Circuit Court for Baltimore City
Case No. 116293010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 909

September Term, 2017

ARNILLO PARKS

v.

STATE OF MARYLAND

Berger,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 7, 2018

Arnillo Parks, appellant, appeals his convictions in the Circuit Court for Baltimore City for first- and second-degree assault upon Kendria Long and reckless endangerment of Kendria Long and K.P. He raises the following questions, which we have rephrased slightly:

> 1. Did the trial court err in allowing the prosecutor to question appellant about *nolle prossed* criminal assault charges and the trial court's consideration of those charges in imposing sentencing?
>
> 2. Did the trial court abuse its discretion in admitting testimony by a witness that the witness thought Parks was going to kill the victim?
>
> 3. Should this Court review for plain error Park's claim that the trial court coerced the jury into rendering a verdict?

We shall hold that: (1) the trial court did err in allowing the prosecutor to question appellant about *nolle prossed* criminal assault charges, but the error was harmless, and consideration of the charges in sentencing was not preserved for review; (2) the trial court did err in overruling the objection to witness testimony that the witness feared appellant would kill the victim, but the error was harmless; and (3) appellant did not preserve the issue of jury coercion, and review under a plain error standard is not justified. Accordingly, we shall affirm.

I.

The Grand Jury for the Circuit Court for Baltimore City indicted appellant with crimes related to an assault upon Ms. Long, including first- and second-degree assault upon Ms. Long, reckless endangerment of Ms. Long and K.P., Ms. Long's child, second-degree

assault upon Gloria Wagner, Ms. Long's grandmother, and carrying a dangerous weapon openly with intent to injure. Trial began on May 4, 2017. Appellant was acquitted of the charge of carrying a dangerous weapon openly with intent to injure. The jury found appellant not guilty of second-degree assault upon Ms. Wagner and convicted appellant of first- and second-degree assault upon Ms. Long and reckless endangerment of Ms. Long and K.P.

The following evidence was presented at trial: On September 24, 2016, appellant arrived at the shared residence of Ms. Long, K.P., and Ms. Wagner. His stated purpose was to take Ms. Long and K.P. to the zoo. Appellant left the residence to take a telephone call and returned later that same day. Upon appellant's return from taking the call, he entered the home and repeatedly punched Ms. Long in the face while Ms. Long was holding K.P., an infant at the time. During the attack, Ms. Long moved to the backdoor step of the residence. Appellant followed Ms. Long and repeatedly struck her with a "two by four" piece of wood. Ms. Long then gave K.P. to Ms. Wagner and moved through the backdoor of the residence to the neighboring lawn, followed by appellant. Upon arriving on the neighbor's lawn, Ms. Long collapsed, appellant fled, and a neighbor called 911. Ms. Long was then taken to a hospital and treated for various injuries.

Ms. Wagner testified at trial as follows:

> "[THE STATE]: On September 24th, 2016, did you see Mr. Parks?
>
> [MS. WAGNER]: Yes.
>
> [THE STATE]: And what, if anything, happened on September 24th when you saw him?

[MS. WAGNER]: He came to the house saying Kendria and him was going to the zoo with the baby. Then he had a phone call and he got upset and he started punching my granddaughter in the face repeatedly.

***

[THE STATE]: And where were you when this happened?

[MS. WAGNER]: In the living room—

***

[THE STATE]: Where was Kendria?

[MS. WAGNER]: In the living room sitting on the couch with the baby in her arms.

[THE STATE]: And how did [appellant] hit her?

***

[MS. WAGNER]: He kept on taking his fist and punching her straight in the face—

***

[THE STATE]: And where was the baby at this time?

[MS. WAGNER]: In her arms. And she was covering the baby.

***

[THE STATE]: And what did you see while he was hitting her?

[MS. WAGNER]: I seen him hit her. And I had told him to stop. The baby. The baby. He said I don't care.

[THE STATE]: And did you ultimately get a hold of the baby?

[MS. WAGNER]: Not at this point yet. After this happened, he was punching her. And she got up and was heading to the back steps. And she went—and as she was getting up, I was

trying to protect the baby and her. And that's when he punched me in the arm.

***

[THE STATE]: And where was Kendria at this time?

[MS. WAGNER]: She was heading outside on the step.

***

[THE STATE]: And then what happened? What's the very next thing that happened?

[MS. WAGNER]: And then I thought she had fell on the step but she sat down. And then he took—I had a two by four, which is a board, to close the door . . .

***

[MS. WAGNER]: He took the two by four and she was sitting on the steps. She still had the baby in her arms like this. And he just took the board and kept on beating her and beating her. And I got in the middle of it trying to protect my great grandson and her. And I thought he was going to kill her. I really did.

[DEFENSE COUNSEL]: Objection. Move to strike.

[MS. WAGNER]: And he would not stop. He just kept on beating—

THE COURT: I'm sorry. Ma'am, when you hear an objection, you should just stop talking till I rule.

[MS. WAGNER]: I'm sorry.

[DEFENSE COUNSEL]: Moving to strike.

THE COURT: No. I'm going to permit that. Go ahead. You may answer.

[THE STATE]: What did you think was happening as he was hitting her?

[MS. WAGNER]: The only thing I thought—and I kept on screaming is 'The baby! The baby!' And told him to stop and he just wouldn't stop.

[THE STATE]: And then what happened?

[MS. WAGNER]: Well, then she got up. I don't know how she got up. But she got up and when she did, she went to him and she says, 'I'm sorry for whatever I did. Let's go outside and talk about it.' And that's when she give me the baby.

[THE STATE]: And then what happened?

[MS. WAGNER]: And then she went—both of them went out the door and she got right in the next yard and she collapsed.

***

[THE STATE]: And what did you do at that time?

[MS. WAGNER]: The neighbors was out there and I said call the ambulance. Call the police. And he went out. He was there holding her head up.

[THE STATE]: Did the ambulance ultimately arrive?

[MS. WAGNER]: Yes. And the police.

[THE STATE]: Did he stay around for that?

[MS. WAGNER]: No. He ran . . .

***

[THE STATE]: Where did you go next?

[MS. WAGNER]: Then the ambulance took me and the baby. And the ambulance—another ambulance took Kendria.

***

[THE STATE]: Did you ultimately go see Kendria?

> [MS. WAGNER]: Yes. Soon as I finished with [K.P.], I went and see Kendria and stayed with her all night.
>
> [THE STATE]: And did she go home that night?
>
> [MS. WAGNER]: We were scared to go home. So they said that she could go home around 3 o'clock in the morning. But we stayed there until her grandfather picked us up and took us home. And I packed and then we left to go to Georgia. We ran 'cause we were scared that he would come back and kill her.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Yes. Ladies and gentlemen, I'm going to overrule the objection. But just bear in mind this is her speculations as to what may happen. It's not necessarily what, in fact, was going to happen. Go ahead."

The State rested its case, and appellant testified. He stated that on September 24, he was emotionally overwrought about his relationship with Ms. Long. He admitted to striking Ms. Long, did not recall striking her numerous times or using a board, and denied striking the grandmother or baby. In part, he stated as follows:

> "[DEFENSE COUNSEL]: How long were you in a relationship with Ms. Long?
>
> [APPELLANT]: About three years.
>
> [DEFENSE COUNSEL]: And based on what you were hearing, what was your impression?
>
> [APPELLANT]: That we were family. I felt like a husband and—husband and wife without the ring on. We had been living together. . . . I mean, I was home for only six days and I did a lot with my son and her. Like, so I don't—and then when I was locked up for the 60 days, I come home and she had a tattoo of another guy that I always questioned about and she told me that it was to make me upset. I forgave her, but it

was—things just kept building up within them six days and it was like an emotional breakdown.

Like, I was hurt. Like, I know like it wasn't right or like whatever happened, but—and I know I would never let myself get to that point *because I never put my hands on females. Like, I never had a record of putting my hands on females.* Like, this is basically my first love and I didn't know how to handle a heartbreak."

Upon cross-examination, appellant testified as follows:

"[THE STATE]: So you said you never put your hands on a woman; is that true? Did you—

[APPELLANT]: I said before I met Kendria I never put my hands on a woman.

[THE STATE]: Oh, before you met Kendria you never put your hands on a woman?

[APPELLANT]: Yeah.

[THE STATE]: So you've put your hands on Kendria before?

[APPELLANT]: No. Before this incident?

[THE STATE]: Yes.

[APPELLANT]: No.

[THE STATE]: So you didn't put your hands on Kendria in the assault case on September 14th—

[DEFENSE COUNSEL]: Objection.

[THE STATE]: —2016?

[APPELLANT]: 2000 and—say it again.

THE COURT: Hold on. Come here, please."

The State, appellant's counsel, and appellant approached the bench, and the following colloquy occurred:

> "[THE STATE]: I have case law—
>
> ***
>
> THE COURT: This door is wide. I told you. This door is wide open.
>
> ***
>
> [THE STATE]: And there's case law, *Jackson v. State*.
>
> [DEFENSE COUNSEL]: This is not a conviction.
>
> [THE STATE]: It doesn't matter.
>
> ***
>
> THE COURT: The question was you didn't strike her not whether you were convicted of it, but I think it's a legitimate question. The door is open and you may proceed with this."

The State, defense counsel, and appellant returned to the trial tables, and the following occurred in open court.

> "[THE STATE]: So you didn't strike her when you got charged with an assault II case against Kendria Long and it was *nol prossed* on September 14th, 2016?
>
> [APPELLANT]: Nope, because in that case I haven't been charged with it. It would be on my record still.
>
> [THE STATE]: Oh, it would be on your record, but it was *nol prossed*—
>
> [APPELLANT]: Yeah.
>
> [THE STATE]: —because she didn't come.

[APPELLANT]: Yeah, but I never—

[THE STATE]: Oh. And did you—

[APPELLANT]: —put my hands on her.

[THE STATE]: —not put your hands on her on June—

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: All right. Let him finish the—

[DEFENSE COUNSEL]: He's still answering the question.

THE COURT: I know. I agree. Let me [sic] him answer his questions.

[APPELLANT]: I never put my hands on her.

[THE STATE]: Okay. Did you never put your hands on her in the case that was *nol prossed* on June 21st, 2016, an assault II—

[APPELLANT]: Never put my hands on her. Nope.

[THE STATE]: Never put your hands on her on December 14th, 2015 in the assault too, second degree assault case—

[APPELLANT]: I swear—

[THE STATE]: —against Kendria long?

[APPELLANT]: —I didn't put my hands on her.

[THE STATE]: Is it fair to say you had a number of charges pending against you—

[APPELLANT]: I mean—

[THE STATE]: —for the same victim?

[APPELLANT]: —I explained—

[DEFENSE COUNSEL]: Objection.

[APPELLANT]: I explained that.

THE COURT: Ok. Overruled. Go ahead.

[APPELLANT]: Her grandmother been not liking me because of the way I react and I don't know—like, I keep it funky. I'm down to earth. So I don't know. Sometimes she be spoiled and nobody tells her when she's wrong and I can't even talk to her and let her know that sometimes. That's just the way she was raised, but as far as me putting my hands on her, grandma just don't agree with how we talk the situations out. Like, I—and she always try to push t[h]e button. Grandma be calling the police. Kendria don't call the police.

[THE STATE]: So Kendria doesn't call the police and that means you've never touched her?

[APPELLANT]: I never touched her. I told you thought [sic]."

During jury deliberations, the jury submitted a note to the court stating it was undecided on Counts I and V, requesting a "better description of the differences between first and second degree assault," and asking if intent could be inferred. In response, the court reread instructions related to first- and second-degree assault and proof of intent, stating as follows:

"Now for the rest of you, the time has come for you to begin your deliberations. Now, if a question arises during the course of your deliberations and requires the assistance of the Court, please write your questions in on a piece of paper, as you've been doing throughout the trial actually and give it to the Clerk of the Court. After consulting with the parties, you may be given a written response or we may call you back in the courtroom for further instructions or do something else.

***

Now when you're brought back into the courtroom after reaching a verdict, the Clerk is going to ask several questions. She's going to ask, 'Members of the jury, have you agreed upon a verdict,' and all of you should respond 'yes,' assuming that that is, in fact, the answer.

***

We have had a jury note which we received at roughly quarter of three and the note simply asked, 'Can we have a statement of the elements of the charges,' and our response is we're going to be typing those up and sending them to the jury so that they have them in hand. I think that's a reasonable request on the jury's part.

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So it is now ten after five. The jury went out around two to 2:30. I think 2:30, so they've been out for about three hours. They sent back a note which is in the file which both Counsel have seen in which they make the point that if we are—if the jury is not unanimous on one count, does that nullify the other counts. And we sent back a response, also in the file, indicating that no, it does not nullify the other counts but that I wanted them to continue deliberating.

So it is now ten after five. So in a moment, I'm going to be sending Madam Clerk here to check with the jury and find out the status of their deliberations. I usually do this a little later, usually around 5:30ish, but I think at this point I'm going to do it right now just because it's Friday and I don't know where they are in their deliberations.

In general, I do not want juries to go past 6:30 although I—if we have to, we'll do that. What I would like Madam Clerk to do, however, is go back, find out what the status of the deliberations is and, with Counsel's permission, I would like for her to ask which count are they not unanimous on if that's, in fact, the case.

***

Okay. So that's all and, obviously, Madam Clerk, you make no comment to the jury about anything."

Counsel approached the bench, and the following colloquy occurred:

> "THE COURT: All right. So the response is, 'Still stuck on Count I and V.' I is the first degree assault and V—
>
> [THE STATE]: The Gloria Wagner?
>
> ***
>
> [DEFENSE COUNSEL]: Is that correct?
>
> THE COURT: Yeah. Hmm. All right. Well, in that event, I'm going to keep them deliberating, I think. I think those are important counts, especially I think Count I, assault in the second of Gloria Wagner. All right. Okay. We're going to continue."

Counsel returned to trial tables after the sidebar.

> "THE COURT: Okay. It's now just about 6 p.m. and what I'm going to be doing right now is sending the clerk back to inquire of the jury how close they are to a verdict. When she comes back, we'll talk about what we do next.
>
> ***
>
> [CLERK OF THE COURT]: Hey, Your Honor. They're asking me to come back. They—I asked them to write down their response, but I believe they also had a question. So I stepped out so that they could do whatever they had to do . . .
>
> THE COURT: Okay.
>
> ***
>
> [CLERK OF THE COURT]: Let's see. It's 6:06.
>
> THE COURT: All right. We've received three notes.
>
> ***
>
> THE COURT: Okay. Number one, 'We are still stuck on Count I and V. Could you provide a better description of the

differences between first and second degree assault? Can we infer intent?' That is from Juror No. 12. Or no, is it Question No. 13? I'm not sure what it is. 'For assault I, does the Defendant have to have intended to cause serious physical injury or can he just intended to cause injury that wound up being serious?'

And a similar question, 'Does the State have to prove intent of serious physical injury or can we infer intent based on actions of the Defendant?' What I'm going to do, I'm going to call them into the court and I'm going to reread the instruction on intent an [sic] the instruction on first and second degree assault. Okay? So let's bring the jury back out."

The jury re-entered the courtroom.

"THE COURT: Yes. You may be seated. Ladies and gentlemen of the jury, I do have your most recent set of questions, so let me reread to you, if I may, the definition of proof of intent from the instructions and the first and second degree assault instructions.

Intent is a state of mind and ordinarily cannot be proved directly because there is no way of looking into a person's mind. Therefore, a Defendant's intent may be shown by surrounding circumstances.

In determining the Defendant's intent, you may consider the Defendant's acts and statements as well as the surrounding circumstances. Further, you may, but are not required to, infer that a person ordinarily intends the natural and probable consequences of his act.

So that's proof of intent. Now, second degree assault and the reason I'm reading this to you is because this is an element of first degree assault. So second degree assault. The Defendant is charged with the crime of assault. Assault is causing offensive physical contact to another person.

In order to convict the Defendant of assault, the State must prove one, that the Defendant caused physical harm to, in this case two people, Kendria Long and/or Gloria Wagner. Two, that the contact was the result of an intentional or reckless act of the Defendant and was not accidental and three, that the contact was not consented to by Kendria Long or by Gloria Wagner.

That's second degree assault. Now, first degree assault includes everything that I've just read in second degree assault.

So the Defendant is also charged with the crime of first degree assault. In order to convict the Defendant of first degree assault, the State must prove all of the elements of second degree assault—that's what I just noted—and must also prove that the Defendant intended to cause serious physical injury in the commission of the assault.

A 'serious physical injury' means injury that creates a substantial risk of death or causes a serious and permanent, or serious and protracted loss or impairment of the function of any bodily member or organ.

And as I noted, I just read the definition of intent here. So this is that the Defendant intended to cause serious physical injury in the commission of the assault and then these are the subcategories to that. I hope that is helpful to you. So we're going to continue deliberating for a while. *I apologize, but we do need to reach a decision. Okay?*

All right. Just take them back."

The jury retired to continue deliberations.

"THE COURT: Okay. I'm going to let them go a little past 6:30. I think we'll go probably to about quarter of seven, but at this point, that really is the outside.

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THE COURT: All right. We have—this is another problem. Yeah. Juror No. 4, 'I had a 7:20 flight. Can I have my phone for a [call].'

***

THE COURT: What we're going to do is Juror No. 4 go in the hallway to make a call and Madam Clerk will stay here just to make sure that they properly close it."

At 6:25 p.m. the proceedings continued as follows:

"THE COURT: The State—if they are still undecided on I, you're suggesting an Allen Charge and bringing them back on Monday?

[THE STATE]: Yes, Your Honor.

***

> THE COURT: —we have verdicts, from what I gather, on several counts. It would be—we're—we have verdicts on II, III, and IV. All right? So we have several options. We can call them all back on Monday. If they're all available on Monday, that might be a good solution.
>
> Number two, we could take the verdict on those three counts, leave the two open, declare a mistrial on those two and then resume, retry them. We could take the verdicts on those three and then not go forward on the other two which I would really not want to do.
>
> All right. Well, what we may end up doing is inquiring with the jury as to attendance on Monday. Yeah, the other option, I don't think you're going to want to do this, but I have done this in the past. You can consent to an 11-person jury if we lose one."

At 6:40 p.m., jury returned with the verdict as follows:

> "[CLERK OF THE COURT]: Count No. I, assault in the first degree against Kendria Long. Your verdict is guilty. Count No. II, assault in the second degree against Kendria Long, your verdict is guilty. Count No. III, reckless endangerment of Kendria Long, verdict is guilty. Count No. IV, reckless endangerment of [K.P.]; verdict is guilty. Count No. IV[1], assault in the second degree against Gloria Wagner; verdict is not guilty. And so say you all?
>
> [THE JURY]: Yes."

The court ordered a pre-sentence investigation report and set sentencing for June 23, 2017. Sentencing proceeded as follows:

> "THE COURT: The guidelines are 12 to 20 years. The State has asked for 15. And Mr. Parks, and Mr. Parks's counsel on his behalf, has asked for 10, suspend all but 3. Is that correct?
>
> [DEFENSE COUNSEL]: Yes.

[1] The clerk erroneously listed the charge of assault in the second degree against Gloria Wagner as Count IV. Rather, this should have been listed as Count V.

THE COURT: Okay. And the guidelines are 12 to 20. I've given a lot of thought to this matter. I've looked through the pretrial investigation. And I find this to be a very disturbing case . . . . What really bothers me about the case is that the assault itself was an unusually brutal one. It involved not only his fist but it progressed to the use of a two by four. And we saw it in court. It was a very long heavy piece of wood. And the victim suffered substantial injuries although she's recovered from the injuries.

There was also reckless endangerment of the child who she was holding while he was hitting her. Now that was before, I think, she actually—he had the two by four. But while he was hitting her with his fist, she was holding the child.

He was acquitted of striking Grandma. There was clearly a lot of anger directed towards her as well.

What also strikes me, in addition to the extreme brutality of that assault, was the fact that there was a—it was the culmination of a series of events, that there were three prior *nol prosses* for domestic violence, as I understand it, because the victim would not testify. Clearly, she's ambivalent about this whole process. And because there were additional breakings and enterings that did result in the facts and convictions and the like and stay-aways. And my understanding is he was under a stay-away order at the time of this offense. Is that correct?

[THE STATE]: Yes, Your Honor.

***

THE COURT: So for that reason, I am going to be imposing at the top of the guidelines. It's going to be 25 years, suspend all but 20. There will be a five-year probationary period. During the five-year probationary period, there will be a stay-away from the two victims, Kendria—you'll have to help me on the names. Kendria and the child and the grandmother.

***

THE COURT: Right. There will be a stay-away from them. In addition to that, he must undergo anger management and mental health treatment. I think that the length of the sentence is justified by the extreme brutality of the actual assault in this

> case, by the use of a particularly ugly weapon, and by the fact that there is a history of domestic violence in this household including the existence of a stay-away order.
>
> ***
>
> THE COURT: But we cannot have this. And I take domestic violence very seriously. You had the mother of your child holding your child and you beat her. And when she was able to give her child to somebody else for safety purposes, you continued to beat her and you did so with a weapon. It was a vicious assault. And if it were standing alone, I would still be giving you a hefty sentence. But it wasn't standing alone. It was the culmination of three separate—this is the fourth assault on the same person, alleged assault, and three burglaries. And I just think this is going to escalate."

This timely appeal followed.

II.

Before this Court, appellant objects to the trial court's treatment of the *nolle prossed* charges, both in admitting reference to the charges at trial and in considering those charges in fashioning a sentence. Appellant contends that the line of questioning regarding the *nolle prossed* charges was not competent evidence, had no probative value, and was highly prejudicial. He further contends that the trial court impermissibly considered these same *nolle prossed* charges at sentencing. He argues that the trial court erred in admitting irrelevant and prejudicial evidence by permitting Ms. Wagner to testify that she feared for Ms. Long's life at the hands of appellant. Finally, although recognizing that the issue was not preserved, appellant argues as plain error that the jury was coerced into rendering a verdict after it reported a stated division on the charges.

The State argues that the trial court did not err in allowing appellant to be cross-examined regarding prior *nolle prossed* assault charges because appellant opened the door to the line of questioning during his direct examination. Alternatively, if error, it was harmless. As to the trial court's consideration of the *nolle prossed* charges during sentencing, the State argues that the court did not err in considering them, but if error, the issue is not preserved for appellate review because appellant did not object. The State also argues that the trial court did not err in allowing testimony by Ms. Wagner that she feared for the life of Ms. Long, and, if error, the error was harmless. Finally, as to the claim that the jury was coerced into rendering a verdict after it reported a stated division on the charges, the State maintains that the issue is not preserved for this Court's review and that, on the merits, the trial court did not err or abuse its discretion.

III.

We address first the State's preservation arguments. The State maintains that appellant's arguments that the trial court erred in permitting the State to question him about *nolle prossed* criminal charges, that the court erred in considering those charges in fashioning a sentence, and that the court coerced the jury into rendering a verdict were not preserved for our review because he did not lodge an objection below. Appellant asks us to review his jury coercion argument as plain error.

Preservation is controlled by the Maryland Rules, interpretations of which are classified as questions of law. *Williams v. State*, 435 Md. 474, 483 (2013). We thus review the trial court's interpretations of the Rules as conclusions of law *de novo*, that is, without

deference "to determine if the trial court was legally correct in its rulings on these matters." *Davis v. Slater*, 383 Md. 599, 604 (2004).

Maryland Rule 8-131(a) restricts appellate review generally to matters that "plainly appear[] by the record to have been raised in or decided by the trial court." In assessing whether we should note, and perhaps correct, an unpreserved issue, "[t]he touchstone remains our discretion." *Williams v. State*, 34 Md. App. 206, 211 (1976). "[E]ven the likelihood of reversible error is no more than a trigger for the exercise of discretion and not a necessarily dispositive factor." *Morris v. State*, 153 Md. App. 480, 513 (2003). It is only "the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing a question based on the plain error doctrine]." *Martin v. State*, 165 Md. App. 189, 195 (2005) (quoting *Williams*, 34 Md. App. at 212). Plain error is error that vitally affects a defendant's right to a fair and impartial trial. *Hammersla v. State*, 184 Md. App. 295, 306, *cert. denied*, 409 Md. 49 (2009). Appellate review under the plain error doctrine "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.* In deciding whether to utilize the plain error doctrine, we ask whether the complained-of conduct in the case was so compelling as to warrant reversal by considering four prongs: (1) the error must not have been "intentionally relinquished or abandoned"; (2) the error must be clear or obvious, not subject to reasonable dispute; (3) the error must affect appellant's substantial rights, which means he must demonstrate that it affected the outcome of the court proceeding; and (4) the appellate court has discretion to remedy the error, but this ought to be exercised only if the error

affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Rich*, 415 Md. 567, 578 (2010).

We address first appellant's claims regarding the *nolle prossed* criminal assault charges. The issue arose in two contexts during the trial—during the cross-examination of appellant and during the sentencing process. As noted *infra*, the trial court ruled that appellant opened the door to the inquiry on direct examination and permitted the prosecutor to inquire about appellant's past abusive conduct with Ms. Long. Appellant's counsel objected on the grounds that appellant had not been convicted of that conduct. At sentencing, the judge referred to three *nolle prossed* charges. Appellant did not object at sentencing to the court's references to what he now claims are references to the *nolle prossed* criminal assault charges.

We hold that appellant's claimed trial error regarding the cross-examination of appellant is preserved for our review. Appellant filed a motion *in limine* as to the admissibility of that evidence, and he objected at trial. Appellant's sentencing claim is not preserved for our review as he made no objection below.

The trial court has considerable discretion regarding the admission of evidence. *Merzbacher v. State*, 346 Md. 391, 404 (1997). Appellant argues that testimony about these *nolle prossed* charges had no probative value and was potentially prejudicial, requiring a new trial. On direct examination, appellant testified that he had never put his hands on women, stating as follows:

> "Like, I was hurt. Like, I know like it wasn't right or like whatever happened, but—and I know I would never let myself get to that point *because I never put my hands on females. Like,*

> *I never had a record of putting my hands on females.* Like, this is basically my first love and I didn't know how to handle a heartbreak."

The trial court ruled that appellant opened the door to his prior conduct of assaulting women by stating that he "never put [his] hands on females . . . never had a record of putting [his] hands on females." While appellant's comments did open the door to the prosecution presenting evidence to rebut appellant's assertion of never putting his hands on females, the State's questions went beyond conduct and referred to criminal charges on specific dates, charges which the State had *nolle prossed*. The conduct was admissible; the *nolle prossed* charges were not relevant and not admissible.

Although the trial court erred, the error was harmless. Error is harmless when the "reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *State v. Logan*, 394 Md. 378, 388 (2006) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Given the overwhelming evidence in this case, including victim and witness accounts and appellant's admission to attacking Ms. Long, the error was harmless. That the jury heard that there were criminal charges which were later *nolle prossed*, in our view, in no way contributed to the guilty verdict.

We turn to appellant's sentencing claims. These claims are not preserved for our review. In order to preserve appellate review of an impermissible consideration during sentencing, a defendant must timely object in the court below. *See Abdul-Maleek v. State*, 426 Md. 59, 69 (2012). Here, there was no objection.

Appellant's jury coercion claim likewise is not preserved for our review as appellant made no objection below. At 6:06 p.m., the court received three notes from the jury, stating "We are still stuck on Count I and V. Could you provide a better description of the differences between first and second degree assault? Can we infer intent?" The trial court re-read the definition of proof of intent from the instructions and the first- and second-degree assault instructions. The court then commented to the jury "*I apologize, but we do need to reach a decision. Okay?*" At that point, the jury had already indicated that it had reached a verdict on Counts II, III, and IV. At 6:14 p.m., the jury returned to continue deliberations. The court engaged counsel in a discussion on how to proceed. At 6:34 p.m., the jury advised the court that it had reached a verdict. The jury found appellant guilty of Counts I, II, III, and IV, and not guilty of Count V.

Appellant concedes that he did not object to the trial court's statement to the jury but requests that this Court review for plain error. We decline to review for plain error. Here, it is unclear from this record why appellant's counsel did not object to the court's comment about the need to decide. Reviewing the court's comment in the context of the three questions regarding intent distinguishing first- and second-degree assault, counsel may have thought that any jury verdict would be favorable to the defense. Counsel's silence may have been strategic and tactical, which raises the possibility that appellant intentionally relinquished or abandoned the claim, failing the first prong of the *Rich* plain error analysis. We thereby decline to review for plain error.

Finally, we turn to appellant's preserved claim that the trial court erred in overruling his objection to Ms. Wagner's testimony that she feared appellant would kill the victim. A

person's mental state is relevant evidence when it renders a disputed material proposition more or less likely to be true. *See Parker v. State*, 156 Md. App. 252, 272–73 (2004). In this case, the mental state of Ms. Wagner was not relevant to any disputed material proposition; therefore, allowing her to testify as to her fears for the life of the victim was error. This error, however, was harmless beyond a reasonable doubt. Ms. Wagner's comments that she thought that appellant was going to kill the victim did not contribute to the guilty verdict, in light of the overwhelming evidence, the victim's testimony, and the fair inference the jury could have drawn that striking the victim with a two by four was life threatening.

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