UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

KERRY DWAYNE WINFIELD

v.

STATE OF MARYLAND

No. 1569, September Term, 2013

KERRY DWAYNE WINFIELD

v.

STATE OF MARYLAND

No. 2483, September Term, 2015

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

JJ.

Opinion by Moylan, J.

Filed: March 16, 2017

The appellant, Kerry Dwayne Winfield, was convicted in the Circuit Court for Harford County by a jury, presided over by Judge Elizabeth M. Bowen, of second-degree rape and of a second-degree sexual offense. Both the rape and the sexual offense were predicated on the victim's status as "mentally defective." Maryland Code, Criminal Law Article, Sect. 3-301(b) defines a "mentally defective individual":

> (a) *In general*. In this subtitle the following words have the meanings indicated.
> (b) *Mentally defective individual*.- "Mentally defective individual" means 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.

On appeal, the appellant raises the two contentions

1. that Judge Bowen erroneously refused to let him testify as to his own diagnosis of mental disorders and to the medications that he was taking to treat them; and

2. that this Court should take "plain error" notice of an improper remark made by the prosecutor in jury argument.

The Appellant's Mental Condition

We are not without some sympathy with what the appellant was attempting to offer as, at the very least, some mitigation or extenuation of his behavior toward his victim. He did not, to be sure, hit his victim on the head and drag her into an ally. They met each other at the Harford Memorial Hospital in Aberdeen, where they both had been going for treatment for mental disorders. She testified that after one of her discharges from the hospital, she called the appellant and arranged to meet with him at the library. They then drove to Baltimore to his grandmother's house. She did her laundry at the grandmother's house and then spent the night there, with no significant sexual activity taking place between them. The appellant did touch the victim's breast

with his hand, but the victim told the appellant that she was not ready for sex and he forbore further contact.

The next day, they went shopping together. At one point, the appellant was pulled over by the police and his car was impounded. The victim went with him to retrieve the car and paid the impound fee. On that day, the victim did not take her prescribed medication. Later that day, the appellant drove the victim back to her apartment in Aberdeen. Back at the victim's apartment, the two engaged in sexual intercourse. She told him that she was not ready for that, but he proceeded. At some time thereafter, they engaged in sexual intercourse a second time. Shortly thereafter, the police arrived and arrested the appellant.

The victim further testified that when they were in the car in Baltimore, she had discussed marrying the appellant. During the time they were together in her apartment in Aberdeen, moreover, the two had showered together, gone out together briefly to purchase wine, and then drank the wine back at the apartment. The victim, however, was found to have been mentally defective, without the legal competence to consent to sexual intercourse or any other sexual act.

The appellant's contention is that he was erroneously denied the opportunity to testify with respect to his own diagnosis of a mental problem or to present evidence of the medication he himself was taking. On a number of occasions, the appellant expressly disclaimed any intention of offering a defense of not criminally responsible. The flaw in the appellant's argument is that he was, in effect, attempting to establish a defense of "diminished capacity" in a state that affirmatively rejects that defense.

The trouble with the appellant's argument is that he was attempting to establish his own diminished capacity to understand his victim's condition as sensitively close to the line that separates criminal responsibility from criminal irresponsibility. Except perhaps for sentencing

purposes, however, being close to that line of demarcation does not count. The dividing line, as a matter of practical necessity, demands, with respect to formal verdicts, simple binary answers to what might in another sense be questions of infinite complexity. In terms of his own vulnerability to a verdict, appellant was either criminally responsible or not criminally responsible (a status he never asserted). In this binary world, there are no borderline nuances such as "just barely criminally responsible" or "almost not criminally responsible." Such nuances might well be relevant at a more open-ended sentencing hearing, but not at the formal trial itself.

The Court of Appeals was explicit about the necessarily binary nature of the inquiry in *Johnson v. State*, 292 Md. 405, 420, 439 A.2d 542 (1982):

> [A]n individual determined to be "sane" within the traditional constructs of the criminal law is held accountable for his action, regardless of his particular disabilities, weaknesses, poverty, religious beliefs, social deprivation or educational background. The most that is proper to do with such information is to weigh it during sentencing.

The Court's rejection of the defense of "diminished capacity" was unequivocal:

> Appellant urges that the entire report is relevant to his defense of "diminished capacity"-that is, he did not have sufficient mental capacity to form the requisite specific intent to commit some of the crimes with which he is charged. Consequently, the argument goes, it was error to keep that information from the jury when it determines the guilt issue. In order to decide whether this ruling on the evidence was erroneous, however, we must first examine whether the criminal defense known as "diminished capacity," or as it is sometimes called, "diminished responsibility," is recognized in this State. Only if such a doctrine exists in our jurisprudence is defendant arguably entitled to produce evidence in support of it. Because we here determine, however, that this State does not recognize diminished capacity as a legal doctrine operating to negate specific criminal intent, it was not error to exclude evidence in support of it.

292 Md. at 417-18 (E.S.).

The Court explained why a binary decision, even if at times arbitrary, is mandatory.

> A review of our prior decisions in this area as they interact with legislative enactments on the subject demonstrates that this State has consistently adhered to the just articulated view that the criminal law as an instrument of social control

> cannot allow a legally sane defendant's lesser disabilities to be part of the guilt determining calculus. For the purpose of guilt determination, an offender is either wholly sane or wholly insane.

292 Md. at 425 (E.S.).

Quite aside from the substantive rejection of the appellant's contention, the contention is also procedurally bereft. The appellant sought to introduce though his own testimony that he had been prescribed upon discharge from the hospital the following medications: Risperidone, Citaloprom, and Trazadone. He offered no expert to describe the purpose of those drugs, of their effect on the patient, or of what might happen if the patient failed to take his medication. Judge Bowen ruled that the evidence, without explanatory expert testimony, was inadmissible.

> THE COURT: All right. Well, with regard to the medications that the defendant is on, since we have no one here who can say the purpose for which these medications were given or what their impact was on Mr. Winfield from a medical standpoint, I cannot see that this is going to prove to be relevant information that is going to do anything other than actually fuel some need on the part of the jury to speculate.

(E.S.) We see no abuse of discretion in that ruling.

The other prong of the evidentiary rejection was that the appellant would not be allowed to testify to the formal diagnosis of him made by the doctors at the hospital. Only one of the doctors could have testified to that. Judge Bowen ruled:

> THE COURT: I will permit him to say whatever his personal experience was in terms of: I was depressed and I was feeling like hurting myself. I'm okay with that. But there is not going to be any recitation of what the formal diagnosis was by his doctors, because I believe that that is hearsay that is beyond the scope of the [c]ourt's ruling on the earlier medical records.

(E.S.)

In *Testerman v. State*, 61 Md. App. 257, 267, 486 A.2d 233 (1985), the Court spoke on precisely this issue.

> During cross-examination of the victim, appellant sought to elicit from her the fact that she had been hospitalized several times for mental disorders.

> The State objected and a bench conference ensued. Appellant's counsel proffered that the victim had been hospitalized in 1977 for schizophrenia. The court, however, precluded these questions pending further proffer. Attempts were then made to identify the exact nature of the victim's hospitalization. The court and counsel consulted hospital records which indicated that the victim had entered Fallston General Hospital in Bel Air, Maryland, on May 27, 1977; she was released a week or so later. While there she was diagnosed "Schizophrenia. Schizo-defective type depressed." Appellant's counsel made no attempt to subpoena a physician to explain this diagnosis. Judge Cameron then concluded that this evidence was altogether inadmissible.

(E.S.)

Even as with the medications, the bare reference to a mental disorder, without expert explanation, can be counterproductive to jury understanding.

> We observe from the record in this case that the victim was allegedly suffering from schizophrenia. We note, however, no further medical explanation was ever solicited. There was no evidence to show that this type of mental disorder, schizophrenia, was one that would affect the victim's credibility. Consequently where, as here, there was little explanation of the nature of the disorder, there was no abuse of discretion in the court's refusing to permit the cross-examination.

61 Md. App. at 268.

We see no abuse of discretion in Judge Bowen's evidentiary rulings.

Another Claim of Plain Error

The appellant now contends that the prosecutor made an improper remark in closing argument to the jury. The appellant did not object, however, and nothing is preserved for appellate review. The appellant, recognizing this deficiency asks us to notice plain error. The appellant, however, has not persuaded us why we would wish to do so. We do not wish to do so.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.