Circuit Court for Wicomico County
Case No. C-22-CR-19-000558

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 60

September Term, 2022

FRANKLIN JOSE RODRIGUEZ GUTIERREZ

v.

STATE OF MARYLAND

Nazarian,
Reed,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: January 23, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2019, the State charged Franklin Jose Rodriguez Gutierrez with sexually abusing two minor children, A and Y, after the children came forward alleging that Mr. Rodriguez had touched them inappropriately during the time he was dating their mother ("Mother") and living with them, from late 2012 through late 2014. Mr. Rodriguez was tried before a jury in December 2021 and convicted of eight sex offense charges, one of which was second-degree rape of A. Mr. Rodriguez asks us to reverse his rape conviction, claiming *first* that the evidence was insufficient as to the element of penetration, and *second* that the prosecutor made improper statements in closing argument that influenced the jury as to that element. We affirm.

I. BACKGROUND

In November 2012, when A was six and Y was three, Mother began a romantic relationship with Mr. Rodriguez. In January 2013, Mr. Rodriguez moved in with Mother and her daughters in their home in Fruitland, and the couple had a son together in December 2013. The relationship ended the following October, and in December 2014, when A was eight and Y was five, Mother and the children moved out of the house.

Years later, in July 2019, when A was twelve and Y was ten, someone expressed concern to Mother about possible inappropriate contact that Mr. Rodriguez had had with the girls. Mother immediately asked the girls about the allegations and, not knowing how best to proceed, took them to see A's therapist the following day for a family therapy session. During that therapy session, A and Y both alleged that Mr. Rodriguez had abused

them sexually.[1] Mother then contacted child protective services to disclose the abuse and scheduled the girls to be interviewed later that week by social worker Devan Sample of the Child Advocacy Center. During A's interview with Ms. Sample, A disclosed that Mr. Rodriguez "would stick his finger in [her]" and that he made her touch his "area," meaning his penis. She also said that Mr. Rodriguez "tried to stick [his penis] inside [her]" on more than ten occasions, and that she remembered it "hurting inside" when he did this. A was able to draw a penis when Ms. Sample asked her what Mr. Rodriguez's penis looked like, and she used dolls to demonstrate "the time he put his penis in [her] vagina."[2]

During Y's interview, Y told Ms. Sample that Mr. Rodriguez had on more than five occasions touched her "crouch," meaning her genitals, with his hand and his "wee wee," meaning his penis, and that he had put penis "inside" her "crouch." At the end of the interviews, Ms. Sample and the detective assigned to the case made Mother aware of the extent of the allegations the girls had made and advised Mother that she may wish to take

[1] The therapist's notes from this session were admitted into evidence at Mr. Rodriguez's trial.

[2] Pointing to the crotch area of the pants on the male doll, A stated, "There was, like, a zipper her[e]," and explained, "He would never take his pants off. Like, he would, like, kind of (inaudible)," as she motioned pulling a zipper down on the male doll's pants. She then positioned the male doll to be standing between the open legs of the female doll, which was positioned lying on its back with its dress pulled up, so that the two dolls crotch areas were touching. She also explained that "there was one time" when they were "on the couch," and she positioned the female doll so that it was sitting on top of the male doll, with both dolls sitting and facing the same direction. When Ms. Sample asked, "So there was times where—and correct me if I'm wrong—that you were laying on your back, and there was times where you were sitting on him, like, kind of straggling [sic] on top of him[?]" A nodded in agreement.

the girls for forensic medical examinations. She did—the examinations were conducted on July 19, 2019 by Nurse Eunice Esposito of Tidal Health, and the State charged Mr. Rodriguez with sexually abusing A and Y that same week.

Over the course of two days in December 2021, Mr. Rodriguez was tried before a jury on twenty-one counts of sexual offenses against A and Y—two counts of sex abuse of a minor by a household/family member, eleven counts of rape in the second degree, two counts of sex offense in the second degree, and six counts of sex offense in the third degree. At trial, Mother testified about her relationship with Mr. Rodriguez, including the fact that during the time they lived together, Mr. Rodriguez was often left to watch the girls when she was working or otherwise wasn't home.

A, who was fifteen at the time of the trial, testified that while her family was living with Mr. Rodriguez, he would "touch [her] private parts sometimes," meaning her vagina. She said that he touched her "underneath" her clothes with his with his fingers, his mouth, and his penis, each more than five times. She also said that more than once he made her touch his penis with her hands and her mouth. She testified that she "d[id]n't really know" whether he had touched her "on the outside or the inside of [her] vagina" with his fingers and his penis. However, she said that he would sometimes make her shower afterwards and "it would hurt washing down there." She also explained that Mr. Rodriguez told her that her mom would get mad at her and he would get in trouble if she told anyone.

Y, who was twelve at the time of the trial, also testified that Mr. Rodriguez had touched her genital area under her clothes with his mouth, his "private part," and his hands.

When the prosecutor asked, "[D]o you remember if when he touched you with his private part did it go on the outside or inside of your private part?" Y answered, "Inside."

Ms. Sample testified about her 2019 forensic interviews with A and Y, and video recordings of those interviews were played for the jury. Transcripts of the interviews and diagrams Ms. Sample used during were admitted into evidence. Nurse Esposito was admitted as an expert in the field of forensic nursing and testified about her 2019 forensic medical examinations of A and Y. Her notes from those examinations were also admitted into evidence.

At the conclusion of the two-day trial, on a motion by Mr. Rodriguez's counsel, nine of the eleven counts of second-degree rape and four of the six counts of third-degree sexual offense were dropped after the prosecutor conceded that it made sense to send only two counts of each offense, *i.e.*, one count per girl, to the jury.[3] The jury found Mr. Rodriguez guilty on all of the eight remaining charges, and he was sentenced to 90 years in prison—two consecutive twenty-five-year terms for sexual abuse of a minor and two consecutive twenty-year terms for second-degree rape. Mr. Rodriguez noted this timely appeal.

II. DISCUSSION

Mr. Rodriguez presents two questions on appeal: *first*, whether the evidence was insufficient to sustain his conviction for the second-degree rape of A; and *second*, whether it was plain error for the trial court to allow the prosecutor to state in closing, in reference

[3] The prosecutor conceded that the evidence was not detailed enough to allow the jury to delineate between each different instance of each type of abuse suffered by each girl.

to the charge of second-degree rape of A, "But A[], I think that's seen a lot, is children describe it as tried to put it in. So I think [A] clarified it to say that it did go in."[4] Mr. Rodriguez argues that if we find for him on either issue, his conviction for second-degree rape of A must be reversed. For the reasons that follow, we disagree with Mr. Rodriguez on both issues.

A. A Reasonable Juror Could Have Found Penetration Beyond A Reasonable Doubt.

During the time at issue in this case, between December 2012 and October 2014, Maryland Code (2002, 2012 Repl. Vol.), § 3-304 of the Criminal Law Article ("CR") which defines second-degree rape, provided that "[a] person may not engage in vaginal intercourse with another" under certain circumstances.[5] The term "vaginal intercourse" was

[4] In his brief, Mr. Rodriguez phrased the Questions Presented as follows:

1. Did the trial court plainly err by allowing the prosecutor to argue in closing facts which were not in evidence?
2. Is the evidence insufficient to sustain the conviction for second-degree rape of A?

In its brief, the State phrased the Questions Presented as follows:

1. If not waived, was the evidence was [sic] legally sufficient to sustain [Mr. Rodriguez]'s conviction of second-degree rape against A?
2. Should this Court decline to consider whether the trial court erroneously allowed the State to argue facts not in evidence during closing argument?

[5] The statute has since been revised and now states that "[a] person may not engage in vaginal intercourse *or a sexual act* with another" under certain circumstances. Md. Code (2002, 2021 Repl. Vol.), CR § 3-304(a) (emphasis added). Thus, the definition of second-degree rape has expanded considerably since the time period at issue in this case.

defined as "genital copulation, whether or not semen is emitted," and as "includ[ing] penetration, however slight, of the vagina." Md. Code (2002, 2012 Repl. Vol.), CR § 3-301(g).[6] Mr. Rodriguez argues that the evidence was insufficient to sustain his conviction for the second-degree rape of A because the evidence was insufficient to establish the element of penetration.[7] He does not argue that the evidence was lacking as to any of the other elements of second-degree rape, nor does he claim that the State failed to prove any of the other crimes of which he was convicted.

[6] Before 2002, the definition of vaginal penetration in the Maryland Code stated that "[p]enetration, however slight, is evidence of vaginal intercourse." Md. Code (1957), Art. 27 § 461(g). In 2002, this language was deemed "inaccurate" by the Maryland General Assembly and modified "for clarity." *See* Revisor's Note, Md. Code (2002), CR § 3-301. Before the change, we held that for the element of penetration to be met in a rape case, "penetration into either the *labia minora* or the vagina is not required; invasion of the *labia majora*, however slight, is sufficient to establish penetration." *Kackley v. State*, 63 Md. App. 532, 537 (1985). Although it appears that the new version of the statute may require penetration of the vagina rather than merely penetration of the labia majora to sustain a rape conviction, in the only case since 2002 that has dealt squarely with the issue, this Court applied the *Kackley* definition to uphold an attempted rape conviction. *See Collins v. State*, 164 Md. App. 582, 611–12 (2005) (stating that the following jury instruction was "in accordance with" Maryland Code (2002), CR § 3-301: "Vaginal intercourse, for the purpose of this crime, means the penetration of the penis into the vagina. The slightest penetration of the labia majora will be sufficient for this purpose, and the emission of semen is not required."). Because we find that the State proved vaginal penetration in this case, we do not decide whether proving penetration into only the labia majora would have sufficed.

[7] The State disagrees and argues as well that Mr. Rodriguez waived his right to argue this issue by agreeing, in his motion for judgment of acquittal, that the evidence was legally sufficient to send one count of second-degree rape of A to the jury. As we read the transcripts, though, the State's waiver argument fails as it takes Mr. Rodriguez's statements out of context. We will address this issue on the merits.

The standard of review we apply to challenges to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citation omitted). In other words, "the limited question before us is not 'whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Washington v. State*, 179 Md. App. 32, 70 (2008) (*quoting Jenkins v. State*, 146 Md. App. 83, 137 (2002)), *rev'd on other grounds*, 406 Md. 642 (2008). This standard "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). Indeed, "there is no difference between direct and circumstantial evidence," *Hebron v. State*, 331 Md. 219, 226 (1993) (citation omitted), and "[a] conviction may be based on circumstantial evidence alone." *Jensen v. State*, 127 Md. App. 103, 117 (1999). And because "the jury has authority to decide which evidence to accept and which to reject," *Bayne v. State*, 98 Md. App. 149, 155 (1993), our review does not involve "re-weigh[ing] the evidence." *Spencer v. State*, 422 Md. 422, 434 (2011) (citation omitted). Rather, we give "due regard to the [factfinder's] finding of facts, its resolution of conflicting evidence,

and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Albrecht*, 336 Md. 475, 478 (1994) (citation omitted).

In rape cases, proof of the element of penetration "'may be supplied by medical evidence, by the testimony of the victim, or by a combination of both.'" *Wilson v. State*, 132 Md. App. 510, 521 (2000) (*quoting Kackley*, 63 Md. App. at 537). As we have acknowledged before, "[e]specially in rape cases involving very young victims," this evidence "is frequently very problematic." *Id.* And really, how could it not be? Many young children don't even know what intercourse *is*, even when it has happened to them, much less have the vocabulary to describe it. Isn't this precisely how predators take advantage of children in the first place—by exploiting their difficulty in understanding and articulating that they are being abused? In recognition of the fact that rape and sexual assault are difficult topics for *any* victim to discuss, we have held that even "[w]here the key to the prosecutor's case rests with the victim's testimony," the victim "need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault." *Simms v. State*, 52 Md. App. 448, 453 (1982). Instead, "the courts are normally satisfied with descriptions which, in light of all the surrounding facts, provide a reasonable basis from which to infer that penetration has occurred." *Id.* (citation omitted).

Mr. Rodriguez argues that even when all the evidence is viewed in the light most favorable to the State, the evidence is "entirely unclear and too uncertain for the jury to have reasonably inferred that" penetration occurred. In support of this argument, Mr. Rodriguez claims that the record is devoid of any instance when A stated explicitly that

Mr. Rodriguez's penis penetrated her vagina. He highlights the following three points: *first*, A testified at trial that she "d[id]n't really know" if Mr. Rodriguez's penis had touched "the outside or inside of [her] vagina"; *second*, when A was interviewed by social worker Devan Sample four years after the abuse occurred, she described incidents when Mr. Rodriguez "*tried* to stick [his penis] inside [her]" (emphasis added), but never stated explicitly that his penis actually did go inside her; and *third*, Nurse Esposito, the forensic nurse who examined A four years after the abuse occurred, did not state explicitly at trial that A had mentioned penile penetration to her during the forensic examination. To be sure, these witnesses did not use these specific words at trial that Mr. Rodriguez's penis penetrated A's vagina. But his argument ignores all the other critical facts in evidence that, taken together, "provide[d] a reasonable basis from which to infer that penetration . . . occurred." *Simms*, 52 Md. App. at 453.

First, and although it's true that at trial then-fifteen-year-old A stated that she "d[id]n't really know" whether Mr. Rodriguez had touched her with his penis "on the outside or inside of [her] vagina," A's statements at trial were not her only statements in this case. Her 2019 statements to Ms. Sample and Nurse Esposito, given shortly after she first disclosed the abuse she suffered at the hands of Mr. Rodriguez, were also admitted as evidence. And before discussing those statements, we note that at trial, A stated that the *reason* she "d[id]n't really know" whether Mr. Rodriguez had touched her with his penis "on the outside or inside of [her] vagina," was because she "d[id]n't really remember" anymore, but that she had remembered things better when she was interviewed by Ms.

Sample. Her testimony indicated as well that her reluctance to testify with certainty before the jury may have been due to embarrassment:

> [PROSECUTOR]: So let's talk about what body part he used to touch your vagina. What body part did he use?
>
> A: Sometimes his fingers, sometimes his mouth. And, you know, his area, too.
>
> * * *
>
> [PROSECUTOR]: And when you say area, are you referring to his penis?
>
> A: Yes.
>
> * * *
>
> [PROSECUTOR]: When he would touch you with his penis, is that on the outside or inside of your vagina?
>
> A: I don't really know.
>
> [PROSECUTOR]: Okay. When you say you don't really know, is it that you're not comfortable talking about it?
>
> A: Well, that and I'm not really—I don't really remember.
>
> [PROSECUTOR]: You don't really remember?
>
> A: (Nodding head up and down.)
>
> [PROSECUTOR]: Did you remember it better when you were interviewed by Ms. Sample?
>
> A: (Nodding head up and down.)
>
> [PROSECUTOR]: Okay. Is it something that you don't like to think about now?
>
> A: (Nodding head up and down.) Just in general.
>
> * * *
>
> [PROSECUTOR]: Do you remember talking to Ms. Sample, Dev[a]n Sample?
>
> A: Yes.
>
> [PROSECUTOR]: Is that the social worker who interviewed you?
>
> A: Uh-huh.

[PROSECUTOR]: Did you feel comfortable talking to her about everything that happened with [Mr. Rodriguez]?

A: Yes.

[PROSECUTOR]: Do you remember if you told her everything that you remembered then about what he had done?

A: I think I did.

* * *

[PROSECUTOR]: Did you remember it better when you spoke to Ms. Devan than you do now?

A: I think I did.

* * *

[COUNSEL FOR MR. RODRIGUEZ]: I guess what I'm asking is are you trying to hide the more serious facts from the injury, are you embarrassed about it?

A: Well, for one it's embarrassing to tell people that.

[COUNSEL FOR MR. RODRIGUEZ]: Sure.

A: And two, . . . I can remember some things, but . . . I can't remember them as well as I did before because of the time. I just feel like it's embarrassing, like how am I going to tell everybody all this stuff.

* * *

[COUNSEL FOR MR. RODRIGUEZ]: During that direct testimony, and correct me if I'm wrong, you didn't mention [Mr. Rodriguez]'s penis ever going inside your vagina, correct?

A: Yes.

[COUNSEL FOR MR. RODRIGUEZ]: Madam State's Attorney gave you the opportunity to say whether or not that occurred, correct?

A: Yes.

[COUNSEL FOR MR. RODRIGUEZ]: And you didn't say that it did.

[PROSECUTOR]: Objection, Your Honor.

A: Because I don't remember

THE COURT: Overruled.

A: I mean I'm not going to say something—I mean I'm not going to say, oh, I'm sure it did happen if I'm not sure. I mean I don't remember if it did or not. I mean I'm 15, this happened when I was—I'm in high school now, this happened when I was in elementary. I mean, I'm not going to remember certain things because I don't think about it every single day.

* * *

[PROSECUTOR]: And you say you don't remember as much as you did when you spoke to Ms. Sample?

A: (Nodding head up and down.)

[PROSECUTOR]: Is that a yes?

A: Yes.

[PROSECUTOR]: And did you tell Ms. Sample the truth about everything that you remembered?

A: Yes.

[PROSECUTOR]: Okay. And today you just don't have as much memory about it because you don't think about it or you try to forget about it?

A: Yes. I mean, the thing is then, like, you know, this happened to me. Like I was just coming out with what I said. So, like, I mean, I told her what happened, you know, I'm just telling her what happened, letting out whatever I have to say and now I don't remember everything. Don't remember many things.

[PROSECUTOR]: Is this hard for you to think about?

A: Yes.

[PROSECUTOR]: And even harder to talk about?

A: (Nodding head up and down.)

Based on A's testimony, a reasonable juror readily could have found that A's reluctance to state with certainty at trial that Mr. Rodriguez's penis had penetrated her vagina was not because it never happened, but because she no longer remembered, was reluctant to discuss it, or both.

Second, Mr. Rodriguez is correct that during her 2019 interview with the social worker, Ms. Sample, then-twelve-year-old A repeatedly used the word "tried" when describing the incidents when Mr. Rodriguez touched her genitals with his penis. However, and critically, she explained as well that she remembered how it "hurt[] inside" after these incidents:

> [MS. SAMPLE:] So going back to what we just talked about. I know you said that he had put his fingers in your vagina, and then he did something with his thing.
>
> Now, could you—I'll give you the marker. Could you circle what thing you are referring to? [(A circles the penis on a diagram of the male body.)]
>
> So you circled the penis. So tell me about that. Tell me about a time where his penis touched your body.
>
> A[:] One time my mom was in the hospital, when we had (inaudible), you know, (inaudible). And he made me go to the room whenever my sister (inaudible), but he made me go to his room. **He tried to stick it inside me, and I was, like, stop, because it hurt.** And I was, like, trying—I was telling him to get off me. Like, I was pushing him, but he held my arms.
>
> [MS. SAMPLE:] Okay. Now, do you remember—and if you don't remember, just say I don't remember. Do you remember if he had on clothes or not?
>
> A[:] He didn't. Well, (inaudible) that time.
>
> * * *
>
> [MS. SAMPLE:] So how many times would you say that he tried to put his penis in your vagina?
>
> A[:] I don't really know. But see, I know it was more because I remember times—like**, I remember sometimes when he did it to me because (inaudible) hurting inside.** So I know it's more than ten times, like, he tried to put it in.
>
> [MS. SAMPLE:] Okay. Now, I know you said he tried. Was it anytime during—do you know what Ms. Sample means by penetration?

> A[:] ([A] sh[akes] her head side to side.)
>
> [MS. SAMPLE:] Okay. So penetration is when something goes in and out of you. Now, I know you said he tried. Did his penis go all the way in you, or was he just trying to get it in but it never went, like, completely in?
>
> A[:] Yes.
>
> [MS. SAMPLE:] Now, you're saying yes. What do you mean by yes?
>
> A[:] One time he was—well, like, he tried to put his thing in my—like, sometimes I would scream, and that was when I (inaudible) said I know I'm going to be in trouble if I screamed.
>
> So he kept—he would keep trying to put it inside of me because I know one time, like, ... He put me on the couch. And then he just took my clothes off. I don't think he took off my shirt, but I'm not sure. **He tried to put it in me. And I was, like, screaming, and he was just still trying. Like, I was kind of confused because, like, it didn't go in and it hurt**.

(Emphasis added.)

During Nurse Esposito's trial testimony, she explained that vaginal penetration would be "very painful" to a female child of six years old, as compared to a child of twelve years old, because of the changes that occur to the female genitalia as children mature. This fact could well have led a rational juror to conclude that A's statements to Ms. Sample that she remembered "hurting inside" even though "it didn't go in" meant that A simply didn't realize that penetration had, indeed, occurred. This conclusion is supported further by the many statements A made at trial and to Ms. Sample that emphasized her youth and her limited vocabulary to describe what Mr. Rodriguez did to her. At one point, she told Ms. Sample, "I don't even know what to call it what he did to me, and I don't even know the right words." We have said that "[e]specially in rape cases involving young victims . . .

[t]he critical difference between consummated rape and attempted rape may turn on overlooked nuances of the genital geography of the human female." *Wilson*, 132 Md. App. at 518 (2000). This case certainly turned on those nuances, which the jury clearly determined had been "overlooked" by A. It was well within the jury's fact-finding ability to resolve A's potentially incompatible statements to Ms. Sample by inferring that A's internal pain resulted from penetration.[8]

Mr. Rodriguez's *third* point focuses on only one statement that Nurse Esposito gave at trial:

> [PROSECUTOR]: And during the course of—so when you spoke with A[] she disclosed the abuse as digital penetration, vaginal intercourse and oral sex as well?
>
> [NURSE ESPOSITO]: She had—her statement to me was that patient admits the event occurred approximately ten times. It usually happened when mom wasn't home and when my mother was having my brother, because evidently there's a smaller sibling in the household. It happened in the living room, in his bedroom. Patient states he would put his fingers in me. RN asked, meaning me, if there was any oral contact and patient states quote, he put his penis in my mouth about three times. I tried to scream, I gave up telling him to stop. And he did that to my sister, too.

[8] In further support of his argument that the State failed to prove that penetration occurred, Mr. Rodriguez notes that although A did not state explicitly that his penis had penetrated her vagina, during her interview with Ms. Sample, she did state explicitly that his *fingers* penetrated her vagina. Again, a rational juror could have concluded reasonably that this was the result of A's lack of familiarity with the female genitalia and the fact that she almost certainly did not understand that even the slightest penetration qualifies as penetration for purposes of the rape statute. Md. Code (2002, 2012 Repl. Vol.), CR § 3-301(g).

Mr. Rodriguez argues that this statement demonstrates that A "did not mention penetration of the penis into the vagina to Nurse Esposito, although she had mentioned digital and oral penetration." But to reach that conclusion, one would have to ignore other critical aspects of Nurse Esposito's testimony, as well as her written forensic medical examination report, both of which were admitted into evidence.

At trial, Nurse Esposito testified that when she met with A on July 19, 2019 and received A's statement before conducting her forensic medical exam, A said, "[M]y mother asked me if I knew what rape was. I told her yes because [Mr. Rodriguez] did it to me." Nurse Esposito testified that penetration would be very painful to a six-year-old, and she explained that, although A's physical exam did not reveal any genital injuries or abnormalities, that was "to be expected" since "the blood flow to that area makes the area heal fairly quickly so within like three to five days I'd expect to perhaps not see [trauma] any longer." Additionally, Nurse Esposito testified that when she examined Y, Y disclosed to her that Mr. Rodriguez "[h]ad put his wee wee in her coochy," and that "he did it to my older sister, too." Perhaps most critically, on the medical record she completed during and after her examination of A, Nurse Esposito had filled out the history sections by checking "[c]lear disclosure by child of:" and writing in "[c]ontact by adult male – oral, vaginal penetration." She also answered the prompt "[h]as the patient EVER had sex? If [y]es, [d]ate of [l]ast [s]exual [c]ontact" by circling "[y]es," and writing "2015?" and "[f]rom

assault."[9] All of this evidence provided bases on which the jury could properly conclude that penetration occurred.

In sum, we find that A's testimony, her statements to Ms. Sample, and Nurse Esposito's written record and witness testimony, taken together and viewed in the light most favorable to the State, provided ample evidence from which a rational juror could have concluded that penetration occurred beyond a reasonable doubt. We affirm Mr. Rodriguez's conviction for the second-degree rape of A.

B. We Decline To Exercise Plain Error Review Of The Prosecutor's Statements In Closing.

The *second* issue that Mr. Rodriguez presents for our review is whether it was plain error for the trial court to allow the prosecutor to make certain statements in closing argument. Specifically, Mr. Rodriguez argues that despite defense counsel's lack of

[9] Mr. Rodriguez argues that, because "Nurse Esposito clearly testified that the 'history piece [] we do get from the parent[,]'" it is a "mischaracteriz[ation]" of Nurse Esposito's report to interpret the history sections as indicating that A reported having had sex and made a "clear disclosure" of "vaginal penetration." In other words, Mr. Rodriguez claims that the jury was required to interpret the history sections as indicating only that Mother, but not A, disclosed that A had had sex and experienced vaginal penetration. He is incorrect. Although Nurse Esposito did testify that "there is a history that is provided by the adult," she did not state that the history sections of her written report were completed *solely* based on information she received from Mother. To the contrary, she testified that she also took statements from A and Y about what had happened to them, referring at one point to receiving these statements as being "given [] the history," and she did not correct either attorney when they asked her questions in which they referred to the "history" she received from the girls. And regardless, the report *does* indicate that A reported having sex and experiencing vaginal penetration, at the very least to Mother, who then disclosed it to Nurse Esposito for the purpose of A's medical diagnosis or treatment. A reasonable juror could have credited Nurse Esposito's report and concluded, contrary to Mr. Rodriguez's argument, that A made at least one clear disclosure of vaginal penetration.

objection, the trial judge was obliged to step in *sua sponte* when the prosecutor said during closing argument, "But A[], I think that's seen a lot, is children describe it as tried to put in. So I think [A] clarified it to say that it did go in. So [Mr. Rodriguez's] penis does not have to be fully inserted into her vagina for there to be penetration." Mr. Rodriguez claims that this statement was "sufficiently prejudicial to warrant reversal" because it "improperly bolstered A's testimony" by arguing two facts not in evidence: *first*, that children often refer to penetration by saying that their abuser "tried to put it in"; and *second*, that A clarified her statement regarding penetration.

Maryland Rule 8-131(a) provides that "[o]rdinarily, 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." And Mr. Rodriguez acknowledges that his counsel did not object to the prosecutor's statement at the time it was made (or at any time before this appeal). He asks us nevertheless to overlook the preservation requirement and to review the issue under the plain error doctrine because, he says, "there is no way to determine, beyond a reasonable doubt, whether or not the jury's verdict was affected by this improper argument." We decline to do so in this case.

The plain error doctrine affords appellate courts the discretion to review material issues that were not preserved in the trial court. But the doctrine is not meant to serve as a safeguard for parties wishing to raise any unpreserved claim on appeal, even though it often is invoked for that purpose. *See Garner v. State*, 183 Md. App. 122, 152 (2008) (noting

that "[t]he frequency with which we are called upon to throw the life preserver of plain error to sinking (and eminently sinkable) contentions is almost a litigational scandal. It is as if appellate preservation had become an anachronistic embarrassment."), *aff'd*, 414 Md. 372 (2010). Indeed, "[i]f every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless." *Morris v. State*, 153 Md. App. 480, 511 (2003). And because the exception is not meant to swallow the rule, "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.* at 507.

Appellate courts exercise review under the plain error doctrine "only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Kelly v. State*, 195 Md. App. 403, 432 (2010) (cleaned up). To demonstrate such exceptionalism, the error must satisfy all four of the following requirements: (1) it hasn't been "affirmatively waived" by the appellant; (2) it "must be clear or obvious, rather than subject to reasonable dispute"; (3) it "must have affected the appellant's substantial rights, which in the ordinary case means . . . that it affected the outcome" of the case; and (4) the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up). The issue Mr. Rodriguez raises fails to satisfy these requirements. For one, if the prosecutor's statement was indeed an error, it was not so "clear or obvious" an error that anyone in the courtroom at the time noticed it.

Additionally, before closing arguments, the judge instructed the jury to rely only on the evidence rather than any conflicting argument by counsel in opening or closing:

> Opening statements and closing arguments of lawyers are not evidence, they are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

Moreover, and even if we assume (without deciding) that the issue Mr. Rodriguez raises *is* exceptional enough to *allow* us to exercise plain error review, our discretion over whether to exercise it is "unfettered." *Morris*, 153 Md. App. at 507; *see also Squire v. State*, 32 Md. App. 307, 309 (1976) ("[E]ven if an error . . . is plain, its consideration on appeal is not a matter of right; the rule is couched in permissive terms and necessarily leaves its exercise to the discretion of the appellate court." (citation omitted)), *rev'd on other grounds*, 280 Md. 132 (1977). Indeed, a decision to exercise this discretion in the past does not establish precedent or require us to exercise it again whenever a similar issue arises. *Morris*, 153 Md. App. at 517–18. And although "the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation," *id.* at 507, the issue Mr. Rodriguez raises does not fall within one of the categories of reasons that often compel us to exercise review under the plain error doctrine. *See id.* at 518–24 (listing "the opportunity to use the contention as a desired vehicle for exploring some hitherto unexplored area of the law"; "[t]he [e]gregiousness of the [e]rror"; "[t]he [n]ature of the [i]mpact," e.g., a concern that "a factually innocent person had been erroneously convicted"; and "the degree of dereliction of the attorney" as categories of reasons that

might motivate an appellate court to exercise review). The court's failure to step in without objection to address this particular statement was not so egregious an error as to shock the conscience, if indeed it was an error at all. We affirm Mr. Rodriguez's conviction for second-degree rape of A.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY COSTS.