

Circuit Court for Somerset County
Case No. C-19-CR-19-000023

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1092

September Term, 2019

CLARENCE ANTONIO NICHOLSON

v.

STATE OF MARYLAND

Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 6, 2021

*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.

Convicted by a jury in the Circuit Court for Somerset County of first degree assault, carrying a dangerous weapon openly with intent to injure, and related offenses, Clarence Antonio Nicholson, appellant, presents for our review two contentions. Mr. Nicholson first contends that the court erred “when it allowed the Government,” during argument, “to repeatedly call attention to Mr. Nicholson’s silence and denigrate [his] counsel.” Acknowledging that defense counsel did not object to the challenged remarks, Mr. Nicholson requests that we review the error under our authority to review unpreserved errors pursuant to Rule 8-131 (“[o]rdinarily, the appellate court will not decide any . . . 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”). We decline to do so. Although this Court has discretion to review unpreserved errors pursuant to 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) (internal 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) (internal citation and quotations omitted). Under the circumstances presented here, we decline to overlook the lack of preservation, and 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 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)).

In his reply brief, Mr. Nicholson contends that “fairness and the interests of judicial economy warrant [our] exercise of [our] discretion to consider his claim[],” because “there appears from the record to be no tactical reason for defense counsel to not have objected to the error[],” and his “convictions will be collaterally attacked through post-conviction proceedings.” But, the Court of Appeals has stated that “[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel’s ineffectiveness.” *Mosley v. State*, 378 Md. 548, 560 (2003) (citations and footnote omitted). Here, like in *Mosley*, the record does not reveal why defense counsel failed to object to the remarks now challenged by Mr. Nicholson. A post-conviction proceeding will allow for the introduction of testimony and evidence, and fact-finding, directly related to Mr. Nicholson’s contention, and hence, the contention should be addressed in such a proceeding.

Mr. Nicholson next contends that the evidence is insufficient to sustain the conviction for carrying a dangerous weapon openly with intent to injure, “because there was no evidence presented to show the . . . knife was carried openly.” Effectively acknowledging that defense counsel did not state this particular ground in his motion for judgment of acquittal, *see* Rule 4-324(a) (“[t]he defendant shall state with particularity all

reasons why the motion should be granted”), Mr. Nicholson again requests that we exercise our discretion to consider his claim, so as to avoid a post-conviction proceeding. For the aforementioned reasons, we again decline to conclude that defense counsel rendered ineffective assistance, and instead conclude that this contention, like the preceding contention, should be addressed in a post-conviction proceeding.

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