Circuit Court for Baltimore City
Case No. 122214002

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1739

September Term, 2023

TAVON SCOTT

v.

STATE OF MARYLAND

Berger,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: December 11, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In the Circuit Court for Baltimore City, a jury convicted appellant, Tavon Scott, of voluntary manslaughter, use of a firearm in the commission of a crime of violence, and possession of a firearm by a person under twenty-one.

Appellant presents the following questions for our review:

> 1. Did the court abuse its discretion in denying appellant's pre-trial motion to transfer his case to juvenile court?
>
> 2. Did the court err by allowing the State, in closing argument, to make comments which could reference appellant's failure to testify?

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City of: (1) first-degree murder, (2) use of a firearm in the commission of a felony and crime of violence, (3) wearing, carrying, and transporting a handgun on his person, and (4) possessing a regulated firearm under the age of twenty-one.

In July 2023, the jury convicted appellant of voluntary manslaughter (under a theory of imperfect self-defense), use of a firearm in the commission of a crime of violence, and possession of a firearm by a person under twenty-one. The court sentenced appellant to a term of incarceration for ten years for voluntary manslaughter; incarceration for twenty years, all but 5 suspended, for use of a firearm in the commission of a crime of violence, consecutive to manslaughter, incarceration of 5 years for possession of a regulated firearm by a person under 21, consecutive, followed by 5 years supervised probation. The conditions of appellant's probation required appellant to maintain no contact with anyone

in the victim's family and to remain law abiding and to be either employed or in school. The judge explained the sentence as follows:

> "As we heard from Dr. Kwitkowski, to be eligible for the Youthful Offender Program the defendant must have significant time remaining on his sentence. I trust that the sentence I'm imposing will ensure Mr. Scott's eligibility for the program. This court has no intention of discarding the defendant as irredeemable. In fact, the opposite is true."

We glean the following facts from the trial. On July 7, 2022, a group of minors were washing car windshields with squeegees for money at the intersection of Light Street and Conway Street in Baltimore City. Shortly after 4:00 PM, motorist Timothy Reynolds stopped at a red light traveling eastbound on Conway Street. A minor in a grey and black shirt approached Mr. Reynolds and began washing part of his front windshield. The individual had an interaction with the driver and walked away. Another minor in a pink shirt then approached Mr. Reynolds' vehicle, leaned on the driver's side door, and had a verbal exchange with the driver. Once the light changed, Mr. Reynolds drove through the intersection and turned left to travel north on Light Street.

After completing the turn, Mr. Reynolds pulled the car over to the side of the road, exited the car while it was still running, and left the vehicle unlocked to walk across the lanes of traffic on Light Street while carrying a baseball bat. He returned to the minors washing car windshields on Conway Street, where he had a verbal exchange with them. At one point, video footage reveals that he ran forward and swung his bat. One of the minors threw a rock, and another pulled a gun out of a backpack on the ground, put on a mask, and shot Mr. Reynolds. The minors then scattered.

Mr. Reynolds was transported to the hospital, where he was pronounced dead. An autopsy revealed five gunshot wounds, two of which Dr. Pamela Ferreira, who performed the autopsy, testified at trial that she classified as "rapidly fatal." Dr. Ferreira testified that the laceration on Mr. Reynold's head was consistent with a blow or rock to the head. Mr. Reynolds had a blood alcohol content of 0.03%.

Officers interviewed eyewitnesses and reviewed CitiWatch camera footage in the area, as well as footage captured by a motorist's dash cam mounted to the car windshield. Using video footage, investigators identified the minor in the pink shirt as the shooter and sent a photo of the individual to other officers to identify. Patrol Officer Kevin Rivera, who had frequent contact with minors washing car windshields contacted a homicide detective to share that he recognized the individual, but Officer Rivera did not know his name. At trial, Officer Rivera identified appellant as the person with whom he had contact and who was in the photo.

Officers canvassed the area to search for evidence. They found a black bag which contained a gun, a blue bandana, various gift cards, credit cards with the name Roderick Downs, and other personal items. A firearms examiner testified at trial that bullets and casings recovered from the scene were consistent with having been fired from the gun. The bag was swabbed for DNA testing. A swab of the bag's strap revealed a mixture of at least three contributors, and appellant matched an inferred genotype. A swab of the zipper revealed multiple contributors, and appellant could not be included or excluded from the inferred genotypes. Investigators determined that the bag was a "community bag," meaning

that the bag was shared among the kids. Because video footage revealed that the shooter was wearing another bag at the time of the incident, investigators determined that the bag did not belong specifically to the shooter. DNA testing on the gun yielded a DNA profile with a mixture of at least four contributors. Appellant was excluded from the inferred genotypes.

At the time of the incident, appellant was one day shy of his fifteenth birthday. Because appellant was at least fourteen and charged with first-degree murder, the circuit court had original jurisdiction.[1] Prior to trial, defense counsel moved to have the case transferred to juvenile court pursuant to CP 4-202(b). The Department of Juvenile Services ("DJS") prepared a Transfer/Waiver Report ("DJS Report"), presented to the circuit court at the hearing.

The DJS Report included the findings of Dr. Kim Hall, who completed a psychological assessment of appellant. Robert Shipman, a resource supervisor for DJS, relied on Dr. Kim's findings to create a Transfer/Waiver Assessment Staffing Team Meeting Outcome Report, which recommended appropriate programs for appellant. Dr. Paul Archibald, a clinical social worker, conducted a biopsychosocial evaluation. The DJS report addressed each statutory factor in CP § 4–202, which a court must consider in

[1] The juvenile court does not have jurisdiction over "[a] child at least 14 years old alleged to have done an act that, if committed by an adult, would be a crime punishable by life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed under § 4–202 of the Criminal Procedure Article." Maryland Code (2001, 2008 Repl. Vol.), § 3-8A-03(d)(1) of the Criminal Procedure Article ("CP").

making a transfer decision from circuit court to juvenile court. *See also Davis v. State*, 474 Md. 439, 464 (2021). The statutory factors read as follows:

> "(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety."

The DJS Report noted that appellant was age-eligible for juvenile services. The report noted appellant's history of mental health issues and traumatic experiences, including his father being incarcerated, a family dog hit by a car, two close cousins killed in 2017 and 2018, and a friend shot and killed in 2022. Appellant reported using cannabis daily since he was thirteen up until a week prior to his arrest and alcohol once or twice. He noted he had positive and negative associations with gangs but denied any personal involvement. Appellant's mother noted he often disobeyed his curfew. Appellant reported he had been suspended three or four times in middle school for fighting with peers after they picked on him. He was suspended twice in high school. Appellant said any aggression on his part has always been in self-defense. He stated that "people hate on me," and said he had been advised to "stick up" for those who are being bullied. He was a freshman in high school before his incarceration and, according to his transcript, he passed three of his eight classes. Appellant informed the writer of the DJS Report that he had never failed or had to repeat any grades. Appellant played basketball, football, lacrosse, and boxing, and was involved in a mentorship program. He reported that he would like to be an engineer. He attended school while incarcerated at the Youth Detention Center, though no records of his grades had been provided to the evaluator.

The DJS Report referenced Dr. Kim's findings, which identified two available DJS programs that could meet appellant's specific treatment needs. The DJS Report noted that the programs identified are designed to mitigate future risks to public safety and support appellant's specific needs. Dr. Hall noted that appellant's "profile suggest an openness to therapy and other forms of intervention, although he may view treatment primarily as another vehicle to have his talents and strengths recognized by another person." Dr. Hall listed several factors associated with a risk for future violence as well as protective factors that mitigate the risk. She estimated that appellant presents a "'Moderate' risk of future violent offending without recommended services and supports."

At the November 17, 2022, hearing, Judge Dorsey denied the motion to transfer while acknowledging that the case was "challenging on every regard" and "the toughest case" he had had as a judge. As to appellant's age, the court found appellant "of an age that treatment and rehabilitation is possible." The court found appellant's mental and physical condition to be a neutral factor with "nothing outstanding for or against," noting as follows:

> "He's 5'9", a little bit more than 126 pounds. No major medical concerns. Had some issues with depression, with ADHD. Was placed on medication, decided to stop taking the medication. Didn't report any trauma history even though Dr. Archibald talked about some of the trauma of death that he had in his family. Substance abuse issues, started smoking marijuana at 13. Has moved a lot. Issues with father being in and out of jail. Intellectually, he's on par with everybody else. Socially, admits to having multiple sexual partners which shows living an adult lifestyle to this Court. Educationally, doesn't go to school."

The court concluded that the nature of the offense weighed against transferring to juvenile court, explaining as follows:

> "The evidence presented, which I have to take into consideration, showed an individual who, while an individual walked away, took himself out from a crowd, in the middle of July, in the heat, put on a mask and shoot somebody numerous times in the middle of Inner Harbor. A mental state that shows a deliberate, willful, premeditated and high level of culpability. A serious offense."

The court concluded that the public safety factor weighed against transferring jurisdiction, noting that DJS determined appellant's risk of committing a future violent offense was "moderate" rather than "minor," and that this determination did not take into consideration the offense for which appellant had been charged in the case *sub judice.* The court found that "a person who participated in such a brazen daylight shooting would do so in the future given the opportunity."

The court addressed amenability to treatment, explaining as follows:

> "And then it comes down to amenability to treatment. And once again, and it isn't enough that I have a program over here. The issue is that I have to look at the evidence to see if there is any factual analysis that shows that he's, even if there's a program here, that he's amenable to be able to follow the directions of that program. That he'll be a part of that program. That he has a willingness to do the work in that program. That's the issue here. That's one of the issues.
>
> And I want to talk about the program that, once again, it came out of the [DJS] report and I'm going to deal with that last.
>
> I want to talk about the evidence that I see when it comes to whether the Defense has shown by a preponderance of the evidence that this Defendant is willing to be amenable to treatment. I have a young man who runs away from home. I have a young man who won't go to school. I have a young man who won't take his medication. I have a young man who approves of antisocial behavior. He hangs out with positive and negative peers even if he knows that they're negative.
>
> And when Dr. Archibald talked about, you know, when the Defendant, he talked to the Defendant about if he could have a dream come true. And the

> thing that was amazing is that he talked about, you know, having some of his family members come back, but never does he talk about remorse of his behavior. Not once does he talk about the empathy towards the victim in this case. Not once.
>
> This is a young man who's assaults in school come from -- and it talks about an egotistical scale which is elevated that he is the ultimate authority to protect everybody else. And when he has the chance to step down, he refuses to. He has a delinquent predisposition likely to experience rules as restrictive and willing to challenge convention. Criminal to genetic thinking. Believes most people would commit crimes if they wouldn't get caught. Often disobeying curfew.
>
> And, so, even though the Department of Juvenile Services says they have programs available, the evidence to this Court is overwhelming that this Defendant is not amenable in treatment because of his lack of willingness. There's no evidence of him successfully completing, being teachable, being open minded to new perspectives, having empathy for others, a willingness to take directions.
>
> And the programming that was offered by the Department of Juvenile Services, a program like Victor Cullen, which is, once again, a program that is a six month, or nine month program. And if a respondent doesn't want to engage in that program, there is no recourse. And at the end of that program, they recommend that the child go back to the community.
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> Therefore, this Court finds that the Youthful Offenders Program is a viable program in the adult system for the Defendant.
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> Because of all of these factors, this Court finds the Defendant not to be amenable to treatment. And for that reason [I] will deny the Defense request for transfer of jurisdiction."

At trial in the circuit court, the State called two eyewitnesses to the shooting. UPS driver Chad Lembach, who was sitting in his truck at the intersection of Light Street and Conway Street, testified that he observed Mr. Reynolds walk across the street with a baseball bat and approach the minors washing car windshields with squeegees. As Mr. Reynolds approached, six or seven of the kids walked toward him. Mr. Reynolds backed

up and some of the kids broke off to resume washing windshields, and three continued toward Mr. Reynolds. One of them, Mr. Lembach testified, ducked behind a bush in the median on Conway Street and then stood up while making a throwing motion with his arm towards Mr. Reynolds. Mr. Lembach experienced some trouble remembering the exact sequence of events, but he recalled that Mr. Reynolds swung the bat towards one of the kids standing near him, and one of the kids pulled out a gun and began to shoot Mr. Reynolds while backing away. Mr. Lembach testified that one minor was wearing a coral shirt, and one minor was wearing a two-tone shirt, though he could not recall which one was the shooter and did not recognize anyone in the courtroom from the incident.

David Stivelman witnessed the shooting from his vehicle and captured the incident on the dash cam mounted to his vehicle's dashboard. Mr. Stivelman was driving south on Light Street to turn right into Conway when he observed Mr. Reynolds walking across the street holding a bat. He testified that he could tell Mr. Reynolds was angry and that he was yelling and gesturing with the bat as he spoke to the minors. As Mr. Reynolds approached, the minors walked forward to meet him. There was a conversation that Mr. Stivelman could not hear, but he could tell the altercation was "tense." It escalated, and Mr. Reynolds swung the bat in a threatening motion. The individuals near him stepped back a bit, and then Mr. Stivelman heard a gunshot, followed immediately by another four. After watching the dash cam footage at trial, Mr. Stivelman identified a minor with his arm outstretched and wearing a backpack as the shooter. Mr. Stivelman believed the shooter put the gun in the backpack and ran west on Conway Street.

During closing arguments, the State argued that appellant chose to shoot Mr. Reynolds although the opportunity to retreat was an option for him. Defense counsel argued that the State had not proven appellant was the shooter, and that the evidence showed the shooter acted in defense of self and defense of others in response to Mr. Reynolds approaching with a baseball bat. Defense counsel explained to the jury the self-defense argument, as follows:

> "Now, we know for a fact, we know, that there was evidence of self-defense and defense of others. And how do we know that? Because you heard the Judge give you a jury instruction. If I'd ask the Judge to instruct you all on alibi, the Judge would have said, "Mr. Brown, there's no evidence of alibi." We say, "Judge, instruct on self-defense and defense of other[s]." Judge says, "Okay." Because it's evidence of it. And where does it come from? Because we didn't present a case. We're not obligated to present a case. It came from the State's case. And it came from their case. And trust that if those other six eyewitnesses, or seven eyewitnesses, had been presented, then it would have been even clearer that this is a case of self-defense or defense of others. They were talking of the actions of a 14-year-old and things are rapidly happening."
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> ***
>
> "This case is–excuse me a minute. This case, and I'm done. Real quick. This case is self-defense, defense of others. And from where I'm sitting, it's kind of defense of others. Defense of another person is a complete defense and you're required to find the Defendant not guilty if all of the following four factors are present:
>
> The Defendant actually believed that a person he was defending was in immediate or imminent danger of death or serious bodily harm. We know that. I mean, even I–one thing I disagree with co-counsel was mentioned to me that the–one of the squeegee kids was five feet away. Huh-uh. That the Detective said he was–I was walking off with him. He was three feet away when the bat was swung. Not at this person if they say he's the shooter, or one of the squeegee kids, three feet away.
>
> The Defendant's belief was reasonable. The Defendant used no more force than was reasonably necessary in light of the threatened or actual force. No

> question about that. Confronted with a deadly weapon, you have the right to respond either to protect yourself or others with a deadly weapon. And we know it was a deadly weapon because the Detectives, both of them, said that a bat is a deadly weapon, too. And we know it's a deadly weapon because the State don't have it here so that you can hold it and swing it and look at it and touch it because they don't want you to do that. Because they know how dangerous that bat is. And finally, the Defendant's purpose in using force was to aid the person he or she was defending. Obviously, he was a few feet behind this person. And shots fired while an angry man, Mr. Reynolds, swings his bat at this individual.
>
> Now, here's the deal. In order to convict the Defendant of murder, the State must prove that the defense of another person does not apply in this case. It means that you are required to find -- this means that -- this means that you are required to find the Defendant, unless the State can persuade you beyond a reasonable doubt that at least one of these four factors of complete defense of another person [is] absent.
>
> So they've got to prove beyond a reasonable doubt either he didn't believe that the person that he was defending was in imminent danger of death or serious bodily harm, or they've got to prove beyond a reasonable doubt that the Defendant's belief was unreasonable. They've got to show beyond a reasonable doubt that there're no way he could believe that that's a reasonable belief. They must prove beyond a reasonable doubt that the Defendant used more force, that he used more force, than was necessary in order to deal with this threatened or action situation or force. And they must prove beyond a reasonable doubt that the Defendant's purpose in using force was not meant to aid or defend this person.
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> So here's self-defense or defense of others. Now, they're obligated to prove beyond a reasonable doubt one of those didn't exist. Not, well, I got some concerns. I don't now if he–maybe he should of, none of that. Beyond a reasonable doubt that one of those four factors did not apply.
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> Now, this is a defense, a self-defense, defense of others that is there. And, so, for the State to say that everybody, all of these people, all of these people, that they're responsible for this. No. Not at all. No. Not all."

In rebuttal closing argument, the State responded to defense counsel's self-defense and defense of others argument as follows:

"[STATE]: Let's go to self-defense. The limit on Defendant's use of deadly force requires that the Defendant make a reasonable effort to retreat. The Defendant does not (indiscernible at 1:08:01). And, number two, the Defendant's[sic] actually believed. *What testimony have you heard about the Defendant's actual belief.*

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: *You have not heard anything. You didn't hear Mr. Lembach, Mr. Stivelman, they didn't hear anything. So you don't know what his actual belief was. You have no idea –*

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: – what the Defendant's actual belief was. And it says here, the Defendant's actually believed he was in immediate or imminent danger of death. How do you determine actual? You don't have that information.

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: Watch the self-defense again. *The Defendant actually believed. You don't have that*. Now, members of the jury, when you look at reasons for self-defense, read the instructions for yourself. Read it word for word and what it requires. The State doesn't have to prove he didn't defend himself. We have to prove that just one element is missing.

[DEFENSE]: Objection, Your Honor.

THE COURT: Overruled.

[STATE]: Excuse me. That one element of self-defense is missing and it does not apply. If a single element is missing it does not apply."

The jury convicted appellant of voluntary manslaughter, use of a firearm in a crime of violence, and possession of a firearm by a person under twenty-one years of age. Defense

counsel again requested the case be transferred to juvenile court. The court denied the request and sentenced appellant. This timely appeal followed.

II.

Before this Court, appellant argues that the circuit court abused its discretion in denying appellant's pre-trial motion to transfer his case to juvenile court. Appellant contends that the circuit court ignored evidence that appellant was amenable to treatment and that programs existed in the juvenile system that could meet his needs, promote public safety, and reduce appellant's likelihood of recidivating. Appellant asserts that the court's ignoring this evidence hampered its ability to properly assess the remaining *Davis* factors, resulting in an erroneous denial of the transfer motion. Appellant also argues the court was unduly influenced by the nature of the alleged offense and failed to consider how the 5 *Davis* factors converged on appellant's amenability to treatment.

Appellant next argues the circuit court erred by allowing the State's rebuttal closing argument which appellant asserts was improper comments on appellant's right to remain silent and his decision not to testify. Appellant refers to the State's arguments that the jury heard no evidence of appellant's actual belief regarding appellant's self-defense argument. Appellant asserts that these comments violated his 5th Amendment rights as well as his rights under Article 22 of the Maryland Declaration of Rights and Section 9-107 of the Courts and Judicial Proceedings Article.

The State argues that the circuit court soundly exercised its discretion in denying appellant's motion to transfer jurisdiction to the juvenile court. The State contends that the circuit court was aware of the applicable law, correctly applied the law, and acted within its discretion in denying the transfer. The State asserts that the court considered each of the 5 factors with a central focus on appellant's amenability to treatment.

The State counters that the circuit court soundly exercised its discretion with respect to the prosecutor's rebuttal closing argument. The State argues that the comment was narrowly tailored as commentary on a lack of evidence and a response to defense counsel's self-defense argument rather than a comment on appellant's failure to testify.

III.

We address first appellant's transfer argument. In discussing the 5 statutory factors set forth in § 4-202, the Maryland Supreme Court noted as follows:

> "The five considerations are not in competition with one another. They all must be considered but they are necessarily interrelated and, analytically, they all converge on amenability to treatment. The age of the child, for example, may, in some circumstances, be critical in determining whether he or she is legally eligible for waiver or transfer, but beyond that, in determining whether jurisdiction *should* be waived or transferred has relevance only in connection with public safety and amenability to treatment, as we have defined it."

Davis, 474 Md. at 464-65. The juvenile bears the burden of persuasion on a motion to transfer jurisdiction to the juvenile court. *Gaines v. State*, 201 Md. App. 1, 10 (2011). We review the circuit court's weighing of the five factors for abuse of discretion. *Whaley v. State*, 186 Md. App. 429, 444 (2009).

Here, appellant argues that the circuit court failed to consider evidence of appellant's amenability to treatment, including: evidence of amenability from the DJS report, which reported that appellant had struggled to attend school regularly before July 2022 but had shown improvement while receiving DJS services at the Youth Detention Center; appellant's statement that he hoped to attend college; appellant's resuming taking his medication; appellant's speaking with a mental health professional and his interest in continuing mental health services; and Dr. Hall's assessment that appellant had a positive attitude toward interventions and authority.

The circuit court carefully considered appellant's amenability to treatment. Contrary to appellant's assertion, the lower court considered DJS's proposed programs and concluded that appellant, based on his history, displayed a lack of willingness to engage with the suggested programs. The court addressed the programming DJS suggested, noting as follows:

> "And the programming that was offered by the Department of Juvenile Services, a program like Victor Cullen, which is, once again, a program that is a six month, or nine month program. And if a respondent doesn't want to engage in that program, there is no recourse. And at the end of that program, they recommend that the child go back to the community."

The circuit court was well within its discretion to conclude that appellant did not display that he would fully participate in DJS programs and was therefore not amenable to treatment. Moreover, the court was within its discretion to determine that, despite some evidence pointing toward appellant's interest in engaging with treatment, overwhelming other evidence suggested an unlikeliness to engage. The trial court weighs the evidence,

and here, the circuit court in no way abused its discretion in determining appellant's amenability to treatment.[2]

Nor did the circuit court fail to consider the other statutory factors related to appellant's amenability to treatment. Appellant draws an analogy to *In re Johnson*, 17 Md. App. 705 (1973) to argue that the circuit court was unduly influenced by the nature of the offense. In that case, sixteen-year-old appellant accidentally struck and killed a child while driving her boyfriend's car without a license. She was charged with manslaughter by automobile, and the juvenile court waived jurisdiction, citing the "very grievous nature of the offense," despite evidence suggesting appellant's amenability to treatment: evidence that appellant was an above average student with good conduct, civically active, and remorseful. *Id*. at 711. This Court held that the circuit court was unduly influenced by the nature of the crime and failed to appropriately consider evidence of appellant's amenability to treatment. *Id*. at 712.

The State is correct to point out how this Court has distinguished *Johnson* in *Gaines v. State*, where the defendant was convicted of offenses including first-degree assault and armed robbery and this Court upheld the circuit court's denial of a motion to transfer jurisdiction back to the juvenile court:

> "The instant case, however, is factually much different from *Johnson.* In *Johnson,* we thought it 'apparent,' from the waiver report and the testimony of her pastor at the waiver hearing, that the child was 'an ideal subject for the rehabilitative measures available from the Department of Juvenile Services,' *id.* at 713, 304 A.2d 859, because, among other things, she was an above-

[2] We note that both the hearing judge and the trial judge considered the evidence and denied appellant's motion to transfer jurisdiction.

> average student who was '"very responsible and reliable,"' was well-behaved, and was actively involved in school extra-curricular activities. *Id.* at 711, 304 A.2d 859. Here, in contrast, appellant has exhibited a pattern of increasingly serious brushes with the law, has performed poorly in school, and has been expelled for truancy.
>
> Moreover, the crime charged in *Johnson,* manslaughter by automobile, albeit a very serious offense, pales in comparison to the crimes charged here, when we consider the conduct of the accused and not just the results of that conduct. Indeed, although the consequences of manslaughter are greater than those of the crimes charged in the instant case, manslaughter may, as in *Johnson,* involve less culpability than the crimes with which appellant was charged, as the mental state required for manslaughter is recklessness or gross negligence, whereas the crimes alleged in the instant case involve intentional wrongdoing.
>
> Not only is the degree of culpability alleged in the instant case far greater than that alleged in *Johnson,* the threat to public safety posed by appellant exceeds that posed by the juvenile in *Johnson.* The court, in weighing the threat to public safety, here, could properly weigh the possibility that a person who participates in a brazen daytime armed holdup is likely to engage in such activity in the future, if given the opportunity, whereas someone who commits manslaughter by automobile may be deemed less likely to repeat such behavior, at least under the circumstances in *Johnson,* where drugs and alcohol were not factors in what appeared to be a simple, but tragic, accident, resulting from a momentary loss of control over a vehicle."

Gaines, 201 Md. App. at 20-21.

We find the case *sub judice* more akin to *Gaines* than *Johnson*. Unlike in *Johnson*, as the motions hearing judge found, there is no evidence that appellant is remorseful, nor does he have the same strong scholastic record as the appellant in *Johnson*. Appellant's school history more closely resembles that of the defendant in *Gaines*. Moreover, appellant was charged with first-degree murder, an intentional crime with a higher degree of culpability than that of manslaughter in *Johnson*. Although appellant was convicted of manslaughter rather than first-degree murder, the trial involved evidence of intentional

wrongdoing, as in *Gaines*, and the hearing judge acted well within his discretion to deny the transfer motion.

As in *Gaines*, the incident at hand involves a daytime shooting, and the circuit court was permitted to consider the nature of the crime in making its determination. The court's commenting on the circumstances of the crime does not mean that the court was unduly influenced by the crime's nature. Instead, the court made clear the central role appellant's amenability to treatment plays in the decision to transfer jurisdiction. We find that the circuit court committed no error in denying appellant's motion and in fact, did exactly what a judge should do---consider the statutory factors, consider all of the evidence, and apply them fairly and explain the decision.

IV.

We next address appellant's argument regarding the State's closing argument. Precedent is clear that prosecutors are precluded from commenting on a defendant's failure to testify in a criminal trial, both under federal law and Maryland law. *Griffin v. California*, 380 U.S. 609, 615 (1965); *Marshall v. State*, 415 Md. 248, 261 (2010). "Today, the privilege against self-incrimination is protected by the Fifth Amendment of the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Maryland Code (1957, 1998 Repl. Vol., 2000 Cum. Supp.) § 9–107 of the Courts and Judicial Proceedings Article." *Smith v. State*, 367 Md. 348, 353-54 (2001). A prosecutor is permitted, however, to "summarize the evidence and comment on its qualitative and quantitative significance."

Id. The test to determine whether a prosecutor's comments are improper is whether "the remark [is] susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt." *Id*. at 354 (internal quotations omitted). We review the trial court's ruling for abuse of discretion. *Goines v. State*, 89 Md. App. 104, 112 (1991).

Appellant relies on *Marshall* and *Smith* to argue that the State violated appellant's rights during closing argument. We find this reliance unavailing. In *Marshall*, the court held that the prosecutor's statements that "Mr. Marshall did not take the stand" and "[w]e don't have Mr. Marshall's thoughts" were used by the State to "highlight the fact that the defendant did not testify in an effort to rebut the State's evidence" and therefore was an impermissible use of "the defendant's silence as support for the State's case." *Marshall*, 415 Md. at 263-64. In *Smith*, the court found as follows:

> "[T]he prosecutor's remarks to the jury, "what explanation has been given to us *by the Defendant,*" and his answer, "zero, none," referred to the defendant's decision to exercise his constitutionally afforded right to remain silent. The prosecutor did not suggest that his comments were directed towards the defense's failure to present witnesses or evidence; rather, the prosecutor referred to the failure of the defendant alone to provide an explanation. The prosecutor's comments were therefore susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error."

Smith, 367 Md. at 358 (emphasis in original). These cases are both distinguishable from the present one. While in *Marshall* and *Smith* the prosecutor's comments specifically mentioned that the defendant himself did not provide testimony, the comments in the instant case did not. Rather, the prosecutor's statements that the jury had not heard

testimony about appellant's actual belief focused on a general lack of evidence, not specifically on appellant's silence. Commenting on the strength of defense counsel's case is not equivalent to commenting on appellant's failure to testify and is permitted under *Smith*. *See also Goines*, 89 Md. App. at 112-13 (holding that the prosecutor's comment that "you may be a little confused about the evidence that the defense put on" and reference to "the only evidence the defense chose to put on" were permissible because the thrust of the remarks was on the lack of evidence). The prosecutor's comments were specifically directed to the strength of defense counsel's self-defense argument and an overall lack of evidence rather than on appellant's failure to testify. We find no error.

JUDGMENTS OF CONVICTION IN THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.