Circuit Court for Baltimore City
Case No. 122055018

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2151

September Term, 2022

DWAYNE YOUNG

v.

STATE OF MARYLAND

Wells, C.J.,
Beachley,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: March 29, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Dwayne Young, was convicted in the Circuit Court for Baltimore City of one count of sexual abuse of a minor, one count of second-degree rape, and one count of second-degree assault. Appellant presents the following questions for our review:

> 1. "Did the court err in denying defense counsel's request for a curative instruction?
> 2. Did the court plainly err in allowing the State to make improper statements during closing argument?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City of four counts of sexual abuse of a minor, thirteen counts of second-degree rape, and four counts of second-degree assault. The jury found appellant guilty of one count of sexual abuse of a minor, one count of second-degree rape, and one count of second-degree assault. For sentencing purposes, the court merged second-degree assault with second-degree rape. The court sentenced appellant to a term of incarceration of twenty years for sexual abuse of a minor and a term of incarceration of twenty years for second-degree rape, to be served consecutively.

This case arose from allegations that appellant abused G, a minor child of his girlfriend, C. C. and G. had lived with appellant for seven to eight years. G. testified that, starting just before she turned nine, she, her brother, C., and appellant lived in a house on Biddle Street in Baltimore City. They lived there for approximately two years. G. alleged that, during that time period, appellant sexually assaulted her more than ten times. She could not recall how many times this had happened. Shortly before G.'s eleventh birthday,

she, C., and appellant moved to a new house on Poplar Grove. G. testified that appellant sexually assaulted her more than ten times at this address.

G. testified that appellant used his "private part that's in between his legs" to "penetrate" her "private part." She testified that, at one point, he put his "private part" in her mouth. She testified that, more than five times, she saw "white stuff" that "kind of looked like lotion" come out of appellant's "private part that he urinates from." G. testified that on one occasion, appellant sexually assaulted her in the bathroom and that C. witnessed it. She testified that she and her mother never discussed it because appellant told G. he would kill her family if she told anyone.

C. testified that she was "confined" in her relationship with appellant, and that appellant was verbally abusive to her. She testified that appellant controlled her ability to go anywhere and controlled her food and sleep. She was not allowed to work. She confirmed that, on one occasion, she had walked into the bathroom to see her daughter with her underwear down around her ankles and appellant with his penis inside her daughter. C. testified that she did talk to her daughter and said that she wanted to leave to get help. C. did not feel she could leave because appellant told her that, if she tried to leave or tell the police, he would "wipe [her] and [her] family from off the face of this earth."

G. and C. both testified that G., C., and appellant took a trip to York, Pennsylvania. C. testified to escaping and fleeing to a police station in York. There was some discrepancy between witnesses as to when, precisely, this had happened in relation to the family's various changes in residence and to the incident in which C. observed appellant sexually assaulting G. C. was taken from the police station to the hospital and then to a domestic

violence shelter. G. remained at the Poplar Grove address until May of 2021 when she was taken to stay with relatives. C. did not report that G. had been sexually assaulted until September of 2021. By the time of the report, the police could locate no physical evidence corroborating the assault.

At issue in appellant's first claim of error is an incident that occurred during the redirect examination of C. The prosecutor questioned C. about her experiences in counseling since the alleged assault. C. testified as follows:

> "[PROSECUTOR:] So you said you go to counseling. Tell me about going to counseling.
>
> [C.:] I go to — I go to a couple different counselors. I go to counseling for women and and children that was abused. I go to a counselor that was — that's for special victims, just to deal with children, specifically to figure out how to deal with their emotions on how to cope with them because nobody knows that my daughter was planning on taking her life.
>
> [DEFENSE COUNSEL:] Objection.
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> [PROSECUTOR:] Okay.
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> [THE COURT:] Sustained."

At a sidebar conference, appellant requested that the court instruct the jury to disregard the testimony about suicide. Defense counsel argued that the testimony was highly prejudicial and that there was no foundation as to how the witness would have personal knowledge that her daughter was planning on killing herself. Defense counsel argued that, most likely, the testimony was based on inadmissible hearsay. The court ruled as follows:

> "Okay. Respectfully, I'm going to overrule the defense's objection to that comment. I'm not going to instruct them to disregard it as I don't believe it was Hearsay or necessarily —

> I certainly don't find it more prejudicial than the allegations against Mr. Young in the first place."

The court ended the bench conference and did not instruct the jury on the subject.

During closing arguments, the State made several remarks that are the subject of appellant's second claim of error. First, the State argued that G. and C. should be believed despite some inconsistencies in their recounting of events. The prosecutor stated, "Now, I expect the defense attorney to talk to you about inconsistencies in their statements because that's a thing defense attorneys like to do." She then explained why, in her view, these inconsistencies did not render G. or C. incredible.

Second, in rebuttal, the State sought to counteract appellant's theory that G. had told a lie to get her mother's attention and the lie got out of control. The State argued as follows:

> "And it's also not reasonable in this case to think that this was a lie that got out of control because, once again, we're all adults. We don't leave our common sense at the door. And we all live in Baltimore City. I would submit to you that each and every one of us knows that if [G.] and [C.] decided that they didn't want to prosecute [appellant] for some reason, all they'd have to do would be to get on the phone to me, and I would say, Yeah, I've got 87 other rape cases on my desk. I can deal with those.
>
> Or they didn't even have to do that. We're in Baltimore City, every adult knows that if a victim decides to short-circuit a case, they can just not show up for court. So if [G.] decided, I told a lie, I didn't want to go forward, just don't show up for court that day. Everyone knows this."

The jury found appellant guilty of one count of sexual abuse of a minor, one count of second-degree rape, and one count of second-degree assault. The trial court sentenced appellant as described above. This timely appeal followed.

II.

Appellant argues first that the court was required to instruct the jury to disregard the testimony about suicide and that failure to do so was error. Appellant argues that, once the judge had sustained his objection, an instruction to the jury that it was required to disregard the testimony was a correct statement of the law, applicable to the circumstances, and not covered by any other instructions given. While the court did give a general instruction to the jury to disregard any testimony or exhibits that the court struck, the court did not give any instructions as to how the jury should treat testimony that drew an objection that was sustained but that was not stricken from the record. Appellant argues that the error was not harmless because testimony that G. was suicidal might tend to bolster the credibility of her testimony regarding the multiple sexual assaults.

The State argues that appellant was not entitled to a curative jury instruction because the court overruled the objection correctly. The State notes that the objection was sustained initially but that, before denying the jury instruction, the court changed course and overruled the objection. The State argues that this was the proper course of action because there was no specific out-of-court statement offered and because the testimony, while damaging to appellant, was probative evidence of a change in behavior by G. that was corroborative of her testimony. Thus, the State argues, the testimony was neither hearsay nor substantially more prejudicial than probative, and the trial court should have overruled the objection. Because the objection was overruled, an instruction that the jury should disregard the evidence would not have been a correct statement of the law.

Appellant next argues that the State's comments in closing argument were improper. Appellant argues that the State's comments about defense attorneys' practice of bringing up inconsistencies impermissibly denigrated defense counsel's role in defending appellant. Appellant maintains that the prosecutor's commentary implied that defense counsel was attempting to distract the jury or waste its time. Appellant argues that the State's comment that, if G. and C. did not want to testify, they could have declined to show up at trial and had the case dismissed relied on facts not in evidence. Appellant recognizes that he did not object to either of these statements below. However, appellant argues that the cumulative effect of these statements affected his right to a fair and impartial trial.

The State argues that the issue is not preserved for appellate review and plain error review is not warranted in this case. On the merits, the State argues that a prosecutor predicting that defense counsel would point out inconsistencies does not denigrate defense counsel in any way, but rather predicts that defense counsel will do his job. The State made no comment that would suggest that defense counsel would misrepresent the inconsistencies or use them to confuse or distract the jury. Similarly, the State argues that the prosecutor's comments on G. and C.'s ability to get the case thrown out were a fair response to comments made by appellant's counsel during the defense closing:

> "Words can get out of control, and that is exactly what happened in this case. It's not easy to take back an accusation like this once it's made, no matter what the State says. Once [G.] said this happened, the police were involved. There was a forensic interview. Her whole family was told. She was swept away *in a process that could not be stopped*.
>
> ***

> But once [G.] went back with her mother's family, this allegation was made, and that was it. He was charged, indicted, on trial for crimes he did not admit because some words were spoken that were not true."

The State argues that neither comment was so clearly and obviously improper that it warrants plain error review.

III.

Under Maryland Rule 4-325(a), a circuit court shall, at the request of any party, instruct the jury as to the applicable law in a given case. The circuit court "must give a requested jury instruction where '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Cost v. State*, 417 Md. 360, 368–69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197–98 (2008)). When analyzing the trial court's decision not to give a requested instruction, we apply an abuse of discretion standard. *Carroll v. State*, 428 Md. 679, 689 (2012).

In this case, the question of whether the court should have given a curative instruction turns on whether the court sustained or overruled the objection. It goes without saying that a jury need not disregard admissible testimony. A statement that the jury must disregard testimony to which an objection was overruled is not a correct statement of the law. *Cf. Carter v. State*, 366 Md. 574, 587 (2001) (holding that the purpose of a curative instruction is to "guide the jury in its receipt of the evidence and to eliminate any confusion that irrelevant and prejudicial evidence might have caused in the minds of the jury").

We do not delve into whether the trial court's ruling on the admissibility of the testimony about suicide was correct, because appellant has not appealed that ruling or argued that the testimony was inadmissible. The fact remains that, before the court denied appellant's request for a curative instruction, the court overruled appellant's objection to the testimony. As a result, a curative instruction would have been inappropriate. We hold that the trial court did not abuse its discretion in declining to advise the jury to disregard the testimony.

IV.

We turn next to appellant's request for plain error review of the State's commentary in closing argument and rebuttal. Rule 8-131(a) dictates that appellate courts will not address claims of error which have not been raised or decided in the trial court. *Graham v. State*, 325 Md. 398, 411 (1992). The purpose of this Rule is to bring to the trial court's attention the alleged error and to give the court an opportunity to correct it. *Robson v. State*, 257 Md. App. 421, 461 (2023). Here, appellant concedes that he did not object to the State's argument but requests that we exercise our discretion to engage in plain error review.

Plain error review is appropriate when (1) there is an error or defect that has not been intentionally relinquished or abandoned, (2) the legal error is clear and obvious, (3) the error affected appellant's substantial rights, and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Newton v. State*, 455 Md. 341, 364 (2017). In Maryland, 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).

Here, we do not find a clear and obvious error in the State's comments in closing arguments. The Maryland Supreme Court held in *Spain v. State*, 386 Md. 145, 153 (2005) as follows:

> "While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined[.]"

Without such hard-and-fast limitations, it is difficult to find clear and obvious error.

Appellant points us to several cases in which Maryland courts have found error in comments denigrating the role of defense counsel and analogizes this case to those cases. *See Beads v. State*, 422 Md. 1, 8 (2011) ("I caution you that, unlike the State, the Defense's specific role in this case is to get their defendants off . . . . It's their job and they do it well, to throw up smoke, to lob a grenade, to confuse."); *Reidy v. State*, 8 Md. App. 169, 172 (1969) (comments implying defense counsel had suborned perjury); *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 n.4 (2013) ("Their job is to sling mud and let's see what sticks").

There are two key differences between the comments made in closing arguments in this case and those made in the above cases. First, in each of those cases, the appellant had raised the issue in the trial court. *Beads*, 422 Md. at 8; *Reidy*, 8 Md. App. at 171; *Carrero-*

Vasquez, 210 Md. App. at 510 n.4. Thus, we did not need to find that any of the above statements reached the high threshold of prejudice required for a plain error analysis.

Second, in each of the above-cited cases, the prosecutor asserted or implied that defense counsel's arguments were unethical or made in bad faith. Here, the statements merely noted that the defense counsel would likely raise an issue that many defense attorneys raise. There was no implication that these arguments were made to trick, confuse, mislead, or prejudice the jury. The implication was simply that they were common.

This Court has recognized this second key distinction as determinative in past cases when evaluating statements made by prosecutors in closing arguments. *Smith v. State*, 225 Md. App. 516, 529 (2015). A prosecutor may not impugn the ethics or professionalism of defense counsel. *Id.* But a prosecutor may reasonably characterize and attack the arguments made by defense counsel. *Id.* ("[T]he 'smoke and mirrors' comments were clearly directed at defense counsel's argument and did not impute any impropriety or unprofessional conduct to defense counsel."). Here, the State did nothing more than note that defense counsel had pointed out inconsistencies throughout the trial and likely would again in closing argument. The State did not accuse defense counsel of impropriety or unprofessional conduct. If there was error at all in permitting such statements, the error was not clear and obvious.

Likewise, we find no clear and obvious error in the State's comments on rebuttal. Appellant has alleged that the State relied upon facts not in the record. The State may rely on facts which are "of such general notoriety as to be matters of common knowledge." *Wilhelm v. State*, 272 Md. 404, 445 (1974) (declining to find error where the trial court

permitted the State to inform the jury that "last year, some three hundred thirty people were murdered in Baltimore City"). It is true that there are limits on what constitutes matters of common knowledge. As appellant points out, the Maryland Supreme Court has found error where prosecutors alleged in closing that the victim was "following the law of the streets" when he testified that the defendant had not committed the crime charged. *Lee v. State*, 405 Md. 148 (2008). Yet this court has not drawn a bright line that would place commentary about what it would take to drop a case on the wrong side of "common knowledge." We find no clear and obvious error.

Further, even were we to find that the State's comments on rebuttal were inappropriate, we would not exercise plain error review unless the comments affected appellant's substantial rights. Ordinarily, this means that appellant must demonstrate that the error affected the outcome of the proceedings. *Beckwitt v. State*, 477 Md. 398, 464 (2022). Yet, where a prosecutorial argument has been made "in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out thus obviating the need for a new trial," even outside the plain error context. *Lee*, 405 Md. at 163-64; *see also Spain v. State*, 386 Md. 145, 157 n.7 (2005) (noting that inappropriate bolstering of an officer's credibility based on facts not in evidence might have been appropriate in light of a "specific and direct" attack on the officer's credibility). Here, defense counsel had argued that, once G. had spoken to the police and undergone a "forensic interview," she could not stop the wheels of prosecution. The State's use of facts not in evidence regarding G.'s ability to stop the prosecution was a direct response to the defense's use of facts not in evidence about G.'s ability to stop the

prosecution. Appellant's substantial rights were not affected by the error, if indeed there was error.

We decline to exercise plain error review.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.