

Circuit Court for Worcester County
Case No. 23-K-15-000500

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1112

September Term, 2016

KEVIN LAMAR COTTINGHAM

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 2, 2017

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

Following a jury trial in the Circuit Court for Worcester County, Kevin Lamar Cottingham, appellant, was convicted of possession with intent to distribute heroin, distribution of heroin, and possession of heroin. On appeal, Cottingham contends that the State made an impermissible argument during closing. Because Cottingham acknowledges that he did not object at trial, he requests us to exercise our discretion and engage in plain error review. We decline to do so and affirm Cottingham’s convictions.

At trial, the State presented evidence that the police had observed Cottingham engage in what appeared to be a hand-to-hand drug transaction with Thomas McGrath. After the transaction concluded, Cottingham gave McGrath two white trash bags and asked him to throw them away. McGrath took the trash bags, put them in the trunk of his vehicle, and drove away. The police stopped McGrath and discovered a torn plastic bag containing heroin on the floorboard of his vehicle. They also searched the white trash bags and recovered a blue plastic bag containing trace amount of heroin and a pizza box with Cottingham’s address. During a subsequent search of Cottingham’s residence, the police found one-half gram of heroin in a Ziploc bag, 96 empty Ziploc bags, and \$890.

During closing, defense counsel argued that Cottingham did not sell the heroin that the police had found on McGrath’s floorboard because it was in a different type of bag than the bag of heroin that was found in the white trash bags.

The prosecutor then made the following statement during rebuttal:

[Defense counsel] talks about the blue bag [of heroin that was found in the white trash bag] – and again, I get that *it’s her job to distract you as much as possible, to distract you away from the real issues that are in front of you, and the real questions that you need to answer.*

Although Cottingham did not object to this argument at trial, he now claims that it improperly denigrated the role of defense counsel, undermined his presumption of innocence, and served to prejudice the jury against him.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should “rarely exercise” that discretion because “considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s ruling, action, or conduct be presented in the first instance to the trial court[.]” *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review “is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.” *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted).

Even if we assume that the prosecutor’s argument was improper and that the trial court committed “clear or obvious” error by not addressing it, *sua sponte*, we are persuaded that the error did not affect “appellant’s substantial rights” or “the fairness, integrity, or public reputation of judicial proceedings.” Moreover, to permit Cottingham to refrain from objecting at trial in order to raise this issue for the first time on appeal would run counter to the considerations of fairness and judicial efficiency discussed previously. *See Chaney v. State*, 397 Md. 460, 468 (2007). Consequently, we decline to exercise our discretion to engage in plain error review. *See Martin v. State*, 165 Md. App.

189, 195 (2005) (noting that it is “the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]”).

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