

Circuit Court for Baltimore City
Case No. 117345012

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 880

September Term, 2018

JERRY MILLINGS

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 3, 2019

*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 City, Jerry Millings, appellant, was convicted of robbery with a dangerous weapon, robbery, theft of property with a value between \$1,500 and \$25,000, and two counts each of first-degree assault, second-degree assault, and use of a firearm in a crime of violence. His sole claim on appeal is that the trial court plainly erred in allowing the prosecutor to make an improper argument during closing regarding the standard of proof beyond a reasonable doubt. We decline to exercise our discretion to engage in plain error review of this issue and, therefore affirm the judgments.

During rebuttal closing, the State made the following argument:

For a reasonable doubt the State is not required to negate every conceivable circumstance of innocence, not required to negate every conceivable circumstance of innocence. Not required to prove beyond all reasonable doubt. Okay. We're talking about reason, common sense. Okay. And the best way to explain it is defense said proof that would convince of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important manner of your own business or personal affairs. Okay.

Let's think of an example of how that applies to each of us because some of us wear glasses, some of us don't. But at least I hope everybody brushes their teeth. Okay, twice a day hopefully, that's probably what your dentist tells you. But a toothbrush is kind of like prescription glasses. It's unique. Okay. You don't share toothbrushes. You don't pass them around.

So you have this unique object, probably kept in your bathroom at home. Okay. And you are going to brush your teeth probably in the morning and probably at night, two times a day. Well, you're here today, probably at work other days, sleeping at night. But for those two times at least during the day you're in the bathroom and you're brushing your teeth.

And what do you do? You walk over to your toothbrush. You pick it up. You stick it in your mouth and you start brushing. Well, before

you did that you didn't fingerprint it. You didn't check surveillance video, which if you had in your bathroom is a little weird, but you didn't check surveillance video. Okay. You walked in there. You picked it up. You put it in your mouth and started brushing your teeth. You didn't need fingerprints. You didn't need video. Okay.

So that – you're comfortable in your own personal affairs going home, picking up your toothbrush, something that's unique to you, something that you don't pass around, kind of like prescription glasses which you don't share with other people. You go home, you pick it up and you stick it in your mouth without thinking about it. Okay. You're comfortable. You've – you're comfortable.

That's what we have here. That's an example of what everybody can relate to, not just those of us who have glasses.

And at the end of the day if you're comfortable going home, picking up your toothbrush, and sticking it in your mouth and all that, you're comfortable with the facts of this case and the DNA evidence, the match, the match that is Jerry Millings, that those glasses that were left behind in that car after he jumped in and did that, that is beyond a reasonable doubt.

On appeal, Mr. Millings contends that the highlighted sections of the prosecutor's argument "trivializ[ed] the concept of proof beyond a reasonable doubt," thus diminishing the reasonable doubt standard to the jury. He acknowledges, however, that this claim is 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 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 BALTIMORE CITY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**