UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1909

September Term, 2015

CURTIS HOWARD

v.

STATE OF MARYLAND

Graeff,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 12, 2016

Tried by a jury in the Circuit Court for Anne Arundel County, appellant, Curtis Howard, was convicted of attempted second-degree murder, reckless endangerment, carrying a weapon openly with the intent to injure, and conspiracy to commit first-degree assault.[1] The trial court sentenced appellant to a total of 18 years in prison, with five years of supervised probation (with conditions) upon his release. Appellant timely noted this appeal, in which he presents the following questions for our consideration:

> 1) Did the motions court err in denying Appellant's motion to suppress physical evidence?
>
> 2) Did the trial court commit plain error by delegating its duty to determine prospective juror bias, when it asked a compound *voir dire* question about whether prospective jurors' connection to law enforcement "causes you some concern about your ability to fairly and impartially assess the evidence in a criminal case?"
>
> 3) Did the trial court err by refusing to admit the prior inconsistent statement of a State's witness, where the defense satisfied all of the foundational requirements for its admission?
>
> 4) Is the evidence sufficient to sustain Appellant's convictions for attempted murder and conspiracy?
>
> 5) Did the trial court impose an illegal condition of probation, when it banned Mr. Howard from returning home upon his release from prison?

For the reasons that follow, we conclude that the trial court imposed an illegal condition of probation upon appellant, and we therefore remand to that court with an order to correct appellant's probation order and commitment record. Otherwise, we shall affirm the judgments of the trial court.

[1] The jury acquitted appellant of attempted first-degree murder and conspiracy to commit first-degree murder, and the court merged charges of first-degree and second-degree assault into the conviction of attempted second-degree murder.

FACTS AND LEGAL PROCEEDINGS

In August 2014, Jason Russell lived on Pioneer Drive, Anne Arundel County, with his wife, father-in-law, and two children. Appellant and his brother, Gary Howard, lived with their mother and other siblings, three houses down the street from the Russells'.[2] Russell and Gary had been involved in a previous disagreement over a matter pertaining to Russell's family members and had engaged in verbal altercations on several occasions.

At approximately 10:00 p.m. on the evening of August 29, 2014, the Russell family returned home from an outing to find that their assigned parking space was occupied by a car Russell believed to belong to Gary's girlfriend. Russell knocked on Gary's door and asked Gary to move the car; Gary said he would and closed the door.

Russell returned to his house, drank six or seven alcoholic beverages, and watched his daughter as she played outside. After three or four hours, no one had removed the offending car from Russell's parking space, so he again knocked on Gary's door and advised Gary that if someone did not move the car, he would have it towed.

Russell walked back to his house, and as he stood outside, he saw Gary, Gary's girlfriend, and appellant approaching. Russell felt threatened by their demeanor and told his daughter to go into the house.

Russell asked Gary why it was taking so long to move the car, and Gary responded by punching him in the face. Russell "may have thrown a punch back or two" and noticed

[2] Because appellant and his brother, who was also involved in the altercation that led to charges being filed against both men, share a surname, we will refer to Gary Howard as "Gary" for the sake of clarity. Gary was tried separately for his alleged participation in the attack.

that appellant had moved behind him. Although he did not see appellant do anything, he felt a "sharp pain" in his back and fell to the ground, where he was punched and kicked. The last thing he remembered before losing consciousness was Gary "stomping" on his face. He awoke at University of Maryland Medical Center, Shock Trauma, in Baltimore.

Anne Arundel County Police Detective Jeff Golas interviewed Russell at Shock Trauma the following day. Russell told the detective that it was appellant and Gary who had attacked him, and he immediately identified them as his assailants from photographs Golas showed him. Golas observed trauma to Russell's face, including a visible shoe print.[3]

Jason Russell's wife, Timica Russell, testified that she was alerted to the altercation involving her husband when their young daughter came into the house yelling that "Gary was stabbing daddy" and "daddy was hurt." Timica Russell looked out the window of their house to find her husband on the ground with Gary and appellant "right there with him, and. . .over him." Gary was kicking, beating, and stomping on Jason with something sharp and shiny—maybe a knife—in his hand. Timica called 911 and ran outside where she also saw "[s]omething shiny" and sharp in appellant's hand. She heard Gary say to Jason, "I bet you won't say nothing else," before he and appellant ran to the Howard home down the street. Shortly thereafter, appellant, Gary, and Gary's girlfriend left the neighborhood in the girlfriend's car.

[3] Russell also suffered numerous other injuries. Dr. William Chiu, his treating trauma surgeon, detailed Russell's injuries: multiple stab wounds, two collapsed lungs, and internal injuries to his spleen and diaphragm. Photos were introduced into evidence showing the stab wounds to Russell's back, a black eye, and the shoe print on his face.

When the police arrived, Timica Russell identified appellant and Gary, and perhaps two other unidentified men, as her husband's attackers. A broken beer bottle was recovered from the scene of the fight, but no weapon was found on the street or at the Howard house upon the execution of a search warrant later that morning.

After interviewing Jason and Timica Russell, Detective Golas obtained arrest warrants for appellant and Gary. Further police investigation yielded the name of a possible girlfriend for Gary, Cheryse Jackson, along with her address.

On September 1, 2014, Golas and other officers responded to Jackson's apartment in Baltimore County. When Jackson answered the door, Golas saw Gary, wearing only a pair of shorts or boxers. After being commanded to get on the ground, Gary complied, and Golas called out for appellant, who eventually joined his brother, also wearing shorts or boxers and a tank top. A Baltimore County officer placed the men under arrest, and they were removed from the apartment in handcuffs.

Golas asked Jackson if she had appropriate clothes and shoes for the men to put on. Jackson directed him to a duffel bag next to the dining room table and to two pairs of sneakers, which Jackson said appellant and Gary had been wearing, by the front door.

Golas, a collector of Nike sneakers, was aware that the sneakers, Nike Foamposites, had a unique sole pattern that matched the injury he had observed on Russell's face. He took the shoes to the Anne Arundel police precinct with the intent of giving appellant and Gary the shoes to wear; once at the precinct, however, he observed "reddish-brown spots" on the soles of the shoes. He photographed the shoes and turned them over to the evidence

collection unit.[4,5] Through Golas, the State also introduced photographs taken of appellant and Gary at the police precinct, which showed a cut on appellant's forearm and numerous cuts on Gary's hand.

Danshawn Stukes, appellant's pretrial cellmate at the Anne Arundel County Detention Center, testified that appellant, while talking to Stukes about "random things," said he was "stressed" because his brother was angry at him for stabbing a neighbor during a fight. Appellant also told Stukes that he had fled the scene of the fight because he thought the victim was dead.[6]

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, arguing that the State had adduced no evidence of any intent to commit murder. In response to the court's comment that there did not appear to be evidence of "a whole lot more than first degree assault," the prosecutor pointed out that Russell had been stabbed nine times on his torso and stomped on his head while lying defenseless on the ground, a clear indication of an intent to commit murder. In addition, Stukes had testified that appellant

[4] The seizure of the shoes was the subject of a pre-trial motion to suppress, which will be discussed in detail, *infra*. At trial, defense counsel asked for, and was granted, a continuing objection to the admission of the shoes into evidence.

[5] The State's expert forensic chemist confirmed that DNA obtained from the presumptive blood on the bottom of both pairs of shoes matched the DNA profile of Jason Russell.

[6] Upon cross-examination, Stukes readily admitted that he faced at least a 20-year prison sentence and was willing to trade information to the State on this and two other defendants' cases for the possibility of leniency on his sentence. The prosecutor clarified that she had given him nothing in exchange for his testimony and had "nothing to give" him.

thought he had killed Russell, which showed his intention to kill and the belief that he had carried out that intention. The court ruled that, as the law says one intends the natural consequences of his actions, proof of multiple stab wounds to the body was sufficient evidence to require a denial of the motion on that ground.

Appellant further argued that there had been no evidence presented of any agreement between the brothers, verbal or non-verbal, to support the conspiracy charges. The court, ruling that the fact that one brother attacked Russell from the front and one from the back simultaneously supported an inference of concerted effort and conspiracy, denied the motion on that ground, as well.

In appellant's defense, his mother, Nancy Peterson, testified that on the night of the attack, she observed appellant trying to pull Gary off Jason Russell during a fight. She also saw several other people at the scene of the fight.

Upon cross-examination, Peterson conceded that she did not call 911 to report the fight. In fact, she had denied a request by the State's Attorney's office to speak with its police investigator because "he worked for the other side."

At the close of all the evidence, appellant renewed his motion for judgment of acquittal, incorporating all of the arguments he had previously made. The court again denied the motion.

DISCUSSION

I.

Appellant first contends that the suppression court erred in denying his motion to suppress physical evidence. He avers that the Nike shoes linking him to the attack on

Russell were seized unconstitutionally during a warrantless search of the apartment belonging to Gary's girlfriend, Cheryse Jackson.[7]

Jason Russell testified at the suppression hearing that when Detective Golas visited him in the hospital the day after the stabbing to present him with photographs of potential suspects, he immediately identified appellant and Gary as his attackers. He also relayed to the detective that Gary had "stomped" on his face before he blacked out.

Cheryse Jackson testified that on August 31, 2014, Gary was an overnight guest at her home, as they were then involved in a romantic relationship. Appellant also spent the night there, as he had on a few previous occasions. When they arrived, the brothers had with them a duffel bag containing clothing and other personal items.

Detective Golas testified that when he met with Russell at Shock Trauma, the victim had cuts, bruises, and "a noticeable shoe imprint" on his face. After Russell identified appellant and Gary as his assailants, Golas obtained arrest warrants for them.

As part of his investigation, Golas responded to Jackson's apartment in Cockeysville, Baltimore County, on the morning of September 1, 2014 to undertake a "knock and talk" with her. He had not obtained a search warrant because he was not sure if he "had the right girlfriend of Gary."

[7] At the suppression hearing, the court initially determined that, contrary to the State's argument, appellant and Gary did have standing to challenge the removal of the shoes from Jackson's apartment, as they were overnight guests at her home, with a reasonable expectation of privacy therein.

When he first knocked on Jackson's door, he received no response, but shortly thereafter, someone asked who was there, and Golas heard movement in the apartment. Another officer informed Golas that someone had attempted to exit the building through a back window.

After another knock on the door, Jackson opened the door slowly, which permitted Golas to see Gary, wearing only a pair of shorts or boxers. Gary complied with Golas's command to get on the ground, and appellant, in response to Golas's call, eventually appeared from somewhere in the apartment to join his brother; appellant was also wearing shorts or boxers and a tank top or undershirt.

A Baltimore County police officer placed appellant and Gary in handcuffs and removed them from the apartment, after which Golas, who had not moved past the threshold of the front door, asked Jackson if she had appropriate clothes and shoes for them to put on. Jackson directed him to a duffel bag next to the dining room table and to "two pairs of Nike foamposite sneakers," which Jackson said belonged to appellant and Gary, by the front door.

Golas, through his personal knowledge as a collector of Nike sneakers, was aware, without looking, that the collectible Foamposites had a unique sole pattern that matched the injury he had observed on Russell's face. He took the shoes to the Anne Arundel County police precinct with the intention of giving them to appellant and Gary; once there, however, he observed "reddish-brown stains" on the shoes. When he noticed the stains, he turned the shoes over to the evidence collection unit.

Golas denied defense counsel's claim that he had no intention of providing the shoes to appellant and Gary. Rather, he said, although his personal knowledge led him to believe that the tread of the shoes matched the injuries to Russell's face, it was his intent to take the shoes to the precinct, photograph the soles, and provide them to the Howards to wear. In support of that statement, he pointed out he had taken only the one pair of shoes for each man, although there were two pairs for each at Jackson's apartment.

Defense counsel argued that Golas, with "more knowledge than the average person about shoes," manipulated the shoes to determine their evidentiary value and took them without the benefit of a warrant, consent of any occupant of the apartment, or any exigency. Despite Golas's claim that he wanted only to clothe and shod the defendants upon their arrest, counsel continued, it was clear that he collected evidence in picking up the shoes and, therefore, the shoe evidence should be suppressed.

The prosecutor countered that Golas was clear in his testimony that he was not looking for evidence when he retrieved the shoes. Rather, he was seeking only to clothe the defendants. He had not obtained a search warrant because he did not know if Jackson was actually Gary's girlfriend, and he did not know that appellant and Gary would be at her apartment when he arrived to speak with her. Golas's plain view of the sneakers to which Jackson had directed him in response to his request for clothing and shoes for the brothers provided an exception to the warrant requirement.

The court, applying a common sense analysis, ruled that Golas had testified credibly that it was his intent to give the shoes and clothing to the defendants when they reached the police precinct. When Golas observed reddish-brown stains on the soles of the shoes

at the precinct, "the plain view doctrine kicked in," and it was then reasonable for the police to seize the shoes as evidence. As such, the court denied the motion to suppress, clarifying that the ruling related both to the shoes and the eventual DNA analysis of the presumptive blood on the shoes.

Our review of a circuit court's denial of a motion to suppress evidence allegedly seized in violation of the Fourth Amendment is ordinarily limited to information contained in the record of the suppression hearing and not the record of the trial. *McCracken v. State*, 429 Md. 507, 515 (2012). When, as here, the motion to suppress has been denied, we are further limited to considering the facts in the light most favorable to the State as the prevailing party. *Id.*

In considering the evidence presented at the suppression hearing, we extend great deference to the fact-finding of the suppression court, and when conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that those findings were clearly erroneous. *Brown v. State*, 397 Md. 89, 98 (2007). We review *de novo*, however, all legal conclusions, making our own independent determinations of whether the search was lawful or a constitutional right has been violated. *Conboy v. State*, 155 Md. App. 353, 361-2 (2004).

The Fourth Amendment to the United States Constitution prohibits unreasonable governmental searches and seizures. When a search or seizure is undertaken in the absence of a warrant, it is *per se* unreasonable, subject to some exceptions. *Cason v. State*, 140 Md. App. 379, 395 (2001). One such exception to the warrant requirement is the "plain view" doctrine, which permits a police officer to seize clearly incriminating evidence that is

discovered in a place the officer has a right to be. *Id*. The U.S. Supreme Court has explained that the plain view doctrine is based on the proposition that as soon as a police officer is lawfully in a position to observe an item, its owner loses his or her privacy interest in that item. *Wengert v. State*, 364 Md. 76, 87-88 (2001) (quoting *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

In order for a search to be reasonable under the plain view doctrine, the following three conditions must be satisfied:

1. There must be a prior valid intrusion into the constitutionally protected area;

2. There must be a spotting in plain view of the item ultimately seized; and

3. There must be probable cause to believe that the item in plain view is evidence of a crime.

Cason, 140 Md. App. at 396 (citing *Sanford v. State*, 87 Md. App. 23, 27 (1991)).

The elements required for the application of the plain view doctrine to the seizure of the shoes were satisfied in this case. The police were lawfully present at Jackson's home in order to question her, as Gary's purported girlfriend, about his whereabouts after the attack on Russell the night before. Jackson voluntarily opened the door to speak with Golas, who did not leave the threshold of her apartment door until she directed him to clothing and shoes belonging to appellant and Gary. Appellant makes no claim that Golas was unlawfully present in Jackson's apartment.

When Golas asked Jackson whether she had clothes and shoes to properly clothe appellant and Gary for their trip to the police precinct, she directed him to a duffel bag containing the clothes and to several pairs of shoes on the floor by the front door of the

apartment.[8] Appellant does not dispute that the shoes were then in the detective's plain view.

Appellant's claim of error centers on his contention that Golas had no probable cause to believe that the shoes in plain view were evidence of a crime until he manipulated them to see what appeared to be blood on the soles. Appellant's argument, however, "confuses what is sufficient knowledge to support probable cause to seize a suspicious item, and what constitutes confirmation of that probable cause," *Garcia-Perlera v. State*, 197 Md. App. 534, 554 (2011), which, in this case did not occur until Golas arrived at the police precinct and turned the shoes over, finding suspected blood on their soles. "Probable cause requires only facts that would support an officer of reasonable caution in the belief that items may be [evidence of a crime]; 'it does not demand any showing that such belief be correct or more likely true than false.'" *Id*. at 555 (quoting *Daniels v. State,* 172 Md. App. 75, 89 (2006)).

Golas was aware, from his interview with Jason Russell at Shock Trauma, that Russell's assailants, whom he positively identified as appellant and Gary, had "stomped" on his face, leaving a distinct bruised footprint, which Golas observed first-hand. Although Golas's intention in asking Jackson for appellant's and Gary's shoes was properly to shod them, he knew, as soon as he saw the Nike Foamposite shoes Jackson said appellant and Gary had been wearing when they arrived at her apartment, that their treads were unique and would match the imprint on Russell's face, through his own knowledge as an avid

[8] Appellant does not challenge the police officers' entry into the duffel bag to obtain clothing.

collector of Nike sneakers. His suspicion that the shoes may have been worn during the attack on Russell was furthered when he observed suspected blood on the soles upon reaching the police precinct. Golas's reasonable suspicion while at Jackson's apartment—that the shoes had made the marks on Russell's face—provided him sufficient probable cause to justify the seizure of the shoes found in plain view, even if we chose not to believe his credible assertion that his initial reason for seeking the shoes was to provide them to appellant and Gary to wear.

Even were we to conclude that the seizure of the shoes was the product of an unlawful warrantless search of Jackson's apartment (which we do not), any error by the suppression court would be harmless. The presumptive blood on the shoes, later determined to provide a DNA match to Jason Russell, served only to provide cumulative evidence of appellant's and Gary's presence at the scene of the attack on Russell. Russell, his wife, and even appellant's mother, however, all identified appellant and Gary as being present during the attack. There was no dispute as to the identity of the attackers, and the blood and shoe's tread evidence did not provide any information to the jury it did not glean from other properly admitted evidence at trial. *See Sinclair v. State*, 444 Md. 16, 45 (2015).

Accordingly, we uphold the suppression court's denial of appellant's motion to suppress the evidence seized from Jackson's home.

II.

Appellant next argues that the trial court erred when it asked the venire panel a compound question about the prospective jurors' connection to law enforcement and whether it caused them concern about their ability to "fairly and impartially assess the

evidence" in the criminal case. Acknowledging that he failed to preserve the issue by lodging an objection to the allegedly improper *voir dire* question, appellant nonetheless urges us to invoke our discretion to consider the issue under a plain error analysis, asserting that the trial court's action denied him his right to an impartial jury and a fair trial.

During *voir dire*, the trial court initially asked the venire panel: "Does anybody know or are you related to any County police officer or any member of the police department[?]" Fourteen prospective jurors approached the bench to explain their connection to county law enforcement and whether that connection would impact their ability fairly to consider the evidence.[9]

One prospective juror advised the court that his stepfather was a retired Howard County police lieutenant and expressed confusion as to whether the court wished him to elaborate. The court responded, without seeking input from counsel:

> Now I might have limited that question to County police officers. If there's anybody who has not already come up who know, who knows a police officer either directly or socially, or is related to them, who works as an officer but not as a County, Anne Arundel County officer, would you come up please? Any other agency. Okay. All right. Shouldn't have done that.
>
> Okay, now I'm going to try to move this along and I'm going to ask the question this way—come up if you're only, only if that relationship causes you some concern about your ability to fairly and impartially assess the evidence in a criminal case. Okay. Come on up then.

Neither the State nor the defense interposed an objection to either the original question or the court's amended question. Four prospective jurors who had not approached

[9] Some of those prospective jurors reported relationships with police officers outside of the jurisdiction of Anne Arundel County.

the bench in response to the court's initial question approached and were then questioned by the court with regard to their relationships with *any* law enforcement officers.

In *Dingle v. State*, 361 Md. 1 (2000), the trial court questioned the venire panel by joining with each of the defendant's requested inquiries about the prospective jurors' experiences or associations, "one suggested by the State, namely an inquiry into whether the experience or association posited would affect the prospective juror's ability to be fair and impartial. Thus, the inquiry the court conducted to satisfy the petitioner's concerns consisted of a series of two part questions, the answers to which, the court instructed, need not be revealed unless a member of the venire panel answered both parts in the affirmative." *Id.* at 3-4.

The Court of Appeals found the compound questioning improper because it "did not require an answer to be given to the question as to the existence of the status or experience unless accompanied by a statement of partiality." *Id.* at 17. The trial court was thus precluded from exercising its discretion, and the defendant was denied the opportunity to discover and challenge prospective jurors who might be biased. *Id.*

In *Pearson v. State*, 437 Md. 350, 364 (2014), *reconsideration denied* (Apr. 17, 2014), the Court again disapproved of the use of compound questions during *voir dire*. Under *Dingle* and *Pearson*, the compound question propounded by the trial court in this matter was improper. Appellant did not, however, object to the error and, as such, he has failed to preserve the issue for our review unless we determine that the error reaches the level of plain error. We conclude that it does not.

Well established is the fact that our discretion to recognize plain error is plenary. *Jefferson v. State*, 194 Md. App. 190, 200 (2010). We will review an unpreserved claim "'only where the unobjected to error can be characterized as "compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial" by applying the plain error standard.'" *Id*. at 200-01 (quoting *Abeokuto v. State*, 391 Md. 289, 327 (2006)).

Although one reason to address an unpreserved issue is to "'communicate a desired message to the bench and bar that might otherwise go unsent,'" *James v. State*, 191 Md. App. 233, 247 (2010) (quoting *McMillan v. State*, 181 Md. App. 298, 360 (2008)), this type of improper *voir dire* question, as discussed above, has already been addressed recently in *Pearson*, and there is no need for further discussion of it.

Moreover, the question regarding the prospective jurors' relationships with all law enforcement officers in this matter was posed to the venire panel after the same question was properly posed regarding their relationships with Anne Arundel County law enforcement officers, specifically. Fourteen prospective jurors responded to the initial, non-compound question and were further questioned by the court as to whether those relationships would affect their decision as to appellant's guilt. After the court, *sua sponte*, broadened the question to include all law enforcement officers, four additional prospective jurors responded.

Defense counsel did not object to the scope of the original, properly formed question that constrained itself to Anne Arundel County law enforcement officers, and the broader question actually yielded more information to him from which he could make a decision

about challenges. Therefore, we are hard-pressed to find any unfair prejudice to appellant in the asking of the additional question.

We conclude that appellant's claim of error is not so compelling or extraordinary that it requires review in the absence of a timely objection at trial. Accordingly, we decline to exercise our discretion to recognize plain error on this issue.

III.

Next, appellant complains that the trial court erred when it refused to admit substantively and for impeachment purposes a written statement by Timica Russell that was allegedly inconsistent with her trial testimony, after he had satisfied all the foundational requirements for its admission.

Upon cross-examination, defense counsel sought to question Timica Russell about her statement to Detective Golas on the night of the attack upon her husband:

> Q. Okay. You testified on direct that at some point, on the scene, Detective Golas came to you and asked you some questions—
>
> A. Yes.
>
> Q. –do you remember that?
>
> A. Yes.
>
> Q. And do you remember telling him that you saw Gary with a silver object stabbing your husband?
>
> A. I told him I saw him with something in his hand sharp.
>
> Q. Okay. Do you remember telling Detective Golas that you saw another man with a knife stabbing your husband?
>
> A. Yes. I told him that I saw—not stabbing, but like, right there, in like, in the same presence in like motion like that.

Q. That same night, did Detective Golas ask you to write out a written statement?

A. I'm not sure if it was right then, or later on that morning. Because it was already morning time.

Q. In that statement, do you remember saying that Gary Howard—you saw Gary Howard—

[PROSECUTOR]: Objection.

BY [DEFENSE COUNSEL]:

Q. –stab your husband?

THE COURT: Basis?

[PROSECUTOR]: May we approach?

At a bench conference, the prosecutor opined that defense counsel was attempting to impeach Timica Russell but argued that he was not doing it properly. The court overruled the objection, after which defense counsel continued his cross-examination:

Q. Now, Ms. Russell, I'm about to hand you what's been marked as Defendant's Exhibit C. Would you mind looking over this?

A. Sure.

Q. Does that appear to be your written statement that you wrote out on August 30th?

A. (No audible response.)

Q. Do you recognize that document, Ms. Russell—

A. Yes, I do.

Q. In that written statement on August—

THE COURT: Now, wait a minute. I understand the objection now. Counsel, approach.

* * *

You can't just hand her a document and tell her it's (inaudible).

[DEFENSE COUNSEL]: (Inaudible).

[PROSECUTOR]: Thank you.

* * *

BY [DEFENSE COUNSEL]

Q. Ms. Russell, do you remember in your written statement saying that you saw Gary Howard stabbing your husband?

A. (No audible response.)

Q. And in that written statement, you referred to Curtis Howard—strike that. You didn't know my client by his first name, correct?

A. Correct.

Q. You knew him as Gary Howard's brother?

A. Correct.

Q. In that written statement, you said that you saw Gary Howard stabbing your husband?

[PROSECUTOR]: Objection.

THE COURT: Sustained. Strike it. Disregard Counsel's statement.

BY [DEFENSE COUNSEL]:

Q. In your written statement, did you refer—didn't you refer to my client as Gary Howard's brother?

A. Correct.

Q. And in your written statement, didn't you say that you saw another man stabbing your husband?

A. I saw—yes—

[PROSECUTOR]: Objection.

THE COURT: Sustained. Strike it. Disregard the comment of Counsel.

Appellant now claims that the trial court erred in preventing him from introducing Timica Russell's written statement to Detective Golas into evidence, both substantively and for impeachment purposes, when he satisfied the foundational requirements for doing so under Rules 5-802.1(a) and 5-616(b)(1), respectively. As the State points out, however, the court cannot be said to have prevented appellant from introducing the written statement into evidence, as he never offered it for admission into evidence.

Defense counsel may have attempted to lay the foundation for the admission of Timica Russell's written statement in questioning her, but when the trial court sustained the State's objection to some of defense counsel's foundational questions, he made no effort to proffer the contents of the statement or to offer it into evidence for any purpose; he simply moved on to another line of questioning. Because the trial court was not asked, nor given the opportunity, to rule on the admission of the written statement for any purpose, there is nothing for this Court to review, and appellant's claim of error on this ground must fail. *See* Rule 8-131 ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

IV.

Appellant also avers that the evidence adduced by the State is insufficient to sustain his convictions for attempted murder and conspiracy to commit first-degree assault, arguing, as he did below, that there had been no proof of his intent to kill Jason Russell (attempted murder) and no showing of a concerted action or agreement with Gary (conspiracy).

Ordinarily, our appellate courts review the sufficiency of the evidence in a jury trial by

> asking whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cox v. State,* 421 Md. 630, 656–57, 28 A.3d 687, 702–03 (2011) (citations and internal quotations marks omitted).
>
> "In determining whether evidence was sufficient to support a conviction, an appellate court 'defer[s] to any possible reasonable inferences [that] the trier of fact could have drawn from the . . . evidence[.]'" *Jones v. State,* 440 Md. 450, 455, 103 A.3d 586, 589 (2014) (quoting *Hobby v. State,* 436 Md. 526, 538, 83 A.3d 794, 801 (2014)). "We defer . . . and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers,* 417 Md. 449, 466, 10 A.3d 782, 791–92 (2010) (citing *State v. Smith,* 374 Md. 527, 557, 823 A.2d 664, 682 (2003)). In *Jones v. State,* we stated:
>
> > In performing its fact-finding role, the trier of fact decides which evidence to accept and which to reject. Therefore, in that regard, it is not required to assess the believability of a witness's testimony on an all or nothing basis; it may choose to believe only part, albeit the greatest part, of a particular witness's testimony, and disbelieve the remainder.

> 343 Md. 448, 460, 682 A.2d 248, 254 (1996) (citing *Muir v. State,* 64 Md. App. 648, 654, 498 A.2d 666, 668–69 (1985)).

Grimm v. State, 447 Md. 482, 494–95 (2016).

The same standard applies to all criminal cases, including those resting upon circumstantial evidence. *Handy v. State*, 175 Md. App. 538, 562 (2007). "'Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities.'" *Mangum v. State,* 342 Md. 392, 400 (1996) (quoting *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984)).

Pursuant to Md. Code (2002, 2012 Repl. Vol.), §2-204(a) of the Criminal Law Article ("CL"), a "murder that is not in the first degree . . . is in the second degree." Although the statute does not define second-degree murder more specifically, Maryland case law recognizes four types of second-degree murder: 1. The killing of another person, other than by poison or lying in wait, with the intent to kill but without the deliberation and premeditation required for first-degree murder; 2. The killing of another person with the intent to inflict such serious bodily harm that death would be the likely result; 3. Depraved heart murder, that is, a killing resulting from the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed; and 4. Murder committed in the perpetration of a felony other than those enumerated in the first-degree murder statutes. *Jones v. State*, 222 Md. App. 600, 610,

cert. granted, 444 Md. 638 (2015). In this matter, the jury was instructed as to the intent to kill modality of attempted second-degree murder.[10]

To be guilty of the crime of attempt, a defendant "must possess 'a specific intent to commit a particular offense' and carry out 'some overt act in furtherance of the intent that goes beyond mere preparation.'" *Harrison v. State*, 382 Md. 477, 488 (2004) (quoting *State v. Earp*, 319 Md. 156, 162 (1990)). For attempted second-degree murder, the State must prove that the defendant took a substantial step toward killing the victim with a specific intent to kill. *Id*. at 488-89.

Appellant argues that there is no evidence that he committed any offensive touching of Jason Russell and that, even under an accomplice liability theory, the evidence did not show that Gary possessed the intent to kill Russell and that appellant aided and/or abetted him. At most, he claims, the evidence shows that Gary had the intent to cause bodily harm

[10] The court's instruction on the charge of attempted second-degree murder was:

> Attempted second degree murder. Attempted second degree murder is a substantial step beyond mere preparation toward the commission of murder in the second degree. Second degree murder does not require premeditation or deliberation. In order to convict the defendant of attempted murder in the second degree, the State must prove 1) that the defendant took a substantial step beyond mere preparation toward the commission of the crime, murder in the second degree; 2) that the defendant had the apparent ability at that time to commit the crime of murder in the second degree; and 3) that defendant actually intended to kill Jason Russell.

The jury was also instructed that it could convict appellant as an accomplice even if he had not personally committed the acts that constituted the crimes, so long as he "aided, counseled, commanded or encouraged the commission of the crime or communicated to a primary actor in the crime that he was ready, willing and able to lend support if needed."

to Russell, which is not enough to support a conviction of attempted second-degree murder under the court's instructions.

Because few defendants announce their intent to kill to witnesses, we look to other factors to discern whether the defendant had an intent to kill. *Pinkney v. State*, 151 Md. App. 311, 332 (2003). For example, our courts have held that a jury is justified in finding that a defendant had a specific purpose to kill when he shot the victim several times at point blank range. *Id*. at 333 (citing *Cummings v. State*, 223 Md. 606 (1960)). In other words, when a defendant's behavior so clearly involve actions that are likely to bring about death, it speaks for itself with regard to willfulness. *Id*.

Here, the State presented evidence that before confronting Russell, appellant and his brother armed themselves with the "sharp" and "shiny" objects Timica Russell saw them holding. Gary punched Russell while appellant moved behind him, so Russell was required to fight off two assailants, one of whom he could not see. Timica saw appellant holding a sharp object, and Russell felt a sharp pain in his back, while he believed appellant was behind him. He was also punched and kicked to the point of unconsciousness and regained consciousness at Shock Trauma with nine stab wounds, two collapsed lungs, an injured spleen and diaphragm, and numerous bruises and abrasions, including a distinct shoe print on his face.

It is always the jury's function to decide which inferences to draw from proven facts. *Anderson v. State*, 227 Md. App. 329, 348 (2016). If the jury believed the Russells' testimony, it rationally could have concluded that in arming themselves with sharp objects before confronting Russell, stabbing Russell numerous times in his torso near vital organs,

punching Russell, and stomping on his head even after he was down on the ground in a fetal position, both appellant and Gary demonstrated a specific purpose and intent to kill.[11] In addition, Stukes's testimony that appellant told him that he stopped stabbing Russell only after he believed the man was dead lends support to the premise that appellant intended to kill and thought he had succeeded.

Viewing the evidence in a light most favorable to the State, there is nothing that persuades us that the jury acted unreasonably or erred in its ultimate decision that appellant committed attempted second-degree murder.

A criminal conspiracy "'consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means.'" *Carroll v. State,* 428 Md. 679, 696 (2012) (quoting *Khalifa v. State*, 382 Md. 400, 436 (2004)). To sustain a conviction of conspiracy, the State is not required to prove the existence of a formal agreement, but it must prove beyond a reasonable doubt that an agreement was formed between the parties. *Id.* at 696-97. Circumstantial evidence is sufficient to prove a conspiracy if the evidence creates an inference that a "common design" existed between the parties. *Alston v. State,* 177 Md. App. 1, 42 (2007), *aff'd*, 414 Md. 92 (2010). The "concurrence of actions by the co-conspirators on a material point is sufficient

[11] It is of no moment that no witness testified that he or she actually saw appellant beat or stab Russell. From Russell's testimony, the jury reasonably could have inferred appellant stabbed him, and even if it did not, several witnesses testified that appellant was with Gary, "over" Russell, while Gary beat him. If the jury found he acted in concert with his brother, appellant would be equally guilty as Gary as an accomplice. *Mumford v. State*, 19 Md. App. 640, 643-44 (1974).

to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy." *Acquah v. State,* 113 Md. App. 29, 50 (1996).

The undisputed evidence in this matter showed that after Russell threatened to have Gary's girlfriend's car towed if Gary did not move it, appellant and Gary approached Russell together from their house. Both men kept their hands out of sight, but each was apparently holding a "shiny" and "sharp" object with which he had armed himself in anticipation of confronting Russell. Gary immediately punched Russell in the face, while appellant apparently moved behind Russell, which the jury reasonably could have inferred was a move calculated by the brothers to act in concert to force Russell to try to defend himself from the front and the back. Although there was no evidence that appellant and Gary overtly made an agreement to attack Russell, based on the evidence, the jury reasonably could have inferred such an agreement, and the evidence was sufficient to prove conspiracy to commit first-degree assault beyond a reasonable doubt.

V.

Finally, appellant avers that the trial court improperly required, as a condition of probation upon his release from prison, that he not be "found in, or near Pioneer City," the site of the attack on Russell, but also appellant's own home. In banning him from his neighborhood, appellant asserts, the court imposed an illegal condition of probation, which he may challenge pursuant to Maryland Rule 4-345(a).[12]

[12] Rule 4-345(a) provides that the court "may correct an illegal sentence at any time." A condition of probation is part of the punishment for the crime. *Walczak v. State,* 302 Md. 422, 426 n. 1 (1985), *abrogation on other grounds recognized by Savoy v. State,*

At sentencing, after imposing a prison term upon appellant, the trial court added conditions to his five-year probation upon his release from prison, to include: 1. A fine of $5000 on the charge of reckless endangerment; 2. Payment of court costs in the amount of $305; 3. Provision of a DNA sample; 4. Submission to random urinalysis; 5. Enrollment into any education program as ordered by the probation officer; 6. Submission to mental health treatment; 7. No contact with Jason Russell; 8. No possession of a handgun; and 9. No presence in or near Pioneer City. Appellant did not object to the imposition of the conditions of probation, but he is permitted to argue the illegality of a sentence on appeal even in the absence of a timely objection at trial. *Chaney v. State*, 397 Md. 460, 466 (2007).

The Court of Appeals explained the derivation and purpose of probation in *Meyer v. State*, 445 Md. 648, 679–80 (2015):

> Placing an individual on probation is a judicial act that arises out of the Judiciary's inherent sentencing function. *DeLeon v. State,* 102 Md. App. 58, 74, 648 A.2d 1053, 1060–61 (1994); *see also Simms v. State,* 65 Md. App. 685, 688–89, 501 A.2d 1338, 1340 (1986). It is well established that probation is considered to be a matter of grace and an act of clemency toward one who has violated the law. *Harrison–Solomon v. State,* 442 Md. 254, 286, 112 A.3d 408, 428 (2015); *see also Scott v. State,* 238 Md. 265, 275, 208 A.2d 575, 580 (1965). Probation and its terms are derived from statutory authority. *Bailey v. State,* 355 Md. 287, 293, 734 A.2d 684, 687 (1999). Pursuant to Criminal Procedure Article § 6–221, a court may, upon judgment of conviction, 'suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper.'
>
> While a trial court has broad authority to impose conditions of probation, this power is not unlimited. *Bailey,* 355 Md. at 294, 734 A.2d at 687. One such limitation is that the conditions of probation must be reasonable and have a

336 Md. 355 (1994). Therefore, "'an illegal condition of probation can be challenged as an illegal sentence.'" *Goff v. State*, 387 Md. 327, 340 (2005) (quoting *Walczak*, 302 Md. at 426 n.1).

> rational connection to the offense. *Brown v. State,* 80 Md. App. 187, 198, 560 A.2d 605, 610 (1989). The condition of probation must also be constitutional. *Kaylor v. State,* 285 Md. 66, 70, 400 A.2d 419, 422 (1979). In furtherance of good behavior and public safety, the trial court may impose conditions upon the defendant's probation. As long as the defendant abides by these conditions, he will retain his liberty. *Gibson v. State,* 328 Md. 687, 690, 616 A.2d 877, 878 (1992). As discussed, probation is not a matter of entitlement, but rather, it is a form of punishment that allows an offender to retain his or her liberty. *Bailey v. State,* 327 Md. 689, 697–98, 612 A.2d 288, 292 (1992). Therefore, a defendant may be required to comply with a standard of conduct that limits his or her liberties to help the defendant avoid incarceration, become a productive member of society, and promote public safety. *Turner v. State,* 307 Md. 618, 624, 516 A.2d 579, 582 (1986).

In *Hudgins v. State,* 292 Md. 342, 348 (1982), the Court recognized that a condition of probation is unenforceable if it is "so amorphous that it is not reasonable to say that the defendant's complained of action was regulated by the standard of conduct imposed by the sentencing judge. . . ." In our view, the condition that appellant not be found in "or near" Pioneer City is amorphous to that degree, as "near" is an imprecise term, undefined by the trial court. It is unclear whether appellant would violate the terms of his probation if he were found, for example, within one mile, or ten miles, or 25 miles of Pioneer City.

In addition, the condition that he not be found in or near Pioneer City after his release from prison interferes with appellant's ability to return to his home and may be considered improper "banishment." *See, e.g., Bird v. State*, 231 Md. 432, 438 (1963) ("the texts are in accord with the more recent weight of authority holding that a sentence of banishment or the suspension of a sentence conditioned on banishment is void"); *Finnegan v. State*, 4 Md. App. 396, 404 n. 3 (1968) ("While the conditions of probation are usually within the discretion of the trial court, its power to impose conditions is not unlimited. For example, the suspension of sentence conditioned on banishment is beyond its power and

void."). Moreover, the broad condition of probation, presumably designed to keep appellant away from the victim of his crimes, unreasonably went beyond what was required to keep Russell safe from appellant, as the court also imposed a condition of no contact with Russell upon appellant, and it was undisputed that the Russell family had moved out of Maryland by the time of sentencing, largely as a means of placing distance between them and the Howard family.

For these reasons, we conclude that the condition of probation that appellant not be found in or near Pioneer City upon his release from prison is illegal. We therefore remand to the trial court with instructions to amend appellant's commitment record and probation order to reflect the deletion of that condition.

CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY WITH AN ORDER FOR THAT COURT TO AMEND APPELLANT'S COMMITMENT RECORD AND PROBATION ORDER IN ACCORDANCE WITH THIS OPINION; JUDGMENTS AFFIRMED; COSTS ASSESSED 1/5 TO ANNE ARUNDEL COUNTY AND 4/5 TO APPELLANT.