UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1603

September Term, 2015

TERRENCE ORDWAY GREENWOOD

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.
Concurring Opinion by Meredith, J.

Filed: November 14, 2016

Terrence Ordway Greenwood, appellant, was charged in the Circuit Court for Montgomery County with first-degree rape, two counts of first-degree sex offense, assault with intent to rape, burglary, and breaking into a dwelling with intent to commit a felony. Greenwood entered a plea of not guilty on an agreed statement of facts, and was found guilty of first-degree rape, two counts of first-degree sex offense, and burglary. He was later sentenced to three concurrent life terms with all but 60 years suspended, and a consecutive term of 20 years for the burglary conviction.

In his timely appeal, Greenwood asserts that he misunderstood the plea proceeding, that he was improperly induced to enter his plea of not guilty on an agreed statement of facts and, as a result, the trial court erred in finding that his plea was knowing and voluntary. At the same time, he concedes that his claims are unpreserved, but asks us to entertain a plain error review.

Finding no error, we shall affirm the judgments of the circuit court.

BACKGROUND

On September 10, 1987, a male assailant entered through a window of the apartment of Kimberly Edmunds in Germantown, Montgomery County, and sexually assaulted her at knife-point. Although Greenwood was developed as a suspect at the time, Edmunds was unable to positively identify her assailant in a photo array, and the case went unresolved. As an aspect of the initial investigation, DNA evidence had been collected at the hospital during a pelvic exam of Edmunds. In 2013 investigation into the case was revived by the Montgomery County Police Department cold case unit. The police matched the DNA evidence taken from Edmunds to a sample taken from Greenwood and identified him as

her assailant. On December 4, 2014, Greenwood was indicted by the grand jury, as we have noted.

On May 1, 2015, apparently after plea negotiations, Greenwood appeared in the circuit court, where he elected to plead not guilty and proceed on an agreed statement of facts. The court first examined Greenwood's waiver of his right to a jury trial:

> THE COURT: Okay. You have a right to proceed in that manner, but I want to make sure you understand the consequences of your approach. So if there's any questions that you have as we go through this colloquy please feel free to simply say you want to consult with your attorney and I'll be glad to give you that opportunity.
>
> You have a right to a trial in this case either by a jury or by the Court, that would be me as a Judge at this time and in terms of a jury you could, unless you waive your right to a trial by jury then the case will be tried by a jury.
>
> The jury consists of 12 individuals who reside in Montgomery County. They're selected at random from a list, which includes registered voters, licensed drivers and holders of identification cards issued by the Motor Vehicle Administration. They are seated as jurors at the conclusion of a selection process in which you, your lawyer and the State participate. All 21 [*sic*] jurors must agree on whether you are guilty or not guilty and may only convict upon proof beyond a reasonable doubt, which is the highest burden of proof that exists in any courtroom in the United States. If the jury is unable to reach a unanimous decision, meaning 12 to 0, a mistrial will be declared and the State will have the option under certain circumstances of retrying you.
>
> If you waive a jury trial the Court will not permit you to change that election unless the Court finds good cause to permit the change. You are presumed to be innocent and you cannot be convicted until a jury considers the evidence, which is admitted at trial, and is unanimously convinced of guilt beyond a reasonable doubt. Do you understand everything that I've said to you so far?
>
> GREENWOOD: Yes, sir.

> THE COURT: Are you making this decision of your own free will, the decision meaning to not have or to waive a jury trial?
>
> GREENWOOD: Yes.
>
> THE COURT: And has anybody offered you or promised you anything or forced you in any way to give up your right to a jury trial?
>
> GREENWOOD: No, sir.
>
> THE COURT: And you have not been coerced in regard to this decision?
>
> GREENWOOD: No, sir.
>
> THE COURT: Have you had sufficient time to consider the factors that go into making this decision and the import of that decision?
>
> GREENWOOD: Yes.
>
> THE COURT: Are you presently under the influence of any medication, drugs or alcohol?
>
> GREENWOOD: No.

After this examination, the court found, and announced, that Greenwood knowingly and voluntarily waived his right to a jury trial.

The court then examined Greenwood on his election to proceed on an agreed statement of facts:

> THE COURT: Now, if you were to – other than – we've just gone through the jury aspect of this, but you still have a right to a trial and you have a right to a trial wherein the State would be required to prove, to produce admissible evidence through documents, through testimony of witnesses, perhaps expert witnesses, perhaps expert reports and in other forms of admissible proof and you through your attorney would have

the right to challenged [*sic*] that evidence, you'd also have the right to confront or cross examine the State's witnesses, that again would be by virtue of questioning that your attorney would engage in and some of those questions indeed could be about the witness himself or herself under certain circumstances.

You also would have the right, but you would not have an obligation, to produce evidence of your own, including your own testimony, but no inference of guilt could be, would be permissible because you chose not to testify. In fact, if we had had – if you had a jury trial there would be advice to the jury that they couldn't even speak about it.

In a Court trial, which is what you also have a right to, the Judge cannot make any inference from your constitutional assertion not testify. [*sic*] You can't think such things as you're not fully defending yourself or you must know something about this, just no inference at all can be utilized by a Judge in considering your assertion of the constitutional right not to testify.

By agreeing to proceed in the manner that we're talking about here today, a not guilty stipulation of facts, you waive all of those rights that I've just told you about. Instead of presenting evidence, as I've indicated, the prosecutor would simply read into the record a summary of the facts or evidence. Through your attorney you'd have the right to agree with the statement or not agree with the statement.

However, if you disagree with any material part of the statement and the prosecutor refuses to alter it there will have to be a trial. We can proceed in this manner only if there is total agreement on all of the facts ultimately stated by the prosecutor. If you do agree with that statement your guilt or innocence will be determined by me solely on the basis of that statement and such argument as the prosecutor and your attorney choose to make. In making this decision the only legal issues that I will consider are whether the Court has jurisdiction in this matter and whether the facts stated by the prosecutor and agreed to by you constitute legally sufficient evidence to establish your guilt.

If I were to find you guilty you and your attorney and the prosecutor would have the right to produce additional facts and argument related to an appropriate sentence, but I would

not consider those facts in deciding whether you are guilty or not guilty. Do you understand everything that I've told you?

GREENWOOD: Yes.

THE COURT: Do you have any questions you'd like to ask of your counsel?

GREENWOOD: No, sir.

THE COURT: All right and you have had enough time to discuss this decision or proceeding in this manner as well with your counsel, is that correct?

GREENWOOD: Yes, sir.

THE COURT: Are you satisfied with the services and advice of your attorney?

GREENWOOD: Yes.

THE COURT: Have you ever been treated for any mental disorder or disability?

GREENWOOD: No.

THE COURT: No. Has anyone promised you that I would be more lenient in a sentencing because you proceeded in this manner by stipulated facts, having pled not guilty as opposed to going to trial and with a not guilty plea? Has anybody told you I'd be more lenient in the sentencing by virtue of your proceeding in this manner?

GREENWOOD: No, sir.

THE COURT: Okay and is your decision to proceed in this manner with your full knowledge of the consequences and a voluntary decision on your part?

GREENWOOD: Yes.

* * *

> THE COURT: Are you under the influence of any medications today at all?
>
> GREENWOOD: No, sir.
>
> THE COURT: You haven't taken any medications today. Are there any medications you should have taken today that you have not taken?
>
> GREENWOOD: No, sir.
>
> THE COURT: All right and you understand that you're in court and that you're here for purposes of a trial proceeding, you understand that?
>
> GREENWOOD: Yes.

Following recitation by the prosecutor of the agreed statement of facts into the record, the court found Greenwood guilty of two counts of first-degree sex offense, one count of first-degree rape, and one count of burglary.

Four months later, on September 1, 2015, Greenwood appeared before the circuit court for sentencing. The State recommended that the court impose three consecutive life sentences for the sexual offenses. In mitigation, Greenwood's counsel advised the court that Greenwood had, at that time, been incarcerated for 23 years, with a release date in 2031. He argued that, during Greenwood's long sentence, he been rehabilitated from his long-term drug habit. Counsel also stated, "So that's when we got a plea offer from the State for a life sentence. We – I think there were conversations with the Court about offering him and quite frankly just offering for Mr. Greenwood some hope of not getting a life sentence in this case and that's why we did the agreed statement of facts."

We shall set out additional details on Greenwood's argument at sentencing below, as relevant to our discussion.

Rejecting the State's recommendations, the court sentenced Greenwood to three concurrent life sentences, with all but 60 years suspended on each, plus a consecutive term of 20 years for the burglary offense. During the explanation to Greenwood of his post-conviction rights, outlined on a court form, the following exchange took place:

> GREENWOOD: What's this right here, if you plead not guilty?
>
> [DEFENSE COUNSEL]: That has to do if you were found guilty, you may choose to do so. Well, we have all that to file an appeal in conviction to the Court of Special Appeals if you choose to do so. We must request this within 30 days. Okay? Okay? You understand what I've just said and we'll talk about that? I'll give you a copy.
>
> GREENWOOD: But I did plead guilty.
>
> [DEFENSE COUNSEL]: What you did do was an agreed statement of facts. We can ask the Court for permission to file that appeal.

Greenwood thereafter noted this appeal.

DISCUSSION

While conceding that his present complaints were not preserved below, Greenwood argues that the court erred in deeming his waiver of a jury trial knowing and voluntary, given the confusion he expressed at the conclusion of the sentencing hearing, as well as the comment made by his counsel during his argument at sentencing. Thus, he asserts, he is entitled to plain error review.

Greenwood asserts that his, and his counsel's, comments demonstrate that the jury trial waiver was made without the requisite knowledge of the rights being waived. He further asserts that the waiver was induced by a promise of a more favorable sentence.

At no point did Greenwood raise this issue before the circuit court by either an objection to the court's ruling on the jury trial waiver, or by moving, pursuant to Md. Rule 4-246(c), for the withdrawal of the waiver.[1] The issue was therefore clearly not preserved for our review.

Plain error

Plain error review is an extraordinary remedy wholly within the appellate court's discretion. *Austin v. State*, 90 Md. App. 254, 261-64 (1992). It is "reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130 (2012) (quoting *State v. Hutchinson*, 287 Md. 198 (1980)). "[T]here is no fixed formula for the determination of when [such] discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused." *Garrett v. State*, 394 Md. 217, 224 (2006) (quoting *Jones v. State*, 379 Md. 704, 713 (2004)). In deciding to exercise this discretion, we consider, among other factors, "the

[1] Md. Rule 4-246(c) provides:

> (c) Withdrawal of a Waiver. After accepting a waiver of jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.

materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* We also consider whether there is an opportunity to use the error as a vehicle for considering an unexplored area of the law; whether the error is flagrant, egregious, outrageous, or extraordinary; whether the moral impact of the error is so great as to require intervention, such as the erroneous conviction of a factually innocent person; and whether there is ample good reason why defense counsel failed to preserve the issue. *Morris v. State*, 153 Md. App. 480, 518-524 (2003). Even if any – or all – of these factors are present, the ultimate touchstone remains the appellate court's discretion. *Austin*, 90 Md. App. at 268, 269, 270, 271, 272.

Our standard in considering whether to review an unpreserved issue derives from *Rich v. State*, 415 Md. 567 (2010), which was recently reinforced by the Court of Appeals in *Givens v. State*, 449 Md. 443 (2016). *Rich* established a four-pronged test: there must exist an error that the defendant has not intentionally abandoned or waived; the legal error must be clear or obvious, rather than subject to reasonable dispute; the error must have affected the defendant's substantial rights, which means that the defendant must demonstrate that the error affected the outcome of the trial court proceedings. If these three prongs are satisfied, we then have the discretion to remedy the error, but only if the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. The *Givens* court noted that "[s]imply put, under Maryland case law, plain error review requires that all four of the *Rich* factors be satisfied before an appellate court may exercise plain error review." *Givens*, 449 Md. at 480.

On this record, we find no error. Assuming, *arguendo,* the existence of error, we would conclude that Greenwood did not intentionally waive; that it would not have been obvious; and that Greenwood would not have been able to demonstrate a different outcome of the proceedings. We do not agree that what Greenwood complains of is a compelling or extraordinary error material to his rights in the context in which it arose. We decline the invitation to review for plain error.

Agreed statement of facts

Disposition of criminal charges by use of the agreed statements of facts method is an accepted procedure where the material evidence is not in dispute and there are no significant credibility determinations required. *Taylor v. State*, 388 Md. 385, 396-99 (2005). In *Hamm v. State*, the defendant pleaded not guilty and proceeded on an agreed statement of facts, but attempted to withdraw his plea at the sentencing hearing, on the grounds that he had been improperly induced to make the agreement. 72 Md. App. 176, 187 (1987). Hamm was not permitted to withdraw from the agreement, because, "the record is clear that prior to trial, the court had gone to painstaking efforts to be sure that appellant's agreement was voluntary and that he understood both the charges against him and the consequences of the agreement." *Id.* These efforts consisted of a colloquy informing Hamm that he had a right to a jury trial, asking whether he waived that right knowingly and voluntarily, and explaining to him the nature and effect of an agreed statement of facts and what rights he would waive in choosing to proceed in that manner. *Id.* at 187-89.

Maryland Rule 4-246 governs a defendant's waiver of a jury trial, and requires an examination of the defendant on the record and a determination by the court, on the record, that the waiver is knowing and voluntary. Md. Rule 4-246(b). The Rules Committee offers guidance in its note to this subsection:

> In determining whether a waiver is *knowing*, the court should seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury; (3) a jury consists of 12 individuals who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate; (4) all 12 jurors must agree on whether the defendant is guilty or not guilty and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant; and (6) if the defendant waives a jury trial, the court will not permit the defendant to change the election unless the court finds good cause to permit the change.
>
> In determining whether a waiver is voluntary, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will? (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial? (3) Has anyone threatened or coerced you in any way regarding your decision? and (4) Are you presently under the influence of any medications, drugs, or alcohol?

Id. (committee note) (emphasis in original). *See also Boulden v. State*, 414 Md. 284, 295 n.5 (2010) (quoting same); *Aguilera v. State*, 193 Md. App. 426, 437 (2010) ("We caution that it is the better practice for a trial court to use the words set forth in the Rule, stating specifically its finding that the 'waiver is made knowingly and voluntarily'").

Here, with even greater specificity than that provided by the court in *Hamm*, the court took "painstaking efforts" to be satisfied Greenwood understood the consequences of his decision to proceed on an agreed statement of facts. The court engaged in a lengthy colloquy regarding Greenwood's decision to waive a jury trial, repeating almost *verbatim* the language recommended by the Rules Committee, including the composition of the jury and Greenwood's right to participate in its selection. The court examined whether Greenwood understood those rights and if his waiver was knowing and voluntarily. The court then explained to Greenwood, in considerable detail, the State's burden of proof as well as the rights he was forgoing by choosing to proceed on an agreed statement of facts, including his right to challenge the State's evidence, to cross-examine witnesses, and to present evidence. Again, the court examined whether Greenwood understood the decision he was making, and found that he did. Greenwood did not then, or after the reading of the statement of facts, ask for clarification or show confusion over why no jury had been empaneled or why no witnesses had been called. The record belies any suggestion of confusion or improper inducement.

It was not until four months later, at the conclusion of the sentencing hearing, that Greenwood expressed some perceived confusion over the exact nature of his plea. As his counsel was explaining to him his appeal rights, Greenwood indicated that he thought he was not entitled to the specific rights his counsel was highlighting because he had pleaded guilty. His counsel corrected him, and the hearing concluded. This exchange is not indicative of a compelling or extraordinary error on the part of the court, nor is it material in its context, given the lengthy and detailed colloquies at the time Greenwood waived the

relevant rights and entered his plea. While Greenwood characterizes it as an indication that he did not understand the proceedings against him, it strikes us as nothing more than buyer's remorse. What is evident from the record is that the court determined at the time of trial that Greenwood understood that he was waiving his right to a jury trial and to require the State to prove its case.[2]

Greenwood also asserts that his waiver was involuntarily made, evidenced by the remarks of his counsel at the sentencing hearing:

> [DEFENSE COUNSEL]: He was always hopeful that when he got out, when he would be 65 or at least when that case was done that there was some light at the end of the tunnel for him. So that's when we got a plea offer from the State for a life sentence. We – I think there were conversations with the Court about offering him and quite frankly just offering for Mr. Greenwood some hope of not getting a life sentence in this case and that's why we did the agreed statement of facts.
>
> In some part Mr. Greenwood expressed a desire not to relive the events of that time, which he had trouble recollecting anyway because of his drug use, not putting the young lady through this again and just basically begging, you know, for the mercy of the Court that there's some light at the end of the tunnel and he's 65 on the other sentence, he might one day get out and the only thing that would keep him from doing that would be a life sentence and we were hoping to get some term of years on this case and I think that's what our entire conversation, that's what our defense strategy had been and that's where we are today.

[2] Further, Greenwood's argument that he thought he was pleading guilty is somewhat beside the point; when a defendant pleads guilty, he forgoes his right to a jury trial. His waiver of a jury trial would have been accepted as knowing and voluntary whether he was pleading guilty or not guilty with an agreed statement of facts. In fact, had he entered a plea of guilty, his appellate rights would have been more limited than he presently enjoys.

> So, that's what we're going to ask the Court to do, show some sort of mercy, not leniency, because he's not getting out for another 20 years anyway, or 10-15 years, but that's why we're here today, Judge, and he's going to tell you a little bit about what he's done while he's been incarcerated, the degrees he's gotten and treatment he's receiving in the sex offender program, et cetera.

It is reasonable to find from the context of his counsel's remarks that Greenwood's plea was made based on a strategic decision that mitigating evidence and facts, if any, would result in a sentence less than life in prison, which is what the State offered during plea negotiations. The record reveals no promise by the State that proceeding on an agreed statement of facts would lead to a more lenient sentence; in fact, at trial, the State sought a greater sentence – the same sentence it offered Greenwood during plea negotiations – than was imposed.

Neither his counsel's remarks nor Greenwood's asserted confusion constitutes a compelling, extraordinary, or outrageous error in the context in which they arose.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.

UNREPORTED

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JJ.

Concurring Opinion by Meredith, J.

Filed: November 14, 2016

Although I concur in the Court's conclusion that the judgment of the Circuit Court for Montgomery County should be affirmed, as well as the majority opinion's statement that "[w]e decline the invitation to review for plain error," I write separately to express my continuing reservations about the description of plain error review in *Rich v. State*, 415 Md. 567, 578 (2010), which has been interpreted as adopting a formulaic process that requires appellate courts conduct four steps of analysis when an appellant seeks relief from an unpreserved claim of error. I have two principal concerns about the *Rich* formula.

As a preliminary matter, I note that the four step language that the *Rich* Court quoted from *Puckett v. United States*, 556 U.S. 129 (2009), did not purport to establish a new formula for appellate review of claims of unpreserved plain error. In *Rich*, the Court of Appeals reversed an unreported ruling of this Court that had found reversible error in the trial court's jury instruction that had been expressly requested by the defendant. The Court of Appeals explained in *Rich*:

> The "rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases . . . . The few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics." *Conyers v. State*, 354 Md. 132, 150, 729 A.2d 910, 919 (1999). It is clear that the tactics employed by Respondent's trial counsel included the argument that, if Respondent were guilty of any offense, he was only guilty of manslaughter. Under these circumstances, because Respondent was convicted by a jury, he is not entitled to appellate relief on the basis of a "sufficiency" argument that is in direct conflict with the argument actually asserted by his trial counsel.
>
> In the case at bar, because the manslaughter instruction was specifically requested by Respondent's trial counsel, the doctrine of invited error is applicable to his argument that "the instructional error materially affected his right to a fair and impartial trial." The "invited error" doctrine is

> a "shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit --- mistrial or reversal --- from that error." *Klauenberg v. State*, 355 Md. 528, 544, 735 A.2d 1061, 1069 (1999), quoting *Allen v. State*, 89 Md. App. 25, 43, 597 A.2d 489, 498 (1991), *cert. denied*, 325 Md. 396, 601 A.2d 129 (1992). "The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009).

After citing several cases illustrative of the rule precluding appellate review of "invited error," the Court of Appeals in *Rich* highlighted the contrast between "plain error" review under Federal Rules of Criminal Procedure, Rule 52(b), and "invited error," stating, 415 Md. at 578-79:

> There is a distinction between a plain error and an invited error. In *Puckett v. United States*, --- U.S. ----, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009), the United States Supreme Court stated:
>
> > We explained in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), that Rule 52(b)[1] review --- so-called "plain-error review" --- involves four steps, or prongs. First, there must be an error or defect --- some sort of "[d]eviation from a legal rule" --- that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. *Id*., at 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. *See id*., at 734, 113 S.Ct. 1770, 123 L.Ed.2d 508. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." *Ibid*. Fourth and finally, if the above three prongs are satisfied, the court of

[1] Federal Rules of Criminal Procedure, Rule 52, provides (as amended in 2002):

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

> appeals has the discretion to remedy the error --- discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*., at 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)). Meeting all four prongs is difficult, "as it should be." *United States v. Dominguez Benitez*, 542 U.S. 74, 83, n. 9, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004).

Id. at ----, 129 S.Ct. at 1429.

The *Rich* Court quoted extensively from the analysis of the invited error doctrine in *United States v. Perez*, 116 F.3d 840, 842-45 (9th Cir. 1997), including the *Perez* court's conclusion that "[f]orfeited rights are reviewable for plain error, while waived rights are not." After stating "[w]e agree with this analysis," 415 Md. at 581, the *Rich* Court explained that appellant Rich was not eligible for appellate review of the error he had invited:

> In the case at bar, when Respondent's trial counsel (1) argued that the issue of voluntary manslaughter was generated by the evidence, and (2) made a specific request for a voluntary manslaughter instruction, that action constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction.

After issuing the ruling in *Rich*, in cases in which the Court of Appeals was asked to grant plain error review, the Court continued to describe the appellate procedure in terms similar to language found in the cases that had preceded the *Rich* opinion. For example, in *State v. Savoy*, 420 Md. 232, 243 (2011), although Judge Barbera's explanation of the Court's decision to grant plain error review of an erroneous jury instruction did follow generally the four prongs listed in *Puckett* (quoted in *Rich*), the *Savoy* Court did not suggest that those four steps were the newly-mandatory analysis required in all cases in which an

appellant raises a claim of plain error. To the contrary, rather than quote the *Puckett* four-prong language, Judge Barbera described plain error review as follows:

> We set forth in *State v. Hutchinson* the circumstances under which an appellate court should consider exercising discretion to take cognizance of plain error: "[A]n appellate court should take cognizance of unobjected to error" when the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980). Factors to consider in that determination include "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id*., 411 A.2d at 1038. **We have not deviated from that standard in the years since *Hutchinson*.** *See, e.g., Miller v. State*, 380 Md. 1, 29–30, 843 A.2d 803, 820 (2004) (collecting cases).

Savoy v. State, 420 Md. 232, 243 (2011) (emphasis added).

In *Yates v. State*, 429 Md. 112 (2012), the Court of Appeals affirmed this Court's refusal to recognize a claim of plain error. When the Court of Special Appeals had issued our opinion in *Yates*, we had quoted *Rich* (quoting *Puckett*), 202 Md. App. 700, 721 (2011), but the Court of Appeals neither cited nor quoted either of those cases as establishing four mandatory steps for reviewing a claim of plain error. The Court of Appeals said in *Yates*, 429 Md. at 130-32:

> In general, a party must object to the failure to give a particular instruction promptly after the instructions are delivered, stating the grounds for the objection. Maryland Rule 4–325(e). This rule of contemporaneous objection applies even to errors of constitutional dimension. *Savoy v. State*, 420 Md. 232, 241–42, 22 A.3d 845 (2011). "An appellate court, on its own initiative or on the suggestion of a party, may, however, take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Maryland Rule 4–325(e).
>
> Plain error review is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy*, 420 Md. at 243, 22 A.3d 845 (2011) (quoting *State v. Hutchinson*,

287 Md. 198, 203, 411 A.2d 1035 (1980)). Among the factors the Court considers are "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id*. **This exercise of discretion to engage in plain error review is "rare."** *Id*. at 255, 22 A.3d 845.

"There is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused." *Garrett v. State*, 394 Md. 217, 224, 905 A.2d 334 (2006) (alteration in original) (quoting *Jones v. State*, 379 Md. 704, 713, 843 A.2d 778 (2004)). The standard set out in *Garrett* encapsulates the principles guiding our review of the intermediate appellate court's decision:

> [W]e do not reverse the Court of Special Appeals for the exercise of its discretion unless it has clearly been abused. While this Court retains its own independent discretion to hear unpreserved arguments, that does not mean we review the discretionary functions of the lower appellate court de novo. To the contrary, we respect the judgment of the Court of Special Appeals in determining whether it needed to consider the issue for the proper execution of justice, and unless upon our review that court abused its discretion under the Rule, we will not substitute our judgment for theirs.

Id. (internal citation omitted) (quoting *Jones*, 379 Md. at 715, 843 A.2d 778).

The Court of Special Appeals did not decline review in a cursory fashion. In deciding whether to exercise its discretion, the Court pointed out that the trial court used a pattern jury instruction; cited past appellate decisions approving of the use of pattern instructions; noted that Petitioner could not cite any Maryland cases in which appellate courts have held that a trial court committed plain error in "giving, without objection, a pattern jury instruction"; and observed that appellate courts outside of Maryland have considered the use of pattern instructions in deciding whether to conduct a plain error review. *Yates*, 202 Md. App. at 722–24, 33 A.3d 1071.

The plain error standard gives a reviewing court a great deal of latitude to decide whether to exercise its discretion. The Court of Special Appeals gave appropriate weight to the use of pattern jury instructions and noted the lack of any authority to support Petitioner's claim of error. There

> is nothing to suggest that the Court of Special Appeals abused its discretion by declining to conduct a plain error review.

(Emphasis added.)

It appears to me that the Court of Appeals never quoted the four-prong language from *Rich* again until 2016, in *Givens v. State*, 449 Md. 443, 469 (2016). But, in *Givens*, the Court pointed out: "In this case, *Givens has not requested plain error review*, and *has not argued that the failure to raise the issue* before the verdicts became final and the circuit court discharged the jury *was not a matter of trial tactics*. Further, the error is neither clear nor obvious." *Id*. at 481 (emphasis added). The Court noted: "Givens has not sought plain error review and has not addressed any of the *Rich* factors." *Id*.

Because the appellate courts of Maryland have historically indicated that the decision whether to grant plain error review is discretionary, I am concerned that adopting the *Puckett/Rich* four-step formula could result in unintended complication of appellate review in cases in which an appellant asks for plain error review. A primary concern is the characterization of the four prongs as four "steps," and the phrase saying "[f]irst, there must by an error or defect . . . that has not been . . . affirmatively waived." 415 Md. at 578. This language could be misconstrued to suggest that the appellate court's decision of whether to grant plain error review is subject to a sequential process, and that the first step in the sequence is that the appellate court must complete its analysis of whether the trial court committed legal error. But determining whether the trial court committed legal error is the first (and usually last) step an appellate court must perform when a claim of legal error has been properly preserved. It makes little sense to require that an unpreserved claim of error

must be as thoroughly reviewed as a preserved claim of error would be *before* deciding whether there are sufficient factors in the case to excuse the lack of preservation.

In other words, it seems to me that the appellate court should be satisfied that the appellant's case presents one of those extraordinary cases in which there is a possibility that an alleged error seriously affects the fairness, integrity or public reputation of judicial proceedings *before* the court undertakes an analysis of the validity of the claim that the lower court erred. Perhaps that is what the *Rich* Court intended, but in my view, the principles governing plain error review were best addressed in *Yates* as quoted above, 429 Md. at 130-32.

My second principal concern is that, even if no specific sequential order of the four steps is intended, the four prong language of *Puckett/Rich* unnecessarily restricts the discretion of appellate courts to deal with plain error claims. Given the very large number of requests for plain error review, it is important for the appellate courts to preserve the plenary discretion that has historically characterized plain error review in Maryland.

Accordingly, I would have omitted the citation to *Rich* from our explanation of our reasons for declining to recognize Greenwood's unpreserved claim of error.