Circuit Court for Howard County
Case No.: C-13-CR-22-000260

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 2126

September Term, 2022

ROY DAVID FREE

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: February 5, 2024

*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Following a jury trial in the Circuit Court for Howard County, Roy David Free, appellant, was convicted of sexual abuse of a minor, conspiracy to commit second-degree rape, and conspiracy to solicit a minor. The State's evidence at trial consisted largely of text messages about the victim, sent by Free to his coconspirator. In its closing, the State argued to the jury that those texts showed "13 distinct ways in which [Free] exploited [the victim]." The first of these was "the act of discussing the sexual abuse of [the victim]." According to the State: "The simple act of discussing the desire to abuse [the victim] under Maryland law is exploitation." The State further argued that these texts demonstrated a single agreement applicable to both of Free's conspiracy charges. The court later sentenced Free to 25 years' incarceration for sexual abuse of a minor; 20 years, consecutive, for conspiracy to commit second-degree rape; and 10 years, consecutive, for conspiracy to solicit a minor.

On appeal, Free raises two issues. He first contends that the State's statement during closing argument was improper because it was an incorrect statement of the law. Recognizing, however, that, by failing to object at trial, he did not preserve this issue for appellate review, Free asks us to exercise our discretion to grant plain error review.

Although we have discretion to review unpreserved errors under Maryland 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). This exercise of discretion "(1) always has been, (2) still is, and (3) will continue to be a rare, rare phenomenon." *White v. State*, 223 Md. App. 353, 403 n.38 (2015) (cleaned up).

Before we can exercise our discretion, four conditions must be met: (1) there must be an error that the appellant has not affirmatively waived; (2) the 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 [trial] court proceedings;" and (4) the error "must seriously affect[] the fairness, integrity[,] or public reputation of judicial proceedings." *Newton v. State*, 455 Md. 341, 364 (2017) (cleaned up). "Meeting all four prongs is difficult, as it should be." *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up).

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 Free's conviction for sexual abuse of a minor.

Free's second issue on appeal concerns his conspiracy convictions. He argues that his conviction for conspiracy to solicit a minor must merge into his conviction for conspiracy to commit second-degree rape because they share the same underlying conduct.

The State urges that we must go one step further and not just merge, but vacate Free's conviction on this count. We agree with the State.

"If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Savage v. State*, 212 Md. App. 1, 26 (2013). The "unit of prosecution" for conspiracy is "the agreement or combination, rather than each of its criminal objectives." *Id.* at 13 (cleaned up). Put differently, to convict a defendant of multiple conspiracies, the State must prove, at a minimum, the existence of multiple agreements. *See id.* at 13–17. Here, the State did not argue that Free entered two separate conspiracies. Instead, it specifically argued that the texts demonstrating the agreement between Free and his coconspirator applied to both conspiracy charges. The jury was also not instructed that it had to find the existence of two separate agreements to convict Free of both conspiracy charges. Therefore, Free's conviction for sexual solicitation of a minor must be vacated. *See Wilson v. State*, 148 Md. App. 601, 641 (2002) (holding that "the most severe sentence imposed for the crimes of conspiracy should remain").

APPELLANT'S CONVICTION ON COUNT III VACATED. JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID EQUALLY BY THE PARTIES.