Circuit Court for Prince George's County
Case No.: CT171400X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 842

September Term, 2019

FERDI AUGUSTO MILLER, III

v.

STATE OF MARYLAND

Nazarian,
Gould,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 28, 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 Prince George's County, a jury found Ferdi Augusto Miller, III, appellant, guilty of three counts of second-degree assault, and two counts of reckless endangerment.[1] The court sentenced appellant to ten years' imprisonment for each of the counts of second-degree assault to be served consecutively. The court suspended five years of one of those ten-year sentences in favor of five years' probation. For each of the two reckless endangerment counts, the court imposed two five-year concurrent sentences.

Appellant contends on appeal that the evidence is legally insufficient to support one of his convictions for reckless endangerment, and that the trial court committed plain error by permitting the State to make prejudicial and inflammatory comments during closing argument. We find the evidence legally sufficient, and we decline to recognize plain error in this case. We therefore shall affirm.

Sufficiency of the Evidence

On the morning of Wednesday, September 13, 2017, appellant accompanied the victim, D.M, who was his then live-in girlfriend, to her place of employment. Before too long, appellant began arguing with one of D.M.'s co-workers which ended after mall security intervened. D.M. testified that, when she returned home from work, appellant was unusually angry and eventually tied her up, beat her, and raped her. She explained that,

[1] The jury acquitted appellant of three counts of first-degree rape, second-degree rape, first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, two counts of first-degree assault, and one count of false imprisonment.

over the course of the next two days, that appellant was aggressive with her, beat her, and forced her to perform various demeaning tasks and sexual acts.

The victim testified that, among other things, appellant tied her hands to her hair, put two sweaters over her head such that she had difficulty breathing, poured water down her throat making her feel as if she was drowning, put a Tylenol bottle in her anus, called her names such a "bitch" and "whore," placed a washcloth in her mouth to stop her from screaming, beat her with his fists and a belt, kicked her, choked her with a belt, vaginally and anally raped her, forced her to perform fellatio, urinated on her, burned her leg and nose with a lit cigarette, and threw food on the floor and forced her to clean it up with her mouth.

Appellant's conduct over the course of those three days spawned the criminal charges against him. The State's charging pattern included various sexual offenses and assaultive crimes for each of the three days. On appeal, appellant claims that the evidence was legally insufficient to support the reckless endangerment count that was charged as having been committed on Thursday, September 14, 2017.

D.M. testified that on that day, she woke up and appellant asked her for her phone and accused her of having "late-night conversations" which she denied. According to D.M., because appellant doubted the veracity of her denials, he beat her by hitting and kicking her and "ranting about just a bunch of things that didn't make sense." Appellant called her a "whore" and a "bitch" and said "[y]ou want to fucking talk to these guys[?]"

In reviewing the sufficiency of the evidence we review the record to determine whether, "'after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Pinheiro v. State*, 244 Md. App. 703, 711 (2020) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Reckless endangerment is a statutory offense that prohibits a person from recklessly engaging in conduct that "creates a substantial risk of death or serious physical injury to another[.]" Md. Code (2002, 2012 Repl. Vol), Criminal Law Article, § 3-204(a)(1). The elements of a prima facie case of reckless endangerment are: (1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly. *Thompson v. State*, 229 Md. App. 385, 414 (2016) (citation and quotation omitted).

"Whether the conduct in issue has, indeed, created a substantial risk of death or serious physical injury is an issue that will be assessed objectively on the basis of the physical evidence in the case." *Marlin v. State*, 192 Md. App. 134, 157 (2010) (quoting *Williams v. State*, 100 Md. App. 468, 495 (1994)). The Court of Appeals has explained that "the purpose of the reckless endangerment statute is to punish conduct that was potentially harmful, even when no actual harm has occurred." *Hall v. State*, 448 Md. 318, 330 (2016) (citing *Williams*, 100 Md. App. at 481). "Guilt under the statute does not depend on whether the accused intended that his reckless conduct create a substantial risk of death or serious physical injury to another." *Thompson*, 229 Md. App. at 415 (citation and quotation omitted). Rather, "[i]t is an inchoate crime and is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but

may, through a stroke of good fortune, be spared the consummated harm itself." *Albrecht v. State*, 105 Md. App. 45, 58 (1995).

In challenging the sufficiency of the evidence, appellant asserts that the State failed to prove where appellant's blows and kicks landed on D.M.'s body on the day in question. From that standpoint, appellant claims that the jury was left to speculate whether those blows and kicks created a substantial risk of death or serious physical injury.

Viewed objectively, and in the light most favorable to the State, the evidence showed that appellant viscously burned, beat, and sexually attacked D.M. over a three-day period. Evidence of her various injuries, including bruising to over fifty percent of her body, was presented to the jury. With that context, we conclude that, based on the facts of this case, a rational trier of fact could infer that appellant's actions created a substantial risk of serious injury when he kicked and beat her on September 14, 2017.

Closing Argument

The State began and concluded its closing argument with comments that appellant claims were inflammatory and prejudicial. At the outset of closing argument, the prosecutor said: "The only thing necessary for evil to flourish is for good men and good women to do nothing. Today I am asking you to do something. I am asking you to hold [appellant] responsible for what he did to [the victim] from September 13th to 15th." The prosecutor concluded his argument with: "[Appellant] is hoping that you completely cover your eyes and your ears and leave all logic and common sense outside, and thinks you were born yesterday. Evil thrives when wise and good men and women do nothing. And this is your chance to do something and hold him accountable and responsible and find him guilty

of each and every charge."

Appellant acknowledges that he lodged no contemporaneous objection to the State's closing argument, and that the issue is, therefore, not preserved for appeal. He asks us to review the error under our authority to review unpreserved errors pursuant to Md. Rule 8-131.

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).

Consequently, we affirm the judgments of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.