

Circuit Court for Baltimore County
Case No. K06-4590

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 983

September Term, 2017

GEORGE EDWARD GREENLEE

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 17, 2018

*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 Baltimore County, George Edward Greenlee, appellant, was convicted of attempted first-degree murder, first-degree assault, two counts of use of a handgun in the commission of a crime of violence and two counts of use of a handgun in the commission of a felony. On appeal, Greenlee contends (1) that the State elicited improper testimony from Lieutenant Jay Landsman regarding his post-arrest invocation of his constitutional right to remain silent, and (2) that his convictions for use of a handgun in the commission of a crime of violence should have merged with his convictions for use of a handgun in the commission of a felony. For the reasons that follow, we vacate both of Greenlee’s convictions for use of a handgun in the commission of a felony but otherwise affirm the judgments.

At trial, the State presented evidence that, following his arrest, Greenlee waived his *Miranda* rights and spoke with Lieutenant Landsman. During that conversation, Lieutenant Landsman informed Greenlee that several witnesses had seen him with a firearm and impressed upon Greenlee the need to locate that firearm before the end of the school day. Greenlee stated that “he did not have a firearm in his possession right now, and that he understood the law as it pertained to possession of a firearm.” Lieutenant Landsman then asked Greenlee about locating the gun a second time, at which point Greenlee responded that “he didn’t think he should say anything else without an attorney.”

On appeal, Greenlee contends that Lieutenant Landsman’s testimony was inadmissible because it referenced his post-*Miranda* right to silence. Conceding that this issue is not preserved due to defense counsel’s failure to object, Greenlee requests that we exercise our discretion and review his claim for plain error.

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 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 and footnote omitted).

Relying on *Testerman v. State*, 170 Md. App. 324 (2006), Greenlee alternatively asks us to conclude that his defense counsel’s failure to object to Lieutenant Landsman’s testimony constituted ineffective assistance of counsel. However, Greenlee has waived his right to raise this claim. Greenlee was convicted and sentenced in 2007 but he did not file a timely direct appeal. He subsequently filed a petition for post-conviction relief raising several claims of ineffective assistance of counsel, including that his defense counsel was ineffective in failing to file a timely notice of appeal and in failing to object to Lieutenant Landsman’s testimony. Following a hearing, the parties agreed that Greenlee would be

allowed to file a belated direct appeal and motion for modification of sentence. In exchange, Greenlee agreed to withdraw all his other post-conviction claims *with prejudice*. The circuit court issued an order to that effect on April 21, 2017. Consequently, we will not consider this claim on appeal.

Greenlee finally contends that two of his convictions for use of a handgun should be vacated. We agree. In *Gardner v. State*, 442 Md. 226 (2015), the Court of Appeals held that the unit of prosecution for use of a handgun under Criminal Law Article § 4-204 is the underlying crime committed with the handgun, regardless of whether that crime is classified as a felony, crime of violence, or both. *Id.* at 241. Here, Greenlee was convicted of two crimes: the attempted first-degree murder of Philip Serald and the first-degree assault of Jon Aumann. However, he was convicted of four counts of use of a handgun: count three, charging the use of a handgun in the commission of a crime of violence involving Serald; count four, charging the use of a handgun in the commission of a felony involving Serald; count seven, charging the use of a handgun in the commission of a crime of violence involving Aumann; and count eight, charging the use of a handgun in the commission of a felony involving Aumann. Because Greenlee should have only been convicted of two counts of use of a handgun, one for each

underlying crime, we vacate both of his convictions for use of a handgun in the commission of a felony.

**APPELLANT’S CONVICTIONS FOR
USE OF A FIREARM IN THE
COMMISSION OF A FELONY
VACATED. JUDGMENTS ARE
OTHERWISE AFFIRMED. COSTS
TO BE PAID TWO-THIRDS BY
APPELLANT AND ONE-THIRD BY
BALTIMORE COUNTY.**