

[J-41-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 66 MAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 599 MDA
	:	2022, entered on January 9, 2024,
v.	:	Affirming the Judgment of Sentence
	:	of the Dauphin County Court of
	:	Common Pleas, Criminal Division,
RONALD JENKINS, JR.,	:	at No. CP-22-CR-0005285-2019
	:	entered on March 30, 2022.
Appellant	:	
	:	ARGUED: May 14, 2025

OPINION

CHIEF JUSTICE TODD

DECIDED: October 1, 2026

In this appeal by allowance, we consider whether the prosecutor’s statements in her closing argument to the jury, referring to the fact that Appellant had retained an attorney when he spoke with a police detective who was investigating him for kidnapping and rape, impacted his right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, and whether such an error could be considered harmless.¹ After review, we conclude that the prosecutor’s mention

¹ The Fourteenth Amendment of our federal constitution forbids states from depriving “any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

of Appellant's retention of an attorney to assist him while speaking with the police was improper and impacted his right to a fair trial.

However, we also determine that this error did not constitute a structural error requiring the automatic award of a new trial. Moreover, because the trial court in this matter gave a prompt curative instruction to the jury that they should disregard this improper reference, which in these circumstances remedied the impact, and given the overwhelming evidence of Appellant's guilt, we find the error must be regarded as harmless under these circumstances, and, thus, the grant of a new trial is unnecessary. We therefore affirm the order of the Superior Court upholding Appellant's conviction.

I. Background

The facts adduced at the criminal trial in this matter, held before the Honorable William T. Tully of the Dauphin County Court of Common Pleas, showed that, on February 14, 2017, Valentine's Day, the victim and her then-boyfriend, now-husband, Damon Robinson ("Robinson"), were living in an apartment located in Lower Paxton Township, Dauphin County, along with their two children. That night, the couple and the children went out to dinner with Appellant, Ronald Jenkins, at an Old Country Buffet restaurant. Robinson and Appellant were long-time friends dating back to their elementary school days.

After dinner, the group went back to the couple's apartment. According to the testimony of Robinson and the victim, all three began to consume vodka and rum in the kitchen while the children were asleep on the couch in the living room. Also, during the course of the evening, Appellant and the victim smoked marijuana, which Appellant had provided. The victim recalled that the effect of smoking the marijuana was, in her

experience, not what she considered to be “regular,” but rather “different” and “extra”. This prompted her to stop smoking it because it “didn’t feel right.” N.T. Trial, 1/25/22, at 80.

As the evening wore on, Robinson began to feel very dizzy and decided to go to bed, and he went back to the bedroom which he and the victim shared. The victim went to check on him, whereupon Robinson told the victim to “take care of [Appellant] and send him home.” *Id.* at 34. Thereafter, Robinson fell asleep.

The victim returned to the kitchen and told Appellant that he needed to leave; however, Appellant refused to leave the residence because Robinson had not personally told him to depart, and he had been allowed to stay overnight in the apartment on previous occasions. *Id.* at 82, 85. While the victim could not clearly recall having any further verbal interactions with Appellant after his refusal, she did remember being suddenly struck by Appellant and thrown against a wall of the apartment with such force that the wall was damaged and two of her acrylic fingernails were broken in an attempt to steady herself. *Id.* at 86, 101-02; N.T. Trial, 1/26/22, at 139. The victim had no further recollection of anything that transpired during that evening.

At some point later that evening, Robinson recalled being awakened by the sensation of somebody hitting something and causing the house to shake. Robinson, while still dizzy, walked into the living room and noticed a hole in the wall and scratches on it that had not previously been there at the time he went to bed. N.T. Trial, 1/25/22, at 39-40. He observed that Appellant and the victim were no longer inside the residence. Robinson, who recalled that he was staggering from the effects of his dizziness, looked around outside the apartment complex, but he did not see either Appellant or the victim.

Robinson returned to the apartment, and, after a fruitless search for his phone, lay back down in his bed and passed out. *Id.* at 40.

Appellant was staying at a nearby motel, and surveillance cameras at the motel recorded Appellant arriving in his vehicle during the early morning hours of February 15, 2017, at approximately 3:15 a.m.² The video footage further showed Appellant parking his vehicle in a space outside of his room, taking the victim's limp and motionless body out of the vehicle,³ carrying her over his shoulder into his room, and then repositioning his vehicle in the parking lot so it was no longer parked outside his room. N.T. Trial, 1/26/22, at 287-90; N.T. Trial, 1/27/22, at 36-38; Trial Court Opinion, 6/22/22, at 6.

The victim awoke later that morning lying on a bed in Appellant's room feeling confused. Her pants and underwear had been removed, and her legs were dangling over the edge of the bed. She was also missing her shoes, and missing her cellphone and identification, which she normally carried with her whenever she left the apartment. N.T. Trial, 1/25/22, at 93. Appellant was sitting in a chair, and smiled and said, "Good morning." *Id.* at 91-92. The victim asked him how she had gotten there. *Id.* He replied that she and Robinson "were fighting" and that he "had to get you out of there." *Id.*

Alarmed, the victim hurriedly left the room and began walking down the nearby busy interstate highway in her stocking feet, hoping to be picked up by the police, as she knew walking on such highways was prohibited. *Id.* at 96. Appellant pulled alongside her in his vehicle and offered her a ride, which she initially refused, but eventually reluctantly

² The videos depicting this sequence of events were played for the jury.

³ Robinson identified the victim as the motionless person Appellant was carrying in still shots taken from the videotape. N.T. Trial, 1/27/22, at 289-90.

accepted, given that she was stranded without any means of transportation or the ability to call Robinson.

Appellant drove the victim back to her apartment and departed. When the victim reentered the apartment, she noticed a large hole in the wall, which she described as big enough for her body to fit into, and she found one of her missing acrylic nails next to the hole. *Id.* at 101. The victim had a terrible headache and bruises on her left arm and along her left jawline. *Id.* at 86-87; N.T. Trial, 1/26/22, at 114-15, 117. She felt very confused and was upset by her inability to remember what had happened the previous night. N.T. Trial, 1/25/22, at 102.

The victim and Robinson discussed that the last thing she remembered was being in their apartment and then waking up partially clothed in Appellant's motel room with no recollection how she had gotten there, or what transpired therein; whereupon Robinson called the police. *Id.* at 100-01.

Officers from the Swatara Township Police Department, whose jurisdiction covered the motel where the victim had been taken, responded, and later that day the victim, accompanied by Robinson, went to that department's headquarters where she was interviewed by a detective in the special investigations unit. N.T. Trial, 1/26/22, at 145-47. The detective who recorded the victim's statement noted that she seemed frightened and confused by her inability to clearly recall what occurred the previous night. *Id.* at 152. The detective observed the victim's missing fingernails, as well as the bruises on her arm and jaw, which she photographed. *Id.* at 158.

Based on the victim's account, the detective recommended that she go to the hospital to be evaluated, including undergoing a sexual assault forensic examination. *Id.*

at 156. After being transported to Harrisburg Hospital, the victim was treated for her injuries, underwent a physical examination, and a nurse took a vaginal swab for purposes of detecting the presence of DNA which may have been deposited during sexual intercourse. The sample was then sent to the Pennsylvania State Police Forensic DNA division for testing. *Id.* at 230.

Later in the evening of February 15, Detective Gregory Langley of the Lower Paxton Township Police Department arrived at the couple's apartment, which was within their jurisdiction. Detective Langley testified that he took photographs of the damage to the apartment wall and other interior areas of the apartment, and retrieved one of the victim's broken fingernails from the trash. *Id.* at 251. He also spoke with Robinson while his partner talked with the victim. Both related the same accounts of what had transpired, which were in accordance with their later trial testimony recounted above.

A few nights later, on February 17, Detective Langley stopped again at the apartment and asked Robinson if he would participate in a recorded telephone conversation with Appellant. Robinson agreed, called Appellant, and discussed what had happened between Appellant and the victim. *Id.* at 263-268. Robinson asked Appellant, "why would you do something like this?" N.T. Trial, 1/25/22, at 49. Appellant replied that "he was sorry," but insisted that "nothing happened." *Id.* Appellant also asserted that Robinson and the victim had been fighting, a claim which Robinson vehemently denied. *Id.*⁴

⁴ Detective Langley photographed Robinson's body and hands at the time of this conversation and noted that they showed no injuries, nor was there any other evidence supporting the recent occurrence of a fight between Robinson and Appellant. N.T. Trial, 1/27/22, at 325-26.

Two months later, after Appellant had retained an attorney to represent him, Detective Langley arranged a telephone conversation with Appellant, in which his attorney participated. N.T. Trial, 1/26/22, at 279-80. During this conversation, Appellant again denied having participated in any wrongdoing, and he also specifically denied having had sex with the victim. At the conclusion of the interview, Detective Langley asked Appellant whether he had any desire to change his statements, and he responded, “no.” *Id.* at 283. Their conversations occurred before the police had obtained the DNA test results on the victim’s vaginal swab.

After the police obtained those test results, revealing the presence of Appellant’s semen, Appellant was charged with, *inter alia*, rape of an unconscious victim and kidnapping to facilitate a felony. At trial, the jury heard testimony from the victim and Robinson, as well as the investigating officers. The jury also was shown the videos taken of Appellant and the victim at the motel, and the jurors listened to the audio recordings made by Detective Langley of Appellant’s conversation with Robinson and the detective’s own conversation with Appellant. Appellant did not testify.

During the Commonwealth’s closing argument, the prosecutor discussed two aspects of Appellant’s pre-arrest behavior, specifically: (1) his repeated denials of sexual contact with the victim; and (2) his reliance upon counsel during his telephone conversation with Detective Langley:

I mean over and over and over again [Appellant] denies anything happening in that -- in that home. In that motel. All right. You say to yourselves, okay, well, you know what, they’ve been friends for [thirty] years. He didn’t want to say me and your wife were messing around, right? Right? I mean, okay, I get that. I can understand why you don’t tell [Robinson]. Not to mention the fact that maybe he’d want to kill you, but I get it. That’s not where it stops though. The police -- the police

are involved in this situation. This defendant knows that this is a big deal now. You know, he talks about the fact that, you know, [Robinson] was calling him and insinuating all of these things. Now, keep in mind, he's talking about those calls. And what he doesn't realize at the time, it's nice for him to not know -- he doesn't realize those calls are being recorded by the police, but he knows what [Robinson] is insinuating.

And what does [Appellant] do because he knows the importance of all this? He gets a lawyer. He gets an attorney. This isn't some schlep who just went in and spoke with the police without the benefit of having someone there to protect your rights, no. He goes in with an attorney. Talks over the phone to the police. And what does he do, ladies and gentlemen? He doesn't say listen, I didn't want to tell [Robinson] because I didn't want [the victim] to get jammed up. I didn't want [Robinson] mad at me but we messed around. We messed around. Shouldn't have done it, perhaps too much drinking, shouldn't have done it. Does [Appellant] say that to the police? Does he tell the police that? No. What does he do when he has the time to come clean? He lies. He lies.

N.T. Closing Arguments, 1/27/22, at 41-42 (emphasis added).

At the conclusion of the Commonwealth's argument, Appellant moved for a mistrial, objecting, in relevant part, that the prosecutor "hammered on" the fact that he retained an attorney when he talked to Detective Langley and created an improper inference of his guilt from that fact in the minds of the jury. N.T. Trial, 1/27/22, at 358. The trial court denied the motion, but, at the request of Appellant's counsel, gave the following instruction to the jury:

Now, its important here because there's a lot of constitutional rights. One, there's no burden on the defendant to prove anything. It's totally on the Commonwealth and they're interactive. I mean, you can't have one without the other. If you put a burden on the defendant then you'd be relieving the burden that's on the Commonwealth so its [sic] not negotiable.

Also, he has the right to counsel. *And I'm going to bring that up only because he did have counsel at some point in the*

course of the proceedings. The fact that he used counsel and spoke at one point puts no burden on him to speak at any other point, including the trial. When he comes in to trial he has an absolute right to put the Commonwealth to the test, not take the stand, and have you evaluate[] the evidence as presented and not any other way.

And that's why I want to make sure, because *I know there was emphasis that he had a statement that was given with counsel. Well, when statements are given the law prefers that it be with counsel. I think any reasonable person, innocent or not, accused of an offense, has the right, and you would expect them to use an attorney during that proceeding.*

So I just didn't want anything to cast any aspersions as to what's involved. *And remember what's constitutional is absolutely mandatory to our system. And we would ask you to take no adverse inference from his using counsel at one point or not taking the stand in this particular case.*

Id. at 363-64 (emphasis added).

After deliberation, the jury convicted Appellant on all charges, and he was sentenced to 13 to 30 years of imprisonment, followed by 5 years of probation. Appellant appealed to the Superior Court, alleging the trial court erred by failing to grant his motion for a mistrial because the prosecutor improperly implied that Appellant's retention of counsel during Detective Langley's questioning, even though he had not yet been charged with any crime, demonstrated his consciousness of guilt and, thus, deprived him of his right to a fair trial.

In its opinion prepared pursuant to Pa.R.A.P. 1925(a), the trial court acknowledged that, while the prosecutor's comments on their face appeared to be improper, the court did not regard them as unavoidably prejudicial, nor did it deem them to have denied Appellant his right to a fair trial. Trial Court Opinion, 6/22/22, at 12. The court noted that Appellant had "adamantly denied any sexual intercourse with [the victim] and claimed that

he was an ‘innocent bystander’ of a domestic incident between Mr. Robinson and [the victim].” *Id.* The court reasoned that, because the Commonwealth played those recordings for the jury, which heard Appellant’s denials, the Commonwealth’s argument was a “response to those statements.” *Id.* Further, the court reminded that, because of Appellant’s objection and request for a mistrial, it gave the above-referenced curative instructions to the jury.

In a divided decision, the Superior Court rejected Appellant’s claim, and affirmed his judgment of sentence. *Commonwealth v. Jenkins*, 313 A.3d 166 (Pa. Super. filed Jan. 9, 2024) (unpublished memorandum).⁵ The majority noted that, as a general matter, improper remarks made by a prosecutor in closing argument do not automatically require the grant of a new trial. *Jenkins, slip op.*, at 5-6 (quoting *Commonwealth v. Clancy*, 192 A.3d 44, 63 (Pa. 2018)). The majority acknowledged that the prosecutor’s remarks in this case were “impertinent,” but noted that our Court has held that the prejudicial effect of inappropriate comments by a prosecutor can be cured by an “adequate” cautionary instruction to the jury. *Id.* at 6, 9 (quoting *Commonwealth v. Cash*, 137 A.3d 1262, 1273 (Pa. 2016)). The majority found that the trial court’s instructions cured any prejudice, given that they “highlighted the offending statement and expressly directed the jury to avoid taking any adverse inferences from the fact that Appellant exercised his right to counsel during his discussions with police.” *Id.* at 10. The panel also noted that the instructions further conveyed “that the law prefers that someone in Appellant’s position

⁵ The majority memorandum opinion was authored by Judge Mary Jane Bowes, and joined by P.J.E. Correale Stevens. As discussed at greater length herein, Judge Anne Lazarus joined part of that opinion, but authored a separate dissent.

have counsel when making statements to the authorities,” and “that any reasonable person in Appellant’s situation would have been expected to invoke that right.” *Id.*

The majority derived further guidance from our Court’s decision in *Commonwealth v. Wright*, 961 A.2d 119 (Pa. 2008). That case involved a first-degree murder trial, and we ruled that a prosecutor’s reference in closing argument to the fact that the defendant did not testify was not reversible error for two reasons: (1) the error was harmless, given that the evidence presented at trial was overwhelming, thus, any prejudicial effect was insignificant in comparison; and (2) the trial court gave an immediate cautionary instruction regarding the defendant’s right not to testify, and also charged the jury regarding the defendant’s right not to testify — warning the jury not to draw any adverse inference from the prosecutor’s remarks.

The majority reasoned that *Wright* applied with equal force to the instant case, emphasizing that

[b]ased upon DNA evidence, the Commonwealth proved that Appellant had sexual contact with the victim, who stridently denied the contact was consensual. Surveillance video also depicted Appellant carrying the victim’s limp body over his shoulder as he approached and entered his motel room, consistent with the victim’s testimony that she woke up in Appellant’s motel room with very little memory of the previous night. Therefore, as the High Court framed this issue in *Wright*, although the remark was inappropriate, ‘[t]he prosecutor’s comments, in the face of this overwhelming evidence, pale into a regrettable but insignificant blemish.’

Jenkins, slip op., at 12 (quoting *Wright*, 961 A.2d at 144).

Additionally, the majority concluded that, because a jury is presumed to follow a trial court’s instructions, the trial court’s cautionary instruction and supplemental

explanation were sufficient to cure any potential prejudice associated with the Commonwealth's remarks. *Id.* at 13.

Judge Lazarus joined the majority's ruling to the extent that it found the prosecutor's comments improper, but, because she considered a defendant's constitutional right to counsel to be as important as his or her right to silence, she considered the prosecution's reference to Appellant's use of counsel to be an improper "weaponization" of that right against him which could not be cured by the trial court's jury instructions; thus, she dissented from that aspect of the majority's decision. *Id.* at 1. (Lazarus, J., dissenting).

Observing that the question of whether the pre-arrest retention of counsel by a non-testifying defendant can be used by a prosecutor to impeach him in a closing argument appeared to be an issue of first impression in our Commonwealth, the dissent looked for guidance from *Commonwealth v. Lang*, 275 A.3d 1083 (Pa. Super. 2022), authored by then-Judge, now-Justice McCaffery. In that case – which involved the prosecution of a priest for sexual abuse of a minor – the priest conducted an internet search for "top Pittsburgh criminal attorneys" one day after release of the Attorney General's 2018 Fortieth Statewide Investigating Grand Jury Report detailing extensive incidents of clergy abuse, even though he was not named in the report. *Id.* at 1076. The Commonwealth introduced this search at the defendant's non-jury trial as evidence of his alleged consciousness of guilt, and he was convicted. The defendant filed post-sentence motions claiming that the introduction of these searches was reversible error because they deprived him of his right to a fair trial. The judge presiding over the post-sentence

motions, who was not the judge who conducted the trial, agreed and granted the defendant a new trial.

In affirming the trial court's order, the Superior Court in *Lang* reviewed jurisprudence from the Third and Sixth Circuit Courts of Appeals, as well as decisions from the high courts of Connecticut and Massachusetts, which held that references by the prosecutor to the jury about a defendant's consultation with an attorney before being formally charged with a crime were indicative of guilt and violated the defendant's due process right to a fair trial. *Id.* at 1081-84 (discussing *U.S. ex. rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir. 1990); *State v. Angel T.*, 973 A.2d 1207 (Conn. 2009); *Commonwealth v. Person*, 508 N.E.2d 88 (Mass. 1987)). In accordance with these decisions, the Superior Court concluded that "the post-trial court properly determined the admission of evidence of [the defendant's] internet searches for criminal defense attorneys, before he was charged or implicated in any offenses, violated his constitutional right to due process and a fair trial." *Id.* at 1084. Moreover, the court found the defendant was prejudiced thereby, because the trial judge, who heard the case without a jury and acted as the fact finder, stated that this evidence was "dispositive" in arriving at his guilty verdict. *Id.*

In Judge Lazarus's view, the prosecutor's comments made in closing argument in this matter infringed on Appellant's right to counsel because, as she characterized it, the prosecutor was arguing, "that [Appellant] was a liar because he hired an attorney." *Jenkins, slip op.*, at 8 (Lazarus, J., dissenting). She considered this statement to be "so flagrant and inappropriate" that it could not be cured by a jury instruction. *Id.*

We granted allowance of appeal to consider the Superior Court’s conclusion that the Commonwealth’s reference in closing argument to a defendant’s pre-arrest retention of counsel did not deprive him of his right to a fair trial, and, in addition, we agreed to consider, if such a reference was improper, whether the error is structural, or, rather, is subject to a harmless error analysis. *Commonwealth v. Jenkins*, 325 A.3d 445 (Pa. filed Aug. 27, 2024) (order).

II. Whether the Commonwealth’s reference to Appellant’s retention of an attorney impacted his right to a fair trial under the due process clause of the United States Constitution

A. Arguments

We first consider the question of whether the prosecutor’s comments to the jury in closing argument impacted Appellant’s right to a fair trial secured by the due process clause of the Fourteenth Amendment to the United States Constitution.⁶ Appellant emphasizes that he is not arguing that his right to counsel under the Sixth Amendment to the United States Constitution⁷ was violated, but, rather, that the Commonwealth’s commentary to the jury regarding Appellant’s consultation with counsel prior to being criminally charged violated his due process right to a fair trial.

Appellant characterizes this issue as one of first impression, and, echoing the dissent below, argues that the Commonwealth’s closing argument “weaponized”

⁶ Appellant develops no separate argument under Article I, Section 9 of the Pennsylvania Constitution, nor does he assert that the due process clause of our organic charter confers greater protections in this instance. Accordingly, we focus our analysis on the relevant caselaw construing and applying the due process guarantees of the Fourteenth Amendment.

⁷ This amendment guarantees, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

Appellant's decision to retain counsel prior to speaking with the police, by implying that the choice to retain counsel reflected sophistication and someone with full knowledge of his rights and protections. Appellant's Brief at 15. However, according to Appellant, the import of the reference was that it implied his guilt.

Appellant notes that the Superior Court's decision in *Lang, supra*, recognized the dearth of authority in our Commonwealth on this issue, but he avers that the decisions on which it relied — *Macon*, *Sizemore*, and *Angel T, supra* — support his contention that these types of prosecutorial references are, as a general matter, violative of a defendant's right to a fair trial.

Appellant proffers that Pennsylvania courts utilize a two-part test when evaluating a challenge to the propriety of prosecutorial comments: first, the court determines whether the substance of the statement at issue was improper; and second, the court ascertains whether the context of the statement fails to relate to the facts of the case, and is either derogatory, or impermissibly intrudes upon constitutionally protected activity. Appellant's Brief at 34 (citing *Commonwealth v. Clancy*, 192 A.3d 56, 62 (Pa. 2018); *Commonwealth v. Rivera*, 296 A.3d 1141, 1153 (Pa. 2023)). Here, according to Appellant, the prosecutor's remarks regarding his actions in consulting with an attorney created an impermissible inference that he was guilty.

Appellant disputes the Superior Court's interpretation that the Commonwealth's arguments were mere commentary on the evidence obtained from the victim's DNA test results which established that he was lying about not having sex with the victim, given that the victim's DNA test results were received only *after* his conversations with Detective Langley. Appellant argues that "[t]here would be no reason to mention the retention of

counsel, to emphasize how serious the matter is that an attorney would need to be retained, if the point was about being confronted with the DNA evidence.” *Id.* at 36. Consequently, Appellant reasons that the Commonwealth’s reference to his decision to retain counsel had no bearing on the factual question of his guilt or innocence, and, thus, the prosecutor’s improper reference to him lying, even after he consulted with counsel, unjustifiably undermined his credibility in the eyes of the jury, and improperly deprived him of his right to a fair trial.⁸

The Commonwealth responds by underscoring that, as a general proposition, with respect to instances of alleged prosecutorial misconduct that are constitutional errors, not all such errors require the reversal of a conviction, given that, as our Court has reminded, a defendant is entitled to a fair trial, but not a perfect trial. See Commonwealth’s Brief at 9 (citing *Commonwealth v. LaCava*, 666 A.2d 221, 231 (Pa. 1995)). Accordingly, the Commonwealth maintains that the dispositive question in addressing such claims is whether the prosecutor’s conduct resulted in complete deprivation of the defendant’s right to a fair trial. The Commonwealth contends that its reference in its closing argument to

⁸ Two *amicus* briefs have been filed in support of Appellant’s position — a joint brief from the Pennsylvania Association of Criminal Defense Lawyers (“PACDL”) and the Defender Association of Philadelphia (“PDA”), as well as a joint brief from the Bucks County Public Defender’s Office and the Bucks County Criminal Defense Panel. On this issue, *amici* assert that the intended inference of the prosecutor’s commentary was to suggest to the jury that Appellant must be a liar because he retained counsel, given that the prosecutor, in making the argument, noted that Appellant’s act of lying occurred while he had the assistance of counsel. *Amici* claim that the prosecutor’s comments were designed to suggest that the entire purpose of Appellant’s retention of counsel was to construct a false defense. *Amici* also maintain that the comments suggest that only guilty individuals seek the advice of counsel. According to *Amici*, these comments struck at the core of Appellant’s exculpatory story and deprived him of a fair trial, and called into question the integrity of defense counsel.

Appellant's lying was permissible under the standard articulated in *Clancy, supra*, because, in its view, it was reasonably related to the facts of the case and the evidence of record.

Specifically, the Commonwealth points out that, when Detective Langley was questioned about the contents of the telephone conversation he had with Appellant and his attorney, Detective Langley recounted that Appellant "adamantly denied any wrongdoing and having sex with [the victim]." Commonwealth's Brief at 40. The Commonwealth further notes that Detective Langley asked Appellant at the conclusion of the interview "whether [he] had the desire to change his statements with the assistance of his attorney present," and he responded, "No." *Id.* (quoting N.T. Trial, 1/26/22, at 284). Consequently, from the Commonwealth's perspective, the prosecutor's commentary that Appellant had lied during the telephone call was a reasonable inference drawn from the evidence, given that Appellant had the opportunity to assert during the call that he had consensual sex with the victim, but did not. The Commonwealth contends that Appellant's false denial of having engaged in sexual relations with the victim was the fact which the Commonwealth stressed in its argument, not the fact that Appellant had retained an attorney.

B. Analysis

The United States Supreme Court has reminded: "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English." *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). Observing that

the right to a jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, indifferent, jurors,” the high Court in *Irvin* admonished that “[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process,” and it emphasized that for a criminal trial to be considered a fair one which comports with constitutional due process requirements, the jury must render its verdict “based upon the evidence developed at trial,” not on extraneous factors. *Id.* (internal quotes omitted); see also *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (“The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.”).

In accordance with these principles, the high Court has recognized that improper prosecutorial commentary in a criminal trial will, in certain situations, have such a pernicious effect that it will create the intolerable risk that the jury will be diverted from its central task of fairly considering the evidence of a defendant’s guilt, so as to deprive the defendant of his or her right to a fair trial. See, e.g., *Griffin v. California*, 380 U.S. 609, 615 (1965) (“[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused’s silence . . . that such silence is evidence of guilt.” (footnote omitted)); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (holding that when prosecutors’ comments prejudice a specific right protected in the Bill of Rights to the degree that it amounts to a complete denial of that right, or whenever the prosecutor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process,” a new trial is warranted); accord *Gideon v. Wainwright*, 477 U.S. 168, 181 (1986).

However, after *Griffin*, the high Court has also established that this principle is not boundless, and, thus, it has subsequently and consistently held that not every improper comment by a prosecutor will automatically constitute a complete denial of the defendant's due process right to a fair trial, necessitating the award of a new trial. Rather, the Court has emphasized that, in determining whether an improper prosecutorial comment wholly deprived a defendant of his or her due process right to a fair trial, the comment cannot be considered in isolation, but, instead, it must be considered along with all other aspects of the trial process which may ameliorate its prejudicial effect. See *Greer v. Miller*, 483 U.S. 756, 765 (1987) (internal quote omitted) (emphasis added). (“[T]he prosecutorial misconduct must be of *sufficient significance* to result in the denial of the defendant's right to a fair trial.”). Relevant factors in making this assessment are the context of the prosecutor's remarks within the circumstances of the entire trial, whether there was a timely objection to the remarks made by defense counsel, and whether a curative instruction was given in response to the objection. *Id.* at 766.⁹

These foundational principles also undergird our Court's review of the denial of a motion for mistrial based on a prosecutor's commentary made in the closing argument of a criminal trial. See *Commonwealth v. Boczkowski*, 846 A.2d 75, 94 (Pa. 2004) (holding that a mistrial is an extreme remedy which should only be granted when a “prejudicial event may reasonably be said to deprive the defendant of their due process right to a fair and impartial trial”); accord *Commonwealth v. Smith*, 131 A.3d 467, 474-75 (Pa. 2015). Consequently, “[a] trial court may grant a mistrial only where the incident upon which the

⁹ The high Court's post-*Griffin* caselaw, utilizing this contextual and holistic evaluation of mitigating trial factors in determining whether improper prosecutorial commentary necessitated the grant of a new trial, is discussed at greater length herein.

motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.” *Commonwealth v. Cash*, 137 A.3d 1262, 1273 (Pa. 2016) (internal citation and quotation marks omitted); see also *Commonwealth v. Bryant*, 67 A.3d 716, 727 (Pa. 2013) (“Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in [the jurors’] minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict.”). Further, “[a] mistrial ‘is not necessary where cautionary instructions are adequate to overcome prejudice.’” *Cash*, 137 A.3d at 1273 (internal quotation marks omitted); *Commonwealth v. Fortenbaugh*, 69 A.3d 191, 193 (Pa. 2013).

Claims of error resulting from a prosecutor’s violation of a defendant’s constitutional rights in remarks to the jury fall broadly into two categories — the violation of a specific constitutional provision, or a broader violation of the defendant’s Fourteenth Amendment right to due process. *Commonwealth v. Arrington*, 86 A.3d 831, 853 (Pa. 2014). As discussed previously, Appellant is not asserting that the prosecutor’s closing argument in this matter violated his right to counsel secured by the Sixth Amendment to the United States Constitution; rather, he contends that the prosecutor’s reference to his consultation with and use of counsel during his conversation with the investigating detective, Detective Langley, denied him his right to a fair trial by improperly suggesting to the jury that his reliance on counsel implied his guilt.¹⁰ Thus, the trial court, in ruling

¹⁰ Appellant concedes he lacks a Sixth Amendment claim in light of the general principle that the Sixth Amendment right to counsel does not attach until formal adversary judicial proceedings have commenced, normally at the time of an individual’s formal arraignment on criminal charges. See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); (continued...)

on Appellant's request for a mistrial, was required to first determine whether the prosecutor's comment regarding his retention of an attorney prejudiced his due process right to a fair trial, and, if so, the trial court was obligated to assess whether the degree of the prejudice was so great as to constitute a complete deprivation of this right. *Commonwealth v. Sanchez*, 907 A.2d 477, 491 (Pa. 2006).

One of the cornerstones of individual freedom upon which our democracy rests is the right of an individual to voluntarily consult with an attorney for the purpose of obtaining legal advice on matters affecting their life. See generally *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (observing that the right to the assistance of counsel is "necessary to insure fundamental human rights of life and liberty"). The right of individuals to seek and receive the assistance of counsel of their choosing attains particular significance when they are facing the prospect of criminal proceedings, as such advice is crucial to ensuring that the person avoids wrongful conviction or deprivation of any of the myriad basic rights protected by our federal and state constitutions. See generally *United States v. Cronin*, 466 U.S. 648, 654 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."); accord *Kuren v. Luzerne County*, 146 A.3d 715, 736 (Pa. 2016).

When a person has reason to believe that they may be under police investigation – as Appellant did in this matter after his initial telephone call with his angry and accusatory friend, Robinson – a decision to consult with an attorney, or to formally retain

Commonwealth v. Briggs, 12 A.3d 291, 319 (Pa. 2011). Thus, in Appellant's view, his Sixth Amendment protections were not implicated during his conversation with Detective Langley as he had not, at that point, been formally charged with any criminal offense.

an attorney, is not, in and of itself, indicative of guilt. Consequently, evidence of such is not relevant or probative of guilt if the person is later formally charged. As cogently noted by the Supreme Court of Connecticut:

[T]he exercise of the right to counsel does not imply a consciousness of guilt. In seeking legal advice or representation, the person may well believe himself culpable of some tortious or criminal conduct. But he may just as well believe himself entirely innocent or only partly culpable, or he simply may not know whether his acts or omissions are in violation of [the] law. And if he has some pre-formed belief as to his culpability or innocence, that belief may turn out to be unfounded. Indeed, common human experience would suggest that, absent some special circumstance . . . the most likely purpose for seeking legal advice or representation is to find out what one's status and exposure may be. If there is a rational inference to be drawn from the seeking of such advice or representation therefore, it cannot be more than that — an uncertainty. To draw an inference of consciousness of guilt from the seeking of such advice, then, is both illogical and unwarranted; the fact to be inferred — the consciousness of guilt — is not made more probable (or less probable) from the mere seeking of legal advice or representation, and so evidence of the predicate fact is simply irrelevant.

Angel T., 973 A.2d at 1221 n.15 (quoting *Hunter v. State*, 573 A.2d 85, 91 (Md. Ct. Spec. App. 1990) (internal quotation marks omitted)); see also *Person*, 508 N.E.2d at 91 (“The right to the advice of counsel would be of little value if the price for its exercise is the risk of an inference of guilt. . . . A defendant’s decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not imply that only guilty people contact their attorneys.” (internal citations and quotation marks omitted)).

Moreover, the suggestion that an individual’s consultation with or retention of a lawyer is somehow indicative of guilt disparages the critical role attorneys play in both the proper functioning of our criminal justice system, and the preservation of constitutional

protections for the welfare of all people.¹¹ As detailed by Appellant's *amici*, when a person in such a situation seeks the advice of an attorney and retains the attorney:

[c]ounsel . . . will use their knowledge and skills, consistent with the Rules of Professional Responsibility, to dissuade improper behavior, advise how to accomplish the client's goals lawfully, if possible; provide advice as to how the innocent can protect themselves against wrongful accusation; and ensure that the guilty do not compound their crimes. Such advice may include exercising the right of silence or cooperating fully with the police, depending on the case; preserving (and not tampering with) relevant evidence; initiating an independent investigation; arranging the client's surrender to authorities; initiating pre-charge disposition bargaining; and more, depending on all the circumstances.

Joint *Amicus* Brief of PACDL and PDA, *supra* note 8, at 10-11.

Because of the wholesale irrelevance to the central issue of a defendant's guilt or innocence of a criminal offense, and the improper vilification of the critical role of attorneys in advising individuals of their legal rights and obligations, the inference of a defendant's guilt by a finder of fact based on a defendant's exercising their right to counsel before they are formally charged with a criminal offense is unjustified and improper.

Consequently, this has prompted a number of federal and state courts to conclude that a prosecutor's informing the jury that a defendant consulted with an attorney prior to

¹¹ Such a negative connotation has no doubt arisen in large part due to the cynical suggestion routinely employed by fictional crime dramas that an individual's consultation with an attorney, usually described as "lawyering up," while under police investigation is merely a way of evading responsibility for a criminal act. See e.g., *CRITIC'S NOTEBOOK; Good Cop vs. Bad Cop: Which Image Is Real?* N.Y. TIMES, Feb. 23, 1995, (available at <https://www.nytimes.com/1995/02/23/arts/critic-s-notebook-good-cop-vs-bad-cop-which-image-is-real.html>) ("What really spooks the honest, hard-working, likable, routinely successful detectives on 'N.Y.P.D. Blue' is the prospect of a suspect 'lawyering up.' The detectives cajole and threaten to keep the probable perp from exercising his right to counsel, because once a sharp lawyer appears the client will say nothing and the audience will be deprived of the confession that climaxes so many episodes.").

his or her arrest, whenever the trial court has not taken sufficient steps to mitigate the prejudicial effect of that improper comment on the jury's deliberations, wholly deprives the defendant's right to a fair trial secured by the Fourteenth Amendment to the United States Constitution. See *Macon*, 476 F.2d at 616-17 (prosecutor's reference in argument to jury that defendant called his attorney the day after the murder, but before he was charged, and the concomitant request that the jury consider whether call was an act of innocence, was a constitutional error, and, because other evidence of guilt was not overwhelming, defendant was entitled to a new trial); *Sizemore*, 921 F.2d at 669 (holding that prosecutor's references to the fact that a defendant who was involved in a shooting where two coal miners were killed spoke to his attorney at the scene before charges were filed, that attorney had been with the defendant "from within five minutes of the killing to the very end," and that defendant had, ultimately, retained seven attorneys, were prejudicial to the defendant because they improperly implied his guilt, and awarding a new trial because the evidence did not show beyond a reasonable doubt that the improper comments amounted to harmless error); *Angel T.*, 973 A.2d at 1220-21 (concluding that prosecutor's comment to the jury in closing argument that defendant obtained counsel during a police investigation of the crimes for which defendant was to be tried was "highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty[]" and holding that the error was not harmless); *Person*, 508 N.E.2d at 90 (prosecutor's statement to the jury in closing argument that "[defendant] went to a lawyer. He had every right to go to a lawyer, but did [defendant] go to a lawyer to determine his legal rights or to help build his cover?" impermissibly sought to have the jury draw the inference that his consultation with an

attorney in the immediate aftermath of a shooting for which he was charged was evidence of his guilt, and because judge gave no curative instruction to the jury specifically addressing the prejudicial impact of the improper reference, a new trial was warranted); *see also United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980) (“It is impermissible to attempt to prove a defendant’s guilt by pointing ominously to the fact that he has sought the assistance of counsel.”); *United States v. Liddy*, 509 F.2d 428, 444 (D.C. Cir. 1974) (explaining that admission of evidence that defendant hired an attorney prior to the filing of charges for criminal offenses “provokes the possibility that it will be taken as self-incriminatory”); *State v. Dixon*, 112 P.3d 883, 905 (Kan. 2005) (holding that prosecutor’s repeated references to defendant’s act of contacting counsel, prior to interviews by the police or his arrest, which was elicited during questioning of witnesses and repeated in closing argument, “appears to have been intended to imply that only guilty people contact their attorneys and to cause the jurors to infer guilt on that basis,” and, thus, was conduct which violated the defendant’s due process right to a fair trial secured by the Fourteenth Amendment), *overruled on other grounds*, *State v. Wright*, 224 P.3d 1159 (Kan. 2010); *State v. Kyseth*, 240 N.W.2d 671 (Iowa 1976) (holding that it was reversible error for the trial court to fail to suppress testimony that defendant told police during a non-custodial interview that he wished to consult with an attorney before discussing the incident they were investigating).

Because we find the reasoning and weight of this aforementioned authority compelling, we now hold that it is error for a prosecutor to inform the finder of fact that a criminal defendant sought the advice or assistance of counsel prior to questioning by the police, or prior to arrest, for the criminal offense for which they are being tried, as it

impacts the defendant's due process right to a fair trial guaranteed by the Fourteenth Amendment. Such information is wholly irrelevant to the issue of the defendant's guilt or innocence of the charges, and when the prosecutor conveys that information, it improperly permits the jury or judge to draw the unwarranted and damaging inference that the defendant's consultation with an attorney was indicative of an awareness of guilt. It therefore creates the substantial risk that the finder of fact will render a final verdict based not solely on the objective evidence developed at trial, as due process demands, but, rather, on this inference, thereby distorting their dispassionate deliberations and assessment of the trial evidence. As the United States Supreme Court has made abundantly clear, such inappropriate diversion of finders of fact from their rightful focus on the trial evidence is forbidden by the Due Process Clause. *Irwin; Taylor*. Our Court has embraced the same view. See *Clancy*, 192 A.3d at 63 ("Merely derogatory, *ad hominem* characterizations of the defendant or defense counsel are beyond the bounds of permissible advocacy; the prosecutor's comments must be tethered to the elements of the charged offenses and the evidence offered to prove those elements, and also should be tailored to a fair and reasonable rebuttal of the arguments advanced by the defense.").

The nature of the particular reference by the prosecutor in the case *sub judice*, viewed within the context of her overall argument to the jury, created a substantial risk of harm to Appellant's right to a fair trial. The prosecutor not only informed the jury that Appellant sought the advice of an attorney, and that the attorney was present on Appellant's telephone call with Detective Langley, but, most troublingly, insinuated that Appellant lied during the telephone call *with* the aid of counsel:

And what does [Appellant] do because he knows the importance of all this? He gets a lawyer. He gets an

attorney. This isn't some schlep who just went in and spoke with the police without the benefit of having someone there to protect your rights, no. He goes in with an attorney. Talks over the phone to the police. And what does he do, ladies and gentlemen? . . . What does he do when he has the time to come clean? He lies. He lies.

N.T. Trial, 1/27/22, at 41-42. The prosecutor's comments explicitly linked Appellant's decision to lie in the interview with his use of counsel, insinuating that the decision to lie was made with the aid and/or blessing of counsel. From this, the jury could reasonably conclude that Appellant was using counsel's services to conceal his guilt from the police. This was manifestly improper.

Although the Commonwealth argues that these comments were merely a response to Appellant's prior claims to the police that he did not have sexual intercourse with the victim, the reference to counsel's presence was wholly unnecessary to accomplish this purpose. The Commonwealth was, of course, free to call the jury's attention to the fact that Appellant appeared to have lied during the interview with Detective Langley by denying any sexual intercourse with the victim, because the DNA evidence later contradicted that assertion, but the prosecutor's gratuitous reference to counsel's involvement did not further this objective, and it only served to undermine Appellant, and also his attorney, in the eyes of the jury.

Accordingly, we conclude that the prosecutor's comment impacted Appellant's due process right to a fair trial. Having so concluded, we now must determine whether this error should be considered a structural error, necessitating the automatic grant of a new trial, or whether, in accordance with the high Court's jurisprudence regarding improper prosecutorial commentary, it was a trial error and thus subject to harmless error review.

III. Nature of the error

A. Arguments

Appellant argues that the error caused by the prosecutor's statement regarding his retention and use of counsel must be considered structural in nature, which he submits are those types of errors that constitute "a structural defect in the trial mechanism, one that harms the trial from beginning to end." Appellant's Brief at 39 (quoting *Commonwealth v. Taylor*, 309 A.3d 754, 764 n.7 (Pa. 2024)). Appellant notes that, as we recognized in *Taylor*, the United States Supreme Court in *Weaver v. Massachusetts*, 582 U.S. 286 (2017), has indicated there are three types of constitutional violations which are deemed structural in nature, and thus warrant automatic reversal of a conviction, regardless of the effect which the error had on the outcome of the trial. *Id.* at 289. These are: (1) when the violated constitutional right is one which does not protect against erroneous conviction, but instead protects some other interest; (2) when the effects of the violation are too hard to measure; or (3) when the violation will always result in fundamental unfairness. *Id.* at 295-96.

Appellant contends that the constitutional violation in this case met all three categories of structural error described in *Weaver*. He asserts that the affected right was his Sixth Amendment right to counsel, which he contends was impacted, even though he concedes that it did not formally attach until he was charged with these offenses. Nevertheless, in his view, that right may be broadly viewed as encompassing the right to have the assistance of counsel in dealing with police, which he argues the Commonwealth transgressed by its commentary.

Appellant maintains this case also falls within the second *Weaver* category of structural errors because its effects were hard to measure on the credibility

determinations made by the jury regarding whether the encounter between himself and the victim was consensual or forcible compulsion.

Lastly, Appellant asserts broadly that the third *Weaver* category was implicated because the prosecutor's comments struck at the core of his defense and, correspondingly, vitiated his fundamental right to a fair trial. He characterizes the Commonwealth's improper reference to his use of a lawyer as wielding a "cudgel" that struck at the heart of his defense by creating the inference that he was lying and guilty, thereby impermissibly prejudicing the jury towards a finding of guilt. *Id.* at 48.¹²

The Commonwealth responds that, as with other instances of prosecutorial misconduct which occur during the course of a trial, the commentary on Appellant's consultation with an attorney should be classified as trial error, not structural error, and, thus, subjected to a harmless error analysis. Commonwealth's Brief at 14 (citing *Chapman v. California*, 386 U.S. 18, 22, 24 (1967) (holding that some federal constitutional errors which occur in the course of a criminal trial are "so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of a conviction," provided that the state demonstrates that the violation "was harmless beyond a reasonable doubt"))). The Commonwealth

¹² Appellant's *amici* align with his contention that the prosecutor's comment on Appellant's retention of an attorney constituted a structural error under the *Weaver* framework. The joint brief by PACDL and PDA again emphasizes that counsel's role goes beyond warding off erroneous convictions, *see supra* note 8 – in particular, acting as an intermediary between the defendant and the authorities, prior to the filing of charges. Hence, in *amici*'s view, the prosecutor's commentary negatively penalized Appellant for utilizing counsel for those legitimate interests. Further, *amici* develop that the error here presented more of a threat to fundamental fairness than do other violations, such as commentary on an individual exercising his or her right to remain silent, given that the right to counsel is foundational to a person's ability to protect all other rights.

proffers that both the United States Supreme Court and all of the appellate courts of our 49 sister states have, in the aftermath of *Chapman*, held that instances of prosecutorial misconduct involving prejudicial or improper comments to the jury are subject to harmless error review. See *id.* at 21-36 (collecting cases).

The Commonwealth suggests that Pennsylvania utilizes the same harmless error analysis in all cases involving instances of prosecutorial misconduct. In this regard, the Commonwealth highlights our Court's acknowledgment that prosecutors are permitted some latitude in employing oratorical flair to make their arguments; hence, not every intemperate remark made in the course of a closing argument is grounds for reversal, particularly if it reasonably relates to the evidence. *Id.* at 39 (citing *Cash, supra* (holding that reference to the defendant as a "cold blooded killer" and a "dangerous man" was within the permissible bounds of oratorical flair)).

Additionally, the Commonwealth stresses that the trial court in this matter gave a cautionary instruction which directed the jury not to draw an adverse inference from Appellant's use of counsel. This, the Commonwealth asserts, was sufficient to cure any prejudice to Appellant, noting that our Court reached this same conclusion in *Wright, supra*, where the Commonwealth improperly called the jury's attention to the fact that the defendant did not testify. We held that the trial court's instruction that the jury was to draw no adverse inference from this fact was sufficient to rectify the error. The Commonwealth reasons that the trial court's curative instruction in the instant matter likewise ameliorated any harm.¹³

¹³ The Pennsylvania District Attorneys Association ("PDAA") has filed an *amicus* brief on behalf of the Commonwealth. The PDAA argues that Pennsylvania has adopted the (continued...)

B. Analysis

As our Court recently explained, “[w]ith its *Chapman* decision, the high Court . . . established that some violations of federal constitutional rights would be subject to appellate review under [a] harmless error standard, except those violations which are basic to a fair trial.” *Taylor*, 309 A.3d at 776-77 (quoting *Chapman*, 366 U.S. at 23) (internal quotation marks omitted). The latter category, errors which “wholly deprive a defendant of his or her right to a fair trial,” are referred to as “structural errors.” *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).¹⁴ A structural error is, as the name implies, a defect that permeates the entire structure or framework of the trial process from beginning to end. *Greer v. United States*, 593 U.S. 503, 513 (2021). Because structural errors “infect the entire trial process,” they “necessarily render a trial fundamentally unfair.” *Neder v. United States*, 527 U.S. 1, 8 (1999). “[T]hese errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment [which results] may be regarded as fundamentally fair.” *Id.* at 8-9 (internal quotation marks omitted).

By contrast, trial errors are “discrete defects in the criminal process . . . [which] do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Greer v. United States*, 593 U.S. at 513 (internal

harmless error standard of *Chapman* and consistently applied it to cases in which the prosecutor has engaged in misconduct through improper remarks to the jury. PDAA asserts that our Court should, in accordance with this approach, hold that the error created when prosecutors improperly comment on a defendant’s pretrial retention of counsel is subject to harmless error review.

¹⁴ In *Taylor*, we reiterated that, because the question of whether an error is structural or subject to the harmless error doctrine is purely a legal one, our standard of review is *de novo*, and our scope of review is plenary. *Taylor*, 309 A.3d at 774 n.22.

quotation marks and emphasis omitted). These types of errors occur at various points during the presentation of a criminal case to the jury, and their prejudicial effect may therefore “be quantitatively assessed in the context of other evidence presented” in order to ascertain whether, in accordance with *Chapman*, they are harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 308; accord *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Since *Chapman*, the United States Supreme Court has not categorically classified, or otherwise treated, constitutional violations of a defendant’s right to a fair trial caused by a prosecutor’s comments as structural errors; rather, it has consistently deemed them to be trial errors. Beginning with *Darden*, *supra*, the high Court has emphasized that, in determining whether improper prosecutorial comments in closing arguments to the jury deprived the defendant of a fair trial, the effect of the improper comments cannot be assessed merely by focusing on the nature of the comments alone. The Court explained in *Darden* that, because such remarks occurred during one phase of a trial that has many other component parts which, together, yielded the conviction, the effect of the remarks must be considered within the context of the entirety of the trial.

In *Darden*, the prosecutor made a number of improper statements in his closing argument, declaring, *inter alia*, that: “the death penalty would be the only guarantee against a future similar act”; the defendant was an “animal,” and he “shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash”; and he wished defendant had been killed, or killed himself, prior to committing the murders for which he was being tried. *Darden*, 477 U.S. at 180. The high Court opined that the statements, while highly improper and worthy of condemnation, did not render

the defendant's trial, as a whole, fundamentally unfair, given that the trial court instructed the jury that their decision was to be made "on the basis of the evidence alone, and that the arguments of counsel were not evidence," as well as the fact that the weight of the evidence of the defendant's guilt was "heavy." *Id.* at 182. The Court concluded that these other factors "reduced the likelihood that the jury's decision was influenced by argument," and, accordingly, held that the defendant was not denied his due process right to a fair trial. *Id.*

The high Court again applied this holistic approach in *Donnelly*, where a defendant, convicted in a Massachusetts murder trial, also alleged that the prosecutor's remarks in his closing argument violated his due process right to a fair trial. In that argument, the prosecutor expressed his belief in the defendant's guilt and informed the jury that the defendant only stood trial because he was not given the opportunity to plead guilty to a lesser charge as his co-defendant had done.

In addressing defendant's contention, the Court evaluated the likely effect of the statement on the jury within the context of the overall trial, as well as the trial judge's efforts to eliminate its prejudicial impact. The Court found that the statement was "but one moment in an extended trial," and that, in response to it, the trial judge reminded the jury that arguments of counsel were not evidence. The Court also noted that the trial court gave instructions to the jury specifically highlighting and disapproving of the prosecutor's statement, and directed the jury to disregard it. *Donnelly*, 416 U.S. at 645. For these reasons, the Court endorsed the conclusion of the Massachusetts Supreme Court that, under those circumstances, the prejudicial effect of the improper statement was sufficiently mitigated by the curative instruction, such that the jury was able to fairly

weigh the trial evidence, and it concluded that the defendant was not denied his due process right to a fair trial.

In *Greer v. Miller*, an Illinois murder prosecution, the high Court once more employed this methodology in considering whether a prosecutor's improper question to the defendant — which raised a negative inference that his exculpatory version of the events of the shooting for which he was on trial was a lie because he did not tell it to the police after being arrested and given his *Miranda* rights — deprived him of his right to a fair trial, as it penalized him for exercising his Fifth Amendment right to remain silent. The Court concluded that it did not, because there was an immediate objection to the question, after which the trial court ordered the jury to disregard the question, and later reiterated to the jury that they were to disregard *all* questions to which objections were sustained. The Court agreed that, because of this particular sequence of trial events, coupled with the Illinois Supreme Court's conclusion, after applying *Chapman*, that the question amounted to harmless error because the other properly admitted evidence at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt, the defendant was not wholly denied his due process right to a fair trial. *Greer v. Miller*, 483 U.S. at 766-67.

Consequently, at present, the high Court employs a harmless error analysis when considering whether improper prosecutorial comments during closing argument deprived a defendant of the due process right to a fair trial, an approach which assesses the prejudicial impact of the comments through evaluation of the context and factual circumstances of the trial under which such comments were made, and other factors such as whether defense counsel made a timely objection to the comments, and whether a curative instruction was given by the trial court in response to the objection. *Greer v.*

Miller, 483 U.S. at 766. Under this analysis, if a reviewing court concludes, in light of these factors, that the overall effect of the remarks did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process,” then a grant of a new trial is not warranted. *Donnelly*, 416 U.S. at 643.

In the aftermath of the high Court’s *Chapman* decision, our Court, like the United States Supreme Court, has, with similar unwavering constancy, regarded prosecutors’ improper comments to a jury which transgress upon a defendant’s constitutional protections as trial errors, not structural ones, and, hence, subject to *Chapman*’s harmless error analysis. Four years after *Chapman* was decided, in *Commonwealth v. Camm*, 277 A.2d 325 (Pa. 1971), we employed its harmless error analysis to address a claim that a prosecutor, in closing arguments, had violated the defendant’s Fifth Amendment right against compulsory self-incrimination by commenting on the defendant’s failure to account for his actions on the evening of the murder for which he was accused, and failing to deny that he made a subsequent confession to the murder. Our Court held that, while the comments violated the defendant’s Fifth Amendment rights by creating an adverse inference of his guilt, this fact alone did not necessitate the grant of a new trial.

Rather, pursuant to *Chapman*, we considered whether the error was “harmless beyond a reasonable doubt.” *Id.* at 332-33. Accordingly, we reviewed the nature of the comments within the context of the entire trial, the degree to which the prosecutor relied on the improper statement to convince the jury of the defendant’s guilt, and whether the trial evidence supported acquittal. Because the comments were brief, because the Commonwealth did not stress the inference of guilt to the jury, and because “there was

no evidence that could have supported acquittal,” our Court held that the improper comment did not require the grant of a new trial. *Id.* at 333.

Following *Camm*, our Court has continued to treat similar challenges to a prosecutor’s improper comments in closing argument in the same manner — as trial errors subject to a harmless error evaluation. See, e.g., *Commonwealth v. Smith*, 384 A.2d 1202 (Pa. 1978) (applying *Chapman* harmless error analysis to conclude that prosecutor’s improper assertion in closing argument that it was proven beyond a reasonable doubt that the gun entered into evidence was used to kill the victim did not contribute to the verdict, given the undisputed evidence that defendant used a knife to stab the victim, and his defense was based on a theory of duress);¹⁵ *Commonwealth v. Miles*, 681 A.2d 1295, 1302 (Pa. 1996) (holding that prosecutor’s disparaging comment in closing argument that defendant acted in conjunction with his co-conspirators to attack the victim like “animals of prey” did not deprive defendant of his right to a fair trial, inasmuch as the effect of this disparaging analogy was “insignificant” when compared to the overwhelming evidence of the defendant’s guilt); *Commonwealth v. Molina*, 104 A.3d 430 (Pa. 2014) (plurality) (holding that Commonwealth’s references in closing argument to the defendant’s failure to meet with a homicide detective investigating the murder of the victim prior to the defendant’s arrest for the crime, and then encouraging the jury to draw an inference of guilt from this fact, violated the defendant’s Fifth Amendment right

¹⁵ In 1978, our Court adopted the *Chapman* harmless error standard for claims of trial error arising under Pennsylvania law. See *Commonwealth v. Story*, 383 A.2d 155, 162 (Pa. 1978) (“The proper standard for determining whether an error involving state law is harmless is the same as the standard this Court applies to federal constitutional error: an error can be harmless only if the appellate court is convinced beyond a reasonable doubt that the error is harmless.” (citing *Chapman*)).

to be free of self-incrimination, and concluding error was *not* harmless due to the serious credibility issues of the Commonwealth's chief witnesses); *Wright, supra* (holding that prosecutor's improper reference in closing argument to the fact that defendant did not testify was harmless because trial evidence was overwhelming, trial court gave an immediate cautionary instruction regarding the defendant's right not to testify, and court instructed jury not to draw any adverse inference from prosecutor's reference to defendant's failure to testify).

As discussed *supra*, in 2017, the United States Supreme Court handed down its decision in *Weaver*, in which it reaffirmed the general principle that "in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" 585 U.S. at 299 (quoting *Neder*, 527 U.S. at 7). The high Court explained its three rationales for classifying a particular error as structural in nature:

- (1) the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest;
- (2) the effects of the error are simply too hard to measure; or
- (3) the error always results in fundamental unfairness.

Id. at 295-96.

The Court noted that it had previously recognized that the following types of constitutional violations fall into these three categories of structural error, and, therefore, are not subject to a harmless error analysis. *See id.* (citing *Faretta v. United States*, 422 U.S. 806 (1975) (an individual's Sixth Amendment right to conduct his own defense); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial conferred on an individual

by the Sixth Amendment); *Gonzalez-Lopez, supra* (denial of the right of a defendant to use privately retained counsel of his choosing); *Gideon*, 372 U.S. at 342 (holding that, because the Sixth Amendment guarantee to an accused individual of the assistance of counsel for his defense is “fundamental and essential to a fair trial,” the due process clause of the Fourteenth Amendment requires states to appoint counsel to represent indigent defendants, and the defendant’s right to a fair trial will always be wholly denied if the state fails to do so); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (“When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.” Therefore, because racial discrimination in the empaneling of a grand jury “undermines the structural integrity of the criminal tribunal itself, [it] is not amenable to harmless-error review.” (footnote omitted)); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (failure of jury in criminal trial to be instructed of the necessity of finding defendant guilty beyond a reasonable doubt was a structural error).

In the years since the *Weaver* decision, the high Court has not found that impacts on a defendant’s due process right to a fair trial caused by a prosecutor’s improper comments in closing argument fit within any of the above-enumerated categories of structural error. Likewise, our Court continues to treat constitutional violations resulting from prosecutorial remarks in jury arguments in the same fashion as we had prior to *Weaver* – as trial errors subject to a harmless error analysis. See *Clancy*, 192 A.3d at 63 (reiterating that “there is no *per se* rule which requires the grant of a new trial whenever the district attorney acts improperly;” and a reviewing court must evaluate the effect of the remark on the jury to determine whether “its unavoidable effect [was] to prejudice the jury,

forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict”).

Despite this caselaw, as detailed above, Appellant maintains that the constitutional violation committed by the prosecutor in the instant case fits within all three of the *Weaver* categories of structural error. We are compelled to disagree.

Regarding the first category — that the right at issue is not designed to protect the defendant from erroneous conviction, but instead protects some other interest — as we have detailed at length *supra*, excluding irrelevant and prejudicial information from the jury’s consideration, such as the defendant’s pre-arrest retention of counsel, is essential to prevent the jury from improperly relying on that evidence in arriving at its verdict, instead of the substantive, properly admitted evidence bearing on the central question of the defendant’s guilt. Excluding such information serves to ensure that the jury will not wrongly convict the defendant based on such irrelevant and prejudicial factors. *Irvin, supra*; *see also Turner*, 379 U.S. at 472 (“In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”)

Consequently, the due process right at issue in this case implicated by the prosecutor’s improper comments — Appellant’s right to the jury’s fair and unbiased evaluation of the evidence presented by the Commonwealth regarding his guilt or innocence of the offenses charged, free of the prejudicial influence of inappropriate considerations — is, first and foremost, *intended* to prevent erroneous convictions, and

is not chiefly intended to protect other important constitutionally protected individual rights, like the right to a public trial, the right to represent oneself, or the right to be free of compulsory self-incrimination. See *Taylor*, 309 A.3d at 780 (“The Fifth Amendment right to be free from compulsory self-incrimination [is] one which is not only designed to protect a criminal defendant from erroneous conviction, but one which protects another vital interest — namely, the right of an individual to be shielded from coercion by those cloaked with official authority into providing facts or information which can then be used as evidence for his later prosecution and imprisonment.”). Accordingly, we conclude the trial error caused by the prosecutor’s improper comments does not fall within the first category of structural error described in *Weaver*.¹⁶

With respect to *Weaver*’s second category of structural errors — that the effects of the error are simply too hard to measure — we likewise determine Appellant’s claim does not fit within this classification. Here, the error did not infect the *entirety* of the trial proceeding from beginning to end as, for example, a complete denial of counsel would, see *Gideon, supra*, or as would forcing a defendant to accept counsel’s strategy to admit his guilt, see *McCoy, supra*. In those circumstances, the high Court has found the harm pervades the entirety of the proceedings, and is impossible to quantify, given that it requires speculative consideration of how the proceedings would have transpired had the error not occurred. See *Gonzalez-Lopez*, 548 U.S. at 150-51.

¹⁶ Appellant is correct that his Sixth Amendment right to counsel was not the right which was impacted by the prosecutor’s comment in this instance, given that it had not formally attached at the time Appellant retained counsel and relied on counsel’s advice during his interview with the police because he had not, at that time, been charged with any criminal offenses. See *supra* note 9.

By contrast, here, the error did not permeate the entirety of the trial proceedings. Rather, it was a discrete, one-time occurrence, during a limited portion of the end of a three-day trial. Moreover, and importantly, its prejudicial effects, like those of other improper comments in closing arguments, may be viewed in the context of other trial evidence to ascertain whether, under *Chapman*, it was harmless beyond a reasonable doubt.

Lastly, we address the third *Weaver* category of structural error: that the error always results in fundamental unfairness. Errors of this nature – such as when a trial is presided over by a judge with a conflict of interest because of the financial benefit he would receive from rendering a guilty verdict, see, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927), or when the trial court fails to accurately instruct the jury on reasonable doubt, *Sullivan, supra* – completely deprive a defendant of his or her right to a fair trial because the entirety of the trial or the jury’s deliberations is infected with the prejudicial taint of the impropriety and, thus, such errors are incurable. As a matter of law and fact, then, the occurrence of those types of events will always render a trial unfair.

Once more, however, the error in the case at bar — a singular comment by the prosecutor — was confined to a discrete portion of the trial, and the judge, in a timely fashion, directed the jury to disregard it, and he also assured the jury of the positive importance the law assigns to counsel’s assistance when dealing with the police; therefore, it did not undermine the fairness and validity of the entire trial. In cases where a defendant is denied representation by counsel, where there is a biased judge that presides over the entirety of a trial, or where an erroneous jury instruction on reasonable doubt is given which the jury followed in reaching its verdict, the prejudicial gravity of the

error pervades every aspect of the trial or the jury's deliberative process, rendering it irrevocably unfair.

By contrast, as the high Court has previously recognized, an error of the type which transpired in this case will not invariably result in a fundamentally unfair trial, inasmuch as the prejudice to the jury's assessment of the trial evidence can be ameliorated in these situations by an instruction that ensures the jury will disregard the prosecutor's improper statement in reaching its verdict. *Donnelly*; *Darden*.

In sum, then, the prosecutor's improper reference to Appellant's consultation with counsel and use of counsel in his interview with the police was not a structural error, but, rather, is subject to a harmless error analysis. Having made this determination, we must address whether the error in this case was harmless beyond a reasonable doubt.

As we said in *Commonwealth v. Fitzpatrick*, 255 A.3d 452, 483 (Pa. 2021), "[a]n error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless." *Id.* (quoting *Story*, 383 A.2d at 162). Harmless error will be found to exist:

if the record demonstrates either: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hairston, 84 A.3d 657, 671-72 (Pa. 2014). When our Court reviews the trial record in conducting harmless error review, we consider "only the uncontradicted

evidence” and “determine whether that body of uncontradicted evidence was so overwhelming that the erroneous admission of the evidence could not have impacted the verdict.” *Fitzpatrick*, 255 A.3d at 478.

Of further relevance in a harmless analysis is whether an adequate curative instruction was given by the trial court to address the error. See *Story*, 383 A.2d at 165 n.18 (“One factor to be considered by an appellate court assessing the impact of an error is whether the trial court instructed the jury to disregard the information which was improperly brought to its attention. Adequate cautionary instructions may minimize the impact of an error so as to render it harmless.”); accord *Commonwealth v. Rivera*, 296 A.3d 1141, 1160-61 (Pa. 2023).

With that background in mind, we turn to the evidence in this case. The uncontradicted evidence of record, recounted above, established that Appellant and the victim were drinking and smoking marijuana at the victim’s apartment on the evening of February 14, after which the victim, who was feeling ill, asked Appellant to leave at the request of her boyfriend who shared the apartment; but Appellant refused. Thereafter, the victim was slammed violently against the wall by Appellant with such force that the wall was damaged and she broke her fingernails, but she could remember nothing else about what transpired thereafter that evening. The victim’s boyfriend, who was also feeling ill and had gone to his room to lie down earlier that evening, was awakened by the force of an impact causing the apartment to shake. When he investigated the source of the disturbance, he observed that Appellant and the victim were no longer in the apartment.

Surveillance video taken in the early morning hours of the next day showed Appellant arriving in his van at his room at a motel, parking the van in front of the room, removing the victim from the van, and carrying the victim over his shoulder into his room. The victim was limp and motionless for the entire time she was shown on the videotape.

The victim next recalled waking up in Appellant's motel room with her pants and underwear removed and Appellant observing her. The victim could not recollect how she had gotten to the room, or anything that happened prior to her waking up. Later medical tests revealed that semen collected from the victim's vagina belonged to Appellant. We find this uncontradicted evidence to be overwhelming in establishing that Appellant committed the offense of kidnapping by transporting the unconscious victim to the motel room from her apartment without her consent, where he then committed the additional offense of the rape of an unconscious person by having sexual intercourse with her while she was unconscious.

In comparison, we find the prejudicial effect of the Commonwealth's improper reference in its closing argument to Appellant's retention of an attorney during the police investigation of this matter was slight, given that, after the inappropriate remarks, Appellant immediately objected, and the trial court gave a prompt curative instruction to the jury which emphasized that there was nothing untoward about Appellant's use of counsel because it was his right to do so, and that, in fact, the law *preferred* that counsel be used when statements are given to the police. N.T. Trial, 1/27/22, at 363-64. Most importantly, the trial judge also explicitly instructed the jury that they were to draw no adverse inference from Appellant's use of counsel. *Id.* We presume the jury followed the

trial judge's directive. See *Commonwealth v. Clemons*, 200 A.3d 441, 474 (Pa. 2019) (jury is presumed to follow the trial judge's instructions); *Cash*, 137 A.3d at 1273 (same).¹⁷

Accordingly, we conclude the constitutional error in this case was harmless beyond a reasonable doubt.

V. Conclusion and Mandate

For all of the aforementioned reasons, we conclude, consistent with Judge Bowes's analysis in her Superior Court memorandum opinion, that the prosecutor's reference to Appellant's consultation with and use of an attorney, prior to arrest for the offenses he was later convicted, impacted Appellant's due process right to a fair trial. We explicitly caution prosecutors that this line of questioning should be scrupulously avoided. However, again, as did Judge Bowes, we conclude that such an error is subject to a harmless error analysis and that, in this instance, given the overwhelming uncontradicted and properly admitted evidence of Appellant's guilt of the charged offenses, together with the clear and comprehensive curative instruction given by the trial judge, the prejudicial

¹⁷ In the federal and state cases discussed above, which directed a new trial because of a prosecutor's improper reference to a defendant's pretrial retention of counsel, the reviewing courts did not regard the prosecutor's improper commentary to have been a structural error; rather they considered whether the error was harmless in the context of the trial proceedings. Importantly, unlike the present matter, in those cases either the trial court gave no curative instruction, or gave an inadequate curative instruction that did not directly address the prosecutor's comment. Likewise, again in contrast to the instant case, there was either not a timely objection made at trial, or the objection resulted in the trial judge taking insufficient steps to rectify the prejudice caused by the reference. The absence of these factors was specifically relied on by several of those courts finding the error could not be considered harmless beyond a reasonable doubt. See, e.g., *Macon*, 476 F.2d at 616; *Sizemore*, 921 F.2d at 672; *Angel T.*, 973 A.2d at 1228; *Person*, 508 N.E.2d at 92.

impact of this error was so slight it could not have contributed to the jury's guilty verdict — in short, that the error was harmless beyond a reasonable doubt.

Order of the Superior Court upholding Appellant's judgment of sentence is hereby affirmed.

Justices Dougherty, Wecht, Mundy and Brobson join the opinion.

Justice Wecht files a concurring opinion.

Justice Mundy files a concurring opinion in which Justice Brobson joins.

Justice McCaffery files a concurring and dissenting opinion in which Justice Donohue joins.