Circuit Court for Anne Arundel County
C-02-CR-18-002687

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2171

September Term, 2019

JONATHAN HANANI BENITEZ

v.

STATE OF MARYLAND

Graeff,
Berger,
Shaw,

JJ.

Opinion by Graeff, J.

Filed: February 1, 2022

A jury in the Circuit Court for Anne Arundel County convicted Jonathan Hanani Benitez, appellant, of two counts each of third degree sexual offense, fourth degree sexual offense, and second degree assault. The court sentenced appellant to ten years imprisonment, all but 18 months suspended, on one count of third degree sexual offense and ten years, consecutive, all suspended, on the second count. The court merged the convictions for fourth degree sexual offense and imposed two 18-month sentences, concurrent, on the two convictions for assault.

Appellant presents the following issues for our review:

1. Did the trial court err in improperly asking voir dire questions in such a manner as to shift the burden of determining bias to the individual juror?

2. Did the trial court err in allowing the prosecutor to make improper and prejudicial statements at closing argument?

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

BACKGROUND

Appellant's convictions are predicated on his inappropriate kissing and touching of V. when she was 11 years old.[1] At trial, the State presented the testimony of V., her mother, her younger brother, and her stepfather, as well as video that was recorded on the evening of the encounter and testimony from an investigating police officer.

On July 29, 2018, V. went with her family to a cousin's birthday party. Appellant, who was 21 years old, was a neighbor and guest of the hosts. During the party, V. and her mother took videos of the party to post on social media. Her mother's video, which was

[1] To protect the child's identity, we refer to her by the initial of her given name and to her family members by their relationship to her.

played for the jury, showed appellant dancing provocatively with women at the party. According to V. and her mother, appellant and his dance partners were grabbing each other's "butts" and touching stomachs.

When it got dark, V. and other children went inside the mobile home, while her parents remained outside. When V. saw appellant in the kitchen, he asked for "a hello kiss." She expected a kiss on the cheek, but he kissed her on the lips. She felt his tongue. Standing "really close" face-to-face, he also grabbed her "butt" in a manner V. demonstrated for the jury. During this encounter, he said: "I love you, mommy."

Appellant's actions made V. uncomfortable. She went to another room and appellant followed. He took her phone and added his Snapchat and Instagram account information, then "followed" her accounts.

V. was lying in bed with her younger brother and other children, and her two-year-old sister was running around. Appellant started touching and rubbing V.'s stomach under her shirt and her chest over her shirt. V. demonstrated for the jury the areas where appellant touched her, which included her breasts. Her younger brother observed appellant "touch[] her on her butt," and he testified that he became "uncomfortable" seeing appellant touching his "sister in a way that's inappropriate."

When appellant left the room to take a phone call, V. immediately went outside to find her mother. Her mother, seeing that V. was upset, scared and crying, asked what was wrong. V. replied that appellant touched her. She said that appellant "touched her chest, grabbed her butt, and touched her belly, and then he tried to kiss her in her mouth with his tongue."

V. and her mother went inside and found appellant talking to V.'s stepfather. Denying that he did anything, appellant said: "[Y]ou could kill me or you could hit me."

V. and her family left the party. On the way home, her mother reported the incident to the police. V. spoke to a police officer about what happened.

The jury rejected appellant's defense that the incidents recounted by V. did not happen, but V. fabricated "false accusations" based on the provocative dancing she had witnessed, in an "attention-seeking" effort to persuade her mother to leave the party. The jury convicted appellant of third degree sex offense for "squeezing her buttocks," third degree sex offense for "fondling her breasts," fourth degree sex offense for "squeezing her buttocks," fourth degree sex offense for "fondling her breasts," second degree assault for "rubbing her stomach," and second degree assault for "kissing her and forcing his tongue onto her mouth."

This timely appeal followed.

DISCUSSION

I.

Voir Dire

Appellant contends that the circuit court erred in asking two voir dire questions during jury selection. The two questions were as follows:

> Is there any member of the jury panel who has strong feelings . . . about the accusations that a young child has been exposed to sexual conduct such that you cannot presume [appellant] innocent?
>
> Last question, has any member of the prospective jury panel ever had anything happen to you or an immediate family member which would

> prevent you from returning a fair and impartial verdict under any circumstances in this case?

Appellant argues that these questions were improper because they "permitted prospective jurors to self-assess their ability to be fair and impartial, despite having potentially disqualifying strong feelings, attitudes, or experiences." Recognizing that defense counsel below did not object to either of these questions, he asks this Court to review this contention under the doctrine of plain error.

The State urges this Court to deny the request for plain error review. It asserts that appellant waived this claim of error because: (1) one of the voir dire questions asked was "verbatim" to one "appellant included in his proposed voir dire"; and (2) at the conclusion of jury selection, counsel stated that he was satisfied with the jury empaneled. Finally, the State argues that, "in light of the trial court's other questions to the prospective jurors and its instructions, [appellant] has failed to demonstrate that the complained-of inquir[i]es affected the outcome of the trial."

"Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance." *Dingle v. State*, 361 Md. 1, 9 (2000) (internal citations omitted). This Court "review[s] the trial judge's rulings on the record of the voir dire process as a whole for an abuse of discretion, that is, questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Washington v. State*, 425 Md. 306, 314 (2012).

As appellant notes, the Court of Appeals has held that asking compound questions, where the court asks about a certain experience or association and then asks in the same question whether that would affect a juror's right to be fair and impartial, is an abuse of discretion. *Dingle*, 361 Md. at 21. The Court explained that it was for the trial court, not the prospective juror, to "decide whether, and when, cause for disqualification exists for any particular venire person." *Id*. at 14–15. In *Pearson v. State*, 437 Md. 350, 363–64 (2014), the Court held that use of compound questions when asking required "strong feelings" voir dire questions is improper. *Accord Collins v. State*, 463 Md. 372, 379 (2019) (a "strong-feelings" question is improper when asked in a compound form that allows the individual panel members to determine whether their "strong feelings" about the charges in that case would make it "'difficult for you to fairly and impartially weigh the facts'").

In this case, however, appellant acknowledges that he did not object to the court's voir dire questions. This Court ordinarily will not review an issue unless it has been raised in or decided by the trial court. Md. Rule 8-131(a). Although we have discretion to review unpreserved issues, "appellate courts should rarely exercise" such discretion because

> considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007). *Accord Ray v. State*, 435 Md. 1, 23 (2013).

Recognizing this, appellant requests that we review the contention under the doctrine of plain error review. Plain error review involves four steps:

> "(1) there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the [trial] court proceedings'"; and (4) the error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."

Newton v. State, 455 Md. 341, 364 (2017) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)), *cert. denied*, 138 S. Ct. 665 (2018).

Plain error review is within this Court's discretion, *Kelly v.* State, 195 Md. App. 403, 433 (2010), *cert. denied*, 563 U.S. 947 (2011), and it is "a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). We decline to exercise our discretion to engage in plain error review in this case. Not only did appellant not object to the voir dire questions asked, but he submitted to the court proposed voir dire that included the exact question that he now contends was error.[2] Moreover,

[2] Counsel for appellant's proposed voir dire included the following question:

> 25(a). "[i]s there any member of the jury panel who has strong feelings about the accusation that a young child has been exposed to sexual contact such that you cannot presume Mr. Benitez innocent?"

The voir dire question to which he now objects was as follows:

> Is there any member of the jury panel who has strong feelings -- I always hate the way this question is worded, but strong feeling about the accusations

(continued . . .)

counsel then accepted the empaneled jury without objection. *State v. Stringfellow*, 425 Md. 461, 469, 471–72 (2012) (holding that defense counsel's unqualified acceptance of empaneled jury waived complaints aimed at inclusion or exclusion of prospective jurors).

Moreover, the court repeatedly stressed that the jury needed to decide the case fairly and impartially, asking each juror if they could do this in voir dire and subsequently instructing the jury at the end of the trial that it must do this. The record does not suggest that the jury did not follow those instructions, and therefore, we are not persuaded that the challenged voir dire questions "'affected the appellant's substantial rights'" in a manner that "'seriously affect[ed]'" both "'the outcome of'" his trial and "'the fairness, integrity or public reputation of judicial proceedings.'" *Newton*, 455 Md. at 364. Under these circumstances, we will not exercise our discretion to engage in plain error review.

II.

Closing Argument

Appellant next contends that "the trial court erred in allowing the prosecutor to make improper and prejudicial comments at closing argument." The comments at issue occurred during rebuttal closing, as follows:

> [PROSECUTOR]: Something very real and scary happened to her and you know what? The reason why I cannot provide you with video cameras and I cannot give you DNA evidence and that Law and Order SVU stuff is because the way these crimes are committed it's not in public.

> that a young child has been exposed to sexual conduct such that you cannot presume Mr. Benitez innocent?

> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: They are not on video because the person takes their opportunity and they take their chance when they have that split second that they can get away with it.

Appellant argues that these comments "were misleading and had no basis in any evidence admitted at trial." He asserts that it was improper for the prosecutor to explain the lack of physical evidence by arguing that forensic evidence was not available in sexual assault cases because the actions are not committed in public.

Trial courts give attorneys "great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[,]" and in doing so, to "discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Wilhelm v. State*, 272 Md. 404, 412-13 (1974), *abrogated on other grounds by Simpson v. State*, 442 Md. 446 (2015).

Nevertheless, among the recognized limits on closing argument is the principle that it is improper for counsel to "'comment upon facts not in evidence or . . . state what he or she would have proven.'" *Mitchell v. State*, 408 Md. 368, 381 (2009) (quoting *Smith v. State*, 388 Md. 468, 488 (2005)). Likewise, "[i]t is improper for counsel to appeal to the prejudices or passions of the jurors, or invite jurors to abandon the objectivity that their oaths require." *Id*. (internal citations omitted). "What exceeds the limits of permissible

comment or argument by counsel depends on the facts of each case." *Smith*, 388 Md. at 488. Consequently, we evaluate both the propriety and the impact of prosecutorial argument "contextually, on a case-by-case basis." *Mitchell*, 408 Md. at 381.

Moreover, not every improper remark requires reversal. *Shelton v. State*, 207 Md. App. 363, 386 (2012). The "'determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court.'" *Id*. (quoting *Degren*, 352 Md. at 430–31). This Court will not reverse a conviction based on a prosecutor's improper statement unless it "actually misled or [was] likely to [] misle[a]d the jury to the defendant's prejudice." *Wise v. State*, 132 Md. App. 127, 142, *cert. denied*, 360 Md. 276 (2000).

We agree with the State that the circuit court did not abuse its discretion in overruling the objection to the prosecutor's comment in rebuttal argument because it was a fair response to defense counsel's closing argument. During the defense's argument, counsel stated that inconsistencies in V.'s testimony so undermined her credibility that the State should be required to present more evidence than "just" her accusations. Defense counsel noted that the State did not present "[p]hysical evidence that is unbiased," conclusive, and independent, such as the "Snapchat information" that appellant allegedly programmed into V.'s phone. Defense counsel argued that, to be convicted of a serious sexual offense, there "needs something more than just an accusation," but independent corroborating evidence "didn't exist. Because this never happened."

In rebuttal, the prosecutor pointed out that the State "cannot provide you with video cameras" or "DNA evidence and that Law and Order SVU stuff" because of "the way these

crimes are committed" outside of public view. That was fair response to the defense argument regarding the lack of independent corroborating evidence.

We discern nothing "misleading" about the State's explanation for why its case was not predicated on physical or forensic evidence. As the Court of Appeals has noted, "child sexual abusers do not usually commit their crimes in the view of others." *Vigna v. State*, 470 Md. 418, 445 (2020), *cert. denied*, 141 S. Ct. 1690 (2021). The prosecutor acknowledged the absence of video recordings and DNA, and his reference to "that Law and Order SVU stuff" was merely permissible rhetorical flourish. Under the circumstances of this case, we cannot conclude that the circuit court abused its discretion in overruling the defense objection.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.