Circuit Court for Worcester County
Case No.: C-23-CR-21-000323

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 802

September Term, 2022

MARKQUETTE LAMAR BYRD

v.

STATE OF MARYLAND

Friedman,
Albright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 10, 2023

*At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**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, Markquette Lamar Byrd, appellant, was convicted of two counts each of distribution and possession of a controlled dangerous substance. During deliberations, the jury sent a note indicating that it was deadlocked. The trial court, with the parties' approval, responded by giving an *Allen*-type instruction. The court prefaced and concluded the instruction with brief, additional remarks but otherwise read MPJI-Cr 2:01 verbatim. The remarks at issue are as follows:

> [I]t's been approximately an hour and fifteen minutes that you have been deliberating. I don't know if any of you have ever served on a jury before. An hour may seem like a long time for you. You may believe that you've actually reached an impasse and no additional consideration will resolve the impasse, but an hour and fifteen minutes is not a tremendous amount of time to be deliberating about serious issues.
>
> . . . I am instructing you to return to the jury deliberation area to continue your deliberations. If you continue to reach an impasse at some point, just let the Court know, but it is important. Again, you can recognize the work that has already gone into the presentation of the case by the parties, and so we would just like you to give it some additional time and work towards reaching a verdict.

The jury returned to its deliberations and later returned with a verdict. On appeal, Byrd asserts that the court's additional remarks before and after reading MPJI-Cr 2:01 coerced the jury into reaching an agreement. For the following reasons, we shall affirm.

Although Byrd acknowledges that he failed to object to the trial court's jury instruction, he asks us to exercise our discretion to grant plain-error review. Although we have discretion to review unpreserved errors under 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) (cleaned up). Plain-error review is therefore "reserved for errors that are compelling, extraordinary, exceptional[,] or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130–31 (2012) (cleaned up). This exercise of discretion "(1) always has been, (2) still is, and (3) will continue to be a rare, rare phenomenon." *White v. State*, 223 Md. App. 353, 403 n. 38 (2015) (cleaned up). What is more, "'[t]he plain[-]error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors.'" *Malaska v. State*, 216 Md. App. 492, 525 (2014) (quoting *Peterson v. State*, 196 Md. App. 563, 589 (2010)), *cert. denied*, 135 S. Ct. 1162 (2015).

Before we can exercise our discretion, four conditions must be met: (1) there must be an error that the appellant has not affirmatively waived; (2) the error "must be clear or obvious, rather than subject to reasonable dispute;" (3) the error must have "affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings;" and (4) the error "must seriously affect[] the fairness, integrity[,] or public reputation of judicial proceedings." *Newton v. State*, 455 Md. 341, 364 (2017) (cleaned up). "Meeting all four prongs is difficult, as it should be." *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up).

Under the circumstances presented, we decline to overlook the lack of preservation and 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."). Moreover, even if the issue was preserved, we are not persuaded that any deviations from the pattern jury instruction in this case affected Byrd's "substantial rights" or "the fairness, integrity, or public reputation of judicial proceedings." Here, the trial court's additional remarks adhered to the spirit of MPJI-Cr 2:01. The court merely emphasized the importance of giving a serious matter, serious consideration and did not indicate that reaching an agreement was more important than any other part of the instruction. *See Hall v. State*, 214 Md. App. 208, 222 (2013); *see also Steward v. State*, 218 Md. App. 550, 568 (2014) ("In order to be 'extraordinary,' and thus cognizable on review, an error must be more than prejudicial, indeed, more than merely reversible, had the error been properly preserved." (citation omitted)).

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