UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0074

September Term, 2015

CAPONE CHASE

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: January 22, 2016

*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.

A jury in the Circuit Court for Baltimore City convicted Capone Chase, appellant, of first-degree murder, two counts of robbery with a deadly weapon, first-degree assault, use of a handgun in a crime of violence, and illegal possession of a handgun. Appellant was sentenced to life-plus-fifty years' incarceration. Appellant noted a timely appeal and presents the following question for our review:

> Where the jury had begun deliberations, and asked to hear two recorded telephone calls which were in evidence and played in open court during trial, did the lower court err in ordering the public to be excluded from the courtroom while those recordings were played for the jury in the presence of the parties, counsel, and court personnel?

For the following reasons, we hold that appellant's issue has not been preserved for our review, and we affirm the judgment of the circuit court.

BACKGROUND

Appellant was charged with first-degree murder, robbery with a deadly weapon, and other related charges in connection with the robbery and shooting death of Ramon Rodriguez. At trial, Jamie Fromm, the girlfriend of the deceased, testified that she and Mr. Rodriguez met with appellant and another man in a public park. During the meeting, Appellant robbed Mr. Rodriguez and Ms. Fromm and, after accusing Mr. Rodriguez of being a "snitch," shot him.

The jury also heard two recordings of 911 calls that were placed in the aftermath of the shooting. The first came from Ms. Fromm, who reported the shooting, and the second came from a witness who claimed that he saw people that were "disturbing the peace in the playground."

During deliberations, the jury asked to listen to the 911 calls again. Both the State and defense counsel objected to allowing the jury to listen to the calls in the jury room. The State was concerned that the jury would have access to the internet if given control over the recording equipment, and defense counsel did not want the jury to have unfettered access to the 911 recordings.[1] After consulting with both counsel, the trial court concluded that the best option was to have the jury return to the courtroom to listen to the recordings, at which time the trial court made the following statement:

> Okay. The other thing is, with regard to the jury listening to the tapes.
>
> * * *
>
> . . . We're doing it this way, we're bringing the jury out to here, [sic] however, this is part of the jury deliberations. This should be taking place in the jury room, in the privacy of the jury room, and in the sanctity of the jury room, without anyone else present.
>
> For that reason, although constitutionally, the courtroom is open to the public, I am going to be clearing the courtroom with the exception of the court staff and my staff and of course Mr. Chase and Counsel. Other than that, I'm going to be asking everyone else to vacate the courtroom.
>
> And the reason is, because the jury is going to be listening to this as they would if it was during deliberations. At that time, there would be nobody else, obviously, present. Because they wouldn't be seeing anyone else's reaction. No one else would be observing them. It would be completely private. So as much as possible, I want to have the same type of environment here.
>
> When—I will also be instructing the jury that, as they listen to it out here, while we are present, they should not be saying anything at all. None of us should be saying anything at all or reacting in any way whatsoever.

[1] The second 911 recording was introduced into evidence by appellant, but only a portion of the recording was played for the jury during trial.

At that time, there was a pause in the proceedings while the recording equipment was setup. The jury was then brought into the courtroom, and the trial court explained the situation to the jury. Once the courtroom was cleared, the jury listened to the 911 tapes in silence. Neither appellant nor defense counsel objected to the court's decision.

DISCUSSION

Although appellant concedes that defense counsel failed to object at any time prior to or during the court's playing of the 911 tapes, appellant argues that we should nevertheless reverse the judgment of the circuit court. Appellant first claims that the trial court's decision to allow non-jury members access to the jury during deliberations was an intrusion upon the privacy of the deliberations. Appellant also argues that the trial court's decision to exclude the public from the courtroom was a violation of his Sixth Amendment right to a public trial. On both grounds appellant argues that defense counsel's failure to object should not preclude review, either because counsel was ineffective in failing to object or because the alleged errors by the trial court constitute plain error.

The State counters that appellant's failure to object precludes review on both issues, and neither claim warrants review under either ineffective assistance of counsel or plain error. The State further argues that, even if we were to review appellant's claims on the merits, the trial court's decision to close the courtroom during the playing of the 911 tapes did not violate appellant's right to a public trial. Because we agree with the State that appellant failed to preserve the issues for our review, we need not address the merits of appellant's public-trial claims.

I. Objection Requirement

Maryland Rule 8-131(a) states that an appellate court "will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" *Id.* This rule "requires an appellant who desires to contest a court's ruling or other error on appeal to have made a timely objection at trial. The failure to do so bars the appellant from obtaining review of the claimed error, as a matter of right." *Robinson v. State,* 410 Md. 91, 103 (2009). Furthermore, the fact that the claimed error involves a fundamental right, such as the Sixth Amendment's right to a public trial, does not absolve a defendant of his obligation to object:

> That [a]ppellant's claim of error implicates a constitutional protection, moreover, does not excuse his failure to make a contemporaneous objection to the court's order . . . . Further, the fact that the Sixth Amendment right to a public trial can be characterized as "fundamental" does not change the requirement that any claimed violation of that right be preserved by contemporaneous objection.

Id. at 106.

Notwithstanding the Court's holding in *Robinson*, appellant asks that we overlook his failure to object for two reasons: one, the dissent in *Robinson* determined that a public-trial error should not be subject to the contemporaneous objection requirement; and two, a contemporaneous objection would have required defense counsel to challenge the *sua sponte* decision of the trial court. On the first point, appellant notes that *Robinson* was decided by a closely-divided Court of Appeals and therefore should be given less weight. As to the second point, appellant claims that the decision to close the court was made by

the court without any input from the parties and without giving Appellant the opportunity to interject.

Appellant's first contention is wholly without merit. As an appellate court, our decisions are governed by stare decisis, and we should "reaffirm, follow, and apply ordinarily the published decisional holdings of our appellate courts[.]" *State v. Stachowski,* 440 Md. 504, 520 (2014). Deviation from precedent should not be embarked upon lightly, even when, as appellant claims of the Court's holding in *Robinson,* opinions are rendered by a closely divided Court. Instead, we may depart from a prior holding only when the prior decision is clearly wrong, or when the precedent has been rendered archaic by the passage of time. *State v. Waine,* 444 Md. 692, 700 (2015). Because neither exception is applicable to this case or the Court's decision in *Robinson*, we shall apply its holding without pause.

As to appellant's second claim, that he was not afforded the opportunity to object, we again find no merit. The trial court's decision to close the courtroom was not "raised and rendered in the same breath," as characterized by appellant. The trial court engaged in a thoughtful analysis of how the jury should listen to the 911 recordings and, after consulting with both the State and defense counsel, determined that it would bring the jury into the courtroom. Then, when the trial court announced its decision to close the court, approximately 10 minutes passed before the recordings were played for the jury—including a pause during this time period to allow the recording equipment to be set up prior to the jury being brought into the courtroom. In sum, appellant had ample time and opportunity to object. *See Hill v. State,* 355 Md. 206, 216 (1999) ("[I]f there is an

opportunity to object to an order or ruling when made, the failure to do so . . . constitute[s] a waiver.").

Finally, appellant's contention that defense counsel was "inviting a contempt citation" if he objected to the court's ruling is without justification, and his reliance on our language in *Lewis v. State,* 71 Md. App. 402 (1987) to support his contention is incongruous. In *Lewis*, defense counsel asked the court if he could pose an additional question on cross-examination, but the court denied the request. *Id.* at 413-414. During recross-examination, defense counsel had an opportunity to ask the same question but chose not to, and on appeal the State argued that this constituted a waiver. *Id.* at 414. In holding that it was not a waiver, we stated that "[c]ounsel was not obligated to invite a contempt citation *by violating [the court's] ruling during recross-examination.*" *Id.* (emphasis added). At no point did we state that defense counsel would be inviting a contempt citation by objecting to the court's ruling; quite the contrary, we held that defense counsel "preserved his challenge . . . by his prompt objection." *Id.*

Unlike in *Lewis*, defense counsel in the present case was not faced with the prospect of violating the trial court's ruling if he chose to interject. The trial court was in fact quite receptive to counsel's interjections regarding the replaying of the 911 recordings in the jury room, and, after both the State and defense counsel voiced their displeasure, the court chose to have the jury listen to the recordings in the courtroom. There is nothing in the record to suggest that the trial court would have acted any differently had defense counsel objected to the court's closing of the courtroom, and there certainly is nothing in the record to suggest that defense counsel was in danger of a contempt citation.

II. Review of Unpreserved Error

Before addressing appellant's next arguments, we must first address how the issues are presented in appellant's brief. In his "Question Presented," appellant argues that the trial court erred in closing the courtroom when the 911 recordings were played for the jury, as this was a violation of appellant's public-trial rights. But in his very first argument, on the right to a public trial, appellant argues that the trial court erred in *opening* the courtroom when the 911 recordings were played for the jury, as this was a violation of the sanctity of jury deliberations.

As appellant notes several times in his brief, the trial court was well within its discretion in allowing the jury to listen to the 911 tapes in open court. *See* Md. Rule 4-326(d)(1) ("The judge may respond to [a jury] communication . . . orally in open court on the record."). The trial court did not technically allow anyone into the jury room during deliberations, but instead engaged in an on-the-record communication with the jury, at which time the courtroom was closed. Therefore, the court's reasoning in closing the court—to protect the sanctity of jury deliberations—is relevant within the public-trial analysis, rather than as a stand-alone error.

However, this issue is moot, as appellant's failure to object precludes review. The remainder of appellant's brief focuses solely on his public-trial claim, so we will only discuss the merits of appellant's remaining arguments as they relate to the public-trial issue. *See DiPino v. Davis,* 354 Md. 18, 56 (1999) ("[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it.").

The Sixth Amendment to the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. Amend. VI. The Supreme Court has made clear that the Sixth Amendment public-trial guarantee was created for the benefit of the defendant, so that "the public may see he is fairly dealt with and not unjustly condemned." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). But the Court also cautioned that this right is not absolute, explaining that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45. In such instances, the presumption of openness may be overcome, and a trial court may exclude the public from a trial. *Id.* "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.*

The Supreme Court encapsulated this balance of interests in a four-part test, which, if satisfied, allows a trial court to infringe on a defendant's right to a public trial:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48.

The failure of a trial court to meet any of the above standards is a *per se* Sixth Amendment violation, which "carr[ies] with it a presumption of prejudice to the defendant and therefore requir[es] the granting of appropriate relief." *Watters v. State,* 328 Md. 38, 46 (1992). In other words, a violation of a defendant's Sixth Amendment right to a public trial is a structural defect and cannot be harmless error. *See Waller,* 467 U.S. at 49 ("[T]he

defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee.”).

As we have stated above, the right to a public trial, regardless of its asserted status as “fundamental” or “structural,” is subject to the contemporaneous objection requirement outlined in Md. Rule 8-131(a). Nevertheless, appellant argues that we should exercise our discretion and review his claim on the merits despite his failure to object. Appellant highlights three circumstances under which we have held that review of an unpreserved claim was appropriate: (1) when direct review is appropriate and desirable in the case of ineffective assistance of counsel, (2) when subsequent post-conviction relief on the same issue is inevitable, and (3) when the issue constitutes plain error. Appellant contends that all three exceptions are applicable in his case. We disagree.

A. Ineffective Assistance

Appellant correctly recognizes that claims of ineffective assistance of counsel should be raised in post-conviction proceedings and not on direct appeal; however, appellant also points out that in limited circumstances, “review [of ineffective assistance] on direct appeal may be appropriate and desirable.” *In re Parris W.,* 363 Md. 717, 726 (2001). Appellant relies on our opinion in *Testerman v. State,* 170 Md. App. 324 (2006), in which we held that we may review an ineffective assistance claim on direct appeal “where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim[.]” *Id.* at 335 (quoting *In re Parris W.,* 363 Md. at 558-559).

Appellant’s reliance on both *In re Parris W.* and *Testerman* is misplaced. The full passage from *In re Parris W.,* which we quoted in *Testerman*, was that we *may* review an

ineffective assistance claim "where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, *there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.*" *In re Parris W.,* 363 Md. at 726 (emphasis added). Consequently, our decision to review an ineffective assistance claim on direct appeal hinges not just on the sufficiency of the record, but also on whether a review of the claim is appropriate and desirable.

In the present case, we find a review of appellant's claim to be neither appropriate nor desirable. There is nothing in the record to suggest that defense counsel's failure to object was unreasonable or that the interests of judicial economy would be served by our review of appellant's claim. Moreover, the circumstances of *Testerman* are wholly dissimilar to the circumstances of the present case.

In *Testerman*, defense counsel failed to make a motion for acquittal, despite the fact that the evidence presented at trial clearly did not support a conviction on the crime charged. *Testerman,* 170 Md. App. at 343. As a result, we held that direct review of appellant's ineffective assistance claim was appropriate because "the undisputed facts were clearly insufficient to establish a required element of the offense, and none of the hundreds of cases considering similar issues would have supported the defendant's conviction." *Steward v. State,* 218 Md. App. 550, 572 (2014) (discussing *Testerman*). In short, we were certain that, had defense counsel in *Testerman* made the appropriate motion, the court would have ruled in his favor.

In appellant's case, we are not faced with nearly the same certainty. We cannot speculate what would have happened had defense counsel objected. The trial court made

it clear that the sanctity of the juror's deliberations was paramount, so it is unlikely that the trial court would have allowed an open courtroom had defense counsel objected. Given that defense counsel objected to the playing of the 911 tapes in the jury room, the trial court may have determined that there was "good cause" not to allow the jury to hear the 911 recordings at all. *See* Md. Rule 4-326(b) (the jury may review admitted evidence unless the court for good cause orders otherwise).

In fact, defense counsel may have consciously chosen not to object because he wanted the jury to listen to the 911 recordings again and was afraid the trial court would not permit them to do so in an open court. As appellant notes in his brief, the State's case "rested upon one witness, Jamie Fromm," and that "her credibility was vigorously attacked at trial" by inconsistencies between her trial testimony and both 911 calls. Defense counsel very well may have weighed the pros and cons of objecting and decided that appellant was better served by having the jury listen to the 911 recordings again, rather than insisting on an open court.

Obviously all of this is mere supposition, and we may never know the actual reasons why defense counsel did not object. Still, the point is clear: there is not enough information in the record to discern why defense counsel did not object, let alone to decide whether this decision was unreasonable. *See Robinson,* 410 Md. at 104 ("It would be unfair to the trial court and opposing counsel . . . if the appellate court were to review on direct appeal an unobjected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent."). Such guesswork is precisely why direct review of ineffective assistance claims are generally inappropriate, and why it is

especially inappropriate in this case. *See id.* ("Moreover, if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship.").

B. Md. Rule 8-131(a)

Appellant's next argument focuses on the use of the word "ordinarily" in Md. Rule 8-131(a), which the Court of Appeals held "has the limited purpose of granting to the appellate court the prerogative to review an unpreserved claim of error[.]" *Robinson,* 410 Md. at 103-104. Appellant asserts that the interests of fairness and judicial economy would be served by our review of his unpreserved claim. *See Bible v State,* 411 Md. 138, 150 (2009) ("Fairness and the interests of judicial economy also guide our decision to consider [an unpreserved issue]."). Appellant's sole argument in support of this assertion is that he has presented a meritorious issue on which he will inevitably be entitled to post-conviction relief. *See id.* (review of an unpreserved issue may be appropriate "in order to avoid an inevitable successful post-conviction proceeding").

Appellant's bald assertions notwithstanding, we do not see how appellant's post-conviction relief is "inevitable," or likely. In the cases cited by appellant where the Court of Appeals held relief to be "inevitable," the Court had little doubt as to the veracity of the defendant's claims. *See, e.g.*, *id.* (evidence presented at trial clearly did not meet all the elements of the crime charged); *Moosavi v. State,* 355 Md. 651 (1999) (defendant was charged under the wrong statute). In both cases, the Court held that denying appellate review solely because the defendant failed to object would be a waste of judicial resources,

when the merits of the defendants' claims virtually assured them of some sort of post-conviction relief. *Id.*

Much like appellant's ineffective assistance claim, we are not faced with the same certainty that the Court faced in the cases cited by appellant. As noted above, we do not know what the trial court would have done had appellant objected to the closure of the courtroom. The trial court may have, among other things, engaged in the appropriate constitutional analysis set forth by the Supreme Court in *Waller, supra.* That the court made remarks about the constitutionality of an open courtroom when rendering its decision makes this all the more likely.

It would be improper, therefore, for us to delve into a public-trial analysis when appellant did not give the trial court the opportunity, via an objection, to engage in this analysis first. One of the primary purposes of the objection requirement is to "bring the position of [the objecting party] to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings." *Clayman v. Prince George's County,* 266 Md. 409, 416 (1972). As such, we would actually be subverting, rather than promoting, the interests of fairness and judicial economy if we were to review appellant's claim without affording the trial court the opportunity to address the issue. *See Robinson,* 410 Md. at 104 (review of an unpreserved issue under Md. Rule 8-131(a) is appropriate "only when doing so furthers, rather than undermines, the purposes of the rule").

C. Plain Error

Finally, appellant argues that the alleged violation of his Sixth Amendment right to a public trial constitutes plain error. We reject appellant's claims. We have already stated that an alleged deprivation of a defendant's Sixth Amendment right to a public trial does not negate the requirement of a contemporaneous objection. *See Robinson, supra.* That he was unable to "waive this personal right" does not absolve him of the responsibility of raising the issue at trial. *See Hunt v. State,* 345 Md. 122, 138 (1997) (the right to public trial is not encompassed by the "narrow band of rights that courts have traditionally required an individual [to] knowingly and intelligently relinquish or abandon"). Furthermore, that a violation of a defendant's public-trial rights carries with it a presumption of prejudice does not, by itself, tip the scales in favor of overlooking appellant's failure to object. *See Robinson,* 410 Md. at 108 (a defendant is not entitled to automatic review simply because the issue involves a "structural error").

Plain error review is reserved for those issues that are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *State v. Hutchinson,* 287 Md. 198, 203 (1980). Even in the face of such an issue, we shall intervene "only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State,* 300 Md. 387, 397 (1984). Most importantly, "the exercise of our unfettered discretion in not taking notice of

plain error requires neither justification nor explanation." *Morris v. State,* 153 Md. App. 480, 507 (2003). For those reasons, we decline to review appellant's claims for plain error.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.