Circuit Court for Talbot County
Case No. C-20-CR-19-000072

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1859

September Term, 2019

RAYMOND GELLERT, JR.

v.

STATE OF MARYLAND

Graeff,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 7, 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 a jury trial in the Circuit Court for Talbot County, Raymond Gellert, Jr., appellant, was convicted of second-degree assault and malicious destruction of property valued at less than $1,000. At the conclusion of all the evidence, the court instructed the jury on all three modalities of second-degree assault. During deliberations, the jury sent a note to the court asking: "Must all three categories be met." The prosecutor informed the court that "I believe the answer is no." Defense counsel then stated that he "[didn't] take any position at all." Thereafter, the court agreed that the "answer is no" and indicated that it was going call the jury back in. When the jury returned to the courtroom the court instructed the jury as follows:

> [Y]our forelady sent out a note written on the second-degree assault page and the question that was presented to me is must all three categories be met. The answer is no, they don't. They don't need to satisfy all three categories. Any one of these categories is sufficient to constitute the elements of second-degree assault. So, with that in mind I'm going to send you back out to deliberate.

Mr. Gellert now claims that the trial court abused its discretion in answering the jury's question because, "in light of the fact that battery and attempted battery both contain three elements, . . . the jury may have understood the court's response to mean that the State did not need to prove all three elements of battery and attempted battery in order to find [him] guilty of assault." Acknowledging that he did not object to the court's response at trial, Mr. Gellert asks us to engage in plain error review of this issue.

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.

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