Circuit Court for Frederick County
Case No.: C-10-CR-22-000382

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1159

September Term, 2023

CARLOS ALBERTO CANALES-TAVORA

v.

STATE OF MARYLAND

Shaw,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: December 12, 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).

Carlos Alberto Canales-Tavora, Appellant, was convicted by a jury sitting in the Circuit Court for Frederick County of three counts of sexual abuse of a minor.[1] Appellant asks the following two questions on appeal, which we have slightly rephrased:

I. Did the circuit court err in admitting sexual propensity evidence under Md. Code Ann., Crim. Proc. § 10-923?

II. Did the circuit court err in allowing the State to make an improper closing argument?

For the reasons that follow, we shall affirm.

BACKGROUND

The State's theory of prosecution was that Appellant sexually abused his daughter, E., on three consecutive days when she was around five years old. Testifying for the State, among others, was E., who was eleven years old at the time of trial, and several family members, including her mother and her cousin. The child forensic specialist who interviewed E. after her disclosure also testified, and a recording of that interview was played for the jury. Additionally, the State introduced sexual propensity evidence of Appellant through A.R., E.'s older, maternal half-sister, that Appellant had sexually assaulted her when she was around four years old. The theory of defense was that E. (and A.R.) were lying. Appellant presented character testimony but did not testify in his defense. Viewing the evidence in the light most favorable to the State, the following was elicited at trial.

[1] The court subsequently sentenced Appellant to a total of thirty years of imprisonment, with all but ten years suspended, and five years of supervised probation upon his release from prison.

In June 2011, E. was born to Appellant and A.T., who lived in Frederick, Maryland, with Appellant's two boys, aged thirteen and nine years old, whose mother had recently died. The family thereafter moved to a two-bedroom apartment. A female housemate, who lived with them until 2015, slept in one bedroom, and the family of five slept in the other bedroom, with the boys in a bunkbed, A.T. and Appellant on a bed, and E. on a separate bed. A.T. worked from about 9:00 a.m. until midnight, and sometimes until 3:30 p.m. Appellant worked from 6:00 a.m. until 6:00 p.m.

The marriage was volatile, and in April 2018, A.T. left Appellant and took E. to New York, where they lived with A.T.'s sister, husband, and their eighteen-year-old daughter, Vanessa. Within a few months of living in New York, E., who was seven years old, disclosed to Vanessa that Appellant, her father, had sexually abused her when she was five years old.

Vanessa testified that she and E. shared a bedroom when E. came to live with her family, and they became very close. A few months after E. arrived, she told Vanessa that she had "a secret." E. whispered that Appellant had "S-E-X" with her and described her father rubbing his penis against her vagina. During the ten-minute conversation, E. said she had never told anyone because she was afraid, and as the conversation progressed, she began to cry.

E. subsequently told her mother that Appellant had "tried" to put his penis in her vagina. A.T. did not report E.'s disclosure to the police because she was worried about what would happen to Appellant's sons, who had no family if Appellant was incarcerated. She eventually confronted Appellant over the telephone. He denied the allegations.

In early 2022, when E. was ten years old, she told her teachers at school that she had been sexually abused. An investigation ensued. A.T. testified that after E. disclosed to the school, she still did not want the police involved because she felt guilty about what had happened and that she had done nothing.

Kristen Dunn, a forensic interviewer with the Frederick County Department of Social Services at the Child Advocacy Center, interviewed E. on February 16, 2022. The interview was played for the jury. At the outset, E. was told that the interview was being recorded and that a detective and another social worker were listening. E. agreed to tell the truth and said she understood how important it was to tell the truth. In the interview, E. said she was five or six years old when Appellant had "S-E-X" with her. When asked why she had her hands over her eyes, E. explained that she was "uncomfortable" and did not like talking about it. E. said she was scared after it happened and did not tell her mother because she thought Appellant might hurt her or her mother, explaining that Appellant and her mother argued "a lot" and they acted like they "hate[d] each other."

During the interview, E. described the sexual abuse, stating that her father was in the bedroom she shared with him and her mother when he said, "[W]hy don't you come in here and lie by my side." At the time, her mother was working and her brothers were in the bedroom their former housemate had used. Her father then shut the bedroom door and put a towel beneath it. He took off his clothes and then hers. He laid on his back and told her that he wanted to "teach" her how to move "up and down" while on top of him. She initially tried what he suggested, but then said she did not want to, and he stopped. He then got on top of her and put his "private part" inside her vagina. She said it felt "very weird"

and he was breathing "very hard[.]" She said it lasted several minutes, and she did not know why it stopped. He applied to her genital area a red cream for men that burned. He then applied a cream "for little kids" because her vagina was "very red" and "hurt." Later, when she went to the bathroom to urinate, her vagina hurt and "burned." He did the same thing over the next two days. E. told the interviewer that when she eventually told her mother, her mother "didn't do anything" but bought her "coloring books and stuff to get it out of my mind." E. said she tried not to think about it, but after a while, she started having flashbacks of her father touching her, and she eventually told the school because she could not focus, and she got "tired" of it being on her mind.

E., who was eleven years old at the time of trial, also testified about the sexual abuse. She testified that her mother was at work and her brothers were in the second bedroom that a housemate had used before she moved out. E. walked into the bedroom she shared with her parents to get a toy, when her father told her to close the bedroom door and put a towel underneath it, which she did. He told her to "come lie beside [him]," which she did, and he took off his and her clothes. He directed her to get on top of him, and said he wanted to show her "how to do it" and showed her how to move "up and down." He then put his penis inside her vagina. It felt "slimy," "weird," and it was "horrible." He put a red-colored cream on her that was his personal cream. After it was over, he acted "normal," but her vagina "hurt a lot . . . all the time."

The next day it happened again, but this time she was on her back and her father got on top of her when he put his penis in her vagina. As before, the door was shut, a towel was placed under the door, and both of their clothes were off. She could not remember

how those things happened. The sex act lasted about five minutes, after which he applied the same cream, and she went back to her normal day. The third day, she was again on her back and her father was on top of her. The door was shut, and a towel was under the door. The pain on the third day was worse than the other days, and it lasted several weeks. At some point, she told her mother about the pain, but not what had caused it, and her mother applied Desitin to her genital area, which helped. Around that time, her mother took her to the doctor because E. complained about pain in her vaginal area, but nothing was done other than her mother applying a topical cream to the area.

E. testified that after her father sexually abused her, she did not tell anyone because she was scared about what he might do to her or her mother, or he would lie and say it did not happen. When asked why she told her cousin, E. testified, "I just needed someone to tell . . . I just needed that space to get it out of my mind. And I didn't trust anybody, but I was really close with her, and it felt like it was the right thing to do[.]" She testified that she finally told a school counselor in 2022 because she did not know how to deal with the "stress" and "anxiety" it caused her. She did not want her father to get in trouble with the police, but she "just wanted to get this out of my mind."

E. testified that after she told her cousin and mother, she stopped talking as frequently to her father over the telephone, admitting that she did talk to him a "little bit" because he was her "dad." She said she last saw her father in December 2021, just before she disclosed to her teachers at school, when she and her mother went to her father's home to pick up her brothers for a week-long holiday over Christmas. She missed her brothers,

whom she had not seen since she and her mother left for New York. When E. went into the home, she hugged her father because she missed him too.

The State introduced sexual propensity evidence through A.R., who was born in North Carolina in 2005, to A.T. and J.R., who were married at the time. In 2009, A.T. met and became romantically involved with Appellant and left J.R. to be with him. The next year, she moved to New York, where A.R. and Appellant joined her. A.R. was four years old when she lived in New York.

In New York, A.T., Appellant, and A.R. lived with about a dozen of A.T.'s family members. A.T., Appellant, and A.R shared one bedroom. A.T. worked nights, from 7:00 p.m. until 4:00 a.m., and Appellant worked days, from 9:00 a.m. until 6:00 p.m. After six months, A.R.'s father came to New York to visit his daughter, had an argument with Appellant, and then took A.R. back to North Carolina to live with him permanently. A.R. never returned to New York.

A.R. testified that she remembered living in New York with her mother, Appellant, and many of her mother's family. They slept in a bedroom, with Appellant and her mother sleeping in one bed and she in another. One evening she was alone with Appellant in their bedroom. She did not remember how her bottom pants came off, but Appellant "was putting" his penis next to her vagina. After that, he tried to force her to put her lips on his penis, but she refused, after which he asked her to kiss her fingers and then touch his penis, which she did.

A.R. did not tell anyone about what had happened until 2016, when she was ten or eleven years old and in a fifth-grade sex education class. She placed a note in her teacher's

comment box where students could place notes about things that worried them. A.R. was subsequently interviewed by a child forensic interviewer, which was videotaped. The video was introduced into evidence and played for the jury.

In the video, A.R. said that when she was four or five years old and living in New York with her mother and Appellant. Her family had gone grocery shopping and had left her behind with Appellant. At some point, he locked their bedroom door. She said that she tried to unlock the door, but he pushed her onto the bed. He took off her clothes and got on top of her and his "wrong" part touched her "wrong" part. When he got off her, she put her pants on quickly, he unlocked the door, and she ran out. She did not tell her mother because she was scared. Sometime after that, her father visited, and she and her father returned to North Carolina. She has had no contact with Appellant since she left New York. The parties stipulated that A.R.'s sexual assault allegation was reported to law enforcement in 2016, but no charges were brought within the applicable five-year statute of limitations. A.R. had not seen the videotape of her interview before trial, and she testified that everything she said in the interview was true, except that she had tried to escape, which she did not but had in fact "frozen[.]"

E. and A.R.'s mother, A.T., testified that she first learned of A.R.'s sexual abuse allegations against Appellant in 2016 when she received a letter from the Department of Social Services. She testified that she never asked A.R. about the allegations, but she confronted Appellant, who said it was a lie. She admitted that she stayed with Appellant for another two years after A.R.'s disclosure because she did not think Appellant was capable of the accusations.

A.T. testified that after A.R. left New York, she visited her daughter only five times: in 2013, 2015, 2016, 2018, and then a few months before trial. All visits were over weekends in North Carolina during which E. was also present. A.T. testified that she never told E. about A.R.'s allegations. A.R. likewise testified that she had never spoken to E. about her sexual abuse allegations against Appellant, which A.R. only found out about in 2022 when her father told her. Vanessa testified that she only met A.R. two times and had never discussed what had happened between E. and Appellant. E. testified that before she told her cousin and her mother, she never told A.R. about the sexual abuse.

On March 28, 2022, shortly after E. disclosed the sexual abuse to her teachers, the Frederick County Police set up a controlled, one-party consent call between A.T. and Appellant. Appellant made no incriminating statements during the call, but A.T. admitted that she had warned Appellant that the police would be listening in and recording their telephone conversations.

Two days after the consent call, the police interviewed Appellant at his home about E.'s and A.R.'s sexual abuse allegations. The interview was audiotaped and played for the jury. In the recording, Appellant told the police that when A.T. was working, he took care of the children. He said he had had a good relationship with E., but they had not spoken in a while. He denied abusing E. or A.R. and said they were lying. He implied that E. might have made up the allegations of abuse because she was "traumatized" when she was sent home from school due to genital irritation twice over the course of three months, and he had applied a topical cream. He explained that because his sons were also home, he directed her into their bedroom, shut the door, and applied the cream to her genital area,

causing them both to be embarrassed. He suggested that because E. learned in school that "nobody should touch your parts[,]" she now thinks that what he did was inappropriate. He also suggested that E. made up the allegations because she had witnessed he and A.T. having sex when they shared a bedroom with E. He also told the police that he had met A.T. in North Carolina after she had separated from her husband and that he had not spoken to her in over a year.

The defense called Appellant's two sons. They testified that around Christmas 2021, A.T. and E. picked them up from their home in Frederick for a week-long holiday visit to New York. E. went into their home and hugged Appellant and seemed happy to see him. Appellant's wife since 2021 was also present when E. came into the house. She likewise testified that E. hugged Appellant and appeared happy to see him. She testified that she had observed Appellant with her ten-year-old daughter and other children, and Appellant was always "very respectful." She admitted on cross-examination, however, that she has never left Appellant alone with her daughter. A friend of Appellant's also testified that Appellant has been respectful around her elementary school-aged granddaughters, but she admitted on cross-examination that she has never left Appellant alone with her granddaughters. The defense also called Appellant's employer, who testified that Appellant was a "prized" employee, and that he was hardworking and intelligent, but he admitted on cross-examination that he did not socialize with Appellant and never saw him with his family.

DISCUSSION

I.

Appellant argues that the circuit court erred for two reasons in admitting A.R.'s testimony under Md. Code Ann., Courts & Judicial Proceedings Art. ("CJP") § 10-923, which allows for the introduction of other sexually assaultive behavior when certain conditions are met. First, the circuit court abused its discretion in ruling that the probative value of E.'s testimony outweighed the danger of unfair prejudice under CJP § 10-923(e)(4), and he presents specific arguments that we shall delineate further in this discussion. Second, the circuit court failed to exercise its ultimate discretion under CJP § 10-923 to exclude A.R.'s testimony, even if the State had technically satisfied the "conditions precedent" to admissibility. The State argues that we should reject all of Appellant's arguments because he failed to preserve them for our review as he did not raise them below. Additionally, Appellant has failed to identify any factor on appeal that the trial court should have but failed to consider in exercising its ultimate discretion before admitting the evidence.

Standard of Review

Where a circuit court's ruling "involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are legally correct under a *de novo* standard of review." *Mayor & City Council of Balt. v. Thornton Mellon, LLC*, 478 Md. 396, 410 (2022) (quotation marks and citation omitted). We review the circuit court's balancing of probative and prejudicial value for an abuse of discretion. *Woodlin v. State*, 484 Md. 253, 268 (2023). There is an abuse of discretion if "no reasonable person would take the view adopted by the [circuit]

court . . . or when the court acts without reference to any guiding principles." *Alexander v. Alexander*, 252 Md. App. 1, 17 (2021) (quotation marks and citation omitted).

CJP § 10-923 and *Woodlin*

In 2018, the Maryland General Assembly passed CJP § 10-923, titled "Evidence of other sexually assaultive behavior[.]". "Sexually assaultive behavior" is defined to include "[s]exual abuse of a minor," which in turn is defined as an "act that involves sexual molestation or exploitation of a minor" to include incest, rape, sexual offense in any degree, and "any other sexual conduct that is a crime." *See* CJP § 10-923(a)(2) and Md. Code Ann., Criminal Law, §3-602(a)(4)(i).

The statute begins by stating that "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible[.]" CJP § 10-923(b). Subsection (e) provides that the court "may admit evidence of sexually assaultive behavior if the court finds and states on the record" the following four factors:

> (1) The evidence is being offered to:
>
> > (i) Prove lack of consent; or
> >
> > (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
>
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
>
> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
>
> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

CJP § 10-923(e).

Woodlin v. State, 484 Md. 253 (2023), which was decided six months after Appellant's §10-923 hearing and four months after his convictions, is the only reported appellate decision to date that has interpreted §10-923. In that case, John Woodlin was convicted of child sexual abuse and other sex offenses involving his ten-year-old grandson. *Woodlin*, 484 Md. at 275. At trial, the circuit court permitted the State, following a hearing, to introduce evidence under CJP §10-923 of Woodlin's 2010 sexual assault conviction against a different individual. *Id.* at 262.

We affirmed Woodlin's convictions on appeal. *Id.* Woodlin appealed and argued to the Maryland Supreme Court, among other things, that CJP §10-923(e) required a circuit court to consider specific, probative and prejudicial factors, and that the circuit court had abused its discretion when it determined that the probative value of the 2010 conviction was not substantially outweighed by the danger of unfair prejudice. *Id*. at 262-63. The Maryland Supreme Court disagreed and affirmed. *Id.* at 264.

In its discussion, the Court made the following clarifications as to subsection (e)(4):

1. Subsection (e)(4) employs the same balancing test used in Md. Rule 5-403[2], and a circuit court is not required to consider any particular factor

[2] Md. Rule 5-401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-402 provides that "all relevant evidence is admissible." Md. Rule 5-403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," among other things. Evidence may be considered unfairly prejudicial "if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime[.]" *Odum v. State*, 412 Md. 593, 615 (2010) (quotation marks and citation omitted).

but may consider the following factors in its balancing determination, *id*. at 268, 279-80, 283;

2. A court may consider the following in its relevancy determination under subsection (e)(4):

    - similarities and differences of the acts – such as the characteristics of the victims (the victim's age, biological sex, gender identity, and status - mental state, physical prowess, capabilities, etc.), the nature of the defendant's conduct (the method of perpetrating the sexual offense, like the use of violence/weapons, use of drugs to incapacitate, abuse of a position of trust, etc.), and the sexual offense itself (the specific acts committed, the location of the assault, etc.), *id*. at 284-85;

    - temporal proximity and intervening circumstances – the closer in time between the crime charged and other assaultive behavior the more probative of the crime charged, *id*. at 286-87;

    - frequency of the sexually assaultive behavior – the more frequent the defendant's other sexually assaultive behavior the more probative of the crime charged, *id*. at 287.

3. A court may consider the following in its unfair prejudice determination under subsection (e)(4):

    - that the other sexually assaultive behavior might overshadow the crime charged because it is particularly heinous, *id*. at 287-88;

    - where the jury does not know whether the other sexually assaultive behavior resulted in a conviction, they may be less likely to be swayed by the notion that the defendant previously escaped punishment, *id*. at 288-89.

The Court stated that after the State has satisfied the four factors in subsection (e), the circuit court still retains discretion in ultimately deciding whether to admit the evidence. *Id*. at 289-91. In making this last general assessment of admissibility, the Court stated that the circuit court may consider: (1) the State's need for the other sexual assault evidence, and (2) the manner in which the State may seek to prove the other sexual assault. *Id*.

Facts elicited at the § 10-923 hearing

Here, the State filed a notice of intent to introduce evidence of other sexually assaultive behavior under § 10-923, specifically, that A.R. disclosed in 2016 an instance of sexual abuse by Appellant. The court subsequently held a hearing on the State's motion over the course of three days.

J.R. and A.R. testified on the first day of the hearing. J.R. testified that A.R. was born in North Carolina in 2005 when he was married to A.T. Three years later, A.T. left him for Appellant. A.T. and J.R agreed that A.R. would live with him for six months and then with her for six months, after which A.T. and Appellant moved to New York.

J.R. testified that when A.R. was about five years old, he went to New York, during which he had an altercation with Appellant and the police were called. After the altercation, he and A.R. returned to North Carolina, where they have lived together ever since. He testified that six or seven months after A.R. came to live with him in North Carolina, she told him that Appellant "did something to me that adults do." At first, he did not know what to do with this information, but two weeks later he contacted Child Protective Services in North Carolina, which began an investigation. Three or four months later, J.R. told A.T. what their daughter had disclosed. He initially pursued charges in New York, but he eventually dropped the case because he did not want A.R. to testify. Later in his testimony, J.R. clarified that A.R. disclosed the abuse to him in 2016, not a few months after she came to live with him in North Carolina. He admitted that he was seeking a U-visa based on the altercation with Appellant in New York.

A.R. testified that she lives with her father and his wife, who adopted her in 2021. The last time she saw Appellant was when she was four years old, and she saw him "fighting" her dad, after which she and her father returned to North Carolina. She testified that in 2016, when she was learning about "body safety" in the fifth grade, she placed a note in her classroom comment box that Appellant had sexually abused her when she lived with him in New York. She decided to write the note because she felt like "it was something that needed to be said[.]"

Regarding the sexual abuse incident, A.R. testified that she was alone lying down on a bed in the bedroom she shared with her mother and Appellant in New York. Her bottom clothes were gone, and Appellant was on top of her rubbing his penis against her vagina. She was confused and did not know what had happened until she attended a sex education class in the fifth grade. After she told her teacher, she told her father. She was subsequently interviewed by someone from Child Protective Services, who videotaped the interview, which was played for the court. At the hearing, A.R. watched the video interview for the first time. She said the only inaccuracy in her interview was when she told the interviewer that she tried to escape when in fact she just "froze[.]" She testified that she lied about the escape because she was afraid she would be judged for not trying to get away, but everything else she said in the interview was the truth. A.R. testified that she had only seen her mother a few times after she left New York, and she saw E. during those visits. A.R. testified that she and her mother now have a healthier relationship and text every day, and she "stays in touch" with her sister.

The following day, the parties made their arguments to the court regarding the merits of the State's request to admit evidence of A.R.'s allegations of abuse under §10-923. Appellant argued only that the State had failed to prove by clear and convincing evidence that Appellant had sexually assaulted A.R. The court likewise focused on that issue, but also on how the lack of a conviction meant Appellant had been unable to cross-examine A.R. about the assault, which impacted the "last step" under §10-923, whether "the probative value outweigh[s] the unfair prejudice[.]" When the court expressed concern about the danger of unfair prejudice to Appellant, the State agreed to call A.T. as a witness, and the court reserved on its ruling.

The hearing was continued until March 30, 2023, when A.T. testified. She testified that J.R. is the father of A.R., and Appellant is the father of E. She was married to J.R. from 2005 to 2011. She met Appellant in 2010 and left J.R. for him. She, Appellant, and A.R. moved to New York when A.R. was four years old, and they lived with her many family members in a six-bedroom house, in which she, Appellant, and A.R. occupied one of the bedrooms. She and Appellant had a bed and A.R. slept in a separate bed. She testified that she worked from 7 p.m. to 4 a.m. six days a week, and Appellant worked 9 a.m. to 6 p.m. five days a week. A.R. lived with them in New York for only six months, before her father took her back to North Carolina, following a physical argument with Appellant. A.T. also testified that after A.R. left New York, she visited A.R. only a few times, and A.R. met E. only during those visits. A.R. likewise testified that she only met E. during the few visits she had had with her mother.

After A.T.'s testimony, the parties again argued the merits of the State's §10-923 motion, covering over thirty pages of typed transcript. The State argued that evidence of Appellant's sexual assault of A.R. was admissible because it was proven by clear and convincing evidence and the other factors of the statute had been met. Appellant said he would address only "two points": whether the State had proven by clear and convincing evidence that Appellant had sexually assaulted A.R., and whether admitting the evidence was unfairly prejudicial to him because he had been unable to defend himself in court as there had been no trial on A.R.'s allegations. After much discussion, the circuit court found that the State had proven A.R. was sexually abused by Appellant by clear and convincing evidence and the probative value of the evidence outweighed the risk of unfair prejudice.

Preservation

Citing *Woodlin*, the State argues that Appellant has failed to preserve all his arguments on appeal because he did not raise them below. Appellant argues in his reply brief that he should not be held to what he described as the "new, specific preservation rule" stated in *Woodlin* because *Woodlin* was decided after his conviction. We agree with the State that Appellant has failed to preserve his arguments for our review. We shall explain.

In *Woodlin*, before beginning discussing the factors a circuit court might consider under §10-923(e), the court stated:

> *First*, it generally is incumbent upon the parties to argue any factor they deem relevant or applicable. A precondition to arguing on appeal that a factor was not properly weighed or considered is that the party brought that particular factor to the circuit court's attention. *See DeLeon v. State*, 407 Md. 16, 29-30 (2008) (noting that defendant waived in this Court evidentiary arguments

> on bases of relevancy and unfair prejudice where the record reflected that he raised at trial only an objection on grounds of improper foundation); Md. Rule 8-131(a) ("Ordinarily, the 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[.]").

484 Md. at 283 (emphasis in original). After discussing various factors a circuit court might consider, the *Woodlin* Court restated that it was "incumbent upon the parties to argue any factor they deem relevant" in a §10-923 motion. *Id*. at 291. At the end of its discussion, the *Woodlin* court reiterated its preservation admonishment, stating that "as outlined above, there are various factors that a circuit court *may* consider during that balancing exercise and it generally is incumbent on the parties to bring any factor they deem applicable to the circuit court's attention." *Id.* at 295.

The court then turned to the case before it. Although Woodlin argued on appeal that his prior sexual assault conviction was inadmissible because it was both dissimilar and more inflammatory than the charged offenses for which he was on trial, he failed to raise below any argument as to the inflammatory nature of the prior conviction. *Id*. at 291-92. The court held that because of his failure to raise it below, Woodlin forfeited any argument as to the inflammatory nature of his prior conviction. *Id*. at 292.

Here, Appellant argues that the circuit court abused its discretion in ruling that the probative value of A.R.'s testimony outweighed the danger of unfair prejudice under § 10-923(e)(4). Specifically, he argues that the probative evidence of her testimony was minimal because A.R. alleged only one incident of abuse, and the risk of unfair prejudice substantially outweighed the probative value for two reasons: (1) the jury might be swayed to convict him knowing that he had never been prosecuted, and had possibly escaped

culpability, for his assault against A.R.; and (2) A.R.'s testimony that Appellant sexually assaulted her might "overshadow" E.'s allegations of assault because A.R. was seventeen years old at trial, and a jury might find her more mature and credible than E. Appellant also argues that the circuit court failed to exercise its ultimate discretion under § 10-923 to exclude the evidence, even if the State technically satisfied the four "conditions precedent" to admissibility.

What Appellant raised below he does not raise on appeal and what he raises on appeal he did not raise below. "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[.]" Md. Rule 8-131(a). We note that while Appellant complained below that he would be unduly prejudiced by A.R.'s allegations because he was unable to defend himself against A.R.'s allegations (as there was never a trial), he never argued below that which he argues on appeal — that he would be unduly prejudiced by A.R.'s allegations because the jury might want to punish him for having escaped culpability for assaulting A.R. Accordingly, we agree with the State's contention that Appellant's appellate arguments are not preserved for our review because he failed to argue any of them below.

Appellant attempts to avoid his preservation problem by suggesting that *Woodlin* announced a "new, specific preservation rule" regarding sexual abuse cases, and he should not be held to this rule because *Woodlin* was decided after his conviction. This argument is meritless. The Maryland Supreme Court in *Woodlin* did not create or announce any new change in Maryland's preservation law. Rather, the court reiterated the long-standing law in Maryland under Rule 8-131(a) and espoused in our case law, that arguments not raised

below are not preserved on appeal. *See* Md. Rule 8-131(a); *Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.") (quotation marks and citations omitted); *Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal."); *Stevenson v. State*, 222 Md. App. 118, 140-41 (2015) ("If counsel provides the trial judge with specific grounds for an objection, the litigant may raise on appeal only those grounds actually presented to the trial judge. All other grounds for the objection, including those appearing for the first time in a party's appellate brief, are deemed waived.") (quotation marks and citation omitted). The "rule limiting the scope of appellate review to those issues and arguments raised in the court below is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quotation marks and citation omitted).

We note that Appellant presents no plain error argument as to his probative versus unfair prejudice arguments under §10-923(e)(4). Because Appellant's argument as to the §10-923(e)(4) factor involves so many additional fact-finding determinations and the weighing of those considerations, which are solely within the province of the trial court, we decline to address the arguments that he has raised solely on appeal.

As to Appellant's remaining argument, that the circuit court failed to exercise its ultimate discretion under §10-923 by balancing the probative value of the evidence against

the danger of unfair prejudice, we find this argument is meritless for several reasons. First, Appellant did not raise this argument below. Second, even if Appellant had preserved his argument on appeal, Appellant has made no argument as to what factor the court should have considered but did not. We note that he neither raised below nor raised on appeal the two factors the *Woodlin* court stated might be considered in a final balancing analysis – the State's need for the challenged evidence or any concern about the way the State intended to introduce the evidence at trial. Third, although the court did not specifically delineate whether it was balancing the probative versus the danger of unfair prejudice under subsection (e) or in its final §10-923 analysis, the circuit court addressed and balanced the factors Appellant raised.

For the above reasons, we find no error below by the circuit court in admitting evidence of A.R.'s allegations of sexual assault by Appellant.

II.

Appellant argues that the circuit court erred in allowing the State to implicitly refer to him as a "predator" during the rebuttal closing argument over defense counsel's objection. Appellant argues that we must reverse his conviction because the comment was "impermissibly inflammatory and unfairly prejudicial[.]" Appellant cites *Lawson v State*, 389 Md. 570 (2005), where the prosecutor in closing argument referred to the defendant as a "monster[,]" and *Walker v. State*, 121 Md. App. 364 (1998), where the prosecutor in closing argument referred to the defendant as "an animal."

During the rebuttal closing argument, the State made the following comment:

> [THE STATE]: If we lived in defense counsel's world, no one would ever get away with sexually abusing a child. There would always be DNA; there would always be obvious injuries; little boys would always remember when their dad took their little sister into a room, and shut the door for three days in a row, and recall it again five or six years later when they find out what she's alleging.
>
> We don't live in that world. We live in a world where <u>predators</u> are very good at what they do.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: We live in a world where they do it in secret. We live in a world where they're charming.

(Emphasis added). After making this one remark, the prosecutor changed the topic and continued its closing argument for four more pages of typed transcript. Closing arguments comprised a total of fifty pages of typed transcript.

"'[C]ounsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly . . . on the nature of the evidence and the character of witnesses[.]'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). In closing argument, counsel "may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. [Counsel] may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Lawson*, 389 Md. at 591 (quotation marks and citation omitted). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005). A

trial court is given wide discretion in determining what counsel may say during closing argument, but counsel must "remain within the bounds of the evidence presented at trial and refrain from appealing to the jury's passions or prejudices." *Lawson*, 389 Md. at 608.

"A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *Donati v. State*, 215 Md. App. 686, 708-09, *cert. denied*, 438 Md. 143 (2014) (quotation marks and citations omitted). "A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks and citation omitted). There is a certain commonality in the many abuse of discretion definitions, "to the extent that they express the notion that a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *King v. State*, 407 Md. 682, 697 (2009) (quotation marks and citations omitted).

We are not convinced that the remark was improper under the circumstances presented. According to the Merriam-Webster Dictionary, "predator" is defined as "1: an organism that primarily obtains food by the killing and consuming of other organisms," and "2: one who injures or exploits others for personal gain or profit[.]" *See Predator*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/predator (last visited Dec. 4, 2024). As the United States Supreme Court counseled, we will not necessarily infer that a prosecutor intends the "most damaging meaning" of a word or "that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging

interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). We also note that our laws currently use the word "predator." The bill under which the challenged testimony was admitted was called the "Repeat Sexual Predator Prevention Act of 2018." *See* 2018 Md. Laws Ch. 362. Additionally, the sex offender registration statute (1) defines a "sexually violent predator" as one who "is convicted of a sexually violent offense" and "has been determined in accordance with this subtitle to be at risk of committing another sexually violent offense;" and (2) provides that a court may consider, prior to sentencing, whether a defendant may be formally classified as "a sexually violent predator" based on certain factors. *See* Md. Code Ann., Crim. Proc. ("CP") §§11-701(k) and 11-703.

However, even if the remark was improper, we are not inclined to reverse. *See Degren v. State*, 352 Md. 400, 430 (1999) ("Not every improper remark [made by the State during closing argument], however, necessarily mandates reversal.") (citations omitted). "'Generally, it is for the trial judge to determine whether such remarks are so prejudicial as to require a new trial[.]'" *Walker*, 121 Md. App. at 376 (quoting *Wilhelm*, 272 Md. at 433). When assessing on appeal whether improper remarks during closing argument constituted reversible error, we "may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005) (citations omitted).

Here, the State's remark did not specifically call Appellant a predator. While the State's word choice is certainly a negative characterization, the prosecutor did not call Appellant an animal. Additionally, the remark consisted of only one word and was an isolated incident. We note that the trial here was lengthy, four days involving many

witnesses and evidence. While the court overruled defense counsel's objection, the court instructed the jury both that closing arguments of counsel are not evidence and:

> You must consider and decide this case fairly and impartially. You are to perform this duty without bias or prejudice as to any party. You should not be swayed by sympathy, prejudice, or public opinion.
>
> During your deliberations, you must decide this case based solely on the evidence that you and your fellow jurors have heard together in this courtroom.

Moreover, this was not a simple credibility case, as the sexual propensity evidence of A.R.'s similar sexual abuse by Appellant greatly strengthened the State's case.

We find *Lawson*, *supra*, and *Walker*, *supra*, distinguishable. Unlike our case, in *Lawson*, the prosecutor made repeated, improper comments during closing argument, specifically: an improper "golden-rule argument"; burden-shifting statements; assertions of defendant's future criminality; and calling the defendant (on trial for child sexual offenses) a "monster." *Lawson*, 389 Md. at 594, 595-96, 599. In *Lawson*, the Court noted that each of the statements "[t]aken alone . . . may not affect the [defendant's] right to a fair and impartial trial but their cumulative effects leads to a different conclusion." *Id*. at 600. Under the specific circumstances presented in that case, the court reversed Lawson's convictions.

In *Walker*, unlike our case, the prosecutor during closing argument called the defendant, who was on trial for sexually abusing two children, an "animal" and a "pervert" and asked the jurors if they could hear "the silent screams" of the two victims. 121 Md. App. at 374. We stated that the use of these words by the prosecutor was pure "name calling," and not a comment on Walker's actions. *Id*. at 382. However, we reasoned that

referring to the defendant as a "pervert" would not, standing alone, amount to reversible error, and while we believed it was improper when combined with calling the defendant an animal, we did not reach the issue of prejudice but remanded on other grounds.[3] *Id*. at 380.

For the reasons stated above, we do not find the prosecutor's use of a single word improper, but even if improper, we do not believe it permeated the trial so as to require reversal and a new trial. *Cf. United States v. Davis*, 514 F.3d 596, 616 (6th Cir. 2008) (holding that prosecutor's remark during closing argument remark referring to the defendant as a "predator" did not require reversal in the circumstances presented), *cert. denied*, 555 U.S. 835 (2008); *Rose v. State*, 163 P.3d 408, 418 (Nev. 2007) (finding that a prosecutor's characterization of the defendant as a "predator who used his daughter to lure friends over to his house so that he could use them for his sexual pleasure" was not error because it was supported by the evidence), *cert. denied*, 555 U.S. 847 (2008); *People v. Taylor*, 804 N.E.2d 116, 129-30 (Ill. App. Ct. 2004) (stating that prosecutor's reference in

[3] At the time of our 1998 *Walker* opinion, our statutory laws included the word "perverted." *See* Md. Code Ann., Family Law §5-701 (stating in the historical notes that in 2012 the General Assembly removed "unnatural or perverted sexual practices" from the definition of "sexual abuse"); Md. Crim. Law §3-601 (crime of child abuse – stating in the historical notes that in 2002, the General Assembly removed "perverted sexual practices" from the definition "sexual abuse."); Crim. Law § 3-602 (crime of sexual abuse of a minor – stating in the historical notes that in 2023, the General Assembly removed "perverted sexual practice" from the definition of "sexual abuse."); Crim. Law, §3-604 (crime of abuse or neglect of a vulnerable adult - stating in the historical notes that in 2020 and 2023, the General Assembly Acts removed, respectively, "perverted sexual practice" and "perverted sex practices" from the definition of "sexual abuse."); and Crim. Law, §3-809 (crime of revenge porn - stating in the historical notes that in 2020, the General Assembly removed "perverted sexual practice" from the definition of "sexual activity.").

closing argument to the defendant as a predator fell within the bounds of proper argument where evidence showed that the defendant established trust with the victim by helping and doing good deeds), *cert. denied*, 813 N.E.2d 228 (Ill. 2004); *State v. Reeves*, 448 S.E.2d 802, 817 (N.C. 1994) (determining that prosecutor's comment in an opening statement referring to defendant as a "predator" was not improper where the evidence showed that the defendant developed a relationship with the victim before sexually assaulting her and comment was not so grossly improper as to require the trial court to voluntarily act), *cert. denied*, 514 U.S. 1114 (1995); *see Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial – modern cases*, 88 A.L.R.4th 8 (1991, Cum. Supp.). Accordingly, we shall affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.