UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0629

September Term, 2015

MARVIN E. COREAS-RODRIGUEZ

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: August 3, 2016

Convicted by a jury, in the Circuit Court for Montgomery County, of second-degree assault and reckless endangerment, Marvin Coreas-Rodriguez, appellant, noted this appeal, raising the following question for our review:

> Did the circuit court err in allowing the State to make four allegedly improper and prejudicial statements during closing argument?

This issue, as appellant acknowledges, was not preserved for our review. In any event, three of the four statements at issue were not improper, and the fourth statement, mis-describing the law regarding self-defense, though improper, did not, under the circumstances, prejudice appellant. Accordingly, we shall affirm the judgments below.

I.

The offenses for which appellant was convicted arose from a domestic dispute between appellant and his former girlfriend, Ana Caceres, during the night of September 15th and the early morning hours of the 16th, 2014, at their Gaithersburg home, where they lived, together with appellant's mother and various other relatives of his,[1] as well as Ms. Caceres's two daughters. At that time, appellant and Ms. Caceres had been romantically involved for four years, and the younger of Ms. Caceres's two daughters, Camilla, was the product of that relationship.

Although, approximately one month before the date of the assault at issue, appellant and Ms. Caceres had ended their relationship, Ms. Caceres was still living, with appellant,

[1]In appellant's words, he and Ms. Caceres shared the home with "my mom, my two girls, my cousins, his wife, and his children."

at the residence they shared, because she could not afford to move elsewhere. In fact, on the date of the assault, appellant and Ms. Caceres were both romantically involved with other people.

On the night that the assault at issue occurred, appellant and Ms. Caceres were engaged in separate but contemporaneous telephone conversations with their respective and newly acquired romantic interests. While appellant remained inside their house, Ms. Caceres went outside to continue her telephone conversation, so that appellant, as she put it, would not "feel bad in hearing [her] talk to another" man. But, unfortunately, that precaution did not prevent appellant from storming outside, confronting her, and demanding that she disclose the password to her cell phone. When she refused to do so, appellant pushed her against a wall, struck her several times with an aluminum baseball bat, and kicked her in the forehead, fracturing Ms. Caceres's arm and bruising her head, shoulder, and back.[2] He then threatened to kill Ms. Caceres and her elder daughter (who was not appellant's biological child) if she persisted in refusing to disclose her cell phone password. Nonetheless, at trial, appellant claimed that he was acting in self-defense at the time he rendered the foregoing blows, as Ms. Caceres had, with a drawn knife, approached him in a menacing manner.

[2]At appellant's trial, Ms. Caceres's testimony regarding the injuries she sustained was further corroborated by photographs, taken within hours of the assault, depicting her injuries, as well as by medical records, created during her ensuing visit to Suburban Hospital.

Eventually, appellant's mother broke up the fight between the two former lovers, whereupon Ms. Caceres called "911." Then, while Ms. Caceres was being transported to Suburban Hospital for treatment of the injuries she had sustained, appellant was arrested for assault. Although the police subsequently recovered the baseball bat, which appellant had used to strike Ms. Caceres, they did not find, at the crime scene, the knife appellant claimed Ms. Caceres had drawn.

After Ms. Caceres was discharged from the hospital, she, a native of El Salvador, whose legal status, in the United States, was, at that time, at least in question,[3] sought a protective order, under Title 4, Subtitle 5, of the Family Law Article. At that time, she was informed that, as a victim of domestic violence who was also an undocumented immigrant, she should "talk to an immigration lawyer." When she did, she was advised that she should apply for a "U visa," a permit which allows an undocumented immigrant to remain in the United States and gain "legal" status.

Appellant was subsequently charged with first-degree assault, second-degree assault, and reckless endangerment. Although a jury later found him not guilty of first-degree assault, it did find him guilty of second-degree assault and reckless endangerment,

[3]At trial, Ms. Caceres claimed that she was legally in the United States but admitted that she had neither a "green card," a social security number, nor any other documents save for "some leaflets that [she] was given" when "talking to the immigration attorney." The only reasonable inference is that, at the time of the assault, she was illegally in the United States but that, at the time of trial, she (perhaps reasonably) believed that, having sought a "U visa," she was now legally present.

whereupon the circuit court, upon merging his conviction for reckless endangerment into his conviction for second-degree assault for sentencing purposes, sentenced him to five years of imprisonment, with all but six months suspended, for the assault.

II.

We begin our analysis by first addressing the three comments, which, as we previously noted, were not preserved for appellate review but which, for the reasons that follow, were, in any event, proper. We will then conclude our analysis by explaining why the fourth comment, which, while not preserved for our review, did not prejudice appellant.

Comment 1

The first purportedly improper comment occurred with respect to testimony that appellant had struck the victim, Ms. Caceres, with an aluminum baseball bat. In arguing that that testimony established that appellant had the intent to cause serious physical injury to Ms. Caceres, an element of assault in the first degree, the prosecutor stated, without objection:

> [H]is intent could be nothing other than to cause serious physical injury. You do not pick up this bat which, it's heavier than you'd think, when you take it back to the jury deliberation room, you'll be able to see yourselves. It is an aluminum bat. **Those aren't even used in [M]ajor [L]eague [B]aseball, because they are so strong and have no give.** This is not a children's bat. This is a brutal dangerous weapon that he took and beat her repeatedly. . . . Because if somebody takes an aluminum bat to your head, they intend, or should know, reasonably should know, that this could cause you to die.

(Emphasis added.)

However, during closing argument, "[j]urors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of common knowledge." *Johnson v. State*, 408 Md. 204, 222 n.4 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 439 (1974)). The prosecutor's comment at issue here, that Major League Baseball does not permit the use of aluminum bats, falls into the category of "matters of common knowledge," as the parent of virtually any school-aged child would attest. Consequently, we do not regard this comment as improper.

Moreover, even if we were to assume that this comment was improper and that, furthermore, appellant had made an objection below and preserved this issue for appeal, reversal would be required only if there were some prejudice resulting from the purportedly erroneous admission of the prejudicial comment. *See*, *e.g.*, *Simpson v. State*, 442 Md. 446, 458 (2015) (noting that if defendant establishes that prosecutor made improper comment, and issue is preserved, then State must show that error was harmless). As noted earlier, appellant was acquitted of assault in the first degree. Thus, even if the first comment had been improper, its admission amounted to no more than harmless error. *Dorsey v. State*, 276 Md. 638, 659 (1976) (explaining that harmless error is error that "in no way influenced the verdict").

Comment 2

The second statement at issue was purportedly a misrepresentation of testimony appellant gave at trial by the prosecutor during her closing argument. Appellant testified

that, on the evening in question, he came home from work "[a]round 9:00 p.m." and encountered his daughter, Camilla. As was his custom, he and Camilla entered a bedroom, where he "played with" her. By 10:00 p.m., both he and Camilla had fallen asleep when, according to appellant, Ms. Caceres entered the bedroom and "pushed" him out of bed. Ms. Caceres then left the bedroom, only to return "about 10 minutes" later, when, testified appellant, "she threw herself" onto the bed, "asking for trouble or something like that." Ms. Caceres then "started talking on [her] phone, insulting" appellant and "hitting" him, while appellant "ignor[ed] her" and "pretend[ed]" that he was asleep. According to appellant, Ms. Caceres continued to talk on her phone "like that" for a "long time," as the call did not conclude until 3:00 a.m.

Then, during the State's cross-examination of appellant, the following exchange took place:

> [THE STATE]: So you're saying that from 10:00, to 10:00, when she came back into the room, until 3:00 in the morning, this talking on the phone, hitting, talking on the phone some more, hitting some more, was happening?
>
> [APPELLANT]: There was a call at 10:00 p.m. Then the fighting started. And then there was another call at 3:00 a.m. in the morning.
>
> [THE STATE]: So it's only two phone calls?
>
> [APPELLANT]: That's what I said.
>
> [THE STATE]: Okay. And you, but she's hitting you throughout the entire time?

> [APPELLANT]: I mean, what I meant by fighting is, like, she was swinging at me at times, and for a period of time. **It's not that she kept throwing punches at me through, for three hours.**

(Emphasis added.)

Appellant complains that the prosecutor "argued repeatedly to the jury, incorrectly, that [he] claimed that Ms. Caceres was hitting him in the bed for five consecutive hours, when [he] very clearly denied that claim during cross-examination." Specifically, he takes issue with the following comments the prosecutor made, without objection, during closing argument:

> "According to [appellant], she was attacking him, she was attacking him for five hours. He wasn't mad."
>
> "So before he said he was pushed off the bed, he was slapped in the face, he was hit over and over again for several hours. There's no mark on him."

According to appellant, these comments were not a fair or accurate summary of the evidence, and they improperly "cast doubt on [his] credibility by misrepresenting his testimony." Appellant omits, however, the exchange that immediately followed the previously quoted passage from the State's cross-examination of him:

> [THE STATE]: Okay, do you have any injuries? Did you have any injuries from all the punches?
>
> [APPELLANT]: I already said that there was no injuries.

[THE STATE]: No injuries? **And, okay, so then at 3 o'clock in the morning, you'd ignored it enough, you decide to go downstairs? Is that correct?**

[APPELLANT]: **Correct.**

[THE STATE]: Okay, and she's on the phone at this point?

[APPELLANT]: No. No, no, no. At that time, when we went downstairs, she was already holding the phone on her head.

[THE STATE]: **I'm asking you, you said, you just said she got a phone call at 3:00 a.m. and that's when she decided, and that's when you decided to go downstairs?**

[APPELLANT]: **Correct, correct. I said she had a call at that time, but then she interrupted the call and we went downstairs.**

[THE STATE]: So she had taken a call, you left, and she followed you down the stairs?

[APPELLANT]: I said on my way down, she interrupted the call and then she followed me.

[THE STATE]: Okay. How do you know she interrupted the call if you were already on your way downstairs?

[APPELLANT]: She was holding, she was holding the phone in her hands.

[THE STATE]: **Why would she follow you down the stairs if she's just taking a phone call?**

[APPELLANT]: **The reason that maybe she had a reason to continue the fight.**

[THE STATE]: **Okay, but you just said it wasn't a fight.**

> [APPELLANT]: **If my (unintelligible), the fight was hers. Egging on me, insulting me, and looking for me.**
>
> [THE STATE]: Okay, you're still not mad?
>
> [APPELLANT]: Absolutely not. Just the fact that I didn't want to be next to her at that point. I --
>
> [THE STATE]: Okay, so it's now been --
>
> [APPELLANT]: -- wanted to get away.
>
> [THE STATE]: Sorry, go ahead.
>
> [APPELLANT]: I wanted to get away.
>
> [THE STATE]: Okay. **So it's now been five hours that this is going on, and you have to work in two and a half hours?**
>
> [APPELLANT]: **Correct.**

(Emphasis added.)

As the State points out, simply because appellant, during cross-examination, stated that he and Ms. Caceres had not been fighting continuously for "three" or even five hours does not preclude the State, in its closing argument, from relying upon other testimony, during both direct and cross-examination, suggesting that the fighting had persisted for most or all of the time period, from 10:00 p.m until 3:00 a.m., the following morning. *See Degren v. State*, 352 Md. 400, 429-30 (1999) (noting that the "general rule" is that "attorneys are afforded great leeway in presenting closing arguments to the jury" and that a prosecutor "may make any comment that is warranted by the evidence or inferences reasonably drawn

therefrom") (citation and quotation omitted). We therefore conclude that the comments at issue draw a permissible inference, from appellant's testimony, that he and Ms. Caceres had been fighting throughout the five-hour time period, from 10:00 p.m until 3:00 a.m., and were not improper.

Comment 3

The third comment at issue was a statement the prosecutor made during closing argument, concerning Ms. Caceres's interest in obtaining a "U visa."[4] The prosecutor, in making that statement, appellant complains, "improperly appealed to the passions and prejudices of the jury by arguing facts not in evidence with respect to immigration law." But appellant ignores the context in which this prosecutorial "appeal" arose. During cross-examination of Ms. Caceres, by defense counsel, she gave the following testimony:

> [DEFENSE COUNSEL]: Ms. Caceres, are you here in the country legally or illegally?
>
> [MS. CACERES]: Legally.

[4]Pursuant to the Victims of Trafficking and Violence Protection Act, a "U visa" permits an "alien" who "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," who "possesses information concerning [such] criminal activity," and who "has been helpful, is being helpful, or is likely to be helpful to" state or federal law enforcement in the investigation or prosecution of such criminal activity, to legally remain in the United States and to eventually obtain a "green card," permitting such a victim to remain permanently in the United States. 8 U.S.C. § 1101(a)(15)(U); *see* "Victims of Criminal Activity: U Nonimmigrant Status" (available at https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status) (last visited Jul. 14, 2016).

* * *

> [DEFENSE COUNSEL]: Okay, so what is your immigration status? Do you have a green card?
>
> [MS. CACERES]: No, I don't have anything. Just like some leaflets that I was given when I was talking to the immigration attorney.
>
> [DEFENSE COUNSEL]: Okay, so you don't have a social security number?
>
> [THE STATE]: Objection.
>
> THE COURT: Overruled. You can answer it.
>
> [MS. CACERES]: Not yet.
>
> [DEFENSE COUNSEL]: Okay, so when you heard about this U visa, that applies to you, right?
>
> [MS. CACERES]: Yes.
>
> [DEFENSE COUNSEL]: Okay, and you knew about that U visa before September 16th [the day of the crimes], is that right?
>
> [MS. CACERES]: No. I was only aware of this when I went to ask for a protective order.
>
> [DEFENSE COUNSEL]: And you know that that applies to you if you allege that you are a victim of domestic violence?
>
> [THE STATE]: Objection.
>
> THE COURT: Overruled. You can answer it.

A bench conference ensued, during which the prosecutor explained the basis for her objection, but the circuit court did not alter its ruling. Questioning then resumed:

> [DEFENSE COUNSEL]: And you know that applies to you if you allege that you're a victim of domestic violence?
>
> [MS. CACERES]: Yes.

Then, during closing argument, the prosecutor, attempting to rebut the suggestion, by defense counsel, that Ms. Caceres had a motive to falsely claim domestic abuse, given the possibility that, as an undocumented immigrant who was also a victim of domestic violence, she could avoid deportation and gain "legal" status by means of a "U visa," made the following comment, to which appellant now objects:

> The purpose of a U visa is for victims of violent crimes, or any crimes, there's 28 different ones, in the United States who are not here legally to obtain a potential deferment of deportation. **Ultimately, the reason, the intent behind that law, is to protect the most vulnerable among us.**

(Emphasis added.)

After a timely defense objection to that comment, the circuit court admonished the State, "Don't talk about immigration law." The State then resumed its closing argument, without commenting further about the victim's application for a "U visa."

To begin with, appellant's claim of error, regarding the above-emphasized comment, was not preserved for our review. Rule 4-323(c) provides:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the

> court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Appellant objected to the challenged statement. As the court sustained his objection, he does not challenge the circuit court's ruling. Rather, he takes issue with the court's curative action, taken in conjunction with sustaining that objection, namely, its instruction to the State that it not "talk about immigration law." But, at trial, appellant did not then "make[] known to the court" either the action that he desired it to take or his "objection to the action of the court," despite having every opportunity to do so. To be more specific, he did not move to strike the purportedly objectionable comment, nor did he request a curative instruction, nor did he ask for a mistrial. Under these circumstances, we hold that the issue of the propriety *vel non* of the prosecutor's challenged comment was not preserved for our review. Indeed, in failing to request any other form of relief, appellant, in effect, acquiesced in the court's action. Consequently, he may not now challenge, on appeal, the court's failure to do more. *See Grandison v. State*, 305 Md. 685, 765 (1986) (observing that the "right of appeal may be waived where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal").

In any event, given the testimony, elicited during cross-examination of the victim, Ms. Caceres, which established that "U visas" are potentially granted to victims of domestic violence, who are present in the United States illegally, the prosecutor did not argue a fact

not in evidence. Moreover, her comment that domestic violence victims are among "the most vulnerable among us" was not improper.

Comment 4

Having found that none of the first three comments at issue were improper, we turn to the one that was. As we shall explain, appellant cannot, however, obtain the relief he requests because he fails to show the level of prejudice necessary to establish plain error.

Appellant contends that the prosecutor misstated the law of self-defense, in closing argument. Specifically, he complains that the prosecutor improperly shifted the burden of persuasion to the defense and that the circuit court's failure to correct the prosecutor's purported misstatement of the law unfairly prejudiced him.

Because appellant had testified that he had acted in self-defense, the circuit court instructed the jury accordingly, both orally and in print, in words that closely tracked the pattern instruction on "self-defense," Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 5:07. The court stated:

> You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense to all the charges in this case and you are required to find the defendant not guilty if all of the four factors are present. So all four factors have to be present.
>
> One, the defendant was not the aggressor. Two, the defendant actually believed that he was in imminent and immediate danger of bodily harm. Three, the defendant's . . . belief was reasonable. And four, the defendant used no more

> force than was reasonably necessary to defend himself in light of the threatened or actual harm.
>
> In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors of complete self-defense was absent.

Then, during closing argument, the prosecutor commented to the jury about appellant's claim of self-defense:

> Okay, so now we get to self-defense. The defendant claims he acted in self-defense, and **the judge gave you the instruction and you'll have that with you and this is the exact instruction. But the wording of it is a little confusing. What this means is that, for self-defense to apply you must find that all of the following factors are true.**
>
> So, if one of these four things fails, self-defense does not apply. So it doesn't mean that if one of these is true, then self-defense applies. It means all four, you have to find all four are true for the defense of self-defense to apply.
>
> **First of all, you have to find that the defendant was not the aggressor.** It's over right there. Does anyone truly believe that Ms. Caceres came after the defendant with a knife? **There's no evidence to support that side of the defendant's testimony. Not even his mother can give you that. Only comes from the defendant. Fails right there. You don't even have to consider anything else.**
>
> Playing this out, if he believed that she was coming after him with a knife then he must have actually believed that he was in immediate and imminent danger of bodily harm. And that that belief was reasonable. So, and it's hard to sort of play this out, because it just doesn't make any sense. But he comes in, and she's somehow, with her non-dominant hand, trying to stab

> him with this knife. And the only thing he can do to protect himself is to find a bat and hit her with it.
>
> Is that reasonable? That really gets us to point four, which is that the defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm. And if this defense is going to fail, if it doesn't fail on one, it fails on four. Because grabbing a bat is not a reasonable defense. Grabbing an aluminum weapon and bludgeoning his former partner is not a defense.
>
> He got this purported knife out of her hand. And he continues to hit her. That isn't self-defense. This is not self-defense. He says this was, he hit her once or twice, two or three times maybe on her shoulder. That's not what this is. This mark on her arm, we don't have an explanation for that. He didn't ever say he hit her on her upper arm. He says he hit her on the back, we've got that.
>
> He somehow was able to break her wrist because, in self-defense, the first blow? It doesn't ring true. It's not true.

(Emphasis added.)

The defense used a portion of its closing argument to remind the jury of appellant's claim of self-defense and the State's burden of proof as to that claim:

> The defense that applies in this case, and I'll wrap it up, the defense that applies in this case is **self-defense. That's the defense, so the State has to convince you beyond a reasonable doubt that it doesn't apply.** [Appellant] got up on the stand, his testimony was consistent, his testimony was credible. That is a reason to believe that he acted in self-defense.

(Emphasis added.)

Finally, when the jury was sent to deliberate, it was provided a written copy of the court's instructions, including the self-defense instruction.

Because appellant did not object to the prosecutor's statements regarding self-defense, his claim of error regarding those assertions was not preserved. Md. Rule 4-323(c); Md. Rule 8-131(a); *Cantine v. State*, 160 Md. App. 391, 407 (2004), *cert. denied*, 386 Md. 181 (2005). We shall nonetheless examine the propriety of those statements and determine whether there was plain error by the circuit court, as appellant contends, in allowing them to be introduced. Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2008). It is a matter of appellate discretion, which we should exercise "rarely." *Chaney v. State*, 397 Md. 460, 468 (2007).

"Arguing the law" is defined as "stating, quoting, discussing or commenting upon a legal proposition, principle, rule or statute." *Stevenson v. State*, 94 Md. App. 715, 729 (1993) (citation and quotation omitted). A prosecutor "may not argue the law to the jury even where such argument is consistent with those instructions given to the jury." *Id.*

The prosecutor's comments were not an attempt to argue the law, but to explain to the jury how the evidence was not consistent with the elements of self-defense. Such commentary is generally permissible, as otherwise, were it to be construed as "arguing the law," we would be "prevent[ing] counsel from effectively presenting" the State's case. *Id.*

We do acknowledge, however, that the prosecutor's comments did not accurately state the law as to self-defense. Specifically, once the defendant has shown "some evidence to support each element of" self-defense and thereby demonstrated that a jury instruction is required upon request, *McMillan v. State*, 428 Md. 333, 355 (2012), the burden shifts to the State to prove, beyond a reasonable doubt, that the defendant did not act in self-defense, *Dykes v. State*, 319 Md. 206, 215 (1990), a burden it may satisfy by proving "that at least one of the four factors of complete self-defense was absent." MPJI-Cr 5:07. But the prosecutor argued that "for self-defense to apply you must find that all of the following factors are true."

Although defense counsel did not object to the State's legally erroneous statements, he did point out near the conclusion of his closing argument to the jury that it was the State's burden to persuade them that self-defense did not apply. In so doing, defense counsel corrected the State's error and thereby lessened any harmful effect of the State's misstatement, an effect that was further diminished by the trial court's correct oral recitation of the self-defense instruction and by the correct written instruction as to self-defense, which was given to the jury. Simply put, we do not believe that, under these circumstances, "the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial," as required to be eligible for relief under the

plain error doctrine. *James v. State*, 191 Md. App. 233, 246 (2010) (citation and quotation omitted).

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.