Circuit Court for Allegany County
Case No.: C-01-CR-18-000263

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1346

September Term, 2020

RICKY CORNELIUS CORNISH

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: October 8, 2021

Following trial in the Circuit Court for Allegany County, a jury found Ricky Cornelius Cornish, appellant, guilty of possessing a weapon in a place of confinement. The court sentenced appellant to five years' imprisonment to be served consecutively to the sentence appellant was then serving. Appellant noted an appeal[1] from his conviction and presents us with the following two questions:

1. Did the trial court err when it permitted Detective Fagan to testify that Officer French's report and interview were consistent?

2. Did the trial court commit plain error when it permitted the prosecutor to make a golden rule argument in both opening and closing arguments?

For the reasons explained below, we shall affirm.

BACKGROUND

At the time of the offense in this case, appellant was incarcerated in the Western Correctional Institution (WCI), which is a prison within the Maryland Division of Correction (DOC). On January 10, 2018, a correctional officer working at WCI, Bradley French, hid behind some bushes in order to observe a large group of inmates approaching a metal detector while they returned to their housing tier after eating dinner. While doing so, he observed appellant throw a "home-made" weapon on the ground. Officer French then recovered the weapon, placed appellant in wrist restraints, and escorted him to disciplinary segregation. He later wrote and submitted a report about the incident.

[1] On January 26, 2021, appellant was awarded post-conviction relief in the form of the right to file a belated appeal.

Detective Sgt. Robert Fagan, an investigator with the Department of Public Safety and Correctional Services, was assigned to investigate the matter. As part of that investigation he reviewed the evidence, read Officer French's report, and interviewed Officer French over the telephone. Detective Fagan then made the decision to file the criminal charge against appellant that resulted in his conviction in this case.

At trial, the State called Detective Fagan and Officer French as witnesses. Appellant testified on his own behalf.

DISCUSSION

I.

The following exchange took place during the State's direct examination of Detective Fagan:

> STATE: Did you have the opportunity to interview Correctional Officer French?
>
> DET. FAGAN: I did.
>
> STATE: Was his interview consistent with his report?
>
> DEFENSE: Objection.
>
> COURT: Basis?
>
> DEFENSE: Well, I am not sure. Officer French, or C.O. French hasn't testified yet and I am not sure … may we approach, Your Honor?
>
> COURT: Yes.
>
> (BEGIN BENCH CONFERENCE)
>
> DEFENSE: I just don't think the question is calling for an answer about a witness that hasn't testified yet.
>
> COURT: And I think that what he said is, the question was, did you get information that was consistent with the statement of.

STATE: Right.

COURT: So that's the question. Now, I agree with you that we are getting awfully close to hearsay, but I don't think we are there yet.

STATE: Okay.

COURT: So I am going to overrule it.

DEFENSE: Okay.

STATE: And by record I mean did he answer your questions.

COURT: Okay.

(END BENCH CONFERENCE)

STATE: Sgt. Fagan, did you answer the last question?

DET. FAGAN: Let me hear it again.

STATE: The last question was, to be clear, you interviewed Correctional Officer French?

DET. FAGAN: It was consistent with the report.

Appellant contends that Detective Fagan's testimony that Officer French's report and interview were, in his opinion, consistent, was hearsay because the contents of the report, which was never entered into evidence, were implicit in such testimony. As such, according to appellant, Officer French's report was an out of court statement admitted for its truth, and therefore inadmissible. He further argues that the statement did not meet the requirements of the hearsay exception for prior consistent statements found in Maryland Rule 5-802.1(b).[2]

[2] Maryland Rule 5-802.1 provides, in pertinent part, as follows:

(continued)

Appellant also contends that the testimony regarding the consistency of the interview and the report was inadmissible as a prior consistent statement under Maryland Rule 5-616(c) to rehabilitate the credibility of Officer French.[3]

Assuming, without deciding, that the trial court erred in admitting Detective Fagan's assertion that Officer French's interview and report were consistent, we find, beyond a reasonable doubt, that any such error was harmless.[4] We note that the testimony was elicited only once by the State. Also, the State never mentioned it during closing argument. In addition, the only meaningful issue for the jury to decide was whether appellant dropped the weapon, or some other inmate dropped it. It was not the defense position that Officer French was not being truthful when he identified appellant as the person who dropped the weapon, rather, the defense position was that, even if Officer French sincerely believed appellant was the inmate who had dropped the weapon, he had identified the wrong inmate,

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]

[3] Maryland Rule 5-616(c)(2) permits the rehabilitation of a witness whose credibility has been attacked by "evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]"

[4] The State contends that appellant failed to preserve his claims of error for appeal. The State is correct, in part. Appellant's argument concerning Maryland Rule 5-616 is fully unpreserved as he made no mention of that Rule at trial. Appellant's argument concerning hearsay is preserved because, even though he did not use the word hearsay, it is clear from his exchange with the court that the court made its ruling on based on hearsay grounds.

as appellant was with a large group of inmates, at night, when the weapon was dropped. As a result, the one-time mentioning of the fact that Officer French's interview and report were consistent did not detract from the defense position that Officer French was simply wrong when he identified appellant as the person who dropped the weapon.

Therefore, upon our own independent review of the record, we believe beyond a reasonable doubt that any error in no way influenced the verdict. *State v. Blackwell*, 408 Md. 677, 698 (2009).

II.

Appellant next contends that the State made prohibited "golden rule" arguments in both its opening statement and closing argument.[5] He acknowledges that he did not object to the allegedly improper arguments and has therefore failed to preserve the issue for appellate review.[6] He asks us to overlook the lack of preservation and exercise our discretion to recognize plain error.

[5] A "golden rule" argument encourages the jury to abandon neutrality and decide the case based on their own self-interest rather than the evidence presented. *Lawson v. State*, 389 Md. 570, 594 (2005).

[6] The allegedly improper remark in the State's opening came after the State described the evidence it intended to present when it stated:

> What it shows is that on that date, [appellant] possessed that weapon and that is a crime and we here in Allegany County are responsible for what goes on in our institutions where our people work. Western Correctional Institute and North Branch are both in Allegany County. Any crime there, we are responsible for.

During the State's closing argument, when referring to Officer French, the State said:

(continued)

Maryland Rule 8-131(a) provides that, "[o]rdinarily, 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."

Although this Court has discretion to review unpreserved errors, 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).

We conclude that any presumptive error on the trial court's part was not so extraordinary or fundamental that it deprived appellant of his right to a fair trial. Thus, under the circumstances presented, we decline to exercise 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

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> He's just doing his job, and you need to make sure his job gets done because without you, without people deciding these facts today, nothing gets done. Okay. Nothing happens.

notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted).

Consequently, we shall affirm the judgments of the circuit court.

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