UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1187

September Term, 2015

ADAN CORDON

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed

JJ.

Opinion by Reed, J.

Filed: March 13, 2017

The appellant, Adan Cordon, was convicted of sexual abuse of a minor, two counts of third degree sex offense, and one count of fourth degree sex offense following a two day bench trial in the Circuit Court for Montgomery County on November 3 and November 5, 2014. On June 3, 2015, the appellant was sentenced to 25 years of incarceration, with all but 15 years suspended, for sexual abuse of a minor, 10 concurrent years for each count of third degree sex offense, 1 year for fourth degree sex offense, and five years' probation. (T132.11-13). On appeal, the appellant presents us with a single issue:

1. Did the trial court commit plain error in permitting the prosecutor to make improper closing argument?

For the following reasons, we answer this question in the negative. Therefore, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2014, the Honorable Steven G. Salant found the appellant guilty of sexual abuse of a minor, two counts of third degree sex offense, and one count of fourth degree sex offense in connection with an incident that occurred on November 13, 2013, involving his fourteen year old daughter, I.C. During trial, the State called four witnesses. The first witness was I.C., who testified as to what allegedly occurred on November 13, 2013. The second witness was a friend of I.C. who testified that on November 19, 2013, I.C. confided in her about the incident. The third witness was the brother of I.C., Irving Gomez. The fourth and final witness for the State was Detective Karen Carvajal of the Montgomery County Police Department, who interrogated the appellant on November 19,

2013. The State later recalled I.C. as a witness to introduce a phone call between her and the appellant that was recorded by police.

The appellant filed a timely appeal on June 19, 2015, asking this court to exercise plain-error review and reverse his convictions. He asks us to consider whether the trial court committed plain error by permitting the following comment during the State's rebuttal closing argument: "What human being, let alone what father, would be volunteering specific information about this horrific act that they perpetrated on their own daughter? A monster. Somebody who isn't worried about consequences might do that. But certainly not this defendant." At the time this statement was made, defense counsel for the appellant did not make an objection.

Although the appellant's appeal was timely, he failed to provide required transcripts pursuant to Maryland Rules 8-411 and 8-413. Therefore, on December 7, 2015, this Court ordered that the appellant had 30 days to show cause in writing why the appeal should not be dismissed pursuant to Maryland Rule 8-602(a)(6). The appellant filed a response to the show cause order, as well as a motion to correct the record, on December 11, 2015. On January 8, 2016, this Court deemed the show cause order satisfactory and ordered the clerk of the Circuit Court for Montgomery County to transmit the transcripts.

DISCUSSION

A. Parties' Contentions

The Appellant contends the trial court abused its discretion in allowing the prosecutor to argue in closing that he was worse than a "monster." The appellant

acknowledges that defense counsel did not object at the time the comments were made. He also acknowledges that his was a bench trial. Nonetheless, he argues that because of the egregiousness of the comments, this Court should exercise plain-error review of an otherwise unpreserved issue and reverse his convictions. In support of this argument, appellant cites Maryland Rule 8-131(a), along with several cases which include *Christian v. State*, 405 Md. 306 (2008), and *Moosavi v. State*, 355 Md. 651, 661-62 (1999).

The appellant also argues that the test articulated in *Lawson v. State*, 389 Md. 570, 592-93 (2005), requires reversal of his convictions. He asserts that under the *Lawson* test, the prosecutor's comment about him being worse than a monster was improper because it only served to inflame the passions of the judge. The appellant recognizes that *Lawson*, as well as the analogous case of *Walker v. State*, 121 Md. App. 364, 380-81 (1998), involved a jury trial, whereas the present case originated with a bench trial. However, he contends that *Lawson* and *Walker* still apply due to the similarity between the comments made in those cases and the one uttered in the case at bar. *See Lawson*, 389 Md. at 596-99 (where the Court of Appeals found reversible error when the prosecutor implied that the defendant was a "monster."); *Walker*, 121 Md. App. at 374-82 (where this Court found reversible error when the prosecutor referred to the defendant as an "animal" and a "pervert."). According to the appellant, the impropriety of the comment, combined with the fact that the trial court did not take any curative measures to minimize the impact of the comment and the lack of overwhelming evidence against him, requires reversal of his convictions pursuant to *Lawson*.

The State argues that we should decline to review for plain error a comment made by the prosecutor during closing argument at a bench trial. The State contends that the appellant has failed to establish error, much less plain error. Moreover, citing several cases which include *Morris v. State*, 153 Md. App. 480, 507 (2003), and *Austin v. State*, 90 Md. App. 254, 264 (1992), the State asserts that plain error review is rarely employed and reserved for errors that are beyond prejudicial.

The State argues that the appellant is attempting to improperly shift the burden of proof by arguing that because the alleged error was not harmless this Court should engage in plain error review. The State asserts that it is not its burden to show harmlessness, but rather the appellant's burden to demonstrate the existence of plain error.

Next, the State contends that where, as in this case, a prosecutor makes an allegedly inflammatory comment during closing arguments in a bench trial, the comment cannot be the basis for reversal. The State contends that the cases upon which the appellant relies make it clear that an improper closing argument constitutes plain error only where there is a risk that the jury, not the judge, will be unfairly prejudiced.

Furthermore, the State asserts that the prosecutor did not argue, as the appellant contends, that he was "worse than a 'monster.'" Instead, according to the State, the prosecutor simply stated that only a monster would, as the appellant did during a videotaped interview with police, provide details about his sexual abuse of his daughter. Thus, because the prosecutor was not directly calling the appellant a monster, the State contends that *Lawson* and *Walker* do not apply.

Finally, the State argues that even if we were to assume that an improper comment during closing argument at a bench trial is ground for reversal and that the prosecutor's comment was improper, the appellant has failed to establish plain error for two reasons. First, the State asserts that the judge presiding over the appellant's bench trial was not at risk of having his passions inflamed by the comment like a jury would have been. Second, the State argues that in light of the substantial evidence of the appellant's guilt, the passing comment in an argument that was otherwise focused on the evidence did not fundamentally affect the appellant's right to a fair trial.

B. Standard of Review

"We have defined plain error . . . as 'error which vitally affects a defendant's right to a fair and impartial trial and have limited our review under the plain error doctrine to circumstances which are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Miller v. State*, 380 Md. 1, 29-30 (2004) (internal citations omitted). Moreover, the Court of Appeals has

> "characterized instances when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." We further made clear that we would intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.

Trimble v. State, 300 Md. 387, 397 (1984) (quoting *State v. Hutchinson,* 287 Md. 198, 203 (1980)) (internal citation omitted).

C. Analysis

For the following reasons, we decline to review the prosecutor's comment during closing argument for plain error.

As the Court of Appeals explained in *Spain v. State*, 386 Md. 145, 152-53 (2005),

> [t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom. In this regard, [g]enerally, . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces.

(citing *Degren v. State*, 352 Md. 400 (1999)). To that end, "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Wilhelm v. State,* 272 Md. 404, 415 (1974)). "Whether a reversal of a conviction based upon improper closing argument is warranted 'depends on the facts in each case.'" *Id.* "We have said that '[r]eversal 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.'" *Lawson*, 389 Md. at 592 (quoting *Spain*, 386 Md. at 158 (quoting *Degren*, 352 Md. at 432)) (alteration in original).

The appellant relies on *Lawson* and *Walker* in support of his argument that we should review the prosecutor's closing argument for plain error. However, his reliance on these cases is misguided. In *Lawson*, the Court of Appeals found reversible error when the prosecutor implied the defendant was a "monster." 389 Md. at 596-99. However, the Court of Appeals held that the comment was ground for reversal because the prosecutor was

implying to the jury that the defendant was a "monster." *Id.* at 597-99. Similarly, in *Walker*, this Court found reversible error when the prosecutor referred to the defendant as an "animal" and a "pervert." 121 Md. App. at 374-82. However, in that case also, the reversible error stemmed from the fact that the comments were likely to inflame the passions of the jury. *Id.* at 380-82. While the comments in both *Lawson* and *Walker* may be similar to the comments made in this instant case, the latter is distinguishable because the appellant had a bench trial. "Nonjury trials present a much smaller danger of unfair prejudice than jury trials." *Carter v. Hewitt*, 617 F.2d 961, 972 n.13 (3d Cir. 1980). Therefore, and because the prosecutor's comment does not amount to a "compelling, extraordinary, exceptional or fundamental [circumstance]," the appellant has not demonstrated a basis for plain error review. *Miller*, 380 Md. at 29 (quoting *Hutchinson*, 287 Md. at 203).

Moreover, we agree with the State that even if we were to apply plain error review, the appellant's convictions would not be reversed. "[T]he factors to be used during appellate review of the trial judge's decision [are as follows]: 'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Lawson*, 389 Md. at 592 (quoting *Spain*, 386 Md. at 158-59). In this case, the prosecutor's comment was not severe, the potential for unfair prejudice was low, and the evidence against the appellant was significant. *See Lawson*, 389 Md. at 593 ("We applied these factors and under the circumstances there present, found that, with respect to the severity of the remarks, the prosecutor's statement was an isolated event that did not

permeate the trial."). Regarding the third factor specifically, the State presented evidence of the victim's testimony as to what the appellant did to her, as well as the two one-party consent calls between the victim and the appellant where the latter stated that he did not know why he did what he did. Additionally, during his interview with police, the appellant admitted that he used his finger to penetrate the victim's vagina and put the tip of his penis on her. Therefore, in light of the substantial evidence against him, even if we reviewed the prosecutor's comment for plain error, the appellant still would not have been able to demonstrate that plain error occurred.

For the reasons stated above, we decline to review the allegedly improper comment of the prosecutor for plain error. Accordingly, the judgment of the circuit court is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.