Circuit Court for Baltimore City
Case No. 121270007

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1567

September Term, 2022

TONY ANGELO EVANS, JR.

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.

Following a jury trial in the Circuit Court for Baltimore City, Tony Angelo Evans, Jr., appellant, was convicted of first-degree assault; reckless endangerment; use of a handgun in the commission of a crime of violence; possession of a firearm by a prohibited person; wearing, carrying, or transporting a firearm on his person; and possession of ammunition by a prohibited person. He was acquitted of attempted murder and attempted manslaughter. The court imposed consecutive sentences of 25 years' imprisonment for first-degree assault; 20 years' imprisonment, the first 5 years without the possibility of parole, for use of a handgun in the commission of a crime of violence; 5 years' imprisonment for unlawful possession of a firearm, and 1 year imprisonment for unlawful possession of ammunition.[1]

Appellant raises two issues on appeal: (1) whether the court plainly erred in allowing the State to cross-examine him regarding his pre-arrest silence and reference his pre-arrest silence during closing argument, and (2) whether the court imposed an illegal sentence when it sentenced him to 25 years' imprisonment for first-degree assault. For the reasons that follow, we shall affirm the judgments of the circuit court, but vacate appellant's sentence for first-degree assault and remand the case to the circuit court for resentencing.

At trial, the State presented evidence that there was an altercation between two groups of women near the 600 block of South Bond Street. During that altercation, appellant pulled out a gun and started shooting, ultimately hitting one of the women five times. Appellant testified that he had observed a man in a red shirt attack his aunt, who

[1] The court merged his convictions for reckless endangerment and wearing, carrying, or transporting a firearm on his person.

was one of the women involved in the altercation. Another woman wearing a white dress then joined the man in the red shirt and asked for his gun, which the man produced. The woman then took the gun and began shooting, which led appellant to fire back at her in self-defense.

During cross-examination, the State asked appellant why, if he had acted in self-defense, he did not "stop and talk to the police and tell them what happened that it was self-defense." The State also questioned why, after he had gone home and had time to reflect on what happened, appellant did not "call the police at that point[.]" During closing, the State then argued that appellant was not credible because his claim of self-defense "was not heard of until yesterday when counsel made opening statements." Appellant did not object to the State's cross-examination or closing argument.

On appeal, appellant first claims that the State's references to his pre-arrest silence violated his rights under the United States and Maryland Constitutions. He also contends that they were inadmissible under Maryland Rule 5-403 because "silence is ambiguous, and its potential for unfair prejudice therefore outweighs its probative value." Acknowledging that he did not raise these issues in the circuit court, he asks this Court to engage in plain error review.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals 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) (quotation marks and 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) (quotation marks and citation omitted). Under the circumstances presented, we decline to overlook the lack of preservation and thus do not 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.") (emphasis omitted).

Appellant next asserts that his acquittal of attempted manslaughter should have "capped" his sentence for first-degree assault at 10 years, and therefore that his 25-year sentence for first-degree assault is illegal. The State agrees, as do we. When a defendant is charged with a greater offense and a lesser included offense based on the same conduct and is convicted only of the lesser included charge "he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had be been convicted of the greater charge." *Simms v. State*, 288 Md. 712, 724 (1980). Here, appellant was charged with attempted manslaughter and first-degree assault based on the same shooting. And appellant was convicted of the first-degree assault but acquitted of attempted manslaughter. Thus, if first-degree assault was a lesser included offense of attempted manslaughter, *Simms* applies and appellant's sentence for first-degree assault could not exceed ten years' imprisonment, the maximum penalty for attempted manslaughter.

To ascertain whether attempted voluntary manslaughter merged with first-degree assault in this case, we must "discern, if possible, under which modality of the first-degree assault statute," appellant was convicted. *Dixon v. State*, 364 Md. 209, 243 (2001). That is because for the purposes of merger, first-degree assault, when committed under the modality of intentionally causing or attempting to cause serious physical injury to another, is a lesser included offense of voluntary manslaughter. *Id*. at 241. Conversely, it is not a lesser included offense when committed under the second modality of the statute involving use of a firearm. *Id*.

Here, the trial judge instructed the jury as to both modalities of first-degree assault. And the verdict sheet did not ask the jury to particularize the modality. Finally, the prosecutor did not mention either modality of the assault statute in either opening or closing. We therefore conclude that the record is not clear as to which modality appellant was convicted of first-degree assault. As such, under the rule of lenity, the ambiguity must be resolved in his favor. *Id*. at 248-49. Appellant's sentence for first-degree assault therefore could not exceed ten years' imprisonment, the maximum sentence for the greater offense of attempted voluntary manslaughter. Consequently, his sentence of twenty-five years' imprisonment for that offense must be vacated.

APPELLANT'S SENTENCE FOR FIRST-DEGREE ASSAULT VACATED AND CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT, ONE-HALF BY MAYOR AND CITY COUNCIL OF BALTIMORE.