Circuit Court for Montgomery County
Case No. 136923C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1731

September Term, 2022

ROLANDO CABRERA PEREZ

v.

STATE OF MARYLAND

Arthur,
Zic,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: November 20, 2023

* 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 Maryland Rule 1-104(a)(2)(B).

On April 19, 2022, following a trial in the Circuit Court for Montgomery County, a jury found appellant Rolando Cabrera Perez guilty of sexual abuse of a minor, second-degree rape, and a third-degree sexual offense. The court sentenced Cabrera Perez to a total of 18 years of imprisonment: ten years for sexual abuse of a minor; six years, to be served consecutively, for second-degree rape; and two years, also to be served consecutively, for the third-degree sexual offense.

Cabrera Perez noted a direct appeal to this Court, raising the following questions:

1. Is the evidence insufficient to sustain the conviction for second-degree rape, and was [a]ppellant denied his constitutional right to the effective assistance of counsel because his trial attorney failed to preserve the sufficiency issue for appellate review?

2. Did the trial court commit plain error by allowing the prosecutor's improper and prejudicial closing argument?

3. Did the trial court err by allowing the State to elicit testimony from [the victim] regarding her self-harming behavior?

For the reasons stated below, we decline to address the first and second questions, and we answer his final question in the negative. We shall therefore affirm the judgment.

BACKGROUND

On November 17, 2018, Cabrera Perez, his 11-year-old daughter, her brother, and her stepbrother spent the night in a hotel room with two beds. The boys slept in one of the beds; Cabrera Perez and his daughter, to whom we shall refer as "D.," slept in the other.[1]

[1] We have randomly selected the initial "D." "D." may or may not be the first letter of D.'s name.

At trial, D. testified that her father drew a bath for her before they went to bed. While she was bathing, Cabrera Perez entered the bathroom and pulled open the shower curtain. She tried to cover herself with her hands, but Cabrera Perez insisted that she let him see her. She felt uncomfortable and did not want to do what he was telling her to do. Eventually, she complied.

D. got out of the bath and went to bed. Cabrera Perez got into bed with her and started hugging and touching her. She tried to avoid his advances, but he persisted.[2]

D. got up and went to the bathroom, hoping that if she stayed there long enough, Cabrera Perez would fall asleep. When she returned, however, he was still awake. She went back to the bathroom two or three times in the hope that she could prevent Cabrera Perez from touching her.

When it became apparent that her plan would not work, D. got into bed. As she lay in the bed, Cabrera Perez started to touch her "inside." At some point, he told her to take her clothes off. She refused and told him that she was hungry. He agreed to take her to a nearby convenience store, but told her that she would have to take her clothes off when they got back.

At the convenience store, D. took her time picking out something to eat because she did not want to go back to the hotel. She also took her time eating in the car.

[2] By this point in D.'s testimony, the jury had heard her testify about prior instances in which Cabrera Perez sexually abused her in South Carolina, where he lived. The abuse included touching her vagina on more than one occasion, digital penetration of her vagina, cunnilingus, and vaginal intercourse.

Cabrera Perez told her to "hurry it up."

When they got back to the hotel room, D. tried to pretend that she had forgotten what Cabrera Perez had said. She got beneath the covers and tried to fall sleep. He told her to take her clothes off. She responded that she was tired. He undressed her, took off his own clothes, and began to touch her. She closed her eyes and prayed that she would fall asleep. He was still touching her when she fell asleep.

Several months later, D. disclosed what Cabrera Perez had done to her. The disclosure led to the charges against Cabrera Perez.

DISCUSSION

I.

Cabrera Perez claims that the evidence adduced at trial is legally insufficient to support a conviction for second-degree rape because, he says, there was insufficient evidence that he penetrated the opening of D.'s vagina. Because Cabrera Perez failed to preserve that claim for appellate review, we shall not consider it.

The State charged that Cabrera Perez committed second-degree rape by committing a "sexual act" with a victim under the age of 14 in violation of section 3-304(a)(3) of the Criminal Law Article ("CL") of the Maryland Code (2002, 2021 Repl. Vol.).[3] CL section 3-301(d) defines the term "sexual act" to mean:

> (i) analingus; (ii) cunnilingus; (iii) fellatio; (iv) anal intercourse, including penetration, however slight, of the anus; or **(v) an act: 1. in which an object or part of an individual's body penetrates, however slightly, into**

[3] The statute requires that the person performing the act be at least four years older than the victim. Because the defendant is D.'s biological father, that requirement was not an issue in this case.

> **another individual's genital opening** or anus; and 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

(Emphasis added.)

In this case, the indictment alleged that Cabrera Perez "did unlawfully commit a rape in the second degree . . ., to wit: digital penetration of [D.'s] vagina[.]" The court instructed the jurors that, to convict Cabrera Perez of second-degree rape, they must find that he had penetrated D.'s genital opening with an object or part of his body.

A defendant may move for a judgment of acquittal at the close of the State's case and at the close of all of the evidence. Maryland Code (2001, 2018 Repl. Vol.), section 6-104 of the Criminal Procedure Article. In moving for a judgment of acquittal, a criminal defendant must "state with particularity all reasons why the motion should be granted." Md. Rule 4-324(a).

"Ordinarily," this Court will not decide any issue, other than subject matter jurisdiction or personal jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Thus, to preserve an argument about the sufficiency of the evidence, a defendant must have made, at trial, the same argument that is being made on appeal. *See*, *e.g.*, *Graham v. State*, 325 Md. 398, 417 (1992); *Winston v. State*, 235 Md. App. 540, 574-75 (2018).

Recognizing that he did not raise his sufficiency claim at trial and thus did not preserve it for appeal, Cabrera Perez urges this Court to consider his claim through a different lens. He argues that, by failing to object to the alleged insufficiency of the evidence at trial, his lawyer committed a prejudicial error that resulted in the denial of his

Sixth Amendment right to effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668 (1984).

In theory, an appellate court can entertain at least some claims of ineffective assistance of counsel on direct appeal. *See*, *e.g.*, *Testerman v. State*, 170 Md. App. 324, 336 (2006). Ordinarily, however, review on direct appeal is appropriate only in "exceptional cases where the trial record reveals counsel's ineffectiveness to be ' . . . blatant and egregious.'" *Mosely v. State*, 378 Md. 548, 562–63 (quoting *Johnson v. State*, 292 Md. 405, 435 n.15 (1982)). The preferred method for litigating the issue of ineffective assistance of counsel is through a separate evidentiary proceeding under the Maryland Uniform Post Conviction Procedure Act. *See, e.g.*, *id.* at 558-59.

Unlike direct appeals, post-conviction proceedings "allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* at 560. "'By having counsel testify and describe [the] reasons for acting or failing to act in the manner complained of, the post-conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence.'" *Addison v. State*, 191 Md. App. 159, 175 (2010) (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

In this case, both parties have pointed out that the trial transcript is ambiguous at a key point. During the direct examination of D., the following exchange occurred.

> A. After trying to go to the bathroom and the plan not working, I just laid there, and he started touching me. He started touching me. And there was a point where he was telling me to take my clothes off.

> **Q. Was he touching you on the inside or outside of your (unintelligible)?**
>
> **A. Inside.** There was a point where he was telling me to take my clothes off, and I told him no. And one excuse I found out to say, I told him I was hungry. Because I was, since earlier that day I didn't eat much. I told him I was really hungry.

(Emphasis added.)

Cabrera Perez asserts that, when the prosecutor asked D. whether her father was "touching [her] on the inside or outside," the prosecutor was referring to D.'s clothing, not to her vagina. Cabrera Perez's appellate counsel asserts that she "has listened to the recording of the trial and [that] the prosecutor may be heard faintly saying 'clothes' at the tail end of his question." The State responds that the question and the context are not at all clear and, thus, that an evidentiary hearing is required to ascertain what occurred.

We agree that the transcript is ambiguous on this important point. Because of the ambiguity, and because of the general preference for resolving claims of ineffective assistance of counsel in post-conviction proceedings, we decline to address Cabrera Perez's ineffective assistance of counsel claim in this direct appeal from his convictions. If Cabrera Perez commences a post-conviction proceeding, a court can make a factual determination about what the prosecutor asked and what D. meant when she responded. On the basis of that factual determination, the court can evaluate whether Cabrera Perez received ineffective assistance of counsel.[4]

[4] We also decline to address Cabrera Perez's unpreserved claim that the evidence is legally insufficient to support the crime of second-degree rape. Although this Court has discretion to review unpreserved errors (*see* Md. Rule 8-131(a)), Cabrera Perez has (continued)

II.

Cabrera Perez claims that the State made an improper closing argument by arguing facts not in evidence or inviting the jury to draw inferences from facts not in evidence. He cites the following comment:

> [D.] laid there with her father behind her praying to God to allow her to fall asleep while the defendant jammed his fingers inside of her 10-year-old vagina and he fondled her and thank God she was able to fall asleep because who knows where it would have stopped.
>
> * * *
>
> Count two, rape in the second degree. The State must prove the defendant had unlawful penetration with [D.]. You heard her talking about as she laid there crying and praying to God, she felt inside of her vagina the defendant's fingers inside of her vagina. That's penetration however slight. Penetration. Check it off.

According to Cabrera Perez, these comments were improper because, he says, there was no evidence that he had penetrated D.'s vagina. Recognizing that this issue is not preserved for appellate review because his lawyer did not object at trial to the State's closing argument, Cabrera Perez urges this Court to review the matter for plain error.

As previously stated, a Maryland appellate court "[o]rdinarily" will not decide an issue, other than subject matter jurisdiction and personal jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The courts, however, have devised a limited and tightly circumscribed exception for "plain error."

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not asked us to review his unpreserved claim as plain error, and we decline to do so on our own motion.

"'Appellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. at 567 (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Before an appellate court will reverse for plain error, four conditions must be met:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. at 567.

"Meeting all four conditions is, and should be, difficult." *Id.* at 568. "[T]he appellate court may not review the unpreserved error if any one of the four [conditions] has not been met." *Id.*

In this case, the alleged error is neither clear nor obvious. The claim of error turns on Cabrera Perez's disputed contention about what D. meant when she testified that he touched her on the "inside." It is at least arguable that D. meant that he touched the inside of her vagina. If so, it would not have been error, much less plain error, for defense counsel not to object to the State's closing argument.

III.

In Cabrera Perez's final claim, he asserts that the trial court erred in permitting the State to elicit testimony about D.'s attempt to harm herself with a pencil shortly after she

disclosed the abuse that she had suffered at her father's hands. Cabrera Perez argues that the evidence was inadmissible because it was irrelevant. Alternatively, he argues that, even if the evidence was relevant, the potential for unfair prejudice "greatly outweighed any minimal probative value."

Before trial, Cabrera Perez moved in limine to prohibit D. from testifying about her self-harming behavior. Before the testimony began, the court asked the State what D. would say when asked why she tried to hurt herself. The State proffered that D. would testify that she hurt herself because she "couldn't get the thoughts of what her father did to her out of her head[.]" The court denied the motion in limine.

During the direct examination of D. at trial, the following exchange took place:

> [STATE]: And have you ever hurt yourself?
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [D.]: Yeah. I tried to multiple times.
>
> [STATE]: Did you ever try to hurt yourself one time when you were in school?
>
> [D.]: Yes.
>
> [STATE]: Can you tell us about that?
>
> [D.]: I remember very vividly, I had gotten the opportunity to go to Spain to study abroad. And I remember every kid like they—we were the chosen ones, so I remember every kid being excited to go.
>
> And I was just there, and it was recent that I told my mom, so it was probably the next day I went to school. And they gave me an opportunity to go to Spain and I remember everybody being happy. And I couldn't be happy because I had to think about the situation I was in already.
>
> [STATE]: What situation is that?

> [D.]: Telling my mom about what my biological father had done. And so I remember just thinking about it the whole day at school. I couldn't focus on any, on any of my classes. And when we got to the point where I was in my counselor's office because she told me I had the opportunity to be going to Spain.
>
> I remember she left, everybody had left because she had to go pull some other students, and I remember just starting to cry, sitting in the office alone. I was alone with my thoughts, I guess. And I grabbed this very sharp pencil and, and I made sure it was sharp, and through that, I was just looking at my wrist, and I was looking at my veins.
>
> And I didn't want to cry in school, so all the pain I felt, I put it into the pencil, scratching my wrists. And I put, put it there because I hated my skin. I hated my skin. I couldn't bear looking [at] myself without feeling anger or disappointment.
>
> I wanted to get out of my skin. I didn't want my skin. I wanted to be something new and I remember just scratching my wrist with anger and so much sadness and I just, I wanted everything to be over because everything I had gone through, I was tired of it. I was really tired.
>
> I couldn't carry no more. I couldn't carry anything no more because I was really tired of just living every day thinking about everything that happened to me.

Standard of Review

"Relevant evidence" is "evidence having 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 5-401. In general, "all relevant evidence is admissible[,]" and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by . . . the danger of unfair prejudice[.]" Md. Rule 5-403.

The determination of whether evidence is relevant is a legal question that an appellate court reviews without deference to the trial court. *See*, *e.g.*, *State v. Simms*, 420

Md. 705, 725 (2011). The determination of whether relevant evidence should be excluded under Rule 5-403 is left to the discretion of the trial court. *Id*. In the context of Rule 5-403, "'[a]n abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court.'" *Montague v. State*, 471 Md. 657, 674 (2020) (quoting *Williams v. State*, 457 Md. 551, 563 (2018)).

The Admissibility of the Testimony

Cabrera Perez asserts that the evidence of D.'s self-harming behavior was irrelevant because "there was no testimony establishing a basis from which the jury could find a causal link between" the "behavior and the alleged abuse." Without that causal link, he argues, the evidence of D.'s behavior "did not further any fact of consequence[.]"

Evidence is relevant if it "could reasonably show that a fact is slightly more probable than it would appear without that evidence." *Smith v. State*, 423 Md. 573, 591 (2011) (quoting 1 McCormick on Evidence § 185, at 776 (4th ed. 1992)). Establishing relevance "'is a very low bar to meet.'" *Montague v. State*, 471 Md. at 674 (quoting *Williams v. State*, 457 Md. at 564).

We disagree that the evidence of D.'s self-harming behavior was unconnected to the abuse that she claimed to have suffered at his hands. D.'s testimony made it clear that, temporally, her self-harming behavior occurred on the day after she disclosed the abuse to her mother. Moreover, her testimony made it clear that she hurt herself because of the emotional trauma that she experienced as a result of the sexual abuse. In summary, D. said that she was so distraught after disclosing the sexual abuse to her mother that she could not focus on school and that she could not feel happy even after learning that she

had earned the opportunity to study abroad. After being left alone in an office at school, she found a sharp pencil and put "all the pain [she] felt [] into [it], scratching [her] wrists." She "hated" her skin. She "couldn't bear looking at [herself] without feeling anger or disappointment."

In our view, D.'s testimony connected her self-harming behavior with the sexual abuse she suffered. The testimony was therefore relevant.

Cabrera Perez contends, briefly, that, even if the evidence of D.'s self-harming behavior was relevant, it was still inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice. He argues that the danger of unfair prejudice arose because the evidence of D.'s "self-harming behavior could only generate hatred and ill will towards [a]ppellant and cause confusion for the jury."

The evidence was certainly prejudicial, but that is not the governing standard. "'The fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, *Maryland Evidence, State & Federal* § 403:1(b) (2d ed. 2001)). The correct inquiry is whether the probative value of the evidence was *substantially* outweighed by the danger of *unfair* prejudice. Because we cannot say that "no reasonable person would take the view adopted by the circuit court" on this issue (*Montague v. State*, 471 Md. at 674), we discern no abuse of discretion in the decision to admit D.'s testimony about her attempts to harm herself.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY

AFFIRMED. COSTS TO BE PAID BY APPELLANT.