UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0632

September Term, 2015

RYDELL LEE ESTEP

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 6, 2016

*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.

Rydell Lee Estep shot and killed 16-year-old Jericka Chambers over a bottle of tattoo ink. In September 2011, a jury in the Circuit Court for Prince George's County convicted him. He appealed, and we reversed the convictions and remanded for reasons not at issue here.[1] Mr. Estep was re-tried, convicted again, and appeals anew. In this appeal, he challenges the court's decisions to admit the testimony of an unavailable medical examiner and to instruct the jury regarding flight from the scene. He also takes issue with portions of the State's rebuttal argument, the court's prohibition against recross-examination, and his sentence. This time, we affirm.

I. BACKGROUND

The underlying story of the crimes at issue begins with a plan to take the eventual victim to get a tattoo:

> On May 31, 2010, Ms. Chambers and a friend, Brittany Bell, were walking toward an apartment in their Greenbelt housing complex, where Ms. Chambers planned to get a tattoo.[] According to Ms. Bell, the young women stopped along the way at the home of [Mr. Estep]'s brother Darnell,[2] and both he and [Mr. Estep] joined them. One of the Estep brothers (it's not clear which) had a tattoo gun, Ms. Chambers had a bottle of tattoo ink, and the group headed together to another apartment, where someone else was to use the gun to tattoo Ms. Chambers.
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> As the group walked, [Mr. Estep] and Ms. Chambers began arguing about the ink and appellant took the bottle from her. As Ms. Chambers spoke with Darnell, she tried to get the ink back from [Mr. Estep]; [he] then came up next to her and put a handgun to her head. She "smacked" the gun away, and

[1] *Estep v. State*, No. 2045, Sept. Term 2011 (filed Aug. 15, 2013) ("*Estep I*").

[2] We refer (then and now) to Darnell Estep by his first name to avoid confusing him with his twin brother.

appellant put it back up to her head and shot her. Ms. Chambers fell to the ground; later on, she was taken from the scene to Prince George's County Hospital Center and remained unconscious for three days until she died, on June 3, 2010.

After he shot Ms. Chambers, [Mr. Estep] pointed the gun at Ms. Bell and chased her around a corner. Ms. Bell testified that he stopped and said, "[S]top, bitch, you're going to snitch, I know where you live at." Although later that day, when questioned by law enforcement officers, Ms. Bell denied seeing anything, she returned to the police station the next day and gave a new statement, and ultimately identified [Mr. Estep] as the shooter.

The State also called Tevon Wright, a twenty-one-year-old who had been visiting his grandmother at her apartment in the same complex on the day of the shooting. Mr. Wright testified that he saw [Mr. Estep] chasing Ms. Bell around a corner and heard him say, "If you say something, I'm going to kill you."

Darnell testified in the State's case-in-chief that he was with Ms. Chambers and Ms. Bell on the evening of May 31, but he claimed that [Mr. Estep] was not with them. He also claimed that he was around the other side of a building when he heard the gunshot that took Ms. Chambers's life. As we discuss in greater detail below, the State established at trial that Darnell had previously informed detectives in a recorded interview that [Mr. Estep] *was* with them that evening, that Darnell heard the gunshot behind him as the group walked along, and that he turned around to see his brother holding a gun. Over [Mr. Estep]'s objection at trial, the State introduced an excerpt of Darnell's videotaped interview.

The State also called Cheryl Birdow, [Mr. Estep] and Darnell's mother, who testified that [Mr. Estep] left the Greenbelt area right after the shooting, and cut his hair not long after. She testified that her sons left her house on the afternoon of May 31, 2010, and she did not see them again until several days later. She volunteered in the course of her testimony on direct examination by the State (not in response to a question, but spontaneously) that she told [Mr. Estep] not to return to her house because it had been "shot up." She told the jury that on

> the date of the murder, [Mr. Estep] had long hair, but that when she saw him next, it had been cut. Counsel for [Mr. Estep] explored this point on cross-examination, and Ms. Birdow explained that [Mr. Estep] got his hair cut because of an upcoming job interview and because he had to see "his counselor." On redirect, though, she conceded that she did not know whether [Mr. Estep] had arranged any specific job interview.
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> * * *
>
> The State concluded its trial presentation with two law enforcement witnesses. Dr. Ana Rubio, an Assistant Medical Examiner for the State, performed the autopsy on Ms. Chambers and testified that the bullet entered on the left side of her forehead.[3]

Estep I, slip op. at 1-4 (footnotes omitted).

The jury in the first trial found Mr. Estep guilty of first-degree murder, first-degree assault, and two counts of use of a handgun in the commission of a felony or violent crime. On appeal, though, we were constrained to reverse Mr. Estep's convictions because of errors in the way that notes from the jury during deliberations were handled, and we remanded for further proceedings. Mr. Estep was re-tried on April 27-29, 2015 and again found guilty of first-degree murder, first-degree assault, and two counts of use of a handgun. The court sentenced him to life imprisonment without the possibility of parole, plus an additional thirty years. We will discuss additional facts as appropriate.

[3] In our first opinion, we also noted that Dr. Rubio testified that the "small abrasions around the entrance wound were caused by gunpowder stippling, a sign that the weapon had been held quite close to the skin—and specifically that the gun barrel was less than two feet from Ms. Chamber's [sic] face when appellant fired it." *Estep I*, slip op. at 4. At the first trial Officer Beatrice Sullivan also testified and introduced a cartridge casing she had recovered from the scene. *Id*.

II. DISCUSSION

Mr. Estep raises six issues on appeal.[4] He contends *first* that the trial court erred both in finding that Dr. Ana Rubio, the medical examiner, was unavailable and in permitting her testimony from the first trial to be read into the record at the second. *Second*, Mr. Estep argues that the court erred in giving a flight instruction; *third*, in permitting improper prosecutorial rebuttal; and *fourth*, by prohibiting recross-examination for which he urges us to conduct a plain error review. *Fifth*, Mr. Estep argues that his sentence must be vacated because, he believes, the court believed it was bound by the sentence from the first trial. And *finally*, Mr. Estep contends that his sentence of life imprisonment without

[4] In his brief, Mr. Estep phrased the Questions Presented as follows:

1. Did the trial court err in finding that the medical examiner was unavailable and in permitting her prior testimony to be read into the record under Maryland Rule 5-804?

2. Did the trial court err in giving a flight instruction?

3. Did the trial court err in permitting improper prosecutorial rebuttal argument?

4. Did the trial judge commit plain error in prohibiting any recross-examination, where this Court has already held in a reported decision that the same trial judge's practice is erroneous?

5. Must Appellant's sentence be vacated in its entirety because the sentencing court failed to exercise its discretion by believing that it had no choice but to impose the same sentence it imposed after the first trial?

6. Must Appellant's sentence of life imprisonment without the possibility of parole for murder be vacated?

parole must be vacated because the governing statute, as amended by legislation repealing Maryland's death penalty, entitled him to elect sentencing by jury. We find no reversible error.

A. The Trial Court Did Not Err In Finding The Medical Examiner Unavailable To Testify.

Mr. Estep argues *first* that the trial court erred in finding that Dr. Rubio, the medical examiner who performed the autopsy on Ms. Chambers, was unavailable to testify at his second trial, then allowing her testimony from the first trial to be read into the record. And all else being equal, Dr. Rubio's testimony from the first trial would be hearsay in the second trial and, therefore, inadmissible. Under Maryland Rule 5-804(b)(1), though, a court may admit "[t]estimony given as a witness in any action or proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." There is no dispute that Dr. Rubio's testimony satisfies this definition—the question is whether the State satisfied its burden of proving the prerequisite, *i.e.*, that Dr. Rubio was in fact unavailable to testify at the second trial. Md. Rule 5-804(a)(4)-(5). We review the court's legal decisions regarding hearsay testimony *de novo*, but review deferentially the findings of fact on which the hearsay determination relies. *Vielot v. State*, 225 Md. App. 492, 500-01 (2015) (citing *Gordon v. State*, 431 Md. 527, 536-37 (2013)).[5]

[5] Mr. Estep seeks to "preserv[e] for further review" his contention that we utilized the wrong standard of review in *Vielot*, and that *Gordon v. State*, 431 Md. 527, 536 (2013), directs *de novo* review of all elements of a court's decision to admit hearsay.

At the beginning of the second day of the re-trial, the State informed the court that Dr. Rubio would be unavailable to testify. Defense counsel asked for additional proof that this was true:

> [THE STATE]: The medical examiner who testified in the first trial, Ms. Rubio, unfortunately, is suffering from a very severe illness which is preventing her from continuing her job with the medical examiner's department. She has retired. She is unavailable to testify based on her physical condition. We would ask the court, pursuant to Rule 5-804(a)(5)[,] to determine that she is an unavailable witness. If the court is inclined to do so, we would be moving to have her former testimony read into the record.
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> THE COURT: The question, number one, is do you accept the factual representation?
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> [DEFENSE COUNSEL]: I would like to see some verification of that.
>
> (Pause.)
>
> THE COURT: I guess he just threw the ball back into your court.
>
> [THE STATE]: We have some communications from Ms. Rubio that we will provide to [defense counsel] so he can feel more comfortable she is, unfortunately, dying of a terminal illness.

A short time later, the court accepted the State's representation that Dr. Rubio was gravely ill and unavailable to testify. Defense counsel asked for and was granted a continuing objection to the introduction of Ms. Rubio's prior testimony, which was subsequently read into the record.

Mr. Estep argues that the trial judge erred in relying on the State's representations about Dr. Rubio's unavailability rather than requiring more rigorous proof; that "the State's

proffer as to the witness's unavailability was insufficient as a matter of law under Md. Rule 5-804"; and that, by accepting counsel's assertions, he says, "the court abandoned its role as evidentiary gatekeeper." His argument seems to flow, though, from the premise that Md. Rule 804(a) requires a specific quantum of proof that the witness is unavailable. It doesn't. In *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 643 (1997), the trial court accepted a proffer from counsel as to the unavailability of a witness: "I rely on counsel and if counsel makes a representation, as far as I am concerned, counsel's word is counsel's bond . . . ." We affirmed, and observed that "[a]s officers of the court, lawyers occupy a position of trust and our legal system relies in significant measure on that trust." *Id*.

Whether or not Dr. Rubio was unavailable is a question of fact—a question of fact that leads to a decision of law, but a factual question nonetheless. The defense asked in the trial court for documentation of Dr. Rubio's illness, but has never—then or now—expressed or cast any actual doubt on the fact or severity of Dr. Rubio's illness. *Vielot*, in contrast, presented a closer question: the witness had recently had shoulder injury, and the parties disputed whether she could travel to Maryland (from New Jersey) to testify. The court ultimately relied on a letter from the witness's doctor and found her unavailable. 225 Md. App. at 503-04. In *Vielot*, then, there was a factual dispute for the court to resolve. Here, there wasn't, which means that we would have to find counsel's representation insufficient as a matter of law to support the court's unavailability finding. *Commercial Union* holds otherwise, and we discern no error in the court's decision to allow the State to read Dr. Rubio's testimony into the record at Mr. Estep's second trial.

B. The Trial Court Did Not Err In Giving A Flight Instruction.

Mr. Estep argues *next* that the trial court abused its discretion by giving a flight instruction.[6] He contends that the facts proved only that he departed the scene, not a motivation to flee that could justify this instruction. We review a trial court's decision to give a jury instruction for abuse of discretion. *Conyers v. State*, 354 Md. 132, 177 (1999).

A flight instruction is appropriate when the facts allow the jury to find or infer that the defendant's guilt or involvement motivated his flight from the scene:

> [F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

[6] The instruction tracked Maryland Criminal Pattern Jury Instruction 3:24:

> A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide that there is evidence of flight, you then must decide whether this flight showed a consciousness of guilt.

Mr. Estep does not take issue with the specific language of the instruction, but rather the court's decision to give one at all.

Thompson v. State, 393 Md. 291, 312 (2006). Mr. Estep contends that the evidence fell short with regard to the first of these inferences—that is, that his behavior does not suggest flight.

We disagree. The trial testimony revealed that on May 31, 2010, the date of the murder, Mr. Estep resided in the Springhill Lake apartment complex, but didn't return home after that night. His mother, Ms. Birdow, acknowledged that she had testified before the grand jury that she did not see Mr. Estep again until the following Saturday, and she testified that Mr. Estep had cut his hair by the time she next saw him. Darnell testified that Mr. Estep left the Greenbelt apartments and never returned. And an expert in cell phone mapping testified that over the three-hour period following the shooting, Mr. Estep's phone accessed cell towers that were increasingly farther away from the scene of the crime.

Mr. Estep cites *State v. Shim*, 418 Md. 37 (2011), *abrogated on other grounds by Pearson v. State*, 437 Md. 350 (2014), and *Hoerauf v. State*, 178 Md. App. 292 (2008), for the proposition that mere departure from the scene does not constitute flight absent additional circumstances. That principle is true as far as it goes, but those cases are not this case. In *Shim*, the victim worked the nightshift as a security guard at a FedEx facility. 418 Md. at 40. The evidence suggested the murder occurred at 2:30 AM, but the body was not found for several hours, *id*. at 41, and there was no evidence of flight. *Id*. at 41-42. In *Hoerauf*, the defendant simply left the crime scene prior to the arrival of law enforcement officers. 178 Md. App. at 298. At the time of defendant's departure, arrival of the police was not imminent, *id*. at 326, and when ultimately apprehended, the defendant did not flee. *Id*. But in this case, there was more: Mr. Estep not only left the scene, but stayed away

from his home for an extended period of time and altered his appearance before his mother next saw him. The evidence above and beyond Mr. Estep's mere departure from the scene would allow a jury to infer that he fled and that his flight reflected consciousness of his guilt.

Mr. Estep characterizes the flight instruction as implicitly telling the jurors that enough evidence existed to make all four inferences, but the language of the instruction refutes this on its face. The instruction specifically instructs the jury that it must determine whether the defendant fled and, if so, whether his flight showed a consciousness of guilt. *See supra* note 6. And the instruction begins by reminding the jury that it would be inappropriate to overly rely on flight in reaching a determination of guilt. *Thompson*, 393 Md. at 307 (quoting *Miller v. United States*, 320 F.2d 767, 773 (D.C. Cir. 1963) (describing the purpose of the flight instruction as "to caution against the dangers of drawing conclusions from superficial consideration of experience")). On this record, the court did not abuse its discretion in granting the State's request for a flight instruction.

C. The State's Rebuttal Argument Was Not Inappropriate.

Mr. Estep argues *third* that the trial court abused its discretion by allowing the prosecutor to argue facts not in the record concerning flight. Sergeant Jordan Swonger, an expert in cell phone mapping, testified about the general location of a mobile phone in relation to certain cell towers. **(**During direct examination, the State introduced several maps that indicated the location of cell towers used by a phone number ending in 2787. Sergeant Swonger also testified that the phone records only indicated the general area where a mobile phone was located, and that the technology does not allow them to pinpoint

the precise location. Mr. Estep acknowledges that Sergeant Swonger carefully avoided alleging that Mr. Estep fled, but contends that the State made the (inappropriate) leap from cell tower evidence to flight in its rebuttal closing argument:

> [THE STATE]: The detective [sic] was very honest, he said I can't say he was at Springhill Lake. I'm saying he was in the area of Greenbelt for a period of time, 29 communications, *and then he fled*. *When he fled*—
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> [DEFENSE COUNSEL]: Objection.
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> THE COURT: Basis?
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> [DEFENSE COUNSEL]: Characterization of the detective's [sic] testimony.
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> THE COURT: Overruled.

(Emphasis added.)

Trial courts have broad discretion to manage closing arguments, and we disturb their management of counsel's arguments only where the argument is "both 'manifestly wrong and substantially injurious.'" *Thomas v. State*, 301 Md. 294, 309 (1984) (quoting *Huffington v. State*, 295 Md. 1, 14 (1982)); *see Ingram v. State*, 427 Md. 717, 726 (2012) (holding that a trial court is in the best position to assess the relation between a closing argument and proffered evidence). This argument was neither, most notably because the prosecutor did not, as we read it, argue that Sergeant Swonger testified that Mr. Estep fled. Although the transition may seem awkward, we agree with the State that, read in context, the prosecutor did not put those words in the Sergeant's mouth or ascribe to the Sergeant the conclusion that Mr. Estep fled. *Cf. Jones v. State*, 217 Md. App. 676, 692-98 (2014) (reversing conviction where prosecutor relied on a fact not in evidence to refute defendant's

theory of the case). Instead, the prosecutor was recounting the Sergeant's testimony—which Mr. Estep doesn't challenge—and arguing from it that the evidence supported a finding that Mr. Estep fled the scene.

D. Plain Error Review Of The Court's Policy Against Recross Is Not Warranted.

Fourth, Mr. Estep contends that the circuit court erred when it announced a policy prohibiting recross-examination during trial, in defiance of our holding that "[b]ecause of the great variation in circumstances that can arise during trials, it is not appropriate for a trial judge to determine before ever hearing the redirect examination that no recross examination will be permitted." *Thurman v. State*, 211 Md. App. 455, 470 (2013). He acknowledges that he did not object to the trial court's policy, but asks us to exercise plain error review and reverse his convictions on this basis.

Appellate courts generally will not consider issues on appeal that the appellant failed to preserve at trial. Md. Rule 8-131(a) ("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 . . . ."). This preservation rule prevents unfairness by "requiring that all issues be raised in and decided by the trial court." *State v. Rich*, 415 Md. 567, 574 (2010) (quoting *Conyers v. State*, 354 Md. 132, 150 (1999)); *Yates v. State*, 202 Md. App. 700, 720 (2011), *aff'd*, 429 Md. 112 (2012). We do, however, recognize one legitimate exception to this general rule: plain error. *See, e.g.*, *Lawson v. State*, 389 Md. 570, 589-605 (2005) (finding plain error when the State made numerous inflammatory remarks, referenced facts not entered as evidence, and invoked the "Golden Rule" argument in its

closing statement). The plain error doctrine is based on the premise that some mistakes at trial are so obvious, so egregious, and so greatly affect the fairness of a trial that it would be unjust to deny the party an appeal. But the standard for when we may grant plain error review is extremely high, and we rarely grant it. *See Hammersla v. State*, 184 Md. App. 295, 306 (2009) (holding that our use of plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon" (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003))).[7] We undertake plain error review only if the mistake "'vitally affect[ed] a defendant's right to a fair and impartial trial,'" *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), which we usually limit to those circumstances that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial," *State v. Hutchinson*, 287 Md. 198, 203 (1980).

When considering the possibility of plain error review, we look first for an error, defect, or some deviation from a legal rule. After direct examination, the trial judge informed the parties:

> I advise the parties that I do not permit recross after redirect. Therefore, if there is any problem with the scope of the question brought up in redirect, please make your objection in a timely manner otherwise I deem it that you are waiving the scope objection. That applies to all witnesses throughout the trial.

[7] As the Court of Appeals explained in *Chaney v. State*, plain error review "is a discretion that appellate courts should rarely exercise, as 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," thereby ensuring "that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." 397 Md. 460, 468 (2007).

This policy is nearly identical to the policy that we deemed an abuse of discretion in *Thurman v. State*, 211 Md. App. 455 (2013).[8] To the extent, then, that the court announced and followed this policy categorically, it erred. *See Gunning v. State*, 347 Md. 332, 352 (1997) ("[A] court errs when it attempts to resolve discretionary matters by the application of a uniform rule, without regard to the particulars of the individual case.").

Even so, before we will consider exercising our discretion to review for plain error, the error asserted must have affected Mr. Estep's substantial rights—that is, it must have affected the outcome of the trial—and he hasn't identified a single instance during the trial in which he sought unsuccessfully to ask questions on recross, or even where, with twenty-twenty hindsight, he wishes he had. The court did invite the parties to raise scope objections during redirect, and nobody did; had counsel done so, we could assess whether the inability to ask questions might have prejudiced him. Instead, we are left to speculate about whether defense counsel would have asked recross questions, and then whether those questions, if asked, would have made a difference. The court should have entertained the possibility of allowing recross when appropriate, but we decline to undertake plain error review on a broad-brush basis.

[8] "I advise the parties that I do not permit recross after redirect. So if there's any problem with the scope of a question brought up in redirect, please make your objection in a timely manner or I'm going to deem that you are waiving the scope objection. That applies for all witnesses throughout this trial." *Thurman*, 211 Md. App. at 466.

E. Sentencing Was Appropriate.

Mr. Estep's *fifth* claim is that the lower court erroneously believed it could not deviate from the sentence it imposed after the first trial. He draws this conclusion from the court's statement after the jury rendered its verdict that it did not need to hear from the State:

> I wasn't really going to hear from the State. I assume they are asking me to impose the sentence that happened in the first trial, which is all I can do, and giving him credit for the time that he has already served.

Again, this claim is unpreserved because Mr. Estep failed to object at the time. Md. Rule 8-131(a). But even if Mr. Estep had lodged a timely objection, his claim would be without merit. Ordinarily, the appellate court "will presume that the trial judge knows the law and applies it properly . . . ." *Mobuary v. State*, 435 Md. 417, 440 (2013) (quoting *Thornton v. State*, 397 Md. 704, 736 (2007)). In fact, the Court of Appeals has recognized that "[t]he most fundamental principle of appellate review [] is that the action of a trial court is presumed to have been correct and the burden of rebutting that presumption is on the party claiming error first to allege some error and then to persuade us that the error occurred." *State v. Chaney*, 375 Md. 168, 183-84 (2003) (internal quotations and citation omitted). As a result, "error is never presumed by a reviewing court, and we shall not draw negative inferences from [a] silent record." *Mobuary*, 435 Md. at 440 (quoting *Chaney*, 375 Md. at 184).

Immediately after the judge's comment, the prosecutor advised that the State "would not be making a presentation." The judge replied, "I thought that might be the

case." Although the defense argues that the judge's "all-I-can-do" comment suggests the court believed Mr. Estep's sentence a foregone conclusion, it could just as easily be read as the court acknowledging (correctly, since there is no greater sentence than life without parole) that it could not exceed the sentence it imposed after the last trial. Nor is it clear how Mr. Estep could be prejudiced by the State's decision not to make a presentation at sentencing, since he remained free to argue for a lesser sentence than last time. Because Mr. Estep's argument would, if we adopted it, require us to presume that the circuit court misunderstood and misapplied the law, this is not an appropriate issue for plain error review.

F. The Trial Court Correctly Denied The Motion For Jury Sentencing.

Finally, Mr. Estep argues that because the State had filed a notice of intention to seek a sentence of life without the possibility of parole, he was entitled to elect sentencing by jury, and the circuit court erred in denying his motion for sentencing by jury. His argument is primarily a statutory one—that the language the General Assembly left behind in Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 2-304(b) of the Criminal Law Article ("CL"), after removing the parts relating to the death penalty, extended to defendants facing life without parole the sentencing by jury procedures previously reserved for capital defendants. He argues as well that once Maryland repealed its death penalty, a sentence of life without the possibility of parole is more than an enhanced sentence—it is "the harshest sentence that can be imposed in Maryland for defendants convicted of first-degree murder,"

to which the constitutional protections accorded previously to defendants facing life sentences now attach.

In the time since the briefs were filed in this case, however, we had occasion to address and reject the same arguments in *Bellard v. State*, No. 1281, Sept. Term 2014 (filed August __, 2016). As the Supreme Court's death penalty jurisprudence has long recognized, the death penalty is different, and the unique permanence of capital punishment compels procedural safeguards that other punishments do not—even punishments, such as life imprisonment without parole, that are meant to be permanent. *Bellard*, slip op. at 11-12. Although the legislation repealing Maryland's death penalty did, through apparent clerical inadvertence, create some ambiguity in the statute governing sentencing procedures in life without parole cases, *see id*. at 14-17, the structure and legislative history left no doubt that the purpose of that legislation was to repeal the death penalty, not to alter the sentencing procedures or create new rights for defendants where the State seeks life without parole:

> But we need not dig deeply into Senate Bill 276 to find its purpose. The bill's Preamble says in so many words that its purpose was "repealing the death penalty," and the Fiscal and Policy Note states that the bill "repeals the death penalty and all provisions relating to it." Fiscal and Policy Note Revised, S.B. 276 Md. at 1. Neither mentions other alterations to the sentencing authority or procedures for first-degree murder, and the provisions of the bill itself simply removed portions of the Maryland Code relating to the death penalty and replaced references to repealed language. This obviously was a complicated task, and details can—and apparently did—get overlooked. But our two alternatives are to acknowledge that subsection (b) of CL § 2-304 has become purely vestigial, or to interpolate an intention on the part of the General Assembly to create jury sentencing rights that previously didn't exist in

> non-capital first-degree murder cases. We see nothing in the purpose or language of the legislation itself that suggests any intent to expand jury sentencing to defendants facing life without parole. And although we could have stopped there, we reviewed the legislative history as well, and it too supports a conclusion that the purpose of the legislation was to repeal the death penalty, rather than alter sentencing procedures in non-capital murder cases.

Id. at 18.

From there, we rejected the other arguments that Mr. Estep raises here: that the absence of jury sentencing guidelines rendered the life without parole sentencing process unconstitutionally vague, *id*. at 19 (citing *Woods v. State*, 315 Md. 591, 602-08 (1989)), and that the elimination of the death penalty elevated life without parole to the status of an "enhanced sentence" that requires proof of additional facts beyond a reasonable doubt. *Id*. at 20-21 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000)). Again, to reach either conclusion, we would need to hold, in the face of long-standing (and controlling) precedent to the contrary, that death was not, in fact, different, or that life without parole became "different" once the once the death penalty was repealed.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.