Circuit Court for Baltimore City
Case No.: 118270015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 503

September Term, 2019

JAMES BLACKSTON

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 8, 2020

*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 trial in the Circuit Court for Baltimore City, a jury found James Blackston, appellant, guilty of second-degree assault, and malicious destruction of property for striking his former girlfriend with a brick, and tearing the door off her minivan.[1] The court sentenced appellant to ten years' imprisonment for second-degree assault, and to a consecutive term of sixty days' imprisonment for malicious destruction of property.

Appellant contends that the circuit court made a plain error during the State's closing argument, and abused its discretion, and/or made a plain error, by declining to grant a defense request for a mistrial when the jury learned of appellant's previous unrelated incidents involving domestic violence against the victim. We disagree and affirm.

BACKGROUND

At trial, the State produced evidence that, on August 1, 2018, the victim, who was distressed, crying, and emotional, approached a Baltimore City Police Officer on routine patrol. She displayed a deep gash in her forearm and explained to the officer that appellant, her former boyfriend, had torn the door off of her minivan and thrown a brick at her causing the injury to her arm.[2] The police officer observed the minivan's door lying in the roadway some distance away. The interaction between the victim and the police officer was recorded by the police officer's body-worn video camera which was played for the jury at trial. The victim explained that, on the day in question, she had induced appellant to get in the van under the pretext that she would give him a ride, when, in fact, her actual motivation

[1] The jury acquitted appellant of first-degree assault, and reckless endangerment.

[2] It would turn out that the thrown brick also fractured her arm.

was to have him arrested by the warrant apprehension task force because of their prior verbal and physical history. Appellant's violent expletive laden tirade, which was accompanied by throwing the brick and tearing the door from the minivan, arose after he deduced that she had no intention of providing the ride she had agreed to.

I. The State's Closing Argument.

At the end of the State's closing argument, after detailing the evidence against appellant, and acknowledging that the State could not procure certain evidence, the State made the following comment:

> But we don't live in an ideal world. But as the jury instruction said, reasonable doubt is not a doubt that has to go to a mathematical certainty. It's reasonable. Reasonable. What you would make a decision in your normal life to act upon. Is it reasonable to believe that someone else did this when [the victim] even testified for the defense that they had an ongoing relationship. That she even debated afterwards whether she even wanted to go forward in this case. In fact, the defense went in so far as to ask were you pressured to go forward in this case. So you need to look at what's reasonable and what you believe. Use your own experiences, your own relationships, people, your own experiences in your life to evaluate the evidence that you have before you and hopefully, upon doing that and reviewing the evidence and using your own judgment, you'll find the Defendant guilty.

Appellant contends that the State's comment that: "It's reasonable. Reasonable. What you would make a decision in your normal life to act upon[,]" had the effect of lowering the State's burden of persuasion. Appellant acknowledges that he did not object to the State's closing argument, and therefore urges us to resort to finding that the trial court made a plain error in failing to interject, *sua sponte*, into the State's closing argument. We decline appellant's invitation.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other 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."

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). 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. *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 and footnote omitted).

II. Mistrial.

During the victim's initial interaction with the Baltimore City Police, which, as indicated earlier, was recorded by a body-worn video camera and played for the jury, she explained some of her and appellant's turbulent past to include prior incidents of domestic violence. Appellant moved in limine to preclude the jury from hearing about these prior incidents, and the State agreed to mute the audio of the body-worn video recording during the portion that appellant objected to. While the body-worn video was played for the jury, appellant did not object to any portion of it. However, at the conclusion of it, appellant requested a mistrial because, during a portion of the video where the audio was not muted, the jury learned that the victim had obtained a protective order against appellant. The circuit court declined to grant a mistrial on that basis but agreed to instruct the jury to disregard the comment.

On appeal, appellant first claims that the circuit court abused its discretion in declining to grant a mistrial for the reasons advanced at trial. Secondly, he claims that the circuit court should have granted a mistrial because of other references made to the victim's and appellant's troubled past that he did not bring to the attention of the trial court when requesting a mistrial. In other words, as to those latter un-objected-to instances, appellant asks us to resort to finding that the trial court made a plain error in failing to order, *sua sponte*, a mistrial.

We hold that the trial court did not abuse its discretion in not ordering a mistrial on the grounds advanced at trial, and we decline to exercise our discretion to review, as plain

error, the trial court's decision to not order a mistrial on the grounds not advanced by appellant at trial.

We have already explained the Court of Appeals has emphasized that we should rarely exercise our discretion to review unpreserved errors, *Ray*, 435 Md. at 23. We decline to exercise that discretion under the circumstances presented here.

As to the appellant's contention that the trial court abused its discretion in failing to order a mistrial because the jury learned of the existence of a protective order against appellant, we hold that the trial court did not abuse its discretion. The decision to grant a motion for mistrial rests in the discretion of the trial judge. *Molina v. State*, 244 Md. App. 67, 174 (2019); *Parker v. State*, 189 Md. App. 474, 493 (2009). Under the abuse of discretion standard, this Court will not disturb the circuit court's ruling, unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable. *Mack v. State*, 244 Md. App. 549, 573 (2020); *North v. North*, 102 Md. App. 1, 14 (1994). Moreover,

> a mistrial is an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice. Additionally, where the motion for mistrial is denied and the trial judge gives a curative instruction, we must determine whether the evidence was so prejudicial that it denied the defendant a fair trial; that is, whether the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.

Coffey v. State, 100 Md. App. 587, 597 (1994) (cleaned up); (s*ee also Diggs & Allen v. State*, 213 Md. App. 28, 70 (2013)).

Under the circumstances of this case, where the jury already knew that the victim was amidst her plan to have appellant arrested for his prior verbal and physical conduct

towards her before he threw the brick at her and tore the door off of her minivan, we are not persuaded that the trial court's decision to instruct the jury to disregard the remark about the protective order, rather than order a mistrial, constituted an abuse of discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.