UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1131

September Term, 2016

ANDRE BRANDON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 13, 2017

*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.

A jury in the Circuit Court for Baltimore City convicted Andre Brandon, the appellant, of second-degree assault, unlawful taking of a motor vehicle, and unauthorized removal of property. The court sentenced him to ten years for second-degree assault and a consecutive five years for unauthorized removal, all but two years suspended, and merged the unlawful taking conviction for sentencing purposes. He poses two questions on appeal:

I. Did the trial court err in not striking the entire jury panel when it was learned that the son of one of the jurors played a role in the case?

II. Did the trial court err in admitting into evidence photographs of the victim taken by her mother?

For the reasons stated below, we shall affirm the judgments.

FACTS AND PROCEEDINGS

The evidence at trial established the following. Shantel Hall and the appellant met and began dating in April 2015. In June or July 2015, the appellant moved in with Ms. Hall. According to Ms. Hall, by August, they were "on the verge of breaking up."

Around 11:00 p.m. on August 12, 2015, Ms. Hall drove to a location in West Baltimore to meet the appellant. They sat in Ms. Hall's vehicle and had a conversation, which turned into an argument. The appellant accused Ms. Hall of "leaving him out to dry or something[,]" with no place to live. He then punched her in the eye and hooked his right arm around her neck, choking her. Ms. Hall and the appellant "tussled[,]" moving throughout the interior of the vehicle. She eventually wound up in the passenger seat, and the appellant in the driver's seat. Throughout the struggle, Ms. Hall had difficulty

breathing because the appellant was choking her, and she lapsed in and out of consciousness.

Eventually, the appellant let go of Ms. Hall. She told him she wanted to go to a hospital. He told her to "calm down" and that once she did so he would take her to a hospital. He then drove Ms. Hall's car to a residential neighborhood in the 2600 block of Huntingdon Avenue in East Baltimore. Ms. Hall leapt out of the vehicle and ran to seek help. Two blocks away she encountered two men outside a bar. One of them allowed her to use his cell phone to call 911.[1] She reported that her friend had attacked her and choked her.

At approximately 2:00 a.m., Baltimore City Police Officer Jean Nolet responded and spoke with Ms. Hall. Ms. Hall was "visibly upset and crying[,]" and her face was bleeding. She later was taken to the emergency room and treated by Dr. Frank DeMuth. Dr. DeMuth observed that Ms. Hall's left eye was bruised and swollen shut. She also had swelling and bruising around her neck and blood shot eyes, which was consistent with strangulation. A CAT scan confirmed the soft tissue swelling and also revealed a slight nose fracture, but medical staff could not determine the age of that injury. The hospital discharged Ms. Hall later that morning, and she returned home. The attack left Ms. Hall with a scar above her left eye.

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[1] Ms. Hall called the 911 operator twice because she felt the police were not responding quickly enough to her first call. The 911 calls were played for the jury at trial.

According to Ms. Hall, about a week later the appellant called her and told her where she could find her car. She recovered it, but the appellant never returned her keys.

DISCUSSION

I.

Dismissal of Alternate Juror #1

On the morning of the second day of trial, the court received a note from Alternate Juror #1. That juror informed the court that "there is a chance that my son is one of the two people who leant [sic] the Defendant [sic] the phone at the, at the Ottobar." With counsel present, the court called Alternate Juror #1 to the bench. The following occurred:

> THE COURT: [Alternate 1], this is your message.
>
> JUROR: Yeah.
>
> THE COURT: Why do you think it was your son?
>
> JUROR: My son is a DJ at the Ottobar and I vaguely remember him telling me a story last summer about how he, some girl having to call -9-1-1- twice. That's all I remember. I don't know what happened after that.
>
> THE COURT: Okay.
>
> JUROR: I just figured I'd let you know.
>
> THE COURT: Well, you didn't talk to him about this incident.
>
> JUROR: No.
>
> THE COURT: Okay, have a seat. Thank you.

The court advised counsel that it did not see a reason to strike Alternate Juror #1. The following discussion ensued:

THE [APPELLANT]: I want a new jury, man.

[THE APPELLANT'S COUNSEL]: Hmm.

THE [APPELLANT]: Trust me.

[THE APPELLANT'S COUNSEL]: You don't want that guy on the jury[?]

THE [APPELLANT]: I want a whole new jury.

THE COURT: What you want?

THE [APPELLANT]: He can influence some jurors. I want --

THE COURT: This doesn't have any affect [sic] on anybody else, but good, I'll wait. Do you want to consult with him? What do you want to do?

[THE APPELLANT'S COUNSEL]: I guess I will.

* * *

I tried a lot of jury cases, okay. I don't think [this] is going to affect anything one way or the other and he's an alternate. So he is not going to be deliberating with the other jurors unless we lose one of the other jurors.

THE [APPELLANT]: It doesn't matter. When they get pardoned, that ain't got nothing to do when they go back there and they talk or when they leave out of here and they talk. One juror can influence the whole juror [sic].

[THE APPELLANT'S COUNSEL]: All right. I'll ask that he be dismissed.

* * *

THE COURT: [To Alternate Juror #1.] Don't take this personally, but you're going to be excused.

JUROR: Okay.

* * *

> **THE COURT: You can just go, yes. Thank you. Oh, [Alternate Juror #1]. Since we began this trial, did you say anything to anybody about your son's involvement?**
>
> **JUROR: No.**
>
> THE COURT: Okay, thank you. You're excused.

(Emphasis added.) At no point afterward did the appellant or his counsel object or make any other request concerning the jurors.

On appeal, the appellant contends the trial court should have struck the entire jury or, at the least, questioned the rest of the jurors and/or Alternate Juror #1 to determine if and to what extent Alternate Juror #1 had influenced the jury. The appellant maintains that Alternate Juror #1 may have commented about the 911 calls that Ms. Hall made, and any comment would affect the appellant's credibility with the jury. The State responds that this issue is not preserved because the appellant never asked the court to strike the entire jury or to question the remaining jurors. Moreover, the court did, in fact, question Alternate Juror #1 to ascertain whether he had shared his information with the other jurors.

We agree with the State. The appellant asked the court to strike Alternate Juror #1, which the court did. *See In re Kaleb K.*, 390 Md. 502, 512 (2006) (noting that appellate courts will only review "'the ruling actually asked and made'" (quoting *Wickman v. Bohle*, 173 Md. 694, 695 (1938))). Although the appellant expressed a desire for a "new jury," his lawyer did not move to strike the entire jury. *See Callahan v. State*, 30 Md. App. 628, 633-34 (1976) (noting that a defendant represented by counsel does not act as co-counsel). Furthermore, the appellant cannot complain on appeal that the court failed to question the

alternate juror "to determine whether he shared this outside-the-courtroom knowledge with any other juror[,]" because the court did, in fact, question Alternate Juror #1 on this subject.

II.

Photographs of the Victim

At trial, the State sought to introduce photographs of Ms. Hall's injuries taken by Ms. Hall and her mother shortly after her return from the hospital.[2] Initially, the appellant objected and asserted that the State had not laid a proper foundation for their admission into evidence. The State questioned Ms. Hall further about the photographs, and they then were admitted without objection.

On appeal, the appellant contends the photographs should not have been admitted because they were taken by Ms. Hall and her mother, not by a disinterested third party, such as the police. He argues that the photographs could not be authenticated by an independent third party and, therefore, should not have been admitted. He concedes that this argument was not made below, and, indeed, no objection was raised. Nevertheless, he urges us to exercise our discretion and engage in plain error review.

The State responds that this issue is not preserved, and we should decline the appellant's invitation to engage in plain error review of this meritless claim. The State points out that any witness, including a party, may authenticate a photograph, so long as "'that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time.'"

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[2] Of the six photographs, Ms. Hall took one.

Washington v. State, 406 Md. 642, 652 (2008) (quoting *Washington v. State*, 179 Md. App. 32, 44 (2008), *rev'd on other grounds by Washington*, 406 Md. 642)).

Because the appellant failed to object to the photographs, this issue is not preserved for review. *See* Rule 5-103(a)(1); *Billups v. State*, 135 Md. App. 345, 358-59 (2000). We decline to exercise our discretion to engage in plain error review. *See Perry v. State*, 150 Md. App. 403, 434-35 (2002).

"'Plain error is "error which vitally affects a defendant's right to a fair and impartial trial."'" *Kelly v. State*, 195 Md. App. 403, 431 (2010) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009) (in turn quoting *State v. Daughton*, 321 Md. 206, 211 (1990))). We will engage in plain error review "'only when the "unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial."'" *Id.* at 432 (quoting *Turner v. State*, 181 Md. App. 477, 483 (2008) (in turn quoting *Brown v. State*, 169 Md. App. 442, 457 (2006))). Accordingly, plain error review "'"1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon."'" *Id.* (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009) (in turn quoting *Morris v. State*, 153 Md. App. 480, 507 (2003))). Also, in order to review for plain error, there must be error. *See Molter v. State*, 201 Md. App. 155, 180 (2011) (citing and quoting *Austin v. State*, 90 Md. App. 254, 261 (1992)).

Here, the appellant has cited no legal authority for the proposition that photographs must be authenticated and/or taken by a disinterested third party. Authentication of a photograph does not even require the testimony of the photographer. *See Washington*, 406 Md. at 653. All that is required to authenticate a photograph is the testimony of a witness

with knowledge that the photograph accurately depicts the thing it purports to depict. *Id.* at 652. Accordingly, we do not perceive any error in the court's ruling, much less an extraordinary error. *See Olson v. State*, 208 Md. App. 309, 363 (2012).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.