Circuit Court for Anne Arundel County
Case No. C-02-CR-22-001274

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 308

September Term, 2023

TERENCE ANTHONY GREEN, JR.

v.

STATE OF MARYLAND

Berger,
Leahy,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 7, 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 with Rule 1-104(a)(2)(B). Md. Rule 1-104.

Following a jury trial in the Circuit Court for Anne Arundel County, Terence Anthony Green, Jr. ("Green"), appellant, was convicted of two counts of second-degree rape, two counts of third-degree sexual offense, two counts of second-degree assault, and one count of unnatural and perverted sexual practice. Green was sentenced to an aggregate of thirty years of imprisonment, with ten years suspended, followed by a five-year term of supervised probation. On appeal, Green presents two questions for our review, which we rephrase slightly as follows:[1]

I. Whether Green knowingly and voluntarily waived his right to testify at trial.

II. Whether the State presented sufficient evidence at trial to convict Green with second-degree rape, third-degree sexual offense, and unnatural and perverted sexual practice.

For the reasons explained herein, we shall affirm.

[1] Green's original questions presented read as follows:

1. Was Mr. Green's waiver of his right to testify knowing and voluntary, where his counsel erroneously informed him that if he took the stand to testify, the State could impeach him with his prior conviction for first-degree assault?

2. Was the State's evidence insufficient to prove that Mr. Green committed the alleged offenses in light of the victim's lack of credibility?

FACTS AND PROCEDURAL HISTORY

The incident giving rise to this appeal occurred in July 2021, when the victim, A.W., was fourteen years old and Green was twenty-seven years old.[2] A.W. was living with her father at his home in Anne Arundel County during the summer of 2021. While living with her father, A.W. would spend time with her father's close friend and ex-girlfriend, I.H., who lived a few blocks away. A.W. testified that I.H. was like a mother to her. A.W. was also acquainted with Green, who also lived nearby and was friends with her father and I.H. A.W. would sometimes spend time with Green's younger sister, who is only a few years older than A.W.

On the day of the incident, A.W. asked I.H. to take her to the store. At the time, I.H. had a vehicle but did not have a driver's license, so Green offered to drive them. After going to the store, the trio ended up going to Green's home. A.W. noticed that I.H. started "nodding off" while they were in the kitchen of Green's house, and I.H. later confirmed she was under the influence of drugs and alcohol. After I.H. "dozed off," Green asked A.W. if she wanted to see the sauna in the basement. A.W. agreed and followed him to the basement, where Green showed her the bathroom and the layout of the basement. Green opened the door to a closet and A.W. went in. When she turned around to leave the closet, Green was standing in the doorway. Green unzipped his pants, pushed A.W. down, and

[2] We refer to the victim and other individuals by their initials in order to protect their privacy.

forced her to perform oral sex on him. The incident lasted "a couple of seconds" before A.W. got back up and Green re-zipped his pants.

Green continued to show A.W. around the basement. A.W. testified that, at some point, Green laid on the floor and told A.W. to sit on top of him. A.W. complied, but when she tried to get up, Green grabbed her ankle to prevent her from doing so. She stayed there for some time before they both stood up. A.W. testified that after they stood up, Green pulled up her dress, ripped her stockings, and forced her to engage in vaginal intercourse. She testified that she did not consent to the sexual contact and that she told Green that it hurt. This interaction lasted "no more than 10 seconds" before Green stopped and began to masturbate in front of A.W. A few minutes later, A.W. and Green went back upstairs, where I.H. was still "nodding off."

A.W. reported this incident to the police the following month on August 18, 2021. The Anne Arundel County Police Department issued a warrant for Green's arrest on September 23, 2021, which was ultimately executed on August 24, 2022. On September 19, 2022, a grand jury issued a nine-count indictment charging Green with the following: two counts of second-degree rape, two counts of third-degree sexual offense, two counts of fourth-degree sexual offense, two counts of second-degree assault, and one count of unnatural and perverted sexual practice.

Green's trial commenced on March 7, 2023. At trial, the State entered a *nolle prosequi* as to both counts of fourth-degree sexual offense, leaving the jury to consider the remaining seven counts. The State's witnesses included A.W., I.H., A.W.'s mother and

father, and Detective Tara Russ of the Anne Arundel County Police Department. After the State rested its case, the court advised Green that he had the right to testify and asked defense counsel to "advise [Green] with regard to those options and choices." Defense counsel advised Green as follows:

> DEFENSE COUNSEL: Okay. Mr. Green, you have the absolute right as the Defendant in this case, if you choose, to testify. You have seen other witnesses testify. I ask you questions on what is called direct examination. The State would ask you questions on cross-examination. And those responses that you make become part of the record. Do you understand that?
>
> GREEN: Yes, ma'am.
>
> DEFENSE COUNSEL: And if you were convicted of what we call an infamous crime, a major felony, or a crime that bespeaks of your lack of credibility or reliability as a witness -- in other words, something like burglary, robbery, distribution of a controlled dangerous substance, theft, perjury, fraud -- those kinds of crimes within the last 15 years when you were either represented by counsel or waived your right to counsel, you understand that the State could on cross-examination seek to impeach you with one or more of those prior convictions. Do you understand that?
>
> GREEN: Sure.
>
> DEFENSE COUNSEL: And that would be before the jury. Do you understand that?
>
> GREEN: Yes ma'am.
>
> DEFENSE COUNSEL: Now it is possible that if you chose to testify, that you might say something in response to my questions or the State's questions, even the Court could ask you questions that could possibly incriminate yourself before the jury. So that is a risk you would take. You understand that?

GREEN: Yes ma'am.

Defense counsel proceeded to advise Green that he had the absolute right to remain silent and that his silence could not be held against him. Counsel then asked Green to provide various personal information, such as whether he suffers from any mental illnesses or takes any psychiatric medication. He indicated that the psychiatric medication he took that morning did not affect his ability to understand counsel's advice about the right to testify and the right to remain silent. Defense counsel continued:

> DEFENSE COUNSEL: You understand everything I have said?
>
> GREEN: Yes ma'am.
>
> DEFENSE COUNSEL: You have any questions for me?
>
> GREEN: No ma'am.
>
> DEFENSE COUNSEL: It is my understanding that your election is not to testify. Is that correct?

At this juncture, the court interrupted and asked Green if he had been advised as to whether his criminal history included any crimes "that would constitute qualifying crimes" as it related to impeachable offenses. The court then indicated that it had been "led to believe that there [was] a robbery charge" that would constitute a qualifying crime. After a dialogue between the court, defense counsel, and Green about the accuracy of that statement, it was finally determined that Green had a prior conviction for first-degree assault -- not robbery. After a lunch recess, the court reconvened, and defense counsel

renewed her advice to Green about his right to testify and his right to remain silent. During this colloquy, defense counsel advised Green:

> DEFENSE COUNSEL: And so in addition to that, if you were convicted of an infamous crime or a crime of moral turpitude in the last 15 years, *such as assault in the first degree*; a robbery with a deadly weapon; distribution of a controlled dangerous substance; burglary; those kinds, murder, for example. Those kinds of crimes as well as crimes of moral turpitude, including fraud, theft, perjury, and others, if you were convicted of those within the last 15 years, and you had the benefit of counsel or you waived your right to counsel, you understand the State can bring those convictions up on cross-examination for the jury to hear. You understand that?
>
> GREEN: Yes ma'am.

Green then indicated that he was electing not to testify, that he had not been coerced, and was acting of his own free will. The court noted that Green had "been properly advised of the pros and cons with regard to his ability to testify" and stated:

> THE COURT: Am I clear now that Counsel has in fact exchanged or at least confirmed that if in fact the Defendant were to testify in this case, there are or are not crimes for which he may -- he would be impeached with?
>
> DEFENSE COUNSEL: We did discuss that, and he has a first-degree assault. First-degree assault.
>
> THE COURT: All right. That the Defendant has been advised that if he were to choose to testify in this case, that the State, if they chose to, could question him on the first-degree assault prior conviction.

The court concluded that it was satisfied that Green's waiver to testify was knowing and voluntary. The defense called no witnesses and presented no evidence in its case.

The jury returned a verdict of guilty on all counts. Green was sentenced to fifteen years of imprisonment on the first count of second-degree rape. He was also sentenced to a consecutive fifteen years, with all but ten suspended, on the second count of second-degree rape. All other counts merged for sentencing. The court also sentenced him to a five-year term of supervised probation following release, the terms of which require that he: (1) subject himself to GPS monitoring, (2) register as a sex offender; (3) cease all contact with A.W. and her family, and (4) avoid all unsupervised contact with minor children, with the exception of those who are biological family members.

Green filed a timely notice of appeal on April 18, 2023. He also filed a motion to modify his sentence on July 17, 2023, which the circuit court denied.

DISCUSSION

On appeal, Green argues that his waiver of his right to testify at trial was not knowing and voluntary because he detrimentally relied on his counsel's erroneous advice that the State could impeach him based on his prior conviction for first-degree assault. Additionally, Green contends that the State failed to present sufficient evidence to support his convictions. Green asserts that the State's case primarily relied on the testimony of A.W. and that her credibility was "so thoroughly damaged" that it prevented the State from meeting its burden to prove his guilt beyond a reasonable doubt. For the reasons discussed below, we conclude that Green has failed to show that he detrimentally relied on his counsel's erroneous advice regarding impeachable offenses. Furthermore, we conclude that Green failed to preserve for our consideration his argument that the State presented

insufficient evidence to support his conviction. Accordingly, we affirm the judgment of the circuit court.

I. Green has failed to establish that he detrimentally relied on defense counsel's erroneous advice when waiving his right to testify at trial.

It is a bedrock principle of constitutional law that "a criminal defendant has a constitutional right to testify in his or her defense." *Savoy v. State*, 218 Md. App. 130, 147 (2014) (citing *Rock v. Arkansas*, 483 U.S. 44, 49 (1987)). This right is "fundamental to a fair trial." *Id.* at 148. Therefore, a defendant's waiver of this right must be knowing and voluntary. *Id.* Furthermore, "the right to testify is personal to the defendant," and may, therefore, "only be waived by him, and not by his counsel for him." *Tilghman v. State*, 117 Md. App. 542, 553 (1997) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). In *Savoy v. State*, we noted that, "[i]n Maryland, when a defendant is represented by counsel, there is no obligation on the part of the court to advise the defendant of the right to testify." *Savoy*, *supra*, 218 Md. App. at 148. This is because there exists a presumption that a defendant has been advised by counsel about his or her constitutional rights, including the rights to testify and remain silent. *Id.* at 148–49; *Tilghman*, *supra*, 117 Md. App at 554–55.

Green argues that defense counsel incorrectly advised him that, if he chose to testify, the State could have impeached him based on his prior conviction for first-degree assault. We agree that counsel's advice was erroneous. This Court has recognized that "[f]irst-degree assault is not an impeachable conviction." *Savoy*, *supra*, 218 Md. App. at 146–47. This erroneous advice by counsel, however, does not constitute reversible error unless it can be shown that Green detrimentally relied on defense counsel's misstatement of law.

Establishing detrimental reliance "is a necessary element in determining that the defendant did not knowingly and voluntarily waive his constitutional right to remain silent." *Gregory v. State*, 189 Md. App. 20, 38 (2009) (citing *Morales v. State*, 325 Md. App. 330, 339 (1992)). Furthermore, it is the appellant's burden to establish detrimental reliance, "not the State's burden to show [the appellant] did not rely on the misstatement." *Savoy*, *supra*, 218 Md. App. at 155. If an appellant cannot establish that he detrimentally relied on that advice, the appellant is not entitled to a reversal. *Id.*

In *Savoy*, we held that defense counsel incorrectly advised the appellant at trial that the State could impeach him based on his prior conviction for first-degree assault if the appellant chose to testify. *Id.* at 146–47. Nevertheless, we declined to reverse the appellant's convictions because the appellant failed to establish that his counsel's "incorrect advice influenced his election not to testify." *Id.* The appellant in *Savoy* merely argued that it was "highly likely" that defense counsel's erroneous advice affected his decision not to testify," which we concluded to be "mere speculation." *Id.* at 156. Appellant never claimed he originally planned to testify "or that he changed his mind after his lawyer told him about the impeachment risk." *Id.* We concluded that the appellant failed to establish that he detrimentally relied on his counsel's erroneous advice. Accordingly, we held that the appellant had knowingly and voluntarily waived his right to testify a trial. *Id.* at 156–58.

By contrast, in *Morales v. State*, the Supreme Court of Maryland held that the appellant had detrimentally relied on erroneous advice and concluded that the appellant's

waiver of his right to testify at trial was not knowing and voluntary. *Morales*, *supra*, 325 Md. at 335–40. In *Morales*, the appellant was not represented by counsel at trial. *Id.* at 333–34. When a defendant is unrepresented, "the trial court has an affirmative duty, albeit a limited one" to advise the defendant of their constitutional rights to testify and to remain silent. *Id.* at 336. Accordingly, the trial court in *Morales* advised the appellant of his rights, and the appellant indicated that he wanted to testify. *Id.* at 333. The circuit court, however, told him that it would "give [him] time to think about this." *Id.* at 334. The circuit court then erroneously advised the appellant that if he had "ever been convicted of crime before," the State could ask him about that conviction on cross-examination and use it to impeach his credibility. *Id.* After the circuit court made this incorrect statement of law, the defendant changed his mind and indicated that he would not testify. *Id.*

On appeal, the Supreme Court of Maryland concluded that the appellant had relied on the trial court's erroneous advice when waiving his right to testify, holding:

> A reasonable inference from the quoted colloquy between the judge and Morales is that Morales intended to testify until the judge advised him to "think about this" and that his convictions could be brought out to show whether he should be believed or not. Since Morales apparently changed his decision to testify based on the trial court's incorrect implication that all of his prior convictions could be used to impeach him, the defendant's decision to waive his constitutional right to testify and to exercise his constitutional right to remain silent was not knowingly and intelligently made. If the trial court -- although not required to do so -- had given the correct information regarding impeachment by evidence of prior convictions, the result would be different.

Id. at 339. Accordingly, Supreme Court concluded that the appellant had not knowingly and voluntarily waived his right to testify.

We conclude that the case *sub judice* is analogous to and closely resembles *Savoy.* There is nothing in the record to indicate -- and Green does not argue -- that he had planned to testify before defense counsel incorrectly told Green that the State could impeach him based on his first-degree assault conviction. At no time during defense counsel's opening statement or at any other time during trial did defense counsel indicate that Green would take the stand. In fact, defense counsel never indicated to the jury that the defense would present any evidence or witnesses at all. Instead, Green argues, without support, that "the record supports the conclusion that [he] relied on [counsel's] erroneous advice in making his decision not to testify." This argument is purely speculative. There is no indication here, as there was in *Morales*, that Green originally intended to testify and changed his mind based on the incorrect advice from his counsel related to impeachable offenses.

Notably, the record suggests Green planned to waive his right to testify before the erroneous advice was ever issued. When counsel initially advised Green of his rights to testify and remain silent -- without broaching the topic of impeachable offenses -- defense counsel said to Green: "It is my understanding that your election is not to testify. Is that correct?" Although the court interrupted before Green could answer, it is reasonable to infer that Green and counsel had previously discussed his right to testify and that counsel was aware that Green intended to waive his right to testify. *See Gilliam v. State*, 320 Md. 637, 653 (1990) (supporting the principle that it is appropriate for a court to consider

"references to previous discussions between" the defendant and defense counsel when analyzing a defendant's waiver of his right to testify). Although Green argues that "it is highly unlikely that defense counsel had provided correct advice at an earlier time," this argument is similarly speculative and unsubstantiated.

Green seeks to distinguish his case from *Savoy* by emphasizing that the appellant in *Savoy* waived his right to testify the day after he received erroneous advice from counsel, whereas Green made his decision immediately after his attorney issued the erroneous advice. Specifically, he argues that "[t]here is no chance, therefore, as there was in *Savoy*, that Mr. Green's decision was based on intervening circumstances or that his attorney corrected the mis-advisement at a later time." We are unpersuaded absent any indication that Green originally intended to testify and changed his mind due to counsel's incorrect advice. We, therefore, conclude that Green has failed to show that he detrimentally relied on counsel's erroneous advice.[3] Accordingly, we conclude that Green's waiver of his right to testify was knowing and voluntary.

II. Green failed to preserve for our consideration on appeal his argument that the State presented insufficient evidence based on A.W.'s lack of credibility.

Green also argues that his conviction should be reversed because the State failed to present sufficient evidence to support his convictions. Green challenges the sufficiency of the evidence by emphasizing the lack of physical evidence and attacking A.W.'s

[3] Notably, we have recognized that determining whether a defendant detrimentally relied upon erroneous advice by counsel is best addressed in post-conviction proceedings. *See Savoy*, *supra*, 218 Md. App. at 157–58.

credibility. Green contends that various facts that came to light at trial resulted in A.W.'s credibility being "so thoroughly damaged" that the State could not meet its burden to prove that Green committed the crimes of conviction beyond a reasonable doubt. For example, A.W. testified that did she not scream during the incident and I.H. testified that she did not hear anything when she was upstairs in Green's home while the incident took place. I.H. also testified that, when A.W. originally told her about her interaction with Green, A.W. was "kind of laughing and joking about it." Additionally, A.W. did not tell I.H., her father, or anyone else about what happened on the day of the incident and did not report it to the police until the following month.

It is well-established that "appellate review of the sufficiency of the evidence is available only when the defendant moves for judgment of acquittal at the close of all the evidence[.]" *Mungo. v. State*, 258. Md. App. 332, 362 (2023) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)) (internal quotation marks omitted). Furthermore, Maryland Rule 4-324 requires a defendant to "state with particularity all reasons the motion [for judgment of acquittal] should be granted." Md. Rule 4-324(a). Trial courts are "not required to imagine all reasonable offshoots of the argument actually presented" in support of a motion for judgment of acquittal. *Starr v. State*, 405 Md. 293, 304 (2008). Therefore, a defendant who moves for judgment of acquittal "is not entitled to appellate review of reasons stated for the first time on appeal." *Id.* at 302; *see also* Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

At trial, after the close of the State's case, Green moved for judgment of acquittal solely as to the second count of third-degree sexual assault. Green argued that the State failed to present evidence sufficient to prove that Green used force or threat of force to make A.W. perform oral sex on him, or otherwise failed to establish the elements required under Md. Code (2002, 2021 Repl. Vol.) § 3-307(a)(1) of the Criminal Law Article. The court denied Green's motion and further denied Green's renewed motion for judgment of acquittal at the close of the defense's case.

Green concedes that defense counsel did not challenge A.W.'s credibility in any way or assert that the motions for judgment of acquittal should be granted due to her lack of credibility. Accordingly, we conclude -- and Green further concedes -- that Green failed to preserve this argument for appellate review. Nevertheless, Green argues that this Court should reach the merits of his sufficiency of evidence argument.

Under Maryland Rule 8-131, this Court may exercise its discretion to consider an appellant's unpreserved argument "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 Supreme Court of Maryland has recognized that "[t]here is no fixed formula for the determination of when discretion should be exercised[.]" *Jones v. State*, 379 Md. 704, 713 (2004) (citing *State v. Hutchinson*, 287 Md. 198, 202 (1980)). Nevertheless, our exercise of discretion to consider unpreserved arguments must serve the primary purpose of Rule 8-131, which is to "ensure fairness for all parties and to promote the orderly administration of law." *Id.* at 713 – 14 (citing *Conyers v. State,* 367, Md. 571, 594 (2002)).

As we have explained:

> It is a discretion that appellate courts should rarely exercise, as 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.

Kelly v. State, 195 Md. App. 403, 413 (2010) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). Furthermore, we typically elect to review unpreserved issues "where a decision would (1) help correct a recurring error, (2) provide guidance when there is likely to be a new trial, or (3) offer assistance if there is a subsequent collateral attack on the conviction." *Bailey v. State*, 464 Md. 685, 698 (2019) (quoting *Lewis v. State*, 452 Md. 663, 699 (2017)).

We conclude that none of the interests compelling the exercise of our discretion to consider an unpreserved argument exist in this case. We, therefore, decline to exercise our discretion to address the merits of Green's unpreserved argument.[4] Accordingly, we affirm the judgments of conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] We further note that "unpreserved claims of error generally are best addressed through an ineffective assistance of counsel claim at post-conviction proceedings." *State v. Clark*, 255 Md. App. 327, 332 (2022), *rev'd on other grounds*, 485 Md. 674 (2023).