Circuit Court for Baltimore County
Case No. C-03-CR-20-000956

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1306

September Term, 2021

ARTIS ANTHONY MCDANIEL, III

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 26, 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 Baltimore County, Artis Anthony McDaniel, III, appellant, was convicted of robbery. Appellant raises two issues on appeal: (1) whether the trial court plainly erred in allowing the State to nol pros the lesser-included offenses of second-degree assault and theft because doing so violated his constitutional right to a fair trial, and (2) whether the trial court plainly erred in allowing the State to nol pros those offenses without providing a reason for doing so in violation of Maryland Rule 4-247(a). We decline to exercise our discretion to engage in plain error review of these issues and shall affirm the judgments of the circuit court.

Appellant was charged by indictment with the offenses of robbery, second-degree assault and theft of property valued at more than $500 and less than $1,500. However, the robbery count was the only count that was submitted to the jury. After the court indicated that the jury had reached a verdict, but before that verdict was announced, an unknown clerk stated on the record: "since the only count that was sent back was Count 1 [the robbery count], I assume you are nol prossing or abandoning Count 2 and 3." The prosecutor responded: "Yes, the lesser included . . . Thank you for bringing that to my attention." Defense counsel did not object and only indicated that he would not be able submit a bill "until everything says closed in the bottom of it." Thereafter, the jury returned a verdict of guilty on the robbery count.

On appeal, appellant contends that the trial court erred in allowing the State to enter a nolle prosequi on the lesser included offenses of theft and second-degree assault prior to the jury announcing its verdict because doing so violated his constitutional right to a fair

trial.[1] He further asserts that the court erred in not requiring the State to articulate the reason for nol prossing those charges, which he claims violated Maryland Rule 4-247(a).[2] Appellant acknowledges, however, that these claims are not preserved because he did not object at trial. He therefore requests that we engage in plain error review.

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

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[1] In so claiming, appellant relies on *Hook v. State*, 315 Md. 25, 43-44 (1989) wherein the Court of Appeals held that when a defendant is "plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection, to nol pros the lesser included offense." Notably, however, the State may still nol pros a lesser-included offense, "even where there is evidence that would support a finding of guilt" of that offense if "under the particular facts of the case, there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense." *Burch v. State*, 346 Md. 253, 278-79 (1997) (quotation marks and citation omitted). We have further recognized that "the limitation on the right of the State to *nol pros* applies only where the defendant objects" as there may be circumstances in which defendant might want State to nol pros one or more lesser included offenses because he believes he can create reasonable doubt as to flagship offense and thus gain acquittal. *Kinder v. State*, 81 Md. App. 200, 209 (1989).

[2] We note that although such a requirement was imposed in a former iteration of Rule 4-247(a), it was not required by that Rule at the time of appellant's trial.

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 of the issues raised by appellant. *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 BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.