Circuit Court for Baltimore City
Case No. 118257005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1083

September Term, 2019

RICHARD GRIER

v.

STATE OF MARYLAND

Berger,
Gould,
Wells,

JJ.

Opinion by Wells, J.

Filed: February 8, 2021

Vuai Green was shot and killed on the afternoon of August 18, 2018 while standing in the 2300 block of Harford Road in Baltimore City. With the aid of surveillance cameras from near-by stores, the police quickly arrested appellant, Richard Grier, and charged him with Mr. Green's murder. The case was tried before a jury sitting in the Circuit Court for Baltimore City.

The State's witnesses were comprised entirely of police officers and an assistant medical examiner from the Office of the Chief Medical Examiner for the State of Maryland. The latter opined that the manner of Mr. Green's death was homicide by multiple gunshots, most grievously, one delivered to the back of his head. The police officers testified about evidence collection, including collecting the surveillance videos and about the circumstances in which Mr. Grier gave a statement to the police.

In his video-taped statement, which the circuit court concluded Mr. Grier gave voluntarily, Mr. Grier admitted that he was in the 2300 block of Harford Road at the time of the shooting. He also identified himself in a surveillance video wearing a green shirt immediately before the shooting. However, he denied brandishing a handgun and killing Mr. Green.

A second surveillance video from a different location, however, seemed to show that he did. In that video, a man in a green shirt is seen pulling what appears to be a handgun from his pants pocket and firing multiple shots at Mr. Green. Mr. Green falls to the ground and a group of people nearby scatter. After Mr. Grier's recorded statement was

entered into evidence and the surveillance video was played for the jury, Mr. Grier testified that he killed Mr. Green in self-defense.

The jury convicted Mr. Grier of first-degree murder and the use of a firearm in the commission of a felony. The trial judge sentenced Mr. Grier to life imprisonment for Mr. Green's murder and 20 years, to be served concurrently, for use of a handgun in the commission of the murder.

Mr. Grier filed this timely appeal and poses three questions for us:

1. Did the circuit court err in not suppressing appellant's statement?
2. Is reversal required because appellant was not present during a critical stage of the proceedings?
3. Did the circuit court exercise discretion in sentencing appellant?

For the reasons we discuss, we perceive no error and affirm.

DISCUSSION

I. The Circuit Court Properly Admitted Appellant's Statement to the Police.

A. Parties' Contentions

Mr. Grier's first allegation is that the circuit court erred in not suppressing his statement to the police. He argues that his statement was not voluntary under Maryland's common law of voluntariness. Specifically, Mr. Grier claims that the circumstances of his interrogation, such as being 18 years of age, his level of educational attainment and being placed in "a tiny interrogation room with two homicide detectives," led to his will being overborne. The State responds, arguing that after the police advised him of his *Miranda*

rights,[1] Mr. Grier voluntarily gave a statement. The State contends that neither Mr. Grier's age, educational attainment, nor the location of the questioning, contributed to Mr. Grier's will being "overborne." In the State's view, Mr. Grier fully understood that the police wanted information about Mr. Green's death and Mr. Grier voluntarily answered their questions.

B. Standard of Review

Recently, in *Madrid v. State*, 247 Md. App. 693, 714 (2020), we reiterated the standard of review for a circuit court's denial of a motion to suppress a criminal defendant's statement to the police. There, we explained:

> When reviewing the denial of a motion to suppress evidence, "**we confine ourselves to what occurred at the suppression hearing. We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State**." *Lee v. State*, 418 Md. 136, 148 (2011) (citations and internal quotation marks omitted). "**We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous**." *Id*. (quoting *State v. Luckett*, 413 Md. 360, 375, n.3 (2010)). **The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court**. *Longshore v. State*, 399 Md. 486, 499 (2007) ("Making factual determinations, i.e.[,] resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder. In performing this role, the fact finder has the discretion to decide which evidence to credit and which to reject." (internal citations omitted)). "**We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case**." *Lee*, 418 Md. at 148–49 (quoting *Luckett*, 413 Md. at 375, n.3).

Madrid, 247 Md. App. at 714 (emphasis supplied).

[1] *Miranda v. Arizona*, 84 U.S. 46 (1966).

In Maryland, it is well-settled that "only voluntary confessions are admissible as evidence against a criminal defendant." *Lee*, 418 Md. at 158 (citing *Knight v. State*, 381 Md. 517, 531 (2004)). Indeed, under Maryland's common law, "a confession is presumptively inadmissible…." *Hof v. State*, 7 Md. 581, 595 (1993). In assessing the voluntariness of a statement generally, we have traditionally examined "the totality of the circumstances affecting the interrogation and confession." *Hill*, 418 Md. at 75 (citation omitted).

"A non-exhaustive list of factors to consider in that analysis includes the length of interrogation, the manner in which it was conducted, the number of police officers present throughout the interrogation, and the age, education, and experience of the suspect." *Williams v. State*, 375 Md. 404, 429 (2003). These factors, however, do not share equal weight in our common law analysis. Some factors, such as promises, threats or physical mistreatment, may be "decisive," indicating that the confession was coercive as a matter of law. In such cases, "the State has a very heavy burden, indeed, of proving that they did not induce the confession." *Id.* On the other hand, factors such as the length of interrogation, team or sequential questioning, the age, education, experience, or physical or mental attributes of the defendant . . . may become decisive, only in the context of a particular case—based on the actual extent of their coercive effect." *Id.* As the second group of factors pertain here, we review those circumstances that might have affected the voluntariness of Mr. Grier's statement.

As an alternate basis for reversal, Mr. Grier invokes Article 22 of the Maryland Declaration of Rights, which proclaims "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." Whether a statement is voluntary under Maryland's Declaration of Rights is analyzed similarly to the Fifth Amendment's[2] constitutional analysis. *Rodriguez v. State*, 191 Md. App. 196, 223 (2010). Under this analysis, a reviewing court will "look to all of the elements of the interrogation to determine whether the suspect's confession was given freely to the police through the exercise of free will or was coerced through improper means." *Id*. (quoting *Harper v. State*, 162 Md. App. 55, 72-73 (2005)). The same factors previously discussed should be examined by the reviewing court, such as the length of the interrogation, the manner in which the questioning was conducted, the age of the defendant, and education of the defendant, among other factors. *Williams*, 375 Md. at 429.

C. Suppression Hearing

At the suppression hearing, Detective Frank Miller of the City's Homicide Unit testified that Mr. Grier was arrested at approximately 2:00 p.m. at his home, "a few blocks away" from where Mr. Green was killed. Det. Miller said that he began the interview of Mr. Grier at 4:00 p.m. The interview took place in a "six by eight" foot room with a desk and three chairs, one of which was bolted to the floor. The interview was video and audio recorded by two cameras. Det. Miller's partner, Detective Niedermeier was also present

[2] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

and took part in the interview. According to Det. Miller, Mr. Grier was not restrained during the interview and the detectives permitted Mr. Grier to use the lavatory before the interview began.

At this point in the suppression hearing, the prosecutor played the video recording of the police interview with Mr. Grier.[3] In addition to stating his name, birthdate, home address and other personal information, Mr. Grier stated that he was in "the 10th or 11th grade, one of them. I think 10th." Afterwards, Det. Miller testified that he read to Mr. Grier "the Explanation and Advice of Rights form," a pre-printed form stating each of the *Miranda* warnings.[4] Det. Miller said that as he read each of these rights, Mr. Grier, with another copy of the form, "follow[ed] along with his pen." According to Det. Miller, Mr. Grier initialed that he understood each of the rights and acknowledged that he voluntarily wished to give a statement to the detectives without an attorney being present by placing his signature at the bottom of the form. Dets. Miller and Niedermeier then signed the same form.

[3] Within the hearing transcript, the court reporter provides a transcript of the audio portion of Mr. Grier's recorded interrogation as it was played for the suppression court.

[4] The specific warnings, taken from the hearing transcript, are: 1. You have the right to remain silent; 2. If you give up that right and choose to say something, what you say may be used against you in a court of law; 3. You have the right to have an attorney present before or during questioning; 4. If you cannot afford to hire an attorney, the court may appoint an attorney to represent you; 5. If you agree to answer questions, but later wish to stop or request an attorney, no further questions will be asked of you.

Because aspects of the recorded statement play a part in the suppression court's analysis of voluntariness, we summarize Mr. Grier's interview with the police. Det. Miller started by explaining that he was trying to figure out who was involved in the "incident that happened on Saturday around Cliftview and Harford [Roads]." Det. Miller said, "there's some video from one of the markets . . . and we're just trying to figure out if this is you[.]" Det. Miller then played the surveillance video while Mr. Grier watched. At the suppression hearing, Det. Miller testified that in the video, Mr. Grier had a green shirt "draped over his shoulder." According to Det. Miller, Mr. Grier can be seen walking along the street with a group of people near the Smile carry-out restaurant, located at the corner of Cliftview and Harford Roads. Several seconds later, another camera captured Mr. Grier, wearing the green shirt, near the victim. Det. Miller testified that during the interview, he showed Mr. Grier still photographs taken from the surveillance video. Mr. Grier identified himself as the person wearing the green shirt. Det. Miller asked Mr. Grier to place his initials beside those images.

As the recorded statement continued, Mr. Grier explained that he was with his girlfriend and went inside Smile to buy a drink and a sandwich. Mr. Grier claimed he heard gunshots and ran out of the store. At one point in the interview, he said he was unable to identify any of the other people depicted in the surveillance video, including the victim, Mr. Green. Later, Mr. Grier said he knew the victim because they were from the same neighborhood. Later still, Mr. Grier clarified that he walked past the victim. "I didn't pay him no mind[.] I walked straight past."

When Det. Miller told Mr. Grier that a different surveillance camera from Smile had captured the man in the green shirt shooting the victim in the back of the head, Mr. Grier said, "I ain't shoot that man." Mr. Grier and the detectives then left the interview room to watch the second surveillance video on a large screen monitor in an adjacent interview room. Although Mr. Grier had previously claimed he went into Smile to get something to eat, the surveillance camera seemed to show Mr. Grier outside of Smile, wearing a green shirt, walking with a group of men, leaving the group, walking up behind Mr. Green, pulling a handgun from his pocket, and firing several shots at Mr. Green. After viewing the surveillance video, Mr. Grier initially admitted that he was wearing a green shirt but claimed he did not shoot Mr. Green. Mr. Grier continued to maintain that he went into Smile to get something to eat.

Det. Miller then told Mr. Grier that he had obtained all of the video surveillance footage from Smile and nearby businesses. None of the cameras had captured Mr. Grier going into Smile. After replaying the Smile video again, Mr. Grier denied being the man wearing the green shirt.

Reviewing the surveillance video a third time, but now focusing on the people who came out of Smile, Det. Miller said that the footage did not show Mr. Grier leaving the market, as he claimed. The video did show him running behind the Smile store immediately after the shooting, away from other people who were also running. Mr. Grier explained that he was running away from the others because he did not want to get hit by gunfire. The interrogation ended shortly thereafter.

Det. Miller testified that Mr. Grier was in the Homicide Unit a total of eight hours before he charged Mr. Grier with Mr. Green's murder. At no point during the interrogation, according to Det. Miller, did Mr. Grier ask for an attorney, or say that he wished to end questioning. No other conversations took place aside from those shown in the recorded interview.

On cross-examination, Det. Miller admitted that he never told Mr. Grier why he was being interviewed. Det. Miller also acknowledged that Mr. Grier had turned 18 years old just weeks before the interview and ascertained that Mr. Grier could read and write although he was in the 10th or 11th grade. Det. Miller reiterated that after reviewing each of the *Miranda* rights, Mr. Grier voluntarily waived each right and signed the waiver of rights form.

Mr. Grier testified at the suppression hearing. He said that after the police picked him up, they told him he was going to the Homicide Unit because he was a witness to a crime. He stated that when he got to the Homicide Unit, he met with Det. Niedermeier and asked for an attorney. According to Mr. Grier, Det. Niedermeier told him that "a witness can't have an attorney." When Mr. Grier met with Det. Miller and was shown the waiver of rights form, he claimed he did not ask for an attorney at that time because he had been told that as a witness, he could not have one. Mr. Grier said that he did not understand the waiver form, but he nonetheless initialed that he understood each of the individually delineated *Miranda* rights. He testified that he signed the form and spoke to the detectives "just so I can hurry up and get out of there."

On re-direct, the prosecutor showed Mr. Grier each of the still photographs from the surveillance video that he initialed during the interview with Dets. Miller and Niedermeier. When shown his initials on each of the photographs, Mr. Grier claimed he did not recognize the handwriting. The prosecutor then showed Mr. Grier other samples of his handwriting, including letters he had written to the prosecutor with his SID number,[5] Mr. Grier denied that he had written the letters.

The State called Det. Niedermeier as a witness. He reiterated much of the same testimony that Det. Miller had given.

After hearing counsels' arguments, the court ruled from the bench that the totality of the circumstances showed that Mr. Grier's statement was voluntary.

> THE COURT: It is pretty clear from the video that there were no improper inducements or threats. [T]he police did not threaten him, they did not promise him anything, they did not promise him a deal if he talked. There's nothing – there's nothing to indicate that there was any kind of improper inducement; he wasn't threatened, he wasn't restrained, he was not – he was not told he couldn't have an attorney and – so the court finds that voluntariness standard has been met.
>
> . . . .
>
> There is zero indication that Mr. Grier did not understand what was going on.
>
> . . . .

[5] SID or State Identification number is unique identification and tracking number which each state or the federal authorities assign to individuals within their respective criminal justice systems. This identification number is then placed into a federal database which may be accessed by any state or federal authority. www.quora.com/SID numbers. https://bit.ly/2MmBueg.

> [To Mr. Grier:] You're 18, you're an adult, a police officer's talking to you, you need to be listening. You have the ability to ask questions. I know that. You didn't seem scared or intimidated at all in the video. The – the *Miranda* warnings were properly given. You never indicated that you didn't want to talk.
>
> . . . .
>
> And this Court does not find Mr. Grier to be credible. First of all, I also have Mr. Grier making a statement yesterday that he was never handcuffed. Well, the pictures clearly indicate that Mr. Grier was handcuffed.
>
> The Court does not believe that he's not the author of those letters. It's a ridiculous assumption. So, the court does not find Mr. Grier to be credible, and therefore, believes the police officers when they say…that [t]hey never told Mr. Grier that because he's a witness, he is not entitled to an attorney. So the Court does not believe that.
>
> The Court does find this statement to be voluntary on every level, from the preponderance of the evidence standard, and therefore, the motion is denied.

Our independent review of Mr. Grier's recorded statement leads to the same conclusion: The statement that Mr. Grier gave to the police was done voluntarily. Although Mr. Green had just turned 18 at the time of his arrest, he was an adult who, from our review of the recorded interview, understood the English language and knew how to read and write. Indeed, Mr. Grier told Det. Miller that he could read and write and seemed to follow along with a pen with Det. Miller as the detective read each of the *Miranda* warnings on the waiver. Although he had not completed high school, the record suggests Mr. Grier understood his rights when he signed the waiver form.

Although Mr. Grier claimed he did not understand his right to remain silent and his right to counsel, the record supports the suppression court's conclusion that Mr. Grier was

not a credible witness. The court reached that conclusion based on Mr. Grier's testimony, particularly his claims that he did not write letters to the prosecutor and that he had not initialed still photographs of himself from the surveillance footage. The court concluded that he had written the letters. The recorded statement shows him initialing the still photos and identifying himself in the photographs. Accordingly, the court did not believe Mr. Grier's claim that he had asked for an attorney but Det. Niedermeier denied that request. We defer to the suppression court's first-level fact finding and conclude that the court's findings were not clearly erroneous.

We also agree with the suppression court that there was nothing that occurred during the interview that suggested Mr. Grier was confused about what was happening. In the recorded statement, he answered all of the detectives' questions. He did not hesitate, stop the conversation, ask for his parents, or ask to speak to an attorney at any point during the interview. When the conversation with Det. Niedermeier turned to a different killing, Mr. Grier understood which incident the detective was talking about and knew most of the people that were mentioned. When he did not know who someone was, he said as much. And, when confronted with videotaped evidence that seemingly showed him committing Mr. Green's murder, rather than end the conversation, Mr. Grier continued to speak with the detectives, insisting several times that he did not commit the crime.

There is nothing to suggest to us that Mr. Grier gave a statement because he was confused. *See Ford v. State*, 235 Md. App. 175, 185-86 (2017) (explaining that a statement is rendered involuntary when the suspect is "so mentally impaired that he does not know

or understand what he is saying"). The recorded statement does not reveal that Mr. Grier was intimidated or that the police made improper inducements to get him to talk. *Widner v. State*, 362 Md. 275, 318-19 (2001) (finding the confession invalidated as being induced by threats, intimidation, and improper inducements, such as police protection from mob violence). Under the totality of the circumstances, Mr. Grier's statement was voluntary under the common law of Maryland and Article 22 of the Maryland Declaration of Rights. *Hill*, 418 Md. at 75; *Williams*, 375 Md. at 429.

II. Although the Court Neglected to Establish that Mr. Grier Voluntarily Chose Not to Attend a Discussion of Two Jury Notes, the Court Did Not Commit Clear Error.

Mr. Grier asserts that he should have been present when the trial court and counsel answered two jury notes during a telephonic conference. Mr. Grier's trial counsel did not object to his absence when counsel and the judge answered the notes. Even though his trial counsel did not object, before this Court, Mr. Grier argues that because he was absent from a critical stage in the proceedings we should review for clear error. The State argues that because Mr. Grier's trial counsel did not acknowledge Mr. Grier's absence or otherwise object, we should conclude that Mr. Grier waived any objection and decline to review for plain error. If considered, the State urges us to hold that the error was harmless.

On the morning of the second day of deliberations, the trial judge called counsel on a telephone from the courtroom to address two notes from the jury. The discussion was recorded and transcribed. One note was straight-forward and concerned a question that

asked how the jury should consider certain charges on the verdict sheet. The court and counsel quickly agreed that the jurors were to "follow the instructions on the verdict sheet."

The other question was more substantial and concerned mitigating circumstances. It is not entirely clear from the transcript what the jury's question was, but from the conversation that ensued the question seemed to be what a juror might consider to be "mitigating circumstances" when considering the charges of first- or second-degree murder. After a discussion, the court and counsel agreed to refer the jury to "jury instruction 17, and . . . in parentheses, 4.17.2."[6]

The record is silent as to whether Mr. Grier was present during the court's telephone call with counsel regarding the two notes. We assume that he was not present because during a bench conference held immediately before the verdict was rendered, counsel and the court discussed the jury notes.[7] After discussing the notes the court had received, the court and counsel reviewed the answers given. The prosecutors and defense counsel agreed with the responses that the court gave. Mr. Grier's counsel also said, "I explained them to the defendant[;]he understands."

Maryland Rule 4-326 governs communications between the court and jury. "Maryland Rule 4–326(d) provides explicit guidance to a trial court in dealing with

[6] Maryland Pattern Jury Instruction (Criminal) 4.17.2: HOMICIDE—FIRST DEGREE PREMEDITATED MURDER, SECOND DEGREE SPECIFIC INTENT MURDER AND VOLUNTARY MANSLAUGHTER (PERFECT/IMPERFECT SELF-DEFENSE AND PERFECT/IMPERFECT DEFENSE OF HABITATION).

[7] The court had received a third note, sent before the two discussed. That note simply asked how to open the video files on compact discs that were in evidence.

communications from the jury." *Perez v. State*, 420 Md. 57, 63 (2011). In pertinent part, Rule 4-326 states:

> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication pertains to the action. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.
>
> (C) If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication in writing or orally in open court on the record.

Md. Rule 4-326(d)(2). The Court of Appeals has stated that the "very spirit" of Rule 4-236 "is to provide an opportunity for input in designing an appropriate response to each question in order to assure fairness and avoid error." *Perez*, 420 Md. at 64–65 (quoting *Smith v. State*, 66 Md. App. 603, 624 (1986), *cert. denied*, 306 Md. 371 (1986)).

Maryland Rule 4-231(b) states that "a defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248." A criminal defendant's right to be present at all stages of trial is not absolute, however, and is subject to waiver.

Prior to the Court of Appeals' holding in *Williams v. State*, 292 Md. 201, 216 (1981), this common law right could only be waived "by the defendant himself and be done expressly." *See also Midgett v. State*, 216 Md. 26, 37 (1958) ("[T]he right to be present is

personal to the accused and cannot be waived by his counsel."). In *Williams*, the Court modified the common law right to be present "in light of modern developments" and allowed the right to be waived by counsel, under certain circumstances. The Court explained:

> With respect to all criminal trials, or parts of trials, taking place after the issuance of our mandate in this case, an effective waiver of the defendant's right to be present at every stage of the trial will not always require a personal waiver by the defendant. **Where the right of confrontation is not implicated, and where there is involved no other right requiring intelligent and knowing action by the defendant himself for an effective waiver, a defendant will ordinarily be bound by the action or inaction of his attorney . . . [I]f the defendant himself does not affirmatively ask to be present at such occurrences or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived.**

292 Md. at 218 (emphasis supplied).

Under Rule 4-231(c), waiver of a defendant's right to be present at a critical stage of trial may occur under the following conditions:

> The right to be present . . . is waived by a defendant:
>
> (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or
>
> (2) who engages in conduct that justifies exclusion from the courtroom; or
>
> (3) who, personally or through counsel, agrees to or acquiesces in being absent.

Additionally, the Committee note to Rule 4-231 explained, "[e]xcept when specifically covered by this Rule, the matter of presence of the defendant during any stage of the proceedings is left to case law and the Rule is not intended to exhaust all situations."

Our task, then, is to determine whether Mr. Grier had a right to be present during the discussion of the two jury notes, and if so, whether that right was waived. As the Court of Appeals has said, the right to be present "extends to any communication between the trial judge and the jury." *State v. Hart*, 449 Md. 246 (2016); *Grade v. State*, 431 Md. 85, 95 (2013) (citations omitted). "[C]ommunications between the trial judge and the jury relating to the jury's verdict are generally considered stages of the trial when the defendant has a right to be present." *Bunch v. State*, 281 Md. 680, 685 (1978): *State v. Harris*, 428 Md. 700, 712–14 (2012).

The jury received three notes. The first concerned the operation of the video equipment. As explained, the other two notes that were discussed during the court's conference call were substantive. Unquestionably, the latter two notes "pertained to the action," and Mr. Grier's presence was required, unless waived.

The circumstances presented here suggest that Mr. Grier's trial counsel "implicitly waived his presence." Mr. Grier's counsel told the court that she had communicated the answers to the jury's questions to Mr. Grier, which he understood. Counsel did not say that Mr. Grier needed clarification or objected. We conclude that because he had no objection, Mr. Grier either agreed that his attorney should respond to the notes without him being present or his counsel made that decision for him and he later confirmed his satisfaction with counsel's actions. In either case, the proceedings were not ones in which the right of confrontation was implicated, nor did formulating an answer to the notes implicate a right requiring Mr. Grier's "intelligent and knowing action." *Williams*, 292

Md. 217-20. Under the circumstances, we hold that Mr. Grier's absence was either conceded by his counsel or by his voluntary decision. *Id*. Thus, his objection is not preserved and need not be considered. *See* Rule 8-131(a).

Recognizing that his objection is unpreserved, Mr. Grier asks us to exercise plain error review. Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). Before an appellate court exercises its discretion to find plain error, four factors must be met: (1) "there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights"; and (4) the error must "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

An appellate court finding plain error is "rare." *Yates v. State*, 429 Md. 112, 131 (2012) (citation omitted). An appellate court will only make such a finding when the error was "so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *Trimble v. State*, 300 Md. 387, 397 (1984)).

Were we to exercise our discretion and review for plain error, we would conclude that Mr. Grier cannot meet the factors to find plain error. As for the first factor, we have determined that the record makes a strong case that Mr. Grier either intentionally or tacitly waived his right to be present when the court discussed the jury notes. As for the third factor, as we have discussed, answering the jury notes did not impinge on a substantial right of Mr. Grier. Because the court was communicating with the jury, answering the jury's notes was part of the proceedings which Mr. Grier had a right to attend, if he chose, but the issues under discussion did not affect his "substantial rights." The answers upon which the court and counsel agreed were not controversial. In one instance, the court instructed the jury to follow the instructions on the verdict sheet. In the other instance, the court told the jurors to re-read one of the pattern jury instructions previously given. Regardless, the error did not seriously affect the integrity or fairness of the trial. Mr. Grier's counsel was present for the discussion of the jury's questions and provided the court with input that aided the court in formulating responses that were acceptable to all parties. More importantly, Mr. Grier had been present throughout the trial. Under the circumstances, we are hard pressed to see what additional assistance Mr. Grier could have rendered in answering the two notes.

Finally, reviewing for harmless error, we agree with the State that the evidence against Mr. Grier was compelling. From our review of the surveillance videos, one can clearly see Mr. Grier walking along a city street with about a half dozen other young men, including the victim, Mr. Green. The videos show Mr. Grier, wearing a green shirt, walk

up behind Mr. Green and fire approximately five shots at him from close range.[8] Mr. Green immediately drops to the pavement. Mr. Grier identified himself in the video as the individual wearing the green shirt. Even so, the jurors had an opportunity to see Mr. Grier in the courtroom and could have made an independent identification of him after viewing the videos.

Were we to consider plain error, we would conclude that Mr. Grier could not show manifest prejudice by not being present during the conversation to answers to the jurors' questions. Moreover, any error in Mr. Grier being absent from the discussion of the jury notes was harmless beyond a reasonable doubt.

III. The Court Exercised Its Discretion at Sentencing

Finally, Mr. Grier argues that the trial court failed to exercise its discretion at sentencing. His claim is based on a statement that the trial judge made during the trial in which she mentioned that if Mr. Grier was convicted of first-degree murder, she would likely impose a sentence of life imprisonment. Mr. Grier asserts that because the judge made this comment, she must have failed to exercise her discretion when, later, she sentenced Mr. Grier to a life sentence and suspended none of that sentence. The State maintains that although the judge made the referenced comment during trial, the judge nonetheless exercised her discretion after listening to the prosecutor and defense counsel

[8] The green shirt stands out because the other young men are wearing either red or white tee shirts.

argue at the sentencing hearing. Afterward, the State notes that the judge imposed a legal sentence.

The genesis of Mr. Grier's allegation of error lies in an event that occurred early in the proceedings. Before the trial began, the prosecutor and the defense had entered into plea negotiations. The State's offer was, in exchange for Mr. Grier pleading guilty to first-degree murder and use of a firearm in the commission of a felony, the State would agree to a sentence of life, suspend all but 75 years, for first-degree murder, and 20 years, the first five of which were to be served without parole, for the firearm count, to run concurrently to the life sentence. The sentences were to be followed by five years of supervised probation. Mr. Grier rejected this offer. The court then tried to broker a compromise. During the discussion, the trial judge said:

> THE COURT: You know, I don't know, I mean, I – I can't force [the prosecutor] to go off of their life, if they want life, I could encourage them to come down on the 75 but if they're looking for life which is frankly what I would do if he's found guilty of first[-]degree murder, I mean, let's be realistic, you know, I think that – I could see possibly going down on that number but, you know, if the life is the argument here, I think that we just need to proceed.

After further discussions proved fruitless, the case proceeded to trial.

As previously stated, the jury convicted Mr. Grier of first-degree murder and a related count of use of a handgun the commission of a felony or crime of violence. At the start of the sentencing hearing, the prosecutor said:

> [PROSECUTOR]: So murder in the first degree carries a penalty of life, with – the minimum sentence is life, Your Honor.

> And for the use of a firearm in a crime of violence, the top – the maximum –
>
> THE COURT: The minimum?
>
> [PROSECUTOR]: -- penalty is 20, first 5 without.
>
> THE COURT: Wait a minute. The minimum?
>
> [PROSECUTOR]: A life sentence, Your Honor. It can be life, suspend all but something.
>
> THE COURT: Okay
>
> [PROSECUTOR]: -- but it does have to be a life sentence attached to it, Your Honor.
>
> THE COURT: Okay.

When defense counsel addressed the court, she said:

> [DEFENSE COUNSEL]: All I'm asking this Court to do is to – it is to suspend a portion of that life sentence. And allow him some light at the end of the tunnel. Something to work toward. And the possibility of at some point being able to be paroled.

Before announcing the sentence, the court noted that both Mr. Grier and the victim, Mr. Green, were young men. The court also concluded that the evidence suggested that Mr. Grier engaged in some degree of planning before he shot Mr. Green, and that the shooting did not take place on a moment's notice, as defense counsel suggested.

> THE COURT: I don't believe that this was a split minute decision as defense counsel stated. As a matter of fact, even in your letters you talk about, I wish [I] hadn't [ ] gone and [ ] got that gun – and bought that gun, I just wish I never bought that gun. So this is a little bit more planned and thought about than – I think, than just a being a split minute decision.

The court also found it imperative to address the fact that the trial evidence revealed that Mr. Grier had some sort of disagreement, "a beef," with Mr. Green and decided to resolve it by killing him.

> THE COURT: [T]he message needs to be that street justice in the city of Baltimore needs to stop . . . Could there have been a beef between the two of you? Yes. Could you have been worried and scared? Yes. But at the end of the day, we cannot have a city and we cannot have a civilized society where the street takes care of these problems. It just – we just can't keep functioning as a city like this. And there – that is an important message.
>
> . . . .
>
> And young men can't just keep killing other young men and it be okay, because it's not okay. It's just not okay to take care of problems that way.

A trial court has "broad discretion" in fashioning an appropriate sentence after a criminal trial. *Brown v. State*, 470 Md. 503, 553 (2020) (explaining that abuse of discretion is the appropriate standard in reviewing a sentence, "because of the broad discretion that a court usually has in fashioning an appropriate sentence"). And, "[f]ailure of a court to recognize or exercise its discretion 'for whatever reason—is by definition not a proper exercise of discretion." *Id*.

Maryland Code Annotated, (2002, 2012 Repl. Vol.), Criminal Law Article, section 2-201(b)(1) states that, "[a] person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to imprisonment for life without the possibility of parole; or imprisonment for life." A court may suspend any portion of a sentence, including a sentence of life imprisonment, and place a defendant on a period of probation

"on the conditions that the court deems proper." Maryland Code Annotated, (2001, 2018 Repl. Vol.), Criminal Procedure Article, section 6-221.

We conclude the record contains sufficient indicia that the court understood that it had and exercised discretion in sentencing Mr. Grier. As we read the transcript of the proceedings, both sides explained that the court had the discretion to suspend a portion of Mr. Grier's sentence. The judge did not express surprise or deny that it possessed the ability to suspend a portion of a life sentence. In the quoted exchange with the prosecutor, the judge seemingly acknowledges her discretion.

The situation presented here is distinguishable from the cases on which Mr. Grier relies. In *State v. Wilkins*, 393 Md. 269 (2006), in an appeal from a post-conviction proceeding, the issue was whether the trial court, in allegedly failing to recognize that it could have suspended a portion of a life sentence, rendered Mr. Wilkins' sentence illegal. *Id.* at 272. We held that it did. *See Wilkins v. State*, 162 Md. App. 512, 525 (2005). The Court of Appeals reversed. Without addressing the question of whether the sentencing court abused its discretion, the Court of Appeals held that the sentence was legal. *Wilkins*, 284 Md. at 284. And it held that a motion to correct an illegal sentence was not the appropriate means to address the issue, but, rather by direct appeal. *Id.* From this, Mr. Grier suggests that the Court of Appeals was signaling "that perhaps relief might have been granted," if only raised on direct appeal. We read nothing in *Wilkins* that suggests that Mr. Wilkins would have been successful had he raised his claim on direct appeal. The holding only shows that this would be the proper method for raising the issue.

Another abuse of discretion claim was presented in *State v. Chaney*, 375 Md. 168 (2003). There, Mr. Chaney argued that the trial court did not consider suspending a portion of his life sentence when, at sentencing, the judge said,

> THE COURT: Well gentlemen, there is only one punishment in this State for the crime of which this man has been convicted. The law provides a single penalty and no other penalty and so the sentence in the discretion of the Court in this case is limited to the imposition of that penalty.

Id. at 172. The court then imposed a life sentence. *Id.* The Court of Appeals concluded that the trial judge understood that he had to impose a sentence before he suspended a portion of it. The Court then considered whether the judge realized that another statute permitted him to suspend a portion of the sentence. The Court concluded that that the judge was presumed to know the law and, more importantly, that Mr. Cheney could not rebut that presumption. *Id.* at 179.

Mr. Grier's argument, based on *Chaney*, is that the court bound itself to a life sentence. This interpretation of the court's comment is not supported by *Chaney* or the record. The court's comment about the potential imposition of a life sentence should Mr. Grier be found guilty of first-degree murder, did not express the court's willingness to bind itself to a life sentence. The record shows that neither the prosecutor nor defense counsel took from the court's comment that it was binding itself to the imposition of a life sentence. We conclude that the court's comment was a correct statement of the law and that the court did not imply that it would not consider any defense argument at sentencing.

Finally, Mr. Grier's reliance on *Kent v. State*, 287 Md. 389 (1980), is misplaced. There, two judges who were sentencing Mr. Kent in separate cases, met and agreed on the

total amount of time that they were going to separately impose later at sentencing. One of the sentencing judges announced that both judges had "agreed upon the overall sentence or aggregate of the sentences which this defendant will serve." *Id.* at 391. Mr. Kent argued on appeal that the agreement between the judges meant that they had agreed upon a term of incarceration before the sentencing hearing, violating his constitutional right to a fair trial. *Id.* at 392. The Court of Appeals agreed and reversed, vacating the sentences and remanded for re-sentencing. The Court concluded that while the judges perhaps did not mean "to convey the impression that the prior 'agreement' regarding the total sentences was so firm that it was not subject to modification regardless of what was presented by the defendant or his counsel in mitigation,'" justice required resentencing. *Id.* at 395-96.

In contrast, here, the court gave no indication that it would not consider mitigation. Indeed, the record reflects that the judge rejected the defense assertion that Mr. Grier's actions were irrational and came about on a moment's notice. The court concluded that the evidence showed that Mr. Grier acted deliberately. Ultimately, we conclude that the judge understood that she had the ability to suspend a portion of Mr. Grier's life sentence. She chose not to do so because a man died after being shot at point-blank range, without provocation, on a Baltimore City street corner in the middle of the afternoon.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY THE COSTS.