UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2741

September Term, 2013

JOSEPH R. CURTIS, II

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Woodward, J.

Filed: July 21, 2015

Following a bench trial in the Circuit Court for St. Mary's County, appellant, Joseph R. Curtis, II, was found guilty of first-degree sexual offense, first-degree assault, second-degree assault, and false imprisonment. He presents three questions for our review, which we have slightly re-cast[1]:

1. Did the trial court abuse its discretion in permitting improper lay opinion testimony from a police witness?

2. Did the trial court base its sentence on impermissible considerations?

3. Should the sentence for second-degree assault be corrected in the commitment order, docket entries, and probation order?

For the reasons below, we shall affirm the judgments of the circuit court, but remand the case to that court to correct the commitment order, docket entries, and probation order.

FACTUAL AND PROCEDURAL BACKGROUND

The instant case arises from appellant's assault of Lindsay Cain, his girlfriend, with whom he fathered two children. Cain and appellant dated for ten years, and cohabitated for

[1]Appellant's questions, as presented in his brief, are:

1. Did the trial court abuse its discretion in permitting improper lay opinion testimony from a police witness?
2. Did the sentencing court base its sentence on impermissible considerations?
   a. Did the sentencing court impermissibly consider Appellant's decision to follow the advice of counsel?
   b. Did the sentencing court impermissible [sic] consider Appellant's decision not to allocute?
3. Should the sentence for second-degree assault in the commitment order, probation/supervision order, and docket entries be corrected?

five of those years at 23760 Holland Lane in Leonardtown. Around 9:00 p.m. on June 8, 2013, Cain returned home with the children after spending time with her sick grandfather. She smelled alcohol on appellant's breath and saw empty liquor bottles in the home. Appellant was angry and accused Cain of infidelity, advising her to leave the house before he hurt her. Heeding appellant's threat, Cain left the house and spent the weekend at her brother's house. Appellant sent Cain threatening texts and made threatening phone calls throughout the weekend, continuing to accuse her of infidelity.

On June 10, 2013, after dropping the children off at her mother's home, Cain went to the Holland Lane residence arriving around 7:45 a.m. to get clothing for work. Upon entry, Cain noticed that the house, which was in good order when she left on June 8, was in disarray. Walking through the kitchen toward her bedroom, Cain was attacked by appellant, who grabbed her from behind by the hair and pushed her into the master bedroom. Appellant accused Cain of "stealing" his children and called her a "nasty bitch," as well as verbally abusing her and accusing her of cheating. Appellant slapped Cain's face, causing her to fall to the ground. Appellant then tore Cain's pants and underwear off, turned her over to face the ground, got on top of her, and began beating her on her back and arms with a closed fist and open hands. He then sat on Cain's back, facing her feet, and forced his fingers into her vagina. Cain screamed, but this caused appellant to penetrate even deeper. When Cain attempted to crawl away, appellant grabbed her left calf and twisted it, causing a major injury to her knee. Appellant placed his hand over Cain's mouth to prevent her from

screaming, but also covered her nose, which prevented her from breathing. In response, Cain bit appellant's hand, and he released her. Appellant then threw a box spring on top of Cain and started jumping on it, attempting to crush her. In time, appellant took the box spring off of Cain and tossed it aside. Appellant then told Cain that he was going out to his car to get a gun, so that he could kill her for taking his children.

Cain attempted to flee the room, but appellant held the door shut. During the few minutes that appellant was gone, Cain found a pair of her pants and attempted to put them on, but appellant returned, took the pants and threw them away. Although appellant did not return with a gun, he continued to assault Cain both verbally and physically. He eventually stopped the assault, and walked out of the bedroom, leaving the door halfway shut. Cain put her pants back on, and tried to leave the residence. When Cain entered the kitchen, appellant attacked her from behind, forcing her to the ground. Appellant pulled Cain's pants down, forcing his fingers into her vagina and anus. Cain pushed appellant off of her, pulled up her pants, and reached the living room couch where she rested from exhaustion. Appellant sat next to Cain, and continued berating her verbally. Appellant then got up, picked up an attachment for a vacuum, pulled Cain's pants down again, and attempted to sexually assault her with the attachment. Cain was able to gain control of the attachment, and throw it aside, preventing the impending violation.

Appellant began complaining of chest pains, and sat on the couch, providing Cain the opportunity to get her car keys from the bedroom and flee. As she began to exit the house,

appellant blocked her way, threatening to kill her if she went to the police about what had happened. Five minutes later, as his chest continued to hurt, appellant relented and permitted her to leave.

Cain went to police and reported the incident. She was then examined and treated at St. Mary's Hospital for her injuries.

At trial, Sergeant Richard Russell testified that he participated in arresting appellant on the night of the attack. Sergeant Russell handcuffed appellant and noticed blood on his hands after doing so. He noticed that appellant had a laceration across his back, and he testified as to how the wound appeared at the time of arrest.

As noted above, the trial court convicted appellant of first-degree sexual offense, first-degree assault, second-degree assault, and false imprisonment. The court imposed the following sentence: 25 years' imprisonment with all but 20 suspended for first-degree sexual offense, 7 years' imprisonment to be served concurrently for first-degree assault, and 1 year imprisonment to be served concurrently for false imprisonment. The court merged appellant's second-degree assault conviction with his first-degree assault conviction for sentencing purposes.

Additional facts will be recounted as they become relevant to our discussion.

DISCUSSION

I.

Appellant first contends that the trial court abused its discretion in permitting Sergeant Russell to offer improper lay opinion testimony regarding the "freshness" the wound on appellant's back. Appellant's claim relates to the following exchange, which occurred during direct examination:

[PROSECUTOR]:	In terms of freshness, could you tell anything about the wound?
[DEFENSE COUNSEL]:	We object. Calls for a medical opinion.
THE COURT:	That is overruled. If you know, from your own personal knowledge, what the answer to that question is.
[SERGEANT RUSSELL]:	It looked fairly – I mean, still had – the fatty tissue still had that gloss to it. It wasn't dry. It was still, you know, bleeding a little bit, and, you know, still looked like it had that oily part on it. You know, it wasn't scabbed over or anything like that.

Appellant asserts that the above question by the prosecutor called for an opinion from a medical professional, and that Sergeant Russell was never qualified as such expert. Consequently, according to appellant, Sergeant Russell's testimony was inadmissible under Md. Rule 5-701. The State counters that Sergeant Russell's testimony was admissible

because he was merely testifying about his observations and any testimony regarding the freshness of appellant's wound was based on those observations. In the alternative, the State contends that the freshness of appellant's wound was established by other means, thus rendering any error harmless.

We have described the nature of our review of the admission of lay witness testimony:

> A trial court has wide discretion to rule on the relevance of evidence. *See Cook v. State*, 118 Md. App. 404, 416–17 (1997) (internal citations omitted). Similarly, the decision to admit lay opinion testimony lies within the sound discretion of the trial court. *Robinson v. State*, 348 Md. 104, 118–19 (1997) (internal citations omitted). In either case, the trial court's decision to admit such evidence will not be overturned unless it is shown that the trial court abused its discretion.

Thomas v. State, 183 Md. App. 152, 174 (2008), *aff'd*, 413 Md. 247 (2010).

Maryland Rule 5-701 governs the admission of opinion testimony by a lay witness, and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"The rationale for the standard set by Rule 5–701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness." *State v. Payne*, 440 Md. 680, 698 (2014). In

Ragland v. State, 385 Md. 706, 718 (2005), the Court of Appeals cited Federal Rule of Evidence 701 as it relates to the admissibility of lay opinion testimony:

> "The prototypical example of the type of evidence contemplated by the adoption of [Federal Rule of Evidence] 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.... Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, [and] the value of one's property."

"[E]xpert opinion testimony may not be offered in the guise of lay opinion testimony. [Maryland] Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Warren v. State*, 164 Md. App. 153, 167 (2005) (citation and internal quotation omitted). Put another way, lay opinion "results from a process of reasoning familiar in everyday life" whereas expert opinion "results from a process of reasoning which can be mastered only by specialists in the field." *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992).

We need not reach the merits of appellant's argument here, because the information provided in Sergeant Russell's testimony regarding the freshness of appellant's wound came into evidence at trial by other means without objection. "'When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection.'" *Wilder v. State*, 191 Md. App. 319,

346 (2010) (quoting *Williams v. State*, 131 Md. App. 1, 26, *cert. denied*, 359 Md. 335 (2000)). Central to appellant's argument is the fact that Sergeant Russell should not have been permitted to offer his lay opinion that appellant's wound was fresh. Evidence of the freshness of appellant's wound, however, was introduced by two other means at trial, without objection.

State's Exhibit 21, a photograph, showed the appearance of appellant's wound as Sergeant Russell saw it on the day he arrested appellant. This exhibit was admitted without objection. Furthermore, in a pre-trial statement to police, admitted without objection as State's Exhibit 25, appellant admitted to self-inflecting the large laceration on his back just prior to the police's arrival at the house:

LIEUTENANT YINGLING:[2]	And you've been telling me, ER staff, and everybody that she cut you, and she caused all that. Now, what I'm hearing from you right now, is that that's not exactly true, and that you cut yourself, ah, with a knife, ah, to make it look, ah...
[APPELLANT]:	**I would say she did, maybe, to the, that little cut, but the rest is me. Right before ya'll go[t] there. I was scared, didn't know what to do.**

(Emphasis added).

[2]Lieutenant David Yingling of the St. Mary's County Sheriff's Office Bureau of Criminal Investigations.

Appellant explained further in his statement that he cut himself in the kitchen and threw the knife in the sink as he heard police approach the house and knock on the door. Consequently, appellant may not complain of Sergeant Russell's testimony regarding the freshness of his wound when two other sources of that information were admitted without objection.

Because alternate independent sources of information regarding the freshness of appellant's wound were before the court, we are also persuaded that any alleged error regarding the admissibility of Sergeant Russell's lay opinion was harmless beyond a reasonable doubt. *See Bellamy v. State*, 403 Md. 308, 332 (2008). ("[R]eversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict.") (citation omitted).

II.

Appellant's second contention is that in crafting its sentence, the trial court impermissibly considered appellant's failure to allocute and his refusal to discuss the case with the pre-sentence investigator. The State responds that this issue is not properly preserved for our review because as there was no contemporaneous objection made during sentencing. In the alternative, the State contends that the court acted within its discretion in not deviating below the guidelines in its sentence because appellant did not demonstrate remorse following his conviction.

As an initial matter, we agree with the State that appellant did not object during sentencing, and therefore, this issue is not properly preserved for our review. Appellant urges that, based on *Abdul-Maleek v. State*, 426 Md. 59 (2012)[3], we should ignore the lack of preservation and rule upon the merits of his contention. We decline to do so. Maryland Rule 8-131(a) provides:

> (a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. **Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial** court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(Emphasis added).

We have described the nature of our review of unpreserved issues:

> The failure to object before the trial court generally precludes appellate review, because "[o]rdinarily appellate courts will not address claims of error which have not been raised and decided in the trial court." *State v. Hutchinson,* 287 Md. 198, 202 (1980); *see also* Md. Rule 8-131(a). "[I]t is the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." *Williams v. State,* 34 Md. App. 206, 212 (1976) (Moylan, J., concurring). "Plain error is 'error which vitally

[3]In that case, the Court of Appeals chose to exercise its discretion to review an unpreserved claim that the sentencing court erred in considering the defendant's exercise of his right to a *de novo* trial on appeal from the district court. *Abdul-Maleek v. State*, 426 Md. 59, 66-67, 69-70 (2012). The Court reasoned that review would produce only *de minimis* prejudice to the State and promote the orderly administration of justice by commenting on the issue that appellant raised. *Id.* at 70.

> affects a defendant's right to a fair and impartial trial [,]' " and an appellate court should " 'intervene in those circumstances 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.' " *Richmond v. State,* 330 Md. 223, 236 (1993) (quoting *State v. Daughton,* 321 Md. 206, 211 (1990), and *Trimble v. State,* 300 Md. 387, 397 (1984), *cert. denied,* 469 U.S. 1230 (1985)). "[P]lain error review tends to afford relief to appellants only for 'blockbuster [ ]' errors." *United States v. Moran,* 393 F.3d 1, 13 (1st Cir., 2004) (quoting *United States v. Griffin,* 818 F.2d 97, 100 (1st Cir.1987)).
>
> **In assessing whether to note, and perhaps to correct, an unpreserved issue, "[t]he touchstone remains our discretion."** *Williams, supra,* 34 Md. App. at 212; *see also, e.g., Claggett v. State,* 108 Md. App. 32, 40 (1996); *Stockton v. State,* 107 Md. App. 395, 396-98 (1995); *Austin v. State,* 90 Md. App. 254, 268 (1992).

Martin v. State, 165 Md. App. 189, 195-96 (2005) (emphasis added) (footnote omitted), *cert. denied*, 391 Md. 115 (2006).

Although appellant attempts to obtain our review of his substantive claim by citing to *Abdul-Maleek*, the touchstone of plain error review remains our discretion. We decline to exercise that discretion here. *See Morris v. State*, 153 Md. App. 480, 507 (2003) ("We decline to do so. . . . That five-word holding disposes of the contention. All else is *dicta*. Ordinarily, those five words are all that would be said and all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.").

Were we to reach the substantive issue that appellant presents here, he would still be entitled to no relief. At sentencing, the trial court explained its reasoning:

> And having reviewed the presentence report – and I look at the guidelines, and let me just start for a moment with the guidelines, because I have a card here. And if I am going to depart from the guidelines – they are guidelines. I am not required by law to go by these guidelines.
>
> But if I am going to deviate from the guidelines, I have to use this card. If I go above, there are nine factors I have to choose from to determine whether this case should be above the guidelines. If I go below the guidelines, there are nine factors I have to look at to determine if I am going to go below the guidelines.
>
> Nobody is asking me to go above the guidelines, so the below-the-guidelines are as follows.

The trial court went on to list and examine several factors that might weigh in favor of a the below-the guidelines sentence. The court found no basis upon which to justify a deviation below the sentencing guidelines. In so doing, the court highlighted appellant's lack of remorse, which it found deeply concerning. The court discussed its reasoning:

> **So I am very disappointed, [appellant], that there's nothing in the presentence investigation and nothing you could say to me about your remorse,** about how you're sorry this happened, about how you care about this woman that you loved and lived with for 10 years, and would turn back the clock if you could, about how you love and care about your children and wish they had not been part of this kind of family.
>
> But you had nothing to say to the probation agent, using [Defense Counsel's] advise [sic] as an excuse, and you have had nothing to say to me. You are already convicted, so now would be the time to say it. But you didn't choose to do that.
>
> **So all I have before me is what I heard in testimony, what I saw in the exhibits, and what I understand about the domestic violence and about how that affects people and families and**

> **victims. So I feel like I don't have any choice, no possible choice to go outside of the guidelines.**

(Emphasis added).

The court then announced its sentence, which fell within the sentencing guidelines.

Appellant asserts that the trial court based its sentence on impermissible considerations because he did not speak to the probation agent conducting the pre-sentence investigation upon advice of counsel, and also chose not to allocute. We disagree. We are persuaded that a complete reading of the transcript indicates that the court was searching for *some* reason to deviate below the sentencing guidelines, but was unable to do so, partly because appellant expressed no remorse in the pre-sentence investigation and chose not to allocute. It is well-settled that a sentencing court may consider a defendant's lack of remorse when crafting a sentence. *See Saenz v. State*, 95 Md. App. 238, 250-51(1993) ("We hold that the trial court's present tense observation of a defendant's lack of remorse, so long as it is not explicitly linked to a defendant's prior claim of innocence or not guilty plea or exercise of his right to remain silent, is an appropriate factor to consider at sentencing."); *see also Holmes v. State*, 209 Md. App. 427, 460, *cert. denied*, 431 Md. 445 (2013). Thus the court's observation that appellant lacked remorse was a permissible consideration in crafting its sentence, and did not relate to any penalty for exercising his right to counsel or for failing to allocute. For these reasons, were this issue adequately preserved, we would find no error in the imposition of sentence.

III.

Finally, appellant contends that the commitment order, probation/supervision order, and docket entries erroneously indicate that the trial court imposed a seven-year concurrent sentence for second-degree assault. Appellant asserts that the transcript indicates that the court merged appellant's second-degree assault conviction with his first-degree assault conviction for sentencing purposes. The State agrees with appellant's position.

The court sentenced appellant:

> On the first degree assault, that's going to be seven years in the Division of Corrections. That's going to be concurrent to the sentence I just imposed.
>
> I am merging the second degree assault into the first degree assault. I believe that that does merge.

The commitment order and probation/supervision order erroneously state that the court imposed a seven-year concurrent sentence for second-degree assault. The docket entry ambiguously provides: "Count 2 (Assault-Second Degree) 7 years DOC merged with Count 1 [first-degree assault]." Where a discrepancy exists between the docket entries and the transcript, the transcript prevails unless it is shown to be in error. *Turner v. State*, 181 Md. App. 477, 491 (2008). There is no indication that the transcript here was in error. Accordingly, the commitment order, probation/supervision order, and docket entries must be corrected to reflect the sentence as announced in the transcript. Specifically, they must

reflect that appellant's conviction for second-degree assault merges into his conviction for first-degree assault for sentencing purposes.

JUDGMENTS OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. CASE REMANDED TO THAT COURT FOR THE CORRECTION OF THE COMMITMENT ORDER, PROBATION/SUPERVISION ORDER, AND DOCKET ENTRIES TO REFLECT THE SENTENCE AS ANNOUNCED IN THE TRANSCRIPT. COSTS TO BE PAID 2/3 BY APPELLANT, AND 1/3 BY ST. MARY'S COUNTY.