Circuit Court for Anne Arundel County
Case No. C-02-CR-19-001769

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 706

September Term, 2022

JACOVI DeVAUGHN JOHNSON

v.

STATE OF MARYLAND

Leahy,
Albright,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 2, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Convicted by a jury in the Circuit Court for Anne Arundel County of first degree murder and related offenses, Jacovi DeVaughn Johnson, appellant, presents for our review two issues: whether the court erred in denying his motion for judgment of acquittal as to first degree murder, and whether "the State violate[d his] due process right to a fair trial and commit[ted] prosecutorial misconduct during closing arguments." For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called Dion Sanders, who testified that on July 5, 2019, Mr. Johnson, who was driving a Nissan Altima, picked Mr. Sanders up, and the pair went to a pool party "[i]n the neighborhood behind Quarterfield Apartments" in Glen Burnie. As Mr. Johnson "drove into the party, . . . he was beeping the horn," because a "lot of people were leaving." As Mr. Johnson drove the car "inch by inch," it struck the leg of a man later identified as James Antonio Diggs, IV. Mr. Diggs "jumped on the car" and broke the windshield. Mr. Johnson subsequently retrieved a gun from the glove compartment, "got out of the car[,] and started shooting." Mr. Johnson then "got back in the car" and drove to Quarterfield Apartments, where he and Mr. Sanders disposed of the gun.

In addition to eliciting testimony from Mr. Sanders, the State produced evidence that Mr. Diggs suffered gunshot wounds to the back of his head, the right side of his mid-back, the right side of his upper chest, the side of his right arm, and the back of his right arm. The assistant medical examiner that performed the autopsy of Mr. Diggs classified the wounds to his head and mid-back as "rapidly fatal." At the site of the shooting, a crime scene technician recovered eleven cartridge casings. The State produced a video recorded at the site and time of the shooting. In the video, three gunshots are fired in rapid

succession, followed by a pause, then followed by another eight gunshots fired in rapid succession.

The State also called Rashard Williams, who testified that he became friends with Mr. Johnson while the two were incarcerated together in Anne Arundel County. During their conversations, Mr. Johnson told Mr. Williams that he

> had went to the pool party to pick something up, him and like two other friends. In the process of leaving the pool party the dude had kind of like jumped onto his windshield[,] he had kind of hit him with the car which shattered the windshield.
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> * * *
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> He said the dude kind of jumped, but he kind of tapped him and it shattered his windshield, which broke his windshield.
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> And at the time of the broken windshield he said he was mad because the car was rented by somebody else. So he said he got out of the car and he started shooting. . . . He said he hit the one dude and he shot two others.
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> * * *
>
> I guess the person got off the car and [Mr. Johnson] said that he was angry, that he hopped out, he started firing . . . .

Mr. Johnson first contends that the "court erred when it denied [his] motion for acquittal" as to first degree murder, because for numerous reasons, "the State failed to prove beyond a reasonable doubt that [he] acted with premeditation." We disagree. The State produced evidence that Mr. Johnson transported a gun to the site of the shooting. When Mr. Diggs shattered the windshield of the car that Mr. Johnson was driving, Mr. Johnson became "mad" and "angry." Mr. Johnson retrieved the gun from the car's glove compartment, exited the car, and began shooting. Mr. Johnson fired three shots in rapid

succession, then paused, then fired another eight shots in rapid succession. The Supreme Court of Maryland (formerly known as the Court of Appeals of Maryland)[1] has recognized that "the firing of two or more shots separated by an interval of time may be viewed as evidence of premeditation." *Tichnell v. State*, 287 Md. 695, 719 (1980) (citations omitted). Finally, Mr. Diggs suffered five gunshot wounds, including wounds to his head, chest, and back. We have stated that "evidence of multiple shots, fired at the victim while he was being pursued by the shooter, [is] sufficient to permit the jury to find premeditation." *Handy v. State*, 201 Md. App. 521, 561 (2011). We conclude that the totality of this evidence could convince a rational trier of fact beyond a reasonable doubt that the killing of Mr. Diggs was premeditated, and hence, the court did not err in denying Mr. Johnson's motion for judgment of acquittal as to first degree murder.

Mr. Johnson next contends that, in three ways, "the State violated [his] due process right to a fair trial . . . during closing arguments." Mr. Johnson first contends that "the State displayed two slides during closing arguments that impermissibly shifted the burden of production to" him. But, the slides are not in the record. Also, defense counsel objected to the inclusion of the slides, and the court sustained the objections and instructed the jury to disregard the slides. The Supreme Court of Maryland has stated that "one cannot appeal

[1]At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Rule 1-101.1(a) ("[f]rom and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland").

from a favorable ruling," *Rush v. State*, 403 Md. 68, 95 (2008) (citation omitted), and hence, we shall not reach Mr. Johnson's contention.

Mr. Johnson next contends that "the State made impermissible 'golden rule' arguments." Acknowledging that "[t]rial counsel did not object to this argument," Mr. Johnson asserts that it is "subject to plain error review." We decline to conduct such review. Although this Court has discretion to review unpreserved errors pursuant to Rule 8-131(a) ("[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"), the Supreme Court of Maryland 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)).

Finally, Mr. Johnson contends that "the combined effect of the State's comments was to influence the [j]ury's verdict to [his] prejudice." But, for the aforementioned reasons, Mr. Johnson may not appeal from the court's sustaining of his objections to the challenged slides, and his challenge to the allegedly "impermissible 'golden rule' arguments" is not preserved for our review. Hence, we shall not reach Mr. Johnson's contention.

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