Maryland Criminal Pattern Jury Instructions ("MPJI-CR") to the jury on the binding nature of jury instructions (MPJI-CR 2:00), what does not constitute evidence (MPJI-CR 3:00), and the proper reasonable doubt standard (MPJI-CR 2:02):

> Members of the jury, the time has come to explain to you the law that applies to this case. The instructions that I give you about the law are binding upon you. In other words, you must apply the law as I explain it to you in arriving at your verdict.
>
> * * * *
>
> Opening statements and closing arguments of lawyers are not evidence in this case. They are intended only to help you understand the evidence and apply the law.
>
> * * * *
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

In fact, MPJI-CR 3:00 was the *second* instruction given by the court that emphasized that opening statements and closing arguments are not evidence. At the outset of instructing the jury before closing argument, the court also gave the following instruction:

> Statements and arguments of counsel are not evidence. This includes opening and closing statements as well as comments made during the course of this trial. They are only intended to aid you in interpreting and evaluating the evidence on record.

Jury instructions, which Maryland courts have "long . . . presum[ed] that juries are able to follow[,]" *Spain*, 386 Md. at 160, can "be ameliorative of any prejudice that resulted from . . . improper comments" during closing argument. *Id.* at 161.

Finally, the evidence of the charges against Grinnage for which he was convicted (second degree assault against Gilliam, identity fraud, and resisting arrest) included the following: testimony and photographic evidence of Grinnage's assault on Gilliam; recorded jail calls in which Grinnage admitted that he "grabbed" Gilliam that night because she was "running her fucking mouth"; testimony of several police officers that Grinnage, while handcuffed, resisted arrest by attempting to violently break free from the officers holding him; and Grinnage's own inconsistent and contradictory testimony about the events of that evening, in which he ultimately admitted he made physical contact with Gilliam at one point, claimed not to "recall" whether he physically resisted arrest, and admitted that he provided false identification to the police. To say the least, the evidence at trial weighed heavily in the State's favor. We also note that the jury acquitted Grinnage of a charge of assault on Deputy Matys, for which no physical evidence was admitted and which Grinnage affirmatively denied in his testimony, a clear indication that the jury was not, in fact, misled by the prosecutor's misstatement of reasonable doubt to Grinnage's prejudice. Under these circumstances, any error in the prosecutor's description of the standard of reasonable doubt in closing argument was not grounds for reversal, never mind the "rare, rare" exercise of plain error review. *Morris*, 153 Md. App. at 507.

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