Circuit Court for Wicomico County
Case No. C-22-CR-19-000488

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2490

September Term, 2019

JOSEPH TOWNSEND

v.

STATE OF MARYLAND

Fader, C.J.,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December 28, 2021

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Joseph Townsend was convicted in the Circuit Court for Wicomico County of sexual offenses—two counts of sexual abuse of a minor, household member and three counts of third-degree sexual offense—that he committed against his girlfriend's daughters. On appeal, he argues the circuit court erred in permitting the State to introduce into evidence a journal entry over a hearsay objection and in permitting the State to make prejudicial remarks during rebuttal closing argument. We affirm.

I. BACKGROUND

Mr. Townsend and Ms. G ("Mother") began dating in 2012. That same year, Mr. Townsend moved in with Mother and her children, including the two victims in this case, R and I.[1] On June 9, 2019, while Mr. Townsend was in Louisiana for work, R told Mother that she had been abused by him. Mother testified that on that day, R had a meltdown when Mother asked her to do some chores around the house:

> I'm asking them to, you know, get their chores together, because I had to go to work.
>
> [R] began to have like this meltdown over just not -- I don't know, she just wasn't herself. And this was a continuous thing, whenever you tried to just discipline her about what she's not doing.
>
> So she is having this manic moment, crying, weeping, and like I said, it wasn't the first time. . . .
>
> I'm like it's really not that big of a deal. Don't do it. You know, I got to go to work. I got to put the baby to bed. And then I just looked at her, and I said, [R], if you don't like the way things are, if you want change, you have to be the one to make the change.

[1] To protect their privacy, we refer to both victims by initials that distinguish them.

Some time later, R went into Mother's room and handed Mother her journal. When R left the room, Mother began to read it. On the first few pages, R wrote about "normal teenage stuff," but as Mother read further, she became alarmed:

> Then I flip it again, and I only got as far as the one sentence, and it just -- how do I tell my mom my stepdad is having sex in my butt? In so many words.
>
> So I closed the book. I put the baby down. I went to the door, and she was already at the door, but she was crying.

Mother went to R's room and asked her if the allegations were true. When R answered affirmatively, Mother called the police to make a report. Mother then asked I whether Mr. Townsend had ever sexually abused her, and I answered "yeah." R and I were interviewed by the Child Advocacy Center the next day.

On August 5, 2019, Mr. Townsend was indicted on twenty-five counts of sexual abuse of a minor and related offenses. The State *nol prossed* two counts and the circuit court granted Mr. Townsend's motion for judgment of acquittal on fourteen others. During trial, the State asked Mother about her experience reading R's journal. The State presented her with State's Exhibit 4, a copy of the journal page where R disclosed the abuse. Mother identified State's Exhibit 4 as the journal entry she read on June 9, 2019. The exhibit, *verbatim* and in its entirety, reads:

> Dear Diary
>
> How do you tell your mom that you are being molassed by your stepfather. I want to tell her but shes goig throw so much that it might brake her or joe would do [not legible] tarrable. I just don't know what to do. This been happenin for three years. I so tire of hidding this. I just want it to stop.

> God please make it stop!
>
> I want too die

The defense objected to the substance of the page:

> [THE STATE]: Let me show you what has been marked as State's Exhibit Number 4.
>
> Do you recognize that Xerox copy?
>
> [MOTHER]: I do.
>
> [THE STATE]: What is State's Exhibit Number 4?
>
> [MOTHER]: That is [R] saying how does she tell me that her stepfather --
>
> [COUNSEL FOR MR. TOWNSEND]: Objection.
>
> [THE COURT]: Hold on.
>
> [COUNSEL FOR MR. TOWNSEND]: As to the substance, Your Honor.
>
> [THE COURT]: Yes.
>
> Sustained.
>
> [THE STATE]: Okay.
>
> [Mother], just looking at State's Exhibit Number 4, do you recognize that document?
>
> [MOTHER]: I do.
>
> [THE STATE]: Is that document what you've testified to before, the page that you read?
>
> [MOTHER]: Absolutely.

R identified State's Exhibit 4 as the journal entry that she gave Mother her journal "[t]o tell her about me getting abused." R acknowledged she was the author of that journal entry and wrote it a few months before June 9, 2019:

> [THE STATE]: Did you write that page?
>
> [R]: Yes.
>
> [THE STATE]: Okay.

> How long ago had you written that page before you gave it to your mother, if you know?
>
> [R]: It was a couple of months before I told her.
>
> [THE STATE]: Okay.
>
> And then when you gave your mom the book, how long was it before she came and talked to you about what was in the book?
>
> [R]: A couple of minutes.
>
> [THE STATE]: Okay.
>
> And did she ask you -- I think, did she ask you if it was true?
>
> [R]: Yes.
>
> [THE STATE]: And what did you say?
>
> [R]: I said yes.
>
> [THE STATE]: Then what happened?
>
> [R]: She called the police.

When Detective Rockwell testified on behalf of the State, the State moved to admit the entire journal into evidence, marked as State's Exhibit 5, along with State's Exhibit 4:

> [THE STATE]: Beginning with State's Exhibit Number 5, do you recognize what is contained in State's Exhibit Number 5?
>
> [DETECTIVE ROCKWELL]: This was the journal brought to us by -- or I recovered this journal from [Mother].
>
> * * *
>
> [THE STATE]: Do you recognize State's Exhibit Number 4?
>
> [DEPUTY ROCKWELL]: Yes.
>
> It's a photocopy I made from the inside of [R's] journal.
>
> * * *
>
> [THE STATE]: I move for the admission of State's Exhibit Number 4.
>
> [THE COURT]: It's the page, the photocopied page.
>
> [COUNSEL FOR MR. TOWNSEND]: May we approach, your Honor?
>
> [THE COURT]: You may.

[COUNSEL FOR MR. TOWNSEND]: My -- well, the photocopy of the page is very difficult to read. The primary reason I think that's important is that the date is not legible at all in the photo-copy. It is legible in the journal, itself.

I mean, I think, generally, what is written into the journal is hearsay, so I will object on those grounds.

But I also think that if the Court is going to admit it, that either a better copy be -- should be admitted, that where you can read everything that's on it or the page, itself, in the book, or something that would allow it to be legible for the entire pages.

So that's, I guess, both concerns that I have.

[THE STATE]: Is that as far as the diary and the page?

[COUNSEL FOR MR. TOWNSEND]: Uh-huh.

Okay.

Well --

[THE STATE]: Because I will move the diary and leave the page out, if that's possible.

[COUNSEL FOR MR. TOWNSEND]: Or --

[THE STATE]: If the page is still in the diary --

[COUNSEL FOR MR. TOWNSEND]: Uh-huh.

[THE STATE]: -- then I would just move the diary.

[THE COURT]: Well, I mean, that's the question.

Were you intending to move the diary in?

[THE STATE]: I'll switch it up. I'll move the diary in --

[THE COURT]: Well --

[THE STATE]: -- as State's 5 and I'll leave the page out.

[THE COURT]: Hold on.

* * *

[COUNSEL FOR MR. TOWNSEND]: I'm still going to object that it's hearsay.

[THE COURT]: Well, I'm assuming you don't want the whole diary in.

* * *

> [COUNSEL FOR MR. TOWNSEND]: I haven't seen the entire diary, so -- I certainly don't want a bunch of -- I briefly looked at it this morning.
>
> [THE STATE]: Okay.
>
> [COUNSEL FOR MR. TOWNSEND]: I just want that if the Court's going to allow it in that it be completely legible.
>
> So I don't know if it's possible to get a better copy or if it's possible to just remove that page from the diary[.]
>
> * * *
>
> But I will object on hearsay grounds. But to the extent it comes i[n], I would love like to be completely legible.

The court admitted State's Exhibit 4 into evidence, but did not admit the physical journal itself, State's Exhibit 5.

On cross-examination, Detective Rockwell testified Mother gave him R or I's clothing as "possible evidence," but never sent the clothes off for testing. He also acknowledged that in his interview with Mr. Townsend, Detective Rockwell told Mr. Townsend the clothing would be tested:

> [COUNSEL FOR MR. TOWNSEND]: Going back to the items that were taken out of the home, while speaking with Mr. Townsend, you advised him that you had taken several items out of the home, correct?
>
> [DETECTIVE ROCKWELL]: Yes.
>
> [COUNSEL FOR MR. TOWNSEND]: You advised him those items would be sent to the lab?
>
> [DETECTIVE ROCKWELL]: Yes.

During the defense's closing argument, counsel for Mr. Townsend used this testimony to comment on the missing evidence:

> [Detective Rockwell] said he believed there was some clothing collected. He told Mr. Townsend that was going to be

> tested. . . . It was never tested. No one sent it to the lab. No one tried to confirm whether that contained evidence that would be consistent with what the girls were saying, whether his semen was on their clothing. I assume, that was the idea behind collecting their clothing, is there something of his body material, his bodily fluid on something . . .

During rebuttal closing argument, the State responded to the defense's comments on the lack of testing:

> [Defense counsel] talks about collecting clothing. There was no testimony of what was collected. It was something that was given to law enforcement. You don't know what that is. I don't think you should consider that. Why is that? You don't know what it is and you're living in a house with multiple women and the defendant and the girls? Was the DNA -- who knows? It wasn't tested. It's not testimony. It's not evidence for your consideration.

Defense counsel made no objections to the State's remarks during rebuttal.

On December 18, 2019, a jury found Mr. Townsend guilty of five counts: one count of sexual abuse of a minor-household member and one count of third-degree sex offense against R; and one count of sexual abuse of a minor-household member and two counts of third-degree sex offense against I. The court sentenced Mr. Townsend to a collective term of forty years, followed by five years of supervised probation. We provide additional facts as relevant below.

II. DISCUSSION

On appeal, Mr. Townsend raises two questions that we have rephrased.[2] He

[2] Mr. Townsend phrased his Questions Presented as follows:

> 1. Did the trial court err when it permitted the State to introduce into evidence an entry from [R's] journal over a

contends *first* that the trial court improperly admitted R's journal entry under Maryland Rule 5.802.1(d). *Second*, he argues the trial court committed plain error when it allowed the State to make improper remarks during rebuttal closing argument.

"We review *de novo* the circuit court's determination of whether evidence is admissible under a hearsay exception." *Vigna v. State*, 241 Md. App. 704, 729 (*citing Gordon v. State*, 431 Md. 527, 538 (2013)), *aff'd*, 470 Md. 418 (2020). Whether hearsay evidence was properly admitted under a hearsay exception is also reviewed *de novo*. *Muhammad v. State*, 223 Md. App. 255, 265–66 (2015) (*citing Bernadyn v. State*, 390 Md. 1, 7–8 (2005)). "We review a trial court's allowance of allegedly improper remarks by a prosecutor under an abuse of discretion standard." *Pietruszewski v. State*, 245 Md. App. 292, 318 (2020).

A. Although State's Exhibit 4 May Have Exceeded The Scope Of The Prompt Complaint Exception, This Evidence Was Cumulative And Harmless Beyond A Reasonable Doubt.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and generally is inadmissible. *See* Md. Rules 5-801, 5-802. A hearsay statement may be

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hearsay objection?

2. Did the trial court commit plain error when it permitted the prosecutor to make improper and prejudicial comments during his rebuttal closing argument?

The State phrased its Questions Presented as follows:

1. Did the trial court properly exercise discretion in admitting into evidence an entry from the older daughter's diary?
2. Should this Court decline to exercise plain error review of remarks made by the prosecutor during rebuttal argument?

admitted, however, if it falls within one of the recognized exceptions. One category of exceptions is prior statements by witnesses. If a witness testifies at trial and is subject to cross-examination, their previous "statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony" may be admitted. Md. Rule 5-802.1(d). For purposes of brevity, we'll refer to this as the prompt complaint exception.

The purpose of the prompt complaint exception is to allow the State "to offer 'some corroboration' of the victim's testimony." *Muhammad*, 223 Md. App. at 268 (*quoting Parker v. State*, 156 Md. App. 252, 267 (2004)). Hearsay admitted under this exception is subject to limitations, including "'the timeliness of the complaint'" and "'the extent to which the reference may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail.'" *Id*. at 269 (*quoting Nelson v. State*, 137 Md. App. 402, 411 (2001)). But "narrative details about the complaint are not admissible." *Id.* at 268. Only the basics of the complaint, "the time, date, crime, and identity of the perpetrator" are admissible. *Id.*

Mr. Townsend contends the trial court erred in admitting R's journal entry because it was hearsay and fell outside the scope of the prompt complaint exception. And everyone agrees, as do we, that State's Exhibit 4 is hearsay. The issue is whether the entry was admissible under the prompt complaint exception.[3] Mr. Townsend agrees the journal entry

[3] The State also argues the journal entry was admissible under Maryland Rule 5-

was timely, but argues it was not "'restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit.'" *Muhammad*, 223 Md. App. at 269 (*quoting Nelson*, 137 Md. App. at 411). He concedes that the portion asking "How do you tell your mom that you are being molassed by your stepfather" was admissible under the prompt complaint exception, but argues that the rest of the entry fell outside the scope of the exception. The State argues the entirety of the journal entry falls within the scope of the prompt complaint exception because the remaining portions "were fairly limited in detail." In support of its argument, the State distinguishes *Muhammad*.

In *Muhammad*, we held that the details of a victim's statement to a detective were inadmissible under the prompt complaint exception because the detective's "testimony was not limited to the circumstances in which [victim] made her complaint of sexual assault to him or that [victim] had identified the appellant as the perpetrator and given the location, date, and time of the assault." 223 Md. App. at 271. In concluding the detective's testimony exceeded the scope of the prompt complaint exception, the Court focused on the amount of information the victim had provided to the detective:

> Detective Bell recited [the victim's] "substantive description of the assault." He testified that [the victim] told him that the appellant emerged from some bushes and approached her; that he identified himself as a member of BGF; that he put her in a "sleeper hold"; that he forced her into a vacant house; that he told her to "suck his dick"; that she tried to escape by biting his penis; that he beat her around the head; that she defended

802.1(b) as a statement "offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive." Our resolution of the prompt complaint question, particularly our conclusion that any error in admitting it is harmless, obviates any need to address this contention.

> herself by scratching his face; that he pushed her to the ground and beat her more; and that she could not recall anything beyond that point in time until she woke up at Shock Trauma. These details corroborated much more than [the victim's] testimony that she was sexually assaulted by the appellant in a vacant row house on the afternoon of July 12, 2012. Indeed, they corroborated [the victim's] entire narrative of events, from the moment she encountered the appellant on the street to the moment she awoke at Shock Trauma. Detective Bell's testimony about his interview with [the victim] exceeded the bounds of a prompt complaint of sexual assault.

Id. at 271.

R's journal entry disclosing the abuse did not describe the "entire narrative of events" as Detective Bell did in *Muhammad*. *Id.* We agree with Mr. Townsend that certain segments of State's Exhibit 4, including "I want to tell her but shes goig throw so much that it might brake her" and "I want too die" arguably go beyond the scope of the prompt complaint exception because these portions have nothing to do with the time, date, crime, and identity of the perpetrator. But assuming, without deciding, that the trial court erred in admitting State's Exhibit 4 in its entirety under Md. Rule 5-802.1(d), we hold nevertheless that this error was harmless because the remainder of State's Exhibit 4 was merely cumulative of other evidence presented at trial.

For an error to be harmless, "we must be able to declare, beyond a reasonable doubt, that the error in no way influenced the verdict." *Collins v. State*, 373 Md. 130, 148 (2003). In analyzing whether an error was harmless, we must consider whether the evidence was cumulative. "Evidence is cumulative when, beyond a reasonable doubt, we are convinced that 'there was sufficient evidence, independent of the [evidence] complained of, to

support'" a conviction. *Dove v. State*, 415 Md. 727, 743–44 (2010) (*quoting Richardson v. State*, 7 Md. App. 334, 343 (1969)). "[C]umulative evidence tends to prove the same point as other evidence presented during the trial." *Id.* at 744. "The essence of this test" is determining "whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976).

Applying that test here, we find any error harmless beyond a reasonable doubt. To recall, R wrote in her journal she wanted to tell her mom what was happening, but didn't know how and feared upsetting her or retaliation from Mr. Townsend; that the abuse had been happening for three years; that she was tired of hiding the abuse and wanted it to stop; and that she wanted to die. *First*, R testified on direct examination that she did not tell Mother because she was scared that Mr. Townsend would hurt her and her family:

> [THE STATE]: Did you ever tell your mother about this going on?
>
> [R]: No.
>
> [THE STATE]: Why not?
>
> [R]: Because I was scared.
>
> [THE STATE]: Why were you scared?
>
> [R]: Because [Mr. Townsend] threatened me.
>
> * * *
>
> [THE STATE]: Can you tell me how he threatened you?
>
> [R]: He said he would hurt my family if I said a word.

Similarly, I testified she also wanted to tell her mom but did not know how:

> [THE STATE]: Did you ever tell your mother about him touching your or making you feel uncomfortable?
>
> [I]: No.
>
> [THE STATE]: Why not?
>
> [I]: Because it would ruin our future, I guess. I don't know.
>
> [THE STATE]: Can you explain that to me?
>
> [I]: His financial check, I guess, his money comes in.
>
> [THE STATE]: Okay.
>
> Was that a concern of yours?
>
> [I]: Yes.
>
> [THE STATE]: Why?
>
> [I]: Because how else are we supposed to live? My mom did not have a job.

I also testified she feared Mr. Townsend.

Second, R testified Mr. Townsend had been sexually abusing her for three years. *Third*, R testified, albeit indirectly, that she wanted Mr. Townsend to stop abusing her. For example, one time R kicked Mr. Townsend when he attempted to insert his penis into her vagina. She told the State that testifying made her "[v]ery upset . . . [b]ecause no child should go through what I've been through." R gave Mother the journal so that she would no longer have to hide the abuse. It's true that R didn't testify at trial that she wanted to die because of the abuse. It also is true, however, that redacting this one line of State's Exhibit 4 before giving it to the jury would not negate the cumulativeness of the rest of the entry.

The cumulative effect of the victims' testimony, admitted without objection, outweighs the prejudicial nature of State's Exhibit 4, and there is no reasonable possibility that the jury's decision would have been different had State's Exhibit 4 been excluded. To

the extent, then, that the circuit court erred in admitting State's Exhibit 4 in its entirety, that error was harmless because it was cumulative of other testimony that came in without objection.

B. The State Did Not Make Improper And Prejudicial Remarks During Rebuttal Closing Argument And We Decline To Exercise Plain Error Review.

Mr. Townsend also argues the trial court committed plain error by permitting the State to "make improper and prejudicial remarks in [] rebuttal closing argument." He asks for plain error review because this issue was not preserved for appeal—defense counsel failed to object during trial. We normally don't address issues that were not preserved for appeal, but we have the discretion to exercise plain error review:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived . . . over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issues unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Md. Rule 8-131(a). The authority to decide issues not raised in the trial court is "solely within the court's discretion and is in no way mandatory." *Conyers v. State*, 354 Md. 132, 148 (1999) (*citing State v. Bell*, 334 Md. 178, 187–88 (1994)). In the criminal context, we reserve plain error review only for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980).

Mr. Townsend acknowledges this issue is not preserved but asks us to exercise plain

error review because "the [trial] court's failure to correct the [State's] argument affected Mr. Townsend's right to a fair and impartial trial." But we decline to exercise our discretion to undertake plain error review here because it's far from plain that the trial court erred at all.

Trial courts are "in the best position to evaluate the propriety of a closing argument," and we only disturb their rulings when "there is a clear abuse of discretion." *Ingram v. State*, 427 Md. 717, 726 (2012). In addition, parties "are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted). "Despite the wide latitude afforded attorneys in closing arguments," however, "there are limits in place to protect a defendant's right to a fair trial." *Id.* at 430. Even if the State's remarks during rebuttal closing argument were improper, we reverse only "'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.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (*quoting Spain v. State*, 386 Md. 145, 158–59 (2005)).

Mr. Townsend acknowledges this wide leeway, but contends that the State "exceeded the bounds of permissible argument by telling jurors that they could not consider the lack of forensic evidence in the case, which constituted a gross misstatement of the law." The State responds by arguing that "[p]rinciples of fairness" allow the State "to respond to issues raised in defense counsel's closing argument."

Defense counsel was permitted to comment on Detective Rockwell's failure to test the clothing collected from Mother because "[i]f the State fails to produce evidence that is

reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence" during closing argument. *Patterson v. State*, 356 Md. 677, 682 (1999). By so commenting, however, defense opened the door for the State to respond during rebuttal closing argument.

"The 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." *Mitchell v. State*, 408 Md. 368, 388 (2009) (*quoting Conyers v. State*, 345 Md. 525, 545 (1997)). In *Pickett v. State*, defense counsel made comments during closing argument about the State's failure to test forensic evidence. 222 Md. App. 322, 336 (2015). During rebuttal closing argument, the State responded by telling the jury that Mr. Pickett's comments were "a red herring and we're asking you to focus on the evidence that we have given you." *Id.* at 337. This Court reasoned the State's argument was appropriate because "it was merely a response to appellant's counsel's argument regarding forensic evidence." *Id.*

Here, defense counsel commented on Detective Rockwell's failure to test the evidence collected from the house that "[n]o one sent it to the lab. No one tried to confirm whether that contained evidence that would be consistent with what the girls were saying, whether his semen was on their clothing." In its rebuttal closing, the State asked the jury not to take into consideration the lack of forensic testing and to focus only on evidence presented during trial. These remarks functioned as a reminder to the jury that defense counsel's comments were not in evidence, not as a comment on the law of evidence or

what the jury was allowed to consider.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY COSTS.