Circuit Court for Charles County
Case No.: C-08-CR-21-000526

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1019

September Term, 2022

WILLIAM ANTHONY SMOTHERS

v.

STATE OF MARYLAND

Reed,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 30, 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.

**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.

Following a jury trial in the Circuit Court for Charles County, William Anthony Smothers, appellant, was convicted of attempted second-degree murder and related offenses. At trial, the court admitted into evidence statements Smothers made on the phone at the Charles County Detention Center as well as ones he made in the circuit court allegedly directed at the State's witnesses during a recess. Accordingly, the State requested the court issue MPJI-Cr 3:28, which concerns witness intimidation.

During discussions about this instruction, Smothers objected to language in the pattern instruction referencing "witness intimidation": "Bribery or witness intimidation is not enough by itself to establish guilt, but may be considered as evidence of guilt." MPJI-Cr 3:28. Smothers conceded that the statements were made and that the jury was "certainly allowed to consider" them, but he did not want them called "witness intimidation." The court overruled Smothers's objection.

The court then read the following instruction to the jury:

> You have heard that the defendant made recorded statements on the phone on February 8, 2022, February 10, 2022, and February 14, 2022 as well as verbal statements in the Charles County Circuit Court courthouse in this case. Witness intimidation is not enough by itself to establish guilt, but may be considered as evidence of guilt.
>
> You must first decide whether the defendant made these statements in this case. If you find that the defendant made these statements in the case, then you must decide whether that conduct shows a consciousness of guilt.

When asked whether he was satisfied with the instructions, Smothers answered, "Yes[.]"

On appeal, Smothers contends the trial court erred by keeping the term "witness intimidation" in the pattern instruction it issued to the jury. We, however, agree with the

State that Smothers affirmatively waived this issue, and we also decline Smothers's invitation to engage in plain-error review.

Maryland Rule 4-325(f) requires a party to object "on the record promptly after the court instructs the jury[.]" The purpose of the rule is to correct any error while there is an opportunity to do so. Substantial compliance with the rule can suffice only when an objection is clearly stated on the record in open court, and the court, after ample opportunity to consider the request, unequivocally denies it with such an explanation that it is clear that renewal of the objection after instructing the jury would be futile. *See Watts v. State*, 457 Md. 419, 426 (2018). Here, Smothers did not merely fail to object after the court instructed the jury, he "affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the instructions as actually given." *Choate v. State*, 214 Md. App. 118, 130 (2013). Consequently, the issue is not properly before us.

Further, although we have discretion to review unpreserved errors under Rule 8-131(a), 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) (cleaned up). Plain error review is therefore "reserved for errors that are compelling, extraordinary, exceptional[,] or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130–31 (2012) (cleaned up). We are "especially disinclined" to exercise this discretion when a party affirmatively waives their objection in the trial court. *Choate*, 214 Md. App. at 130. Under the circumstances presented, we

decline to overlook the lack of preservation and exercise our discretion to engage in plain error review of this issue. *See Morris v. State*, 153 Md. App. 480, 506–07 (2003) (noting that the five 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."). Consequently, we will affirm the circuit court's judgments.

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