Circuit Court for Washington County
Case No. C-21-CR-22-000435

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2182

September Term, 2023

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JOLYAN MICHAEL WALKER
v.

STATE OF MARYLAND

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Graeff,
Albright,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

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Opinion by Graeff, J.

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Filed: June 10, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Washington County found appellant, Jolyan Michael Walker, guilty of illegal possession of a handgun and illegal possession of a regulated firearm after having committed a prohibited act. The court sentenced appellant to 15 years, all but seven years suspended, the first five years to be served without the possibility of parole.

On appeal, appellant presents the following questions for this Court's review:

1. Did trial counsel provide ineffective assistance by failing to request a necessity jury instruction?

2. Did the court commit reversible error by responding to a jury note asking "Why was the [appellant's] wife taking pictures of [the] jury on her phone?" by telling the jury that the court was "investigating it," instructing them that "it should not be applied to this defendant," and informing the jurors that Sheriff's Department personnel would escort them to their cars without conducting any voir dire of the jurors to ensure that they could remain fair and impartial and, alternatively, did this constitute plain error?

3. Did the sentencing court utilize impermissible considerations by employing the court's own purported experience with the type of gun involved in the case as expert-level knowledge to make the factual determination that appellant had fired the gun he took from those who robbed him and relying on this fact in imposing his sentence?

(Alterations in original).

For the reasons set forth below, we shall affirm the judgments of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 30, 2022, Officer Joseph Miller, a 79-year-old auxiliary officer for Hagerstown City Police, was on patrol. He testified that auxiliary officers wear a badge,

and their uniforms are similar to city police officers, with the exception that they wear light blue, and the city police wear black. He testified that he was not carrying a firearm.

Officer Miller saw appellant walking in the middle of the street, "swaying back and forth." Suspecting that appellant was intoxicated, Officer Miller approached appellant to "check him out and ask him to get out of the middle of the street so he wouldn't get hit." Appellant stopped and said: "I want a cop." He then told Officer Miller that he had been shot. Based on the way appellant was standing, Officer Miller thought that maybe appellant had been shot in the back. When Officer Miller got closer to appellant, appellant "grabbed ahold" of him, twisted his shirt, and held onto Officer Miller so that he could not move or get away. Officer Miller then noticed that appellant had a gun. Officer Miller said to appellant: "Please don't shoot me." Officer Miller was "really scared." Appellant held the gun for the entire time he held onto Officer Miller, but he never pointed it at Officer Miller. After appellant let Officer Miller go, he began walking down the street. Officer Miller then radioed for assistance. When the police approached, appellant laid down the gun in a flower bed.

Officer Tim Cramer responded to the scene after dispatch advised him that an auxiliary officer was "in a struggle with an armed male." When he arrived, Officer Miller was standing in the roadway "frantically trying to get our attention" and "trying to wave down the police car." Officer Miller's uniform shirt looked like "it had been pulled on where it would button." Officer Miller pointed out appellant, who was 150 to 200 yards away, saying: "[T]hat's him, that's him." Officer Cramer then took appellant into custody.

Officer Cramer recovered a 1911-style, semi-automatic firearm from a flower bed in the public square. The firearm had a shell halfway ejected, and the backside of the firearm had blood on it. Officer Cramer testified that the injury on the webbing of appellant's hand was one that could occur by holding the gun incorrectly when it fires.

Amy Adamson, a forensic scientist for the Washington County Maryland Regional Crime Laboratory, testified that the firearm recovered was operable. No latent prints were developed on any part of the firearm. The firearm had blood on the upper grip and trigger area, but Ms. Adamson conducted no further testing on the blood.

Nick Varner, a detective for the Hagerstown Police Department, was the camera project manager. He was the custodian of record for the Hagerstown Police Department's City Street Surveillance system.[1]

Security footage from three security cameras was introduced. The cameras were located at three different intersections. Detective Varner had personally reviewed the surveillance footage from the cameras where appellant appeared, and he identified the intersections and directions covered by each camera. Detective Varner confirmed that the footage was a fair and accurate depiction of the video in the street surveillance system.

The surveillance footage showed an individual "coming down the middle of the street." Detective Varner identified an auxiliary police officer and a male suspect carrying a gun approach an intersection. The surveillance footage showed appellant holding onto

[1] Hagerstown Police Department's City Street Surveillance System consists of a network of cameras placed at intersections in downtown Hagerstown. The video footage was sent to and maintained by the Hagerstown Police Department.

Officer Miller for a period of time, run away, and then, once the police arrived, place an object in a flower bed.

Appellant testified that, on May 30, 2022, he left a friend's house to go to a hotel where he was staying with his wife. Two men approached him, and they attempted to rob him at gunpoint. An altercation ensued, one of the firearms discharged, appellant gained control of the firearm, and he began running down the street. He was "running and ducking between cars" because he thought the other assailant was going to shoot him. Appellant initially was followed, and he ran for at least "a good half a mile or mile." Appellant retained possession of the gun while he was running because he "really wasn't worried about a gun"; he was worried about his safety.

Officer Miller approached him, and appellant advised: "I've been shot. I need a cop." Officer Miller started to check appellant, but appellant was hyperventilating, anxious, and looking around for the assailants. Appellant testified that he was not trying to harm Officer Miller and never threatened him; he "was just asking for help." When asked if he recalled grabbing Officer Miller's shirt, appellant testified that he recalled being "tangled up" with Officer Miller, and he "might have grabbed his shirt." He reiterated, however, that he was not trying to harm Officer Miller. He was frantic and worried about "getting shot." Officer Miller was "not really a cop," and he thought the assailants might not care about Officer Miller being there or "shooting both of [them]."

When Officer Cramer arrived at the scene, appellant put the gun down. At that point, appellant felt safe, but he "needed to get the gun out of [his] hand because there was

a police officer and [he was] also black in America." After appellant disposed of the gun in the bushes, he surrendered. Appellant did not try to run from Officer Cramer, and he did not resist arrest.

During deliberations, the jury sent the court several questions. As relevant to this appeal, the jury asked the following question: "Why was the defendant's wife taking pictures of the jury on her phone?" We will address what occurred in response to that question in the discussion that follows.

The jury sent two additional notes, including asking for a written description of possession and asking for the definition of intent. It also sent a note stating that it was split on the charges of illegal possession of a handgun and illegal possession of a regulated firearm after having committed a prohibited act, "without signs of becoming unanimous," and asking "What now?" The court responded by re-reading the instructions on illegal possession of a handgun and illegal possession of a regulated firearm after committing a prohibited act.

After the jury returned its verdict, the court sentenced appellant. This appeal followed.

## DISCUSSION

### I.

### Ineffective Assistance of Counsel

Appellant contends that his trial counsel provided ineffective assistance of counsel by failing to request a jury instruction addressing the defense of necessity. Although he

recognizes that a claim of ineffective assistance of counsel is, as a general rule, most appropriately raised in a post-conviction proceeding, he asks us to consider the claim in this case on direct appeal.

The State contends that appellant's claim of ineffective assistance of counsel should be resolved in a postconviction proceeding rather than on direct appeal. In support, it argues that the record is insufficient to determine whether the failure to ask for an instruction on necessity was a strategic decision. It asserts that defense counsel could have decided that, if the instruction was given, the jury may have rejected the defense based on the evidence, and it was better to talk about it in closing argument without a full instruction including the elements of the defense. The State asserts that appellant's claim fails because he "cannot overcome the presumption that counsel were competent and he cannot prove prejudice."

"Generally, in Maryland, a defendant's attack of a criminal conviction due to ineffective assistance of counsel occurs at post-conviction review." *Crippen v. State*, 207 Md. App. 236, 250 (2012). *Accord Bailey v. State*, 464 Md. 685, 703 (2019) (Maryland's appellate courts will "rarely consider ineffective assistance of counsel claims on direct appeal"); *In re Parris W.*, 363 Md. 717, 726 (2001) ("It is the general rule that a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding."). "The primary reason behind the rule is that, ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. at 726. *Accord Bailey*, 464 Md. at 704 ("[P]ost-conviction proceedings are

preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act.") (quoting *Mosley v. State*, 378 Md. 548, 560 (2003)). Although there are exceptions to the rule,

> [t]he rare instances in which we have permitted direct review are instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel. As we explained in *In re Parris W.*, [363 Md. 717, 727, 770 A.2d 202], direct review is an exception that applies only when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim."

*Crippen*, 207 Md. App. at 251 (alteration in original) (quoting *Tetso v. State*, 205 Md. App. 334, 378 (2012)).

Although we reviewed a claim of ineffective assistance of counsel on direct appeal in *Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007), we are not persuaded that the record in this case is sufficiently developed to qualify as one of those rare instances in which review of an ineffective assistance claim is appropriate to consider on direct appeal. Post-conviction proceedings are the appropriate vehicle to address why defense counsel did not request an instruction on necessity and whether the failure to request it resulted in prejudice. *See Wallace v. State*, 475 Md. 639, 654 (2021) (to prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that his attorney's performance was deficient; and (2) that the defendant was prejudiced as a result).

## II.

## Jury Question

Appellant contends that "[t]he court committed reversible error by failing to ensure that the jurors could be fair and impartial after a jury note expressed concern regarding what they perceived as [appellant's] wife taking their picture." He asserts that the note "was evidence that the jury had been tainted," and it "raised a presumption of prejudice," which generated a duty on the part of the trial judge to "conduct voir dire *sua sponte*" to determine whether the jury could be fair and impartial. He further argues that, if this Court disagrees that "the note generated such a duty and a presumption of prejudice," we should conclude that "the court committed plain error in failing to take any action beyond giving an instruction in response to the note."

The State contends that plain error review is precluded because appellant "affirmatively waived his contention that the court erroneously answered a jury question when he agreed with the trial court's proposed answer." The State argues that none of the four prongs required for plain error review are satisfied here. In particular, it asserts that the situation presented here was unique, and therefore, any error in addressing it was not "clear or obvious," as required for plain error review.

### A.

### Proceedings Below

As indicated, the jury sent out a note during deliberations asking: "[W]hy was the defendant's wife taking pictures of the jury on her phone?" The court noted that it had

never dealt with a question like that before. It advised the parties that it intended to respond to the note as follows:

> [I]f that is the case the -- it has nothing to do with the, with the disposition of this matter, but the Court will be glad to direct them to the Sheriff's security and they can make complaints of anything that they felt was threatening when this matter was concluded no matter what the, what the verdict is. I don't know the facts of this and we're not going to introduce those facts into this case. But I'll tell them it's a separate matter and should not be considered in the guilt or innocence of this defendant. Any questions about that?
>
> I don't know how, you know it begs many, many questions that we're not going to speculate about. All right? But I'll tell them it's a separate matter and not to be considered in this matter. But if they have any concerns that Captain Sanders will be available, will make someone available to take any complaints or any concerns they may have.

The State asked if the court could inquire whether the jury was "in fear of coming to a verdict in opposition to the person who's taking pictures of them." The court responded:

> [I]f for some reason they can't, they feel that they cannot reach a verdict that's a separate question and they can let me know. I don't want to invite that. I'm just going to tell them the truth. That it is a separate matter that will be dealt with after, after this case.

The State then expressed concern that the jury may just find appellant not guilty because it did not "feel like dealing with it." The court responded:

> The Court will have its own investigation of this and if there was a, something overt inside or outside the courtroom then, you know, the Court will have to deal with, deal with that. The point is that this defendant, there's nothing to attribute that behavior to this defendant. And I do not wish to -- you know, it's possible that there could be an outside issue introduced and if you want to deal with it that way, your option, sir, is to move for a mistrial.
>
> And I, I just don't know enough about it and we're not going to invade the purview of the jury box to find out. Obviously, if there's some extrinsic

> evidence of her using a cell phone or camera in the courtroom or immediately outside then we'll deal with it.

The court asked defense counsel if he had any comments, and counsel stated: "No, sir. I think that's the way to handle it." The State then requested that the court offer that the jury could "be accompanied by law enforcement to their vehicles if they're uncomfortable."

The court ultimately instructed the jury that the court was sympathetic to the question, and it was investigating it. The court continued:

> It is not part of the evidence of this case from which you can determine these verdicts.
>
> This Court will, is responsible for your security. If you have any concerns whatsoever there will be a deputy available to take your statements and make sure of whatever you saw, whatever you feel uncomfortable with we will make note of it, and it will be investigated. And we will investigate it by extrinsic means.
>
> But it should not be applied to this defendant as, as his behavior as what has been observed here and this note has nothing to do with him. However, I wanted to make sure that we take your concerns seriously and we will make sure that you feel safe getting out of the courtroom and to your vehicle and home today. And we take that very seriously.
>
> But none of that should be applied one way or another for this defendant. But I appreciate you letting us know and when your duties as jurors are done, whatever the verdict is, there will be a Sheriff's Department personnel that will take a statement from each and every one of you if you wish to give about anything that has made you uncomfortable in your deliberations. And that while we will go forward from there. Okay, that's the way we're going to handle this.

**B.**

**Analysis**

Appellant never asked the court below to *voir dire* the jury after it received the note at issue. Although this Court has discretion to review unpreserved issues, "appellate courts should rarely exercise" their discretion under Md. Rule 8-131(a). *Chaney v. State*, 397 Md. 460, 468 (2007). This is 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 so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

*Id. Accord Harris v. State*, 251 Md. App. 612, 660 (2021), *aff'd on other grounds*, 479 Md. 84 (2022).

Based on his failure to preserve the issue, appellant asks us to review the issue for plain error. "Plain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)), *cert. denied*, 583 U.S. 1067 (2018). Appellate review based on plain error is "a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). Indeed,

> [b]efore we can exercise our discretion to find plain error, four conditions must be met: (1) "there must be an error or defect–some sort of 'deviation from a legal rule'–that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case

> means he must demonstrate that it 'affected the outcome of the district court proceedings'"; and (4) the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings."

*Turenne v. State*, 258 Md. App. 224, 257 (2023) (quoting *Newton*, 455 Md. at 364), *aff'd on other grounds*, 488 Md. 239 (2024).

Appellant has not convinced us to exercise our discretion to engage in plain error review in this case, where the court proposed a response to the jury note and counsel for appellant stated that he thought that was "the way to handle it." Appellants are not permitted to agree with a proposed procedure and then seek "reversal when the judge employs that procedure." *Burch v. State*, 346 Md. 253, 289, *cert. denied sub. nom.*, *Burch v. Maryland*, 522 U.S. 1001 (1997). This is not one of those rare cases that warrants plain error review.[2]

## III.

## Impermissible Sentencing Considerations

Appellant contends that the circuit court "utilized impermissible considerations" in sentencing. He asserts that the court improperly relied on its "self-identified expert-level knowledge" of the gun involved in this case, which caused the court "to conclude beyond

[2] We note that appellant's argument that the jury note raised a presumption of prejudice does not eliminate the requirement that there be an objection if there is time for the court to take action at trial; the plain error doctrine applies to unpreserved issues. *Robinson v. State*, 410 Md. 91, 110 (2006) ("[C]laimed violation of the right to a public trial must be preserved for appellate review by a timely objection at trial, notwithstanding that the allegation implicates structural error."); *Montgomery v. State*, 206 Md. App. 357, 381 n.17 (alteration in original) ("[U]n-preserved structural errors are not automatically reversible, but, instead, are subject to plain error review.") (quoting *Savoy v. State*, 420 Md. 232, 243 n.4 (2011)), *cert. denied*, 429 Md. 83 (2012).

any doubt that appellant fired the handgun not while wrestling it away from his robber but at some other point by his own election."

The State contends that appellant's argument was never raised in the circuit court, therefore, it is unpreserved for this Court's review. It argues that, even if the issue were preserved, the trial court did not rely on impermissible considerations in sentencing appellant because it had the discretion to rely on its own personal experiences.

**A.**

**Proceedings Below**

Appellant testified that his hand was injured during a struggle with the assailant over the gun. At sentencing, the following occurred:

> THE COURT: The Court does not buy . . . his account of events. He may have been accosted, he may have [been] robbed, but -- and I don't doubt that. But there may have been some other event because there was a shooting earlier that has never been really brought to justice.
>
> But the Court is very familiar with model 1911 handgun. I had an almost identical model of this and have shot it thousands of times. The injury on the hand, the reason that is so important, if you're, if you hold it wrong the slide is going to go over the webbing of your hand and cut your hand. The unique thing about a model 1911 John and Browning design Colt handgun.
>
> This probably isn't a Colt, but that's the design is there's a safety up under the webbing of your hand. That trigger can't be pulled and Officer Cramer, did he have the cut right here on the webbing of his hand?
>
> OFFICER CRAMER: Yes, Your Honor.
>
> THE COURT: You can't do that unless you've got a hold of the devil's right hand. It can't happen. Don't lie to me. He had the gun and he shot it off. He may have taken it from the other fellas, but it didn't happen while you were wrestling. It happened to me. If you grab that thing wrong, it will come right over your hand and cut you right there. And you can only do it when

> you're holding it, because there's a safety device where your web of your hand fits up in there.
>
> It's, it's a design, whether it's a design flaw or a design aspect of it is, it is the hallmark of a 1911 handgun if you, if you -- and they call it limp wristing it or lazy, you know, lazy arming it. It will stove pipe the round. It's what happened. It is, empirically what happened. Now, I don't know whether you seized it from somebody else or you had that, you were carrying that thing around, but there's nobody chasing you on North Potomac Street.
>
> So, this was a discharged handgun that you discharged. Whether or not you had had an altercation, I don't know. You were high. Who knows if there was anybody chasing you. You're not a reliable narrator on this instant. You grabbed the guy and you, you, you know, you have not been convicted of assault, but you're acting in an aggressive fashion, leveling the handgun as you have him behind you or in front of you looking for you[r] assailants. Nobody's chasing you. There's video everywhere.
>
> So those are the inalienable facts on this particular case.

**B.**

**Analysis**

We begin by addressing the State's contention that this issue is not preserved for review. The Maryland appellate courts have consistently held that, ordinarily, the court will not consider an issue not raised in the circuit court, and an objection that the court relied on impermissible considerations at sentencing must be raised in the circuit court to be preserved for appellate review. *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012); *Taylor v. State*, 236 Md. App. 397, 451 (2018), *rev'd on other grounds*, 473 Md. 205 (2021).

This Court has explained the reason that an objection below is required:

> When, as in this case, a judge's statement from the bench about the reasons for the sentence gives rise to the claim of impermissible sentencing considerations, defense counsel has good reason to speak up. A timely objection serves an important purpose in this context. Specifically, it gives the court opportunity to reconsider the sentence in light of the defendant's

> complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns.

*Reiger v. State*, 170 Md. App. 693, 701 (2006) (footnote omitted), *cert. denied*, 397 Md. 397 (2007).

Here, appellant failed to object to the court's comments prior to imposing the sentence. As such, the issue is not preserved for this Court's review, and we shall not address it.

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