UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1144

September Term, 2013

DAWN MARIE BOYD

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: August 12, 2015

"Compelling," "extraordinary," "exceptional," and "fundamental" are the words the Court of Appeals has used to characterize the kinds of cases in which an appellate court may recognize and remedy *unobjected-to* errors in order to protect a defendant's fundamental right to a fair trial. The instant appeal, raising unpreserved errors, is not one of those rare cases.

T.M.,[1] the victim in this case, is mentally disabled. It was alleged that Appellant Dawn Marie Boyd—with knowledge of T.M.'s disability—agreed with a man named Bryant Lake that she would facilitate sexual intercourse between him and T.M. in exchange for receiving crack cocaine from Mr. Lake. Appellant was charged and convicted by a jury in the Circuit Court for Dorchester County of conspiracy to commit second-degree rape, human trafficking for compensation, and other related offenses on April 10, 2013. On June 28, 2013, the court imposed a sentence of ten years of imprisonment for conspiracy and a consecutive ten years of imprisonment for human trafficking. In her timely appeal, Appellant raises four issues for our review, which we have rephrased and consolidated into three:

I. Did the circuit court err in eliciting testimony from the State's lay witness as to whether T.M. was "mentally defective" as defined by Md. Code, Crim. Law Art. § 3-304 (the rape statute)?

II. Did the circuit err in permitting expert testimony and a legal conclusion from the State's lay witness as to whether T.M. was "mentally defective" as defined by Md. Code, Crim. Law Art. § 3-304?

III. Did the prosecutor's improper comments during opening and closing statements invite the jury to convict Appellant based on extraneous

[1] To protect her privacy, we will refer to the victim in this case by her initials.

evidence not presented to the jury, thereby denying Appellant a fair trial?

Appellant concedes that she failed to preserve these allegations of error. Restricted to reviewing these claims under the lens of plain error, we conclude that the errors committed below did not vitally affect Appellant's right to a fair trial. We affirm the judgments of the circuit court.

BACKGROUND

Although Appellant does not challenge the sufficiency of the evidence to support her convictions, we summarize the facts presented at Appellant's jury trial held on April 9-10, 2013, in the Circuit Court for Dorchester County, to provide context for our examination of Appellant's contentions of error. *See Goldstein v. State*, 220 Md. 39, 42, (1959) (noting that "[t]o understand the contentions made, it is necessary to relate some of the background of the case"); *Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

T.M.'s mother testified that T.M. was diagnosed with a mental disability at age four, specifically mental retardation; that T.M. did not speak until she was seven years old; and that she receives Social Security benefits for T.M.'s disability. T.M.'s mother further testified that T.M. was friends with Appellant and that she had informed Appellant of T.M.'s mental disability.

T.M., who was 19 years old at the time of the incident, testified that on August 29, 2012, she went to her cousin's apartment building, where Appellant also lived, and they

sat outside.[2] Mr. Lake then approached her and asked if she would have sex with him, but she said "no." At some point thereafter, T.M. walked over to Appellant, who was also sitting outside that day. In Appellant's presence, Mr. Lake asked T.M., again, to have sex with him. Appellant then asked T.M. if she wanted to have sex with Mr. Lake so "she [could] get some crack." T.M. said "no." T.M. testified that she did not know exactly what crack was, but she knew it was white and is "smoked."

Appellant then asked T.M. to go inside her home, and when she did so, Mr. Lake was in the kitchen. Despite her prior refusals, Mr. Lake grabbed T.M. by the arm, took her into the living room where there was a bed, told her to take off her pants and lay down on the bed. He then had sex with her. T.M. testified that she did not know what sex was, but stated that Mr. Lake put his penis into her private part. She did know what a condom was and stated that Appellant gave one to Mr. Lake and that he wore one during the incident, which he threw into the bathroom trash afterwards. T.M. testified that after this happened, Mr. Lake handed Appellant some crack, and Appellant then went inside her home and smoked it.

T.M. further testified that a similar incident had happened on a prior occasion, although she could not remember exactly when. On that occasion, Appellant told T.M. to have sex with Mr. Lake so she could get some crack. Appellant also provided Mr. Lake with a condom enclosed in red packaging. T.M. did not tell anyone about this first incident

[2] The State began by asking T.M. whether she knew the difference between telling the truth and telling a lie, and T.M. responded that "you get in trouble" if you lie.

because she was scared. When the State asked, "[s]o you had sex for your friend[, Appellant]?," T.M. responded, "Yes."

Kiashada, T.M.'s oldest sister testified that after she learned what had happened to T.M., she went to Appellant's apartment, feeling a need to protect her sister. She stated that when she was there, Appellant "put her hand in [her] face and [they] got [to] fighting." She also testified that when Mr. Lake had tried to talk to T.M. in the past, Kiashada told him that T.M. was "autistic" and "can't comprehend for herself."

Trooper Charles Gore testified that at approximately 11:00 p.m. on August 29th, he and Trooper Danielle Shultz responded to Appellant's residence in reference to a reported assault. Following their arrival, they learned that Appellant and Kiashada had an altercation. The troopers then went to T.M.'s mother's residence to look for Kiashada. While there, Trooper Schultz spoke with Kiashada and learned that the assault may have occurred in response to a sex crime committed earlier that day involving T.M. T.M.'s mother testified that around that same time, T.M. had uncharacteristically remained in her bedroom until the police arrived. Upon their arrival, T.M. came out and said, "Mommy, [Kiashada] and [Appellant] [were] fighting" because "he had sex with me." When the mother asked T.M. why she did not initially tell her what had happened, T.M. said she was scared. Following initial questioning by police, T.M. was taken to Dorchester General Hospital for examination.

At the hospital, Trooper Jean Davenport interviewed T.M., and a nurse performed a sexual assault examination, which included collecting oral swabs, hair combings, and genital/anal swabs. The nurse testified that she observed a laceration inside T.M.'s vagina.

A subsequent examination of the samples taken revealed a positive test for blood on the vaginal cervical swabs only, but negative tests for semen and saliva on all other samples. According to the forensic analyst, a negative test for semen is not unusual if a condom was used.

Based on the information learned during the interview, Trooper Gore returned to Appellant's apartment and seized several items, including, *inter alia,* a recently used condom found on the floor next to the bathroom trashcan, drug paraphernalia, and a plastic baggie with fresh powder residue, which, in Trooper Gore's experience, was indicative of cocaine. The condom subsequently tested positive for Mr. Lake's DNA and T.M.'s DNA.

Mr. Lake and Appellant were arrested on September 10, 2012. Trooper Davenport testified that at the police station, Appellant waived her *Miranda* rights and stated that T.M. came over to her house for a drink and when T.M. went into her kitchen to get one, Appellant remained outside "sunning" and did not know that Mr. Lake was inside of the residence. She admitted that she received cocaine from Mr. Lake, but asserted that she reimbursed him the following Friday. After discussing condoms, Appellant handed Trooper Davenport two condoms in red packaging that she had in her purse at the time of arrest.

Appellant testified similarly at trial, adding that she did not see Mr. Lake enter her home. About an hour later, Mr. Lake "fronted" Appellant some crack because she did not have money, and she paid him two days later. She stated that there was not any agreement between them regarding Mr. Lake's fronting of the crack and that she never told Mr. Lake to have sex with T.M.

After two days of trial, the jury found Appellant guilty of the following crimes that were committed on August 29, 2012: (1) conspiracy to commit second-degree rape; (2) human trafficking-compensation; (3) human trafficking-benefit financially; (4) human trafficking–aid and abet or conspire; and (5) conspiracy to commit second-degree assault.[3] On June 28, 2013, the court imposed a sentence of ten years for conspiracy to commit second-degree rape and a consecutive sentence of ten years for human trafficking.[4] We will discuss additional facts as relevant below.

DISCUSSION

Under Maryland Rules 8-131(a) and 4-323(a), a party ordinarily must raise his or her objections in the circuit court in order to preserve those issues for appeal. The rules governing preservation "have a salutary purpose of preventing unfairness." *Conyers v. State*, 354 Md. 132, 150, *cert. denied*, 528 U.S. 910 (1999). Recognizing her failure to preserve any of her appellate contentions, Appellant requests this Court to engage in plain error review.

"Plain error is 'error which vitally affects a defendant's right to a fair and impartial trial.'" *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton,* 321 Md. 206, 211 (1990)). Although appellate discretion to overlook non-preservation is plenary, *Morris v. State,* 153 Md. App. 480, 512 (2003), Maryland courts have "characterized instances

[3] The jury could not reach a unanimous verdict as to whether these same charges occurred on a prior occasion, July 29, 2012.

[4] The court merged human trafficking to benefit financially and human trafficking aid and abet into "human trafficking" for sentencing. The court also merged conspiracy to commit second-degree assault into conspiracy to commit second-degree rape.

when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980); *see also Martin v. State*, 165 Md. App. 189, 195-96 (2005) ("[A]n appellate court should 'intervene in those circumstances only when 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.'" (quoting *Richmond v. State*, 330 Md. 223, 236 (1993))). "[A]ppellate review under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Hammersla v. State,* 184 Md. App. 295, 306 (quoting *Morris,* 153 Md. App. at 507), *cert. denied,* 409 Md. 49 (2009). This extremely high standard serves to incentivize parties to object at the trial level, giving the circuit court, "ordinarily in the best position to determine the relevant facts and adjudicate the dispute," the opportunity to resolve the issue at that time. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

In *State v. Rich*, the Court of Appeals adopted the Supreme Court's four-factor analysis for plain-error review: (1) there must be an error that has "not been intentionally relinquished or abandoned, i.e., affirmatively waived"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights"; and (4) "if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" 415 Md. 567, 578-79 (2010) (internal citations omitted) (quoting *Puckett*, 566 U.S. at 135). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*,

566 U.S. at 135 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). We may consider the prongs in any order, and failing to satisfy a single prong ends the plain error inquiry. Taking these factors into consideration, we conclude that although there were errors below, these errors did not deprive Appellant of her fundamental right to a fair and impartial trial.

I.

Jean Lewis's Testimony

Appellant contends that the circuit court made three plain errors regarding the testimony of Jean Lewis, one of T.M.'s teachers: (1) the court lacked impartiality when eliciting testimony regarding whether T.M. was "mentally defective," an element of second-degree rape, as defined by Maryland Code; (2) the court permitted legal testimony by a lay witness; and (3) the court permitted expert testimony by a lay witness.

Jean Lewis testified at trial that she has been a special education teacher for 13 years and that she had a master's degree in special education. She asserted that she was T.M.'s special education teacher, had known her for three years, and was familiar with her disabilities. According to Ms. Lewis, T.M. has an "intellectual disability" and functions between a first- and second-grade level, i.e. that of a seven- or eight-year-old. She clarified that the former term for "intellectual disability" was "mental retardation." Ms. Lewis also testified that T.M. has a "lag time" for processing information and that she has difficulty making informed decisions and recalling specific time frames. During cross-examination, Ms. Lewis testified that T.M.'s disability, if viewed on a spectrum, would be moderate.

On re-direct, Ms. Lewis confirmed that based on T.M.'s cognitive ability, she could not consistently tell a fictional story again and again.

After both counsel concluded their questioning, the court proceeded to ask Ms. Lewis a few questions, giving rise to the issues raised in this appeal:

> [THE COURT]: We use terms sometimes in different areas or disciplines and you mentioned that the old term of mental retardation is now called intellectual disability?
>
> [MS. LEWIS]: Yes, sir.
>
> [THE COURT]: The term that we may have to deal with legally is one of mentally defective.
>
> [MS. LEWIS]: Uh-huh.
>
> [THE COURT]: Do you have an opinion as to whether or not [T.M.] is mentally defective?
>
> [MS. LEWIS]: What, what are you referring to as mentally defective? As a definition, I'm not familiar with it.
>
> [THE COURT]: Well, I'm not – it is a definition, a legal definition that we may have to deal with in this courtroom.
>
> [MS. LEWIS]: Uh-huh.
>
> [THE COURT]: The two legal definitions are mentally defective or mentally incompetent, as opposed to an intellectual disability.
>
> [MS. LEWIS]: Uh-huh.
>
> [THE COURT]: And do you have an opinion as to whether she may be an individual who is mentally defective or mentally incompetent?

At this time, the State requested to approach the bench, and the following colloquy occurred:

[THE STATE]: With the mentally defective, under the second degree rape there's a definition of that in that same statute, which maybe if you read her that definition of mental defective…

[THE COURT]: All right. Well, let me see it. I didn't get that far. I was just reading the 3-304.

[THE STATE]: Right. Mentally defective is defined before you get to that in the –

[DEFENSE COUNSEL]: It's also part of the Pattern jury instructions.

[THE STATE]: It's – this is – it's right – it's at the top of that page.

* * *

[THE COURT]: Since I am the rabbit in the briar patch on this one, do you want me to read the definition or do you want to do it?

[THE STATE]: I can do it, if you would – since she's my witness I can ask her that question if the court would…

[THE COURT]: All right. Why don't you do that.

[THE STATE]: Okay.

[THE COURT]: I don't want the jury to feel that I'm trying to –

[THE STATE]: Okay.

[THE COURT]: – in any way direct the testimony here, but I think it's something that needs to be dealt with. Okay.

Counsel then resumed questioning of the witness:

[THE STATE]: You indicated intellectual disability, which is the old mental retardation. A mentally defective individual is defined in the statute for the criminal code of Maryland as an individual who suffers from mental retardation –

[MS. LEWIS]: Uh-huh.

> [THE STATE]: – or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of [appraising] the nature of the individual's conduct or resisting vaginal intercourse, sexual act or sexual contact, or communicating the unwillingness to submit to vaginal intercourse, sexual act or sexual contact.
>
> Hearing that definition and knowing to the extent that you do about [T.M.]'s disabilities, would you consider her then mentally defective?
>
> [MS. LEWIS]: Yes. Based on that definition, yes, I would.
>
> [THE COURT]: Very well. [Defense counsel]?
>
> [DEFENSE COUNSEL]: Now, may I ask her a few questions, Your Honor?
>
> [THE COURT]: You certainly may.
>
> [DEFENSE COUNSEL]: So you believe [T.M.] isn't capable of saying no to an act of vaginal intercourse or a sexual act?
>
> [MS. LEWIS]: No.
>
> [DEFENSE COUNSEL]: She's not? Okay. I'm not – no further questions, Your Honor.

Appellant asserts that the import of this testimony relates to the charge of conspiracy to commit second-degree rape. One category of second-degree rape is vaginal intercourse with an individual who is "mentally defective" and "the person performing the act knows or reasonably should know that the victim is mentally defective." Md. Code (2002, Repl. Vol. 2012), Criminal Law Art. ("CL") § 3-304(a)(2). CL § 3-301(b) defines a "mentally defective" individual as

> an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of: (1) appraising the nature of the individual's conduct; (2) resisting vaginal intercourse, a sexual act, or sexual contact; or (3)

> communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.[5]

Finally, we note that the court instructed the jury: "[d]uring this trial I may have commented on the evidence or asked a question of witnesses myself. You should not draw any inferences or any conclusions from my comments or my questions either as to the merits of this case or as to my views regarding the witness."

With the foregoing testimony and context in mind, we turn to the alleged errors.[6]

A. Judicial Impartiality

Appellant contends that the circuit court erred by demonstrating partiality in favor of the State when it "filled the role of the prosecution" by eliciting testimony to establish the "mentally defective" element of second-degree rape. The standard for determining whether a judge improperly lacked the impartiality and disinterestedness necessary to

[5] A mentally defective individual is incapable of consenting. *Travis v. State*, 218 Md. App. 410, 429 (2014).

[6] The State contends that Appellant waived any objection to Ms. Lewis's testimony based on defense counsel's failure to object to the court's questioning of *other* witnesses and his indication that the definition for "mentally defective" is also part of the pattern jury instructions. "Forfeited rights are reviewable for plain error, while waived rights are not." *Rich,* 415 Md. at 580 (emphasis omitted) (citing *United States v. Olano*, 527 U.S. 725, 733 (1993)). "Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right.'" *Savoy v. State*, 420 Md. 232, 240 (2011) (quoting *Rich,* 415 Md. at 580)). Here, although defense counsel may have facilitated the reading of the definition during Ms. Lewis's testimony, so as to suggest invited error, we disagree with the State and conclude the transcript does not show defense counsel knowingly relinquished a challenge in a manner amounting to waiver. *Rich*, 415 Md. at 580. We also reject the argument that acquiescing to the court's questioning of other witnesses constituted a waiver of all objections to the court's questioning of any witness, because other the other questioning may have involved unrelated issues and could have been entirely appropriate and unbiased.

conduct a fair trial is whether the "'judge's comments . . . could cause a reasonable person to question the impartiality of the judge[; if so,] then the defendant has been deprived of due process and the judge has abused his or her discretion.'" *Archer v. State*, 383 Md. 329, 357 (2004) (quoting *Jackson v. State*, 364 Md. 192, 207 (2001)).

The court's limited questioning of Ms. Lewis does not, standing alone, demonstrate that a reasonable person would have questioned the court's impartiality; and, therefore, error here is neither clear nor obvious. *State v. Rich,* 415 Md. at 578-79. This case starkly contrasts, for example, with the repeated and egregious conduct and questioning by the court in *Diggs & Ramsey v. State*, 409 Md. 260 (2009), which inspired the Court of Appeals to review claims of judicial bias in two defendants' cases for plain error. In *Diggs*, the circuit court rehabilitated the prosecutor's case against Diggs by laying the foundation for the drug distribution charge, rehabilitating a detective, and questioning defense witnesses. *Id.* at 293. The Court of Appeals held that all of the court's actions bolstered the State's case and "created the aura of partiality in front of the jury" and "impl[ied] a disbelief in the defense." *Id.* at 293. Regarding defendant Ramsey, the circuit court elicited elements of the State's case, established key aspects of the officer's testimony, made comments bolstering the prosecutor's integrity, and established the chain of custody for the drugs. *Id.* The Court of Appeals determined that the court acted as "co-prosecutor" and created "an atmosphere so fundamentally flawed as to prevent . . . fair and impartial trials." *Id.* The Court stated: "**[O]rdinarily the failure to object will only be countenanced in those instances in which the judge exhibits repeated and egregious behavior of partiality, reflective of bias.** Failure to object in less pervasive situations may not have the same

result, nor will we necessarily intervene." *Id.* at 294 (emphasis added). Here, the court's brief questioning did not exhibit repeated and egregious behavior that created an aura of partiality. We observe no *plain* error on this ground.

B. Improper Legal Conclusion and Expert Testimony by a Lay Witness

Appellant next challenges Ms. Lewis's testimony that T.M. was "mentally defective" based on the statutory definition—thereby satisfying an element of second-degree rape for the conspiracy charge—on the grounds that the testimony constituted an improper legal conclusion and improper expert testimony by a lay witness. She argues that Ms. Lewis's testimony regarding the difference between a "learning disability" and an "intellectual disability" was improper expert testimony.

Appellant first maintains that Ms. Lewis's testimony constituted an improper legal conclusion. Under Maryland law, witnesses generally cannot provide testimony that constitutes a legal conclusion, although an expert may be permitted to testify about another jurisdiction's law. *See Solomon v. State Bd. of Physician Quality Assur.*, 155 Md. App. 687, 706 (2003) (citing *Franch v. Ankney*, 341 Md. 350, 360 (1996)), *cert. denied*, 381 Md. 676 (2004). Indeed, although a witness may express an opinion on ultimate facts, "'this does not mean that the witness may in the guise of opinion upon a matter of fact include in it a matter of law or the application of a rule of law to the facts.'" *Franceschina v. Hope*, 267 Md. 632, 643 (1973) (quoting Edmund M. Morgan, *Basic Problems of Evidence*, at 218 (1962)).

In support of her argument, Appellant points us to the Fourth Circuit's analysis in *United States v. McIver*, 470 F.3d 550 (2006), *cert. denied,* 550 U.S. 936 (2007). In that

case, the Fourth Circuit recognized that "[t]he line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern" but identified "improper legal conclusions by determining whether 'the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular[,]'" such as "extortion," "deadly force," "fiduciary," and "unreasonably dangerous products." *Id.* at 562 (citations omitted). The court noted that such testimony may be admissible in certain cases, such as those involving specialized industries, because it may be helpful to the jury. *Id.* at 562 n.13.

Based on *McIver*, Appellant contends that "mentally defective" constitutes legal vernacular and, therefore, Ms. Lewis's testimony was an improper legal conclusion. Our cases reflect that it is within a judge's discretion to exclude testimony based on satisfaction of a statutory definition, *Thomassen Lincoln-Mercury, Inc. v. Goldbaum*, 45 Md. App. 297, 310 (1980) (finding no abuse of discretion in the circuit court's refusal to permit a witness to testify as to what she believed to be a "new car" under the statutory definition, because such testimony would be "her interpretation of the statute i.e., essentially a legal opinion"), or to permit such testimony by an expert as helpful to a jury, s*ee*, *e.g.*, *Braxton v. State*, 123 Md. App. 599, 653 (1998) (finding no abuse of discretion in the circuit court's allowance of expert testimony as to whether a certain firearm constituted a "handgun" under Maryland law, because the definition of a handgun is "complex" and expert testimony on the issue would be helpful to the jury). Thus, the most patent error here is that Ms. Lewis was not qualified as an expert.

Maryland Rule 5-701 governs the scope and admissibility of lay testimony:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

On the other end of the spectrum, Rule 5-702 governs the admissibility of expert testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The Court of Appeals has described the difference between the two, stating that "[e]xpert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education" and "need not be confined to matters actually perceived by the witness[,]" whereas "[l]ay opinion testimony is testimony that is rationally based on the perception of the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). The Court has held that Maryland Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education;" otherwise, parties would be able to "avoid the notice and discovery requirements of our rules and blur the distinction between the two rules." *Id.* at 725.

Maryland Rule 5-704(a) further provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." A lay witness's opinion on an ultimate issue of fact, again, must be "rationally based on the perception of the witness and helpful to the determination of the trier of fact." *Zachair, Ltd. v. Driggs*, 135 Md. App. 403, 438

(2000) (involving an attorney providing a lay opinion on the reasonableness of attorney's fees); *see also State v. Conn*, 286 Md. 406, 421 (1979) ("The permissible lay testimony . . . is in the nature of a description of acts observed by the witness at a time relevant to the issue then before the court . . . . Based upon these observations the lay witness would then express an opinion.").

We do not consider Ms. Lewis's brief testimony about the difference between an "intellectual disability" and a "learning disability," albeit requiring specialized knowledge, to be *plain* error, in that it was not material to the overall case given the lack of dispute regarding T.M.'s mental disability.[7] We do, however, consider Ms. Lewis's conclusion—that T.M. is "mentally defective" based on the statutory definition—to constitute improper expert testimony by a lay witness. Although lay witnesses may provide opinions rationally based on their perceptions, even if that opinion speaks to an ultimate issue of fact, we do not consider Ms. Lewis's perceptions of T.M. in a classroom setting alone to be sufficiently developed to support an opinion as to how T.M.'s mental disability would have impacted her appreciation of and response to sexual advances. Instead, to render an opinion that T.M. was mentally defective, Ms. Lewis necessarily relied on her "specialized knowledge" of mental health based on her master's degree in special education and 13 years of experience. It was error for Ms. Lewis to reach that conclusion without first being qualified as an expert. *Ragland*, 385 Md. at 725.

[7] Moreover, we note that in addition to failing to object to Ms. Lewis's brief testimony about the different disabilities, defense counsel at trial asked several questions during cross-examination about the "spectrum" of disabilities" and where T.M. would fall on that spectrum.

We do not, however, believe reversal to be warranted. As we have stated before, "[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,* 153 Md. App. at 511. We have explained that there is a

> distinction between routine, albeit reversible, error and truly extraordinary error. Every error that, if preserved, might have led to a reversal does not thereby become extraordinary. There is a naive assumption that if a contention would prevail on its merits that it should be noticed under the "plain error" exemption, even if not preserved. Reversible error, however, is assumed, as a given, before the purely discretionary decision of whether to notice it even comes into play.

Perry v. State, 150 Md. App. 403, 436 (2002) (citation omitted). We are unable to conclude that the error rendered this case so compelling, extraordinary, or exceptional that would require us to exercise our discretion to remedy the unobjected-to error to protect Appellant's fundamental right to a fair trial.

As an initial matter, we emphasize Appellant did not dispute that T.M. was mentally disabled or that she knew T.M. was mentally disabled. Appellant did, however, assert during closing argument that T.M.'s disability did not interfere with her ability to comprehend, react to, or communicate unwillingness to engage in sexual activity. Although the State largely relied on Ms. Lewis's testimony in closing to argue that the jury should find T.M. to be "mentally defective," the State also pointed to the testimony from T.M., her mother, and Kiashada. Our review of the record reflects that other evidence aside from Ms. Lewis's testimony was presented to support the jury's finding that the "mentally defective" element was satisfied.

T.M.'s mother testified that "T.M. has a disability mentally" and was diagnosed when she was four years old, explaining:

> She didn't start speaking until she was seven years old and she didn't really complete sentences, so we started doing sign language and we was going to the Judy Center in Cambridge, Maryland. So they had diagnosed her and Dr. Derak Shani, he diagnosed her, as her brain being small. That's the reason why she wasn't catching up with the other kids, because **she couldn't never comprehend like what was going on** and she would never speak.
>
> So as time's going on she would always fall back and she didn't understand, really couldn't comprehend until I had to show her or with help is when – with help and with assistance she can, she can do some stuff."

(Emphasis added). T.M.'s mother also testified that T.M. gets Social Security benefits for her "learning and mental retardation disability." She explained, "The State had awarded her that. She had to go through all psychologists, Kennedy Krieger, all kinds of institutions and she was diagnosed with mental retardation." The mother further testified:

> [T.M.'s] IEP scores is not high enough to receive a [high school] diploma, so she had to get a certificate. She's in a level of a third grader. So just like when we go to the store, I can't just send my daughter in there to get something. I've got to have – she's got to have assistance. If something's like $10, I've got to show her, "This is what you – you've got to – you need this to pay for." She doesn't know what to receive back.

As for T.M.'s habits, her mother testified that she doesn't cook, do laundry, but can put on her own clothes and wash herself, although she has to be reminded. Kiashada also described T.M. as "autistic" and that she "can't comprehend for herself."

Most significantly, the members of the jury had the opportunity to observe T.M. on the witness stand. Notably, T.M. testified that she did not know what sex is:

> **[THE STATE]: Now, when you say sex, [T.M.], do you know what sex is?**
>
> **[T.M.]: No.**

[THE STATE]: Do you know what you call your private parts?

[T.M.]: Yes.

[THE STATE]: What do you call them?

[T.M.]: My vagina.

[THE STATE]: And do you know what you call a male's private part?

[T.M.]: Yes.

[THE STATE]: And what is that?

[T.M.]: The penis.

[THE STATE]: And so what – when you say that Lake had sex with you, what did he do with his penis?

[T.M.]: He put it in me.

(Emphasis added). This testimony supports an inference that although T.M. could testify that "sex" occurred by describing what physically happened, as could a child, she did not actually appraise *the nature* of the conduct. *See* CL § 3-301(b) (individual is mentally defective when he or she suffers from a mental disability that renders him or her substantially incapable of "appraising the nature of the individual's conduct"). Appellant argues that T.M.'s response of "no" to Mr. Lake's requests to have sex reflects that she did understand what sex was and that it was optional. However, the inability to communicate unwillingness to submit to intercourse is only one example of mental defectiveness, along with the inability to appraise the nature of the conduct and to resist. CL § 3-301(b).

We also highlight that Appellant's counsel offered an alternative definition for "mentally defective" to be read to Ms. Lewis, thereby facilitating the questioning.

Moreover, defense counsel also asked a follow-up question to Ms. Lewis's affirmative response that T.M. was mentally defective; specifically, whether she believed that T.M. was mentally incapable of refusing sex. *Ms. Lewis stated no.* Indeed, by acknowledging that T.M. was mentally capable of communicating unwillingness to engage in sex, Ms. Lewis rejected one of the three definitions of being mentally defective: being unable, due to mental disability, to communicate her unwillingness to submit to a sexual act. CL § 3-301(b)(3). However, the statute reads in the disjunctive, defining a "mentally defective" individual as one who suffers from mental retardation, which renders "the individual substantially incapable of: (1) appraising the nature of the individual's conduct; (2) resisting vaginal intercourse, a sexual act, or sexual contact; **or** (3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact." CL § 3-301(b) (emphasis added). Thus, the jury could have still found T.M. to be mentally defective based on subsections (1) or (2) of the statutory definition.

In sum, based on testimony and evidence presented at trial, we are not persuaded that Ms. Lewis's testimony deprived Appellant of her fundamental right to a fair trial.

II.

Improper Opening and Closing Arguments

Appellant next contends that the State made improper remarks during its opening and closing arguments. Just as Appellant failed to object to Ms. Lewis's testimony, she also failed to object to the alleged improper statements made during the State's opening and closing arguments; therefore, we also review these alleged errors for plain error.

Appellant challenges the following statement made in the State's opening argument:

> Bryant Lake originally is in the kitchen and T.M. will tell you that he made her touch his penis while she was in the kitchen and then pulled her into the living room area where the bed is, it's just basically a one room apartment, pulled her in there, pulled her pants down, told her to get face down on the bed and had sex with her.

Appellant argues that T.M. failed to corroborate this statement at trial and that the unsubstantiated language "get face down" served to inflame and prejudice the jury. We observe no plain error in this opening remark, given that Appellant has failed to show that the prosecutor obviously made this statement in bad faith or with knowledge that the evidence would not reflect what was proffered. *Wilhelm v. State,* 272 Md. 404, 412 (1974) (explaining that a prosecutor must confine an opening statement to facts able to proven, but that an appellant is generally required "to establish bad faith on the part of the prosecutor in the statement of what the prosecutor expects to prove or establish substantial prejudice resulting therefrom" (citations omitted)), *abrogated on other grounds by Dorsey v. State*, 276 Md. 638 (1976). Moreover, although T.M.'s testimony did not corroborate the opening statement, Trooper Davenport's testimony largely did so when she recounted what T.M. told her during their interview at the hospital.[8] Accordingly, we do not find plain error here.

Appellant also challenges the following statement made during closing argument:

> And maybe Dawn, the defendant, did like [T.M.]'s company, but the problem is that the defendant also liked crack cocaine and people who are addicted to crack cocaine will do anything to get that crack cocaine. In fact, I would say that more than half the crimes that we have are because people

[8] Trooper Davenport explained that per T.M.'s interview, Mr. Lake "forced her into the living room and from behind he pulled her . . . stretchy pants type of garment down to her knees, never removing anything else, and then had her on her hands and her knees on the bed."

> need money to get their drugs. Most [of] the thefts, the robberies, the burglaries, they're committed because people really need their drugs and so they'll do anything; steal, rob, burglarize to get money to get those drugs.

Appellant claims that this statement amounted to a statistical claim—more than 50% of crimes involve people like Appellant—and "invite[d] the jury to convict Appellant in order to combat crime generally."

"In Maryland, counsel are customarily given wide latitude in closing argument." *Hairston v. State*, 68 Md. App. 230, 240 (citing *Samson v. State*, 27 Md. App. 326, 336 (1975)), *cert. denied,* 307 Md. 597 (1986). "[I]t is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Wilhelm*, 272 Md. at 412. "There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar," but "[h]e may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses" and "indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Degren v. State*, 352 Md. 400, 430 (1999) (quoting *Wilhelm,* 272 Md. at 412-13).

The State argues that the prosecutor's remarks relayed commonly known information that drug addicts commit crimes like theft to obtain their drugs. *See Wilhelm*, 373 Md. at 440 (providing that prosecutor's reference to the number of murders in Baltimore was within the jury's common knowledge). Although it is commonly known that some, or even many, drug addicts engage in desperate measures to fuel their addictions,

the State erred by aligning Appellant with drug addicts in the community who commit *half the crimes*—like burglary and robbery—to "do anything" to get their drugs. Even if this error had been preserved, however, "[n]ot every improper remark, however, necessarily mandates reversal, and [w]hat exceeds the limits of permissible comment depends on the facts in each case." *Degren*, 352 Md. at 430-31 (citations and quotation marks omitted). Under the plain error analysis here, we are even further limited to determining whether "[t]he unobjected-to, improper argument . . . rise[s] to the level of the deprivation of a fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992). When viewed in the context of the entire case, we cannot conclude that the statement rose to the level of a deprivation of a fair trial.

The prosecutor's statement in closing was isolated and did not permeate the trial, and the court instructed the jury that closing arguments were not evidence. Moreover, our review of the record reflects the existence of evidence to support the jury's finding that Appellant entered into an agreement with Mr. Lake to facilitate sex with T.M. for cocaine. First, T.M. testified that Appellant asked her to have sex with Mr. Lake so she could get some crack, and despite her negative response, told her to go inside where Mr. Lake was waiting. Although Appellant testified to the contrary, it was the jury's responsibility to evaluate their contradictory testimony and to make a credibility assessment of the two witnesses. T.M.'s story was also corroborated by other testimony and evidence. T.M. testified that Appellant provided Mr. Lake with a condom in red packaging, and when Appellant was interviewed at the police station after her arrest, she provided Trooper Davenport with condoms she had in her purse at the time that were also in red packaging. Appellant testified at trial that she uses cocaine, although her addiction had declined

recently, and that she used cocaine that she received from Mr. Lake on the date of the incident. Therefore, we conclude that the single improper remark did not infect Appellant's trial with unfairness and thus did not constitute a plain error warranting reversal under plain error review.

Even considering the cumulative effect of the plain error in Ms. Lewis's lack of expert qualification and the improper remark during closing argument,[9] our conclusion remains the same. We cannot find the compelling, exceptional error necessary to persuade this court to permit a rare form of relief under plain-error review.

JUDGMENTS AFFIRMED; COSTS ASSESSED TO APPELLANT.

[9] In *Lawson v. State*, the Court of Appeals concluded that the prejudice caused by several improper remarks made during the State's closing argument should not be considered separately, but cumulatively:

> Once error is determined during a 'plain error' review, prejudice can only be determined by a consideration of the error in the context of the entire case including the cumulative effect of all errors on the ability of a jury to render a fair and impartial verdict in the context of the case.

389 Md. 570, 604-05 (2005). Subsequent cases have applied the "cumulative effect" in the context of multiple improper statements made during closing argument. *See, e.g.*, *Warren v. State*, 205 Md. App. 93, 140, *cert. denied*, 427 Md. 611 (2012); *Donaldson v. State*, 416 Md. 467, 497 (2010). We clarify that even if the "cumulative effect" consideration extends to all plain errors, not just remarks during closing, our conclusion would be no different.