Circuit Court for Montgomery County
Case No.: 127399C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1193

September Term, 2020

KESTER GABRIEL CUTHBERT

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: October 7, 2021

Following trial in the Circuit Court for Montgomery County, a jury found Kester Gabriel Cuthbert, appellant, guilty of two counts of child sexual abuse, three counts of second-degree rape, and four counts of second-degree sexual offense. The court sentenced appellant to two consecutive twenty-five-year prison terms, with all but ten years suspended, for each of the child sexual abuse convictions, and concurrent ten-year sentences for the remaining convictions.

Thereafter, appellant took a direct appeal. On that appeal, we affirmed the judgments of the circuit court. *Cuthbert v. State*, No. 2173, Sept. Term, 2016 (filed unreported September 8, 2017). The Statement of Facts from appellant's direct appeal reveals the following background:

> In the spring of 2015, Rosa R. confronted her fourteen-year-old daughter – whom we shall refer to as "the child" – because she was "acting weird" and her grades were slipping. The child said that she had been raped by a stranger. Ms. R. immediately called police. Later, the child said that she had been raped by appellant.
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> At trial, the child testified to events as follows. When the child was ten years old, she and her mother moved in with appellant at an apartment in Silver Spring. At the time, Ms. R. and appellant were dating, and they had a daughter – the child's younger half-sister – in common. Their relationship ended, but Ms. R. remained in the apartment with appellant and her two daughters. After the relationship ended, and the child turned eleven, appellant began to enter her room when she was sleeping and reach down her pants. The child testified that on several occasions, appellant would come into her room at night, take her pants down, and put his fingers into her vagina. The child also stated that at least once, appellant put his penis into her vagina.
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> In January 2013, the child, her half-sister, and appellant moved into a different apartment in Silver Spring to live with appellant's mother. Ms. R., who refused to live with appellant, was homeless for a period of time. The child testified that the abuse continued at the new apartment. The child stated that the pattern was the same: appellant would come into her room at night, take her pants down, put his fingers into her vagina, and then place his penis

> into her vagina. The child could not recall how many times appellant abused her, but she testified that it was "more than five." In January 2015, following an argument with appellant, the child went to live with Ms. R. A few months later, the child reported the rape to Ms. R. and police. [1]

After not prevailing on his direct appeal, appellant later filed a petition for post-conviction relief contending, *inter alia*, that he was denied his right to effective assistance of counsel when his trial counsel failed to object to the State's rebuttal closing argument when the State vouched for the victim's testimony.

At trial, the State's case consisted of three witnesses: the child, the child's mother, and the police detective who investigated the offenses. In closing argument, appellant pointed out, among other things, that the State had not called certain witnesses, including her godmother, and the examiners from the child assessment center to whom the child had identified appellant as her abuser. In rebuttal the State said, among other things, the following:

> . . . And I also find it interesting that [defense counsel] didn't ask [the child] many questions on cross after she testified. An opportunity that he had to point out any inconsistencies that may have been in her testimony from the multiple statements she made to Sarah Culo, to Dr. Shukat[2], to me[3]. But he didn't do that. Why?

[1] As relevant to the issue in the current appeal, it is noteworthy that the child initially told her mother and two police officers that she had been raped by a stranger. The next day, however, the child revealed to her godmother that appellant had raped her. In addition, when she was later examined at the Treehouse Child Assessment Center, she told the examiners that it was appellant who had raped her.

[2] Neither of these witnesses testified at trial. However, the victim testified that she told both of them that appellant was her abuser.

[3] The prosecutor did not testify at trial. However, during appellant's cross-examination of the child, the jury learned that the prosecutor had spoken with the child. The jury did not learn the content of their conversation.

> Well, one possibility is that there were no inconsistencies. And that she told [her godmother] and the police and Dr. Shukat and the social workers and me the same story over and over and over. And he didn't want to point that out.

In his post-conviction petition, appellant contended that his trial counsel made a prejudicial serious attorney error by not objecting when the prosecutor more or less testified during closing argument that the child had told her that appellant was her abuser. Such closing argument, according to appellant, impermissibly vouched for the victim's testimony.

The post-conviction court agreed with appellant that he was denied his right to effective assistance of counsel when trial counsel failed to object to the State's closing argument. Rather than reverse appellant's convictions, however, the post-conviction court granted relief in the form of the right to "file a belated appeal on this allegation." The post-conviction court arrived at this remedy because, during the post-conviction proceedings, the parties stipulated that, had trial counsel preserved for appeal the State's allegedly impermissible vouching, he would have raised the issue on direct appeal.[4]

Appellant thereafter filed his belated notice of appeal. On appeal, he contends that the post-conviction court erred because, according to him, a post-conviction court cannot require this Court to address an issue of trial court error as if it had been preserved during trial when it had not been preserved. He also contends that the proper post-conviction

[4] We are not at all certain of the correctness of the post-conviction court's analysis because, had trial counsel objected, we would presume that, if the State's closing was, in fact, impermissible, the trial court, which is presumed to know and correctly apply the law, would have sustained the objection and there would have been nothing to raise on direct appeal.

remedy was a new trial, not a belated appeal. Finally, he contends that this Court should recognize plain error and address the issue of the State's alleged vouching in closing argument on its merits.

We decline to address appellant's first two contentions which both address the propriety of the post-conviction court's decision to award a belated appeal as a post-conviction remedy. The propriety of the post-conviction court's decision is not before us in this belated direct appeal from appellant's convictions. Such arguments are properly made in an application for leave to appeal pursuant to Section 7-109 of the Criminal Procedure Article and Maryland Rule 8-204.

All that is left in this belated appeal, therefore, is appellant's contention that we should overlook the lack of preservation and recognize plain error with respect to the State's alleged vouching during rebuttal closing argument.

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."

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review "is reserved for those errors that are

compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted).

We conclude that any presumptive error on the trial court's part was not so extraordinary or fundamental that it deprived appellant of his right to a fair trial. Thus, under the circumstances presented, we decline to exercise plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted).

Consequently, we shall affirm the judgments of the circuit court.

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