Circuit Court for Baltimore City
Case No. 118191017

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1443

September Term, 2019

KEVIN SMITH

v.

STATE OF MARYLAND

Graeff,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 8, 2020

Convicted by a jury in the Circuit Court for Baltimore City of second-degree assault and wearing or carrying a dangerous weapon openly with the intent to injure, Kevin Smith, appellant, presents for our review two contentions. Mr. Smith first contends that the court erred in "failing to instruct the jury that self-defense applied to second degree assault." Acknowledging that "[d]efense counsel did not object to the court's omission," Mr. Smith 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)).

Alternatively, Mr. Smith, relying on *Testerman v. State*, 170 Md. App. 324 (2006), asks us to conclude that "defense counsel rendered ineffective assistance . . . in failing to request the self-defense instruction for the offense of second degree assault," because "[h]ad the . . . court refused to propound the instruction at defense counsel's request, it would have committed reversible error." We decline to do so. 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 request the instruction now sought by Mr. Smith. A post-conviction proceeding will allow for the introduction of testimony and evidence, and fact-finding, directly related to Mr. Smith's contention, and hence, the contention should be addressed in such a proceeding.

Mr. Smith next contends that "defense counsel rendered ineffective assistance . . . in failing to request an instruction explaining that there is an exception to the offense of wearing and carrying a dangerous weapon openly with intent to injure another[] for an individual who carries the weapon as a reasonable precaution against apprehended danger," because "the jury may well have acquitted Mr. Smith of" the offense. 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 BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.