

Circuit Court for Wicomico County
Case No. C-22-CR-23-000323

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND

No. 85

September Term, 2024

JOSEPH SCOT PIETROSKI

v.

STATE OF MARYLAND

Shaw,
Ripken,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 1, 2025

*This is a per curiam opinion. Under Rule 1-104, the opinion is not precedent within the rule of stare decisis nor may it be cited as persuasive authority.

Following a jury trial in the Circuit Court for Wicomico County, Joseph Scot Pietroski, appellant, was convicted of driving while impaired by alcohol, driving a vehicle in violation of alcohol related restriction, and driving a vehicle closer than reasonable and prudent. His sole contention on appeal is that the trial court erred in instructing the jury regarding his failure to take a breathalyzer test. For the reasons that follow, we shall affirm.

At trial, the arresting officer testified that after stopping appellant for speeding, he formed an opinion that appellant was impaired based on a “strong odor of alcohol” emanating from his person, his slurred speech, his glassy eyes, and his poor performance on three standardized field sobriety tests. The officer further testified that appellant refused to submit to a breathalyzer test.

At the conclusion of the evidence, the court instructed the jury with respect to appellant’s refusal to take a breathalyzer test as follows:

You have heard evidence that the defendant refused to submit to a test to determine his alcohol level. You must first decide whether the defendant refused to submit to the test. If you find that the defendant refused to submit to a test, you must then decide whether this refusal is evidence of guilt.

Appellant did not object to this instruction, and subsequently responded “yes” when asked by the court if he was “satisfied with [the] jury instructions” as given.

On appeal, appellant contends that the court erred in instructing the jury with respect to his failure to take a breathalyzer test because the pattern jury instruction reads that if the jury finds that “the defendant refused to submit to a test, [it] must then decide whether this refusal is evidence of consciousness of guilt.” In other words, he attributes error to the court’s omission of the words “consciousness of” from the pattern instruction. By doing

so, he contends that the court “permitted the jury to take the very failure to take the test as evidence of [his] guilt of driving while impaired.” Acknowledging that he did not object, he asks this Court to review his claim under Maryland Rule 8-131.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Supreme Court of Maryland 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) (quotation marks and 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). Under the circumstances presented, we decline to overlook the lack of preservation and thus do not exercise our discretion to engage in plain error review of this issue. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, “[w]e decline to do so[.]” are “all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation” (emphasis omitted)).

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