Circuit Court for Carroll County
Case No. C-06-CR-23-000312

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 224

September Term, 2024

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GARY Q. NEWTON

v.

STATE OF MARYLAND

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Leahy,
Zic,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: March 7, 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.

Convicted by a jury in the Circuit Court for Carroll County of robbery with a dangerous weapon and related offenses, Gary Q. Newton, appellant, presents for our review two issues: whether the evidence is insufficient to sustain the convictions, and whether the court committed "plain error in permitting the prosecutor to effectively testify as a witness during her closing argument." For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called Michael McKeldin, who testified that just before 2:00 p.m. on April 15, 2023, he was working at his tobacco store on Lower Beckleysville Road in Hampstead, when a man wearing a heavy dark-colored coat, long dark-colored pants, a hood, a medical mask, gloves, and boots entered the store. The man stated, "we're going to do this," "pulled out a firearm," and "cocked it." As the man repeatedly stated, "kick it out," Mr. McKeldin made his way to the exit, exited the store, ran to a nearby thrift store, and said, "call 911." Police later showed Mr. McKeldin three "still pictures" that depicted a person "wearing a full winter coat, full gloves, [and] full mask." Mr. McKeldin identified the person to police, and in court, as "the same person that robbed [Mr. McKeldin's] store." One of the pictures also depicted a man named Joe Castor, whom Mr. McKeldin knew as a previous customer of his store. Mr. McKeldin also identified a person depicted in a fourth still photograph as wearing clothing and a mask that matched those worn by the person who attempted to rob Mr. McKeldin's store.

The State also produced evidence that the first three still pictures were taken from a video recording made by a doorbell camera located at the home of Mr. Castor's neighbor Margaret Berdine. Ms. Berdine and Mr. Castor live at the Ridgely House Apartments,

which is located behind the shopping center where Mr. McKeldin's store is located. The fourth still picture was taken from a video recording made by a surveillance camera at a branch of the Farmers & Merchants Bank located in the shopping center.

The State also called Hampstead Police Corporal Jonathan Cranshaw, who testified that he responded to the 911 call, spoke with Mr. McKeldin, and searched the Ridgely House Apartments for the suspect. Corporal Cranshaw subsequently spoke with Mr. Castor. During the conversation, the corporal examined Mr. Castor's phone and discovered that at 1:52 p.m., Mr. Newton sent to Mr. Castor a text message that stated: "Customer." Mr. Newton later sent to Mr. Castor a text message that stated: "The future is yours never again done." Mr. Castor confirmed to Corporal Cranshaw that the messages were sent from Mr. Newton's phone and verified Mr. Newton's phone number. Approximately one week after the attempted robbery, the corporal interviewed Mr. Newton, who stated that he had visited Mr. Castor on the day of the offense. In one of the still pictures, Mr. Newton identified himself and Mr. Castor. Mr. Newton also stated that "he had changed his clothes throughout the day," he had "chocolate black pants" and a "hoodie," and his black pants and coat may have been in his bag.

The State also called Mr. Castor, who testified that on the day of the attempted robbery, Mr. Newton visited him at his apartment at Ridgely House. During the visit, Mr. Newton "stepp[ed] out to smoke or get a smoke," "came back a fairly short time later," "hung out for a couple of minutes, and then . . . said something had come up and he had to go." The State played for the jury the video recording made by Ms. Berdine's doorbell

camera, and Mr. Castor identified one of the individuals depicted in the recording as Mr. Newton.

Following the close of the State's case, defense counsel moved for judgment of acquittal, summarily arguing: "I would submit basically the question here I guess is credibility, and that is it." The court denied the motion, and the jury subsequently convicted Mr. Newton of the offenses.

Mr. Newton first contends that the evidence is insufficient to sustain the convictions because his "presen[ce] in the area of the tobacco store and [Mr.] Castor's residence during the hour and a half prior to the attempted robbery" was "clearly insufficient," and "the changing of clothes during mid-April, when many people guess wrong about the weather and dress in a manner that turns out not to comport with the weather, adds nothing." The State counters that Mr. Newton "failed to preserve his contention about sufficiency," because in moving for judgment of acquittal, defense counsel "did not suggest how the evidence was deficient or contend that the State had failed to prove any elements." Alternatively, the State contends that "the evidence was sufficient to sustain [the] convictions."

We agree with the State that Mr. Newton's contention is not preserved for our review. In making a motion for judgment of acquittal, a "defendant shall state with particularity all reasons why the motion should be granted," Rule 4-324(a), and the Supreme Court of Maryland has stated that "[t]he issue of sufficiency of the evidence is not preserved when the defendant's motion for judgment of acquittal is on a ground different than that set forth on appeal." *Hobby v. State*, 436 Md. 526, 540 (2014) (internal

citation and brackets omitted). Here, the ground upon which Mr. Newton moved for judgment of acquittal is different from that which he now sets forth on appeal, and hence, his contention is not preserved. Even if Mr. Newton's contention was preserved for our review, he would not prevail. Amongst the considerable evidence presented by the State was evidence that Mr. McKeldin identified a person depicted in the video recording from Ms. Berdine's camera as the person who attempted to rob Mr. McKeldin's store, and that Mr. Castor identified that person as Mr. Newton. This evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Newton was the person who attempted to rob Mr. McKeldin.

Mr. Newton next contends that the court "committed plain error in permitting the prosecutor to effectively testify as a witness during her closing argument." Mr. Newton challenges the following portion of the prosecutor's argument:

> So let's go to the next time. The next time we see him on the video is at 1:19:58. So 1:19, he is walking towards the shopping center again in his shorts, and what I am going to point out about this one is – I have been doing this for 30 years, and one of the things that I submit is robbers usually don't change their shoes. They change their clothes. They get rid of vehicles. They get rid of a lot of things. Nobody ever gets rid of their shoes.

Mr. Newton contends that the prosecutor "effectively made herself a witness, arguing to the jury facts not in evidence, completely immune from cross-examination." Acknowledging that "there were no objections lodged to any of these instances," Mr. Newton requests that we apply "the plain error doctrine" and recognize the "obligation" of a trial court "at times . . . to step in *sua sponte* to correct matters." We decline to do so. Although this Court has discretion to review unpreserved errors pursuant to Rule 8-131(a)

("[o]rdinarily, an appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal"), 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) (internal 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) (internal citation and quotations omitted). Under the circumstances presented here, we decline to overlook the lack of preservation, and do not exercise our discretion to engage in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the words "[w]e decline to do so" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation" (emphasis and footnote omitted)).

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