Circuit Court for Baltimore City
Case No. 117025007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2964

September Term, 2018

DERRICK JACKSON

v.

STATE OF MARYLAND

Meredith,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 3, 2019

*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.

Following a jury trial in the Circuit Court for Baltimore City, Derrick Jackson, appellant, was convicted of first degree murder, conspiracy to commit first degree murder, and accessory after the fact to murder. Jackson was sentenced to concurrent life terms with all but 50 years suspended for both premeditated murder and conspiracy to commit murder. The court imposed a consecutive ten-year term for the conviction for accessory after the fact. On appeal, Jackson presents several questions for our review, which we rephrase as follows:[1]

1. Whether the evidence was sufficient to support Jackson's conviction as an accomplice to premeditated murder or conspiracy to commit murder.

2. Whether the evidence was sufficient to support Jackson's conviction as an accessory after the fact.

3. Whether Jackson's sentence for accessory after the fact is illegal in light of the separate sentence imposed for the substantive offense of premeditated murder.

[1] The questions, as presented by Jackson are:

1. Whether Jackson's sentence for accessory after the fact is illegal in light of the separate sentence imposed for the substantive offense of premeditated murder?

2. Whether the evidence was sufficient to support Jackson's convictions?

3. Whether Jackson was denied his right to be present and his right to counsel of choice when the court allowed stand-in counsel to waive his presence during critical stages of the trial?

4. Whether Jackson was denied his right to be present and his right to counsel of choice when the court allowed stand-in counsel to waive his presence during critical stages of the trial.

As we shall explain, we hold that the evidence was sufficient to support Jackson's convictions as an accomplice to premeditated murder and conspiracy to commit murder, but insufficient to support his conviction as an accessory after the fact. We, therefore, need not address whether Jackson's separate sentences for accessory after the fact and premeditated murder was improper. Additionally, we decline Jackson's invitation to undertake plain error review of his contention that he was denied his right to counsel of his choice and his right to be present during critical stages of the trial.

FACTS AND PROCEEDINGS

Jackson was arrested and charged following the shooting death of Tayvon Cokley. The shooting occurred in the 100 block of North Eutaw Street in Baltimore on December 5, 2016 at approximately 12:50 p.m. A joint trial against Jackson and his co-defendant Vincent Barefoot began on August 14, 2017. Bernadine Pinkey, the victim's grandmother, testified that she and Cokley had been visiting his brother at the University of Maryland Hospital that morning. Cokley left the hospital around noon and walked toward Lexington Market. Denise Hargrove, Jackson's girlfriend, testified that around this time she and Jackson arrived together at 16 South Eutaw Street where she had a medical appointment. Hargrove testified that Jackson told her he was "going to go to the market to get something to eat," which she understood to mean Lexington Market. He walked her to the door and she went in for her appointment.

Jackson subsequently headed toward Lexington Market. At trial, the jury was shown surveillance footage that was obtained from two security cameras mounted on North Eutaw Street and operated by the Hippodrome Theater. We summarized that footage as follows in *Barefoot v. State*, No. 2167, Sept. Term 2017 (filed Sept. 28, 2018):[2]

> In one of the videos, the victim, Tayvon Cokley, can be seen walking toward the intersection of West Fayette Street and North Eutaw Street at approximately 12:49 p.m. on the day of the shooting. As the victim crosses Fayette Street heading toward the 100 block of North Eutaw Street, two men, one wearing a zipped-up jacket and black hat, later identified as Barefoot, and the other wearing a gray cap, later identified as Derrick Jackson, can be seen walking south on Eutaw Street and heading toward the intersection at Fayette Street.[3] At the time, the two men were walking side-by-side in the street's far-right travel lane, adjacent to a car that is parked along the street's right-hand curb. As the two continue walking down Eutaw, the video demonstrates that Barefoot removed his right hand from his jacket pocket and then positioned himself behind Jackson.
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> After the victim reaches the northwest corner of the intersection, he can be seen turning and walking east across Eutaw Street, just in front of the parked car that Barefoot and Jackson had been walking next to. Once there, the victim is encountered by Jackson, at which point Jackson can be seen looking directly at the victim, who is right in front of him. At the same time, the video shows that Barefoot lunged forward and pointed his right arm at the victim, who then ran east across Eutaw Street and away from the two men. The video then shows Barefoot turning, pointing his right arm at the victim, and taking several steps in the victim's direction.
>
> Meanwhile, Jackson watched Barefoot's encounter with the victim and then jogged south across Fayette, all the while

[2] Vincent Barefoot, Mr. Jackson's codefendant, appealed his convictions to this Court. In an unreported opinion we affirmed the judgments of the Circuit Court for Baltimore City.

> glancing back toward Barefoot. The video then shows Barefoot putting his right hand in his jacket pocket and then jogging in the same direction as Jackson, who continued jogging south along Eutaw Street while continually looking behind him. Barefoot continued to jog closely behind Jackson, at which point the two go off-camera.

Barefoot, slip op. at 2-3.

Baltimore City Police Officer Thomas Gross testified that on December 5, 2016 he was patrolling in the area of the 100 block of North Eutaw Street. At about 12:46 p.m. he heard six or seven gun shots behind him but could not identify from where the shots were fired. Officer Gross stated that when he looked down the street he saw crowds of people running. He observed one individual in particular, who was later identified as Tayvon Cokley, falling down as he was running towards him. Officer Gross testified that he saw "just about the end of him crossing the street, running between the buildings, hitting the side of the wall and then coming to a finish right in front of the garage doors." He approached Cokley, checked him for weapons, and checked his vitals. Officer Gross determined that Cokley had stopped breathing and administered CPR on him. Cokley regained consciousness but was pronounced dead at the hospital. His cause of death was listed as a homicide by "multiple gunshot wounds." Officers found seven fired cartridge casings, a bullet, and a bullet fragment at the scene. James L. Wagster, a firearm technician for the Baltimore City Police Crime Lab, testified that the cartridges were all fired with the same gun.

T.J. Smith, the civilian Chief of Media Relations for the Baltimore City Police Department testified that on the day of the shooting he was advised that the Hippodrome

had footage of the suspects fleeing the scene of the shooting. The Baltimore City Police Department wanted to obtain the footage for distribution to the media in order to help with identifying the individuals on the tape. Ultimately, four images from the footage were distributed to the news media and through social media.

Lamoore Barefoot, Vincent Barefoot's mother, testified that she was called by Baltimore City police and asked to come into the station because "they said that my son supposedly shot someone." Ms. Barefoot also testified to receiving phone calls from family and friends about the surveillance footage that they had seen on television and social media. She identified her son in still photographs of the surveillance footage that she was shown at the police station. At trial, she identified Barefoot in the stills as well as in the actual video footage.

Denise Hargrove identified Jackson at trial in the surveillance tapes. She further testified to the events following the shooting and leading up to the arrests of Jackson and Barefoot. Hargrove testified that she was still waiting for her doctor's appointment when Jackson came back and said "they were shooting." She then went back with the doctor for her appointment and Jackson remained in the waiting room. Jackson and Hargrove were picked up from the appointment together by one of Hargrove's family members and Hargrove went to work. She testified that that after she went to work that day she "didn't see Mr. Jackson no more." She stated that she had not talked to Jackson until he called her a week or two later, telling her that he wanted to turn himself in. Hargrove said that she did not remember the location where she drove because she put the address given to her by

Jackson into her GPS, but that it was about three to four hours away. She arrived to pick Jackson up around 4:00-5:00 a.m. and Mr. Barefoot got in the car with them. Jackson, Barefoot, Hargrove, and another individual that traveled with Hargrove made their way back to Baltimore around 6:00 a.m., ending up at an apartment building in Park Heights.

Hargrove testified that her car was pulled over by police on the way back to Baltimore. At that time, Hargrove was issued a ticket, and the officer instructed her to leave. When questioned by the prosecutor about whether Jackson or Barefoot were turned in to police at the traffic stop, Hargrove testified "[n]o, we was turning him in when we got back to Baltimore." When questioned about taking Jackson and Barefoot to the apartment in Park Heights, she testified that her car oil light had come on and she wanted to see what was wrong with it. She stated that Jackson went into the apartment building while Hargrove and Barefoot remained in her vehicle. She further testified that they got "back to Park[] Heights and that's when the officer blocked us in. [H]e was already looking for Derrick Jackson and he wanted—he called me for him, for me to turn him in and that's what I did. I wanted to turn him in." Subsequently, Jackson and Barefoot were arrested.

The jury found Jackson guilty of first degree murder, conspiracy to commit first degree murder, and accessory after the fact to murder. On December 8, 2017 Jackson was sentenced to concurrent life terms with all but 50 years suspended for both premeditated murder and conspiracy to commit murder. The trial court imposed a consecutive ten-year term for the charge of accessory after the fact.

Jackson's counsel did not file a timely notice of appeal. Jackson, however, filed a *pro se* Motion to Correct an Illegal Sentence, which the Court denied. Jackson filed a postconviction petition and was granted relief in the form of the right to file a belated appeal. This appeal followed. Additional facts shall be set forth as they become relevant to our discussion of the issues on appeal.

DISCUSSION

I. Sufficiency of The Evidence

Jackson asserts that the evidence is insufficient to establish that he was guilty of first-degree murder under a theory of accomplice liability. He also challenges the sufficiency of the evidence for his conspiracy and accessory after the fact convictions. As we shall explain, the record reflects that the evidence was sufficient to sustain Jackson's convictions for first-degree murder and conspiracy, but insufficient to sustain his conviction for accessory after the fact. Because the evidentiary support for the first-degree murder and conspiracy offenses largely overlaps, we shall set first forth the legal standards for both offenses and then turn to the evidentiary sufficiency for each. We will then turn to the sufficiency of the evidence for the accessory after the fact conviction.

A. Standard of Review

"The standard for determining the sufficiency of evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Suddith*, 379 Md. 425, 429 (2004) (quotation and citation omitted). In doing so, "we review evidence in the light most favorable to the

State[.]" *State v. Albrecht*, 336 Md. 475, 478-79 (1994). "Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence -- that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* (citations omitted).

When considering whether sufficient evidence supports a conviction, we do not differentiate between direct and circumstantial evidence. *Jensen v. State*, 127 Md. App. 103, 117 (1999). "[C]ircumstantial evidence can support a conviction on its own if there is enough to support a finding of guilt[.]" *Hall v. State*, 233 Md. App. 118, 137 (2017). The Court of Appeals has explained:

> Circumstantial evidence is sufficient to sustain a conviction, but not if that evidence amounts only to strong suspicion or mere probability. Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture.

Corbin v. State, 428 Md. 488, 514 (2012) (citing *Smith v. State*, 415 Md. 174, 185 (2010)). "We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference." *Hall, supra*, 233 Md. App. at 137 (quotation and citation omitted) (alteration in original).

B. Sufficiency of the Evidence for Jackson's First-Degree Murder and Conspiracy Convictions

Jackson was convicted of first-degree murder on a theory of accomplice liability. The Court of Appeals summarized the applicable standard for accomplice liability in *Sheppard v. State*, 312 Md. 118, 122 (1988), *abrogated in part on other grounds by State v. Hawkins*, 326 Md. 270 (1992). An accomplice is a person who, "as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another." *Id.* An accomplice's criminal responsibility may take two forms: "(1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense." *Id.* "In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first degree (perpetrator), a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter) and, in addition, the State must establish that the charged offense was done in furtherance of the commission of the principal offense or the escape therefrom." *Id.* at 122-23. In this case, the State alleged and the jury found that Jackson was a principal in the second degree, which is also known as an aider and abettor.

"A principal in the second degree is one who is actually or constructively present when a felony is committed, and who aids or abets in its commission." *Pope v. State*, 284 Md. 309, 326 (1979). We have explained:

> A second degree principal must be either actually or constructively present at the commission of a criminal offense and aid, counsel, command, or encourage the principal in the

> first degree in the commission of that offense. The activity of a principal in the second degree is generally referred to as aiding and abetting, and the aider or abettor is usually called an accomplice.

Owens v. State, 161 Md. App. 91, 99-100 (2005) (quotations and citations omitted). "A person may be guilty of a felony, as a principal in the second degree, by aiding, counseling, commanding, or encouraging, either actually or constructively, the commission of the felony in the person's presence." *Odum v. State*, 156 Md. App. 184, 192 (2004). "'An accomplice . . . who knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime. . . is a guilty participant, and in the eye of the law is equally culpable with the one who does the act.'" *Owens*, *supra*, 161 Md. at 99-100 (quoting *Woods v. State*, 315 Md. 591, 615 n.10 (1989)). The guilt of an accomplice "is not determined by the quantum of his advice or encouragement." *Pope*, *supra*, 284 Md. at 332 (1979). Rather, if the accomplice's advice or encouragement "is rendered to induce another to commit the crime and actually has this effect, no more is required." *Id.*

We next set forth the elements of criminal conspiracy. "'A criminal conspiracy is the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Hall*, *supra*, 233 Md. App. at 138 (citations omitted).[3] "'The agreement at the heart of a conspiracy 'need

[3] We previously addressed whether the evidence was sufficient to establish that Jackson and Barefoot had formed a conspiracy to murder Cokley in Barefoot's direct appeal, which was decided in 2018 in an unreported opinion. *See Barefoot v. State*, No. 2167, Sept. Term 2018 (filed Sept. 28, 2018) (unreported opinion). Pursuant to Maryland Rule 1-104, unreported opinions issued by this Court may not be cited as precedential or persuasive authority. Nonetheless, having already undertaken the analysis of this issue, we

not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.'" *Carroll v. State*, 428 Md. 679, 696-97 (2012) (citations omitted). "To be found guilty of conspiracy, the defendant 'must have a specific intent to commit the offense which is the object of the conspiracy.'" *Porter v. State*, 455 Md. 220, 254 (2017) (citations omitted). "When the object of the conspiracy is the commission of another crime, as in conspiracy to commit murder, the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed." *Mitchell v. State*, 363 Md. 130, 146 (2001). Regarding the evidence required to establish a conspiracy, we have stated:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Jones v. State, 132 Md. App. 657, 660 (2000).

Here, we hold that sufficient evidence was adduced at trial from which a reasonable fact-finder could have concluded beyond a reasonable doubt that (1) Jackson aided and

see no need to reinvent the wheel in this case. Although we do not cite our prior opinion in *Barefoot*, we undertake much of the same analysis and adopt the reasoning as our own.

abetted Barefoot in the commission of the murder, and (2) that that Barefoot and Jackson had conspired to commit first-degree murder. The evidence, viewed in the light most favorable to the State, shows that Jackson accompanied Hargrove to a doctor's appointment at 16 South Eutaw Street before leaving at approximately 12:30 p.m. "to go to the market." Shortly thereafter, Barefoot and Jackson were seen on surveillance footage walking together on Eutaw Street. A reasonable fact-finder could infer that Barefoot and Jackson had agreed to meet at that particular time and location.

The evidence further supports the conclusion that Barefoot and Jackson were walking together southward on Eutaw Street while the victim walked northbound on the same street. Jackson and Barefoot encountered the victim at the corner of Eutaw Street and Fayette Street near a parked car. Shortly before reaching the intersection and encountering the victim, Barefoot reached into his jacket pocket with his right hand and removed a firearm. As we explained in *Barefoot v. State*, No. 2167, Sept. Term 2018 (filed Sept. 28, 2018), slip op. at 13-14:[4]

> The evidence also showed that, although Barefoot and Jackson were initially walking side-by-side down South Eutaw Street, Jackson moved in front of Barefoot around the same time that Barefoot appeared to remove his hand from his jacket pocket. Then, once Jackson reached the corner of West Fayette Street and North Eutaw Street, he appeared to engage (or at least look directly at) the victim just as Barefoot sprang forward from behind Jackson and started shooting. And, as the State notes, Jackson did not cower or immediately flee the scene when the shooting began; rather, Jackson casually jogged south on

[4] We again emphasize that we are not citing *Barefoot* for its precedential or persuasive authority. Rather, we incorporate and adopt portions of the *Barefoot* analysis as our own in this case.

> Eutaw Street, all the while looking back toward Barefoot. Thus, a reasonable inference can be drawn that Jackson not only knew that Barefoot was going to shoot the victim but that the two were acting in concert during the commission of the crime.
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> Lastly, the evidence showed that Jackson, rather than call the police or go back to check on the victim, fled the scene with Barefoot. Although Jackson did eventually tell Ms. Hargrove that he wanted to turn himself in to the police, he did not do so until a week or two after the murder. Moreover, Jackson and Barefoot were together when Ms. Hargrove drove the "three or four hours" to pick Jackson up so that he could turn himself in. From these facts, a reasonable inference can be drawn that Jackson and Barefoot either remained together following the shooting or agreed to meet at a predetermined location at some point prior to or after the murder.
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> In our view, Barefoot's and Jackson's actions prior to, during, and following the murder support a reasonable inference that the two had a "meeting of the minds" to accomplish the deliberate, premeditated, and willful murder of Tayvon Cokley.

We hold, therefore, that sufficient evidence was adduced at trial from which a reasonable factfinder could conclude that Jackson was guilty of conspiracy to commit first-degree murder.

The same evidence that forms the basis for the conspiracy conviction supports Jackson's conviction for first-degree murder on an accomplice liability theory. In addition, based upon a close examination of the surveillance video footage, a reasonable fact-finder could conclude that Jackson walked in front of Barefoot to shield Barefoot -- who was holding a firearm at his side -- from Cokley's view as they approached.[5] When Barefoot

[5] The surveillance camera footage from the Hippodrome Theater's camera is quite high resolution. Although the shooting occurred at a distance from a camera, the playback

and Jackson were close to Cokley, Jackson appeared to lean toward Cokley and direct him toward Barefoot, who was one step behind Jackson at the time.

In closing argument, the prosecutor reviewed the surveillance footage with the jury and characterized the events as follows:

> [H]ere come[] the Defendants [referring to the video]. And somebody has his hand in his right pocket already, Mr. Barefoot. There's Mr. Barefoot right there. There's Mr. Jackson talking, talking, talking. Mr. Jackson is acting as a guard for him, acting as a blocker. Mr. Barefoot is pulling something out of his right hand, right pocket. He has the gun in his hand, as you can see. Mr. Jackson says something to Mr. Cokley, and Mr. Barefoot is firing, firing, firing . . . .
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> ***
>
> [Y]ou saw from the video that Mr. Barefoot and Mr. Jackson see [Cokley] across the street. It appears they see him waiting to cross before he sees them because the fence is obstructing things because you see on the video Mr. Barefoot getting his gun ready. You see Mr. Jackson doing the thing like if you play football, he's the blocker. He's trying to keep Mr. Cokley from seeing Mr. Barefoot. He's acting as a, you know, a step. He's . . . clearing the hold so the guy can come through and shoot.

The State's characterization of the video surveillance footage was not necessarily the only possible characterization of the footage, and the jury was entitled to draw different

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software included with the video exhibit allows the viewer to digitally zoom the footage and see a more detailed view of the shooting.

We do not presume that all viewers would necessarily interpret the surveillance video footage similarly. It is not our task to set forth the varying conclusions that fact-finders could draw from the surveillance footage. Rather, we set forth what we believe a reasonable viewer could conclude based upon the video while viewing the evidence in the light most favorable to the State.

inferences from those suggested by the State. Nonetheless, the evidence, viewed in the light most favorable to the prosecution, permits an inference that Jackson aided and abetted Barefoot in the commission of the murder by positioning himself in a manner that both shielded Barefoot and directed Cokley toward Barefoot. Critically, we defer to any possible reasonable inferences the fact-finder could have drawn from the admitted evidence, and we need not determine whether the fact-finder could have drawn other inferences. *State v. Mayers*, 417 Md. 449, 466 (2010). Further, we do not consider whether we would have drawn different inferences from the evidence presented. *Id.* All that is required to aid or abet is "aiding, counseling, commending, or encouraging, either actually or constructively, the commission of the felony in [Barefoot's] presence." *Odum, supra*, 156 Md. App. at 192. The inference that Jackson acted in a manner that encouraged or aided Barefoot in the commission of the murder is permissible based upon the evidence.

Viewing all of the evidence in the light most favorable to the State and resolving any ambiguities in the light most favorable to the State, we hold that the evidence is sufficient to support the jury's determination that Jackson was guilty of first-degree murder pursuant to an accomplice liability theory. We, therefore, reject Jackson's sufficiency arguments with respect to the conspiracy and first-degree murder convictions.

C. Sufficiency of the Evidence for Jackson's Accessory After the Fact Conviction

We next turn to Jackson's argument that the evidence produced at trial was insufficient to convict him as an accessory after the fact. A person is an accessory after the fact if "that person assisted the felon with the intent to hinder or prevent the

felon's detection, arrest, trial, or punishment." *State v. Hawkins*, 326 Md. 270, 279–80 (1992). Thus, in order to support a conviction for accessory after the fact, the State must prove that "1) a felony [was] committed by another prior to the act of accessoryship; 2) the accessory [knew] of the commission of the felony; [and] 3) the accessory [did] some act personally in his effort to assist the felon to avoid the consequences of his crime." *Id.* at 284.

Jackson, therefore, must have taken some affirmative action that assisted Barefoot in avoiding his own arrest, trial, or punishment. *See*, e.g., WAYNE R. LAFAVE, Substantive Criminal Law § 13.6(a) (3d ed. 2019) ("Illustrative of the acts which qualify, assuming the presence of the other requirements, are harboring and concealing the felon, aiding the felon in making his escape, concealing, destroying or altering evidence, inducing a witness to absent himself or to remain silent, giving false testimony at an official inquiry into the crime, and giving false information to the police in order to divert suspicion away from the felon."). Indeed, the "mere failure to disclose the commission of the felony, or to apprehend the felon, or mere approval of the felony is not sufficient to constitute one an accessory after the fact." *McClain v. State*, 10 Md. App. 106, 115 (1970). Based on the evidence presented at trial -- including all inferences from that evidence – we hold that there was insufficient evidence from which a reasonable fact-finder could have concluded beyond a reasonable doubt that Jackson was an accomplice after the fact.[6]

[6] We focus our analysis of this issue on the third element above, as the other two elements are satisfied by Jackson's presence, with Barefoot, at the shooting.

The State introduced evidence about the events leading up to the arrests of Jackson and Barefoot through Denise Hargrove's testimony. The jury heard testimony that both Jackson and Barefoot were picked up together approximately one to two weeks after the shooting, about four hours away, and that Hargrove transported them back to Baltimore. The jury, however, was presented with no evidence of what had occurred during this one to two-week period. Critically, no evidence was presented as to the location of the pickup and whether Jackson and Barefoot were together during this time period.

Moreover, the jury was presented with slim and obscure evidence of what happened during the drive back to the Baltimore area or why Jackson, Barefoot, and Hargrove went to an apartment in Park Heights instead of turning themselves in. The State argues that Jackson affirmatively hindered the arrest of Barefoot when he did not direct Hargrove to take him and Barefoot to any police station, but instead directed Hargrove to take them to an apartment to avoid being taken into custody. There was no evidence, however, in the record to support the assertion that Jackson directed Hargrove to go to the apartment in order to avoid being taken into custody. The evidence presented by the State, at trial, in fact, contradicts this assertion.

Hargrove testified that the plan was for Jackson to turn himself in. She also testified that she went to the apartment because the oil light in her vehicle came on. We acknowledge that the jury was free to determine the credibility of Hargrove's testimony. Regardless, assuming *arguendo*, the jury found Hargrove's testimony not credible, it was presented with no other evidence that established why Hargrove drove to the apartment or

who directed her to go there. Any inference that Jackson directed Hargrove to the apartment to avoid being taken into custody would be purely speculative.

The State additionally focuses on Jackson's failure to surrender to the police when Hargrove was stopped for a traffic violation. Jackson's failure to disclose to the officer at the traffic stop that Barefoot and he were wanted for murder does not amount to an affirmative act. Jackson was not required to facilitate the arrest of Barefoot, and his failure to do so is insufficient to convict him as an accessory after the fact. Moreover, the State must prove that Jackson did some act to assist Barefoot in evading the consequences of his crime, not simply that Jackson was acting to avoid his own consequences. Both Jackson's and Barefoot's photographs had been broadcasted on the news and social media in connection with the shooting. Jackson's self-serving efforts to evade police himself, although potentially beneficial to Barefoot, are insufficient to prove that he was actively intending to conceal Barefoot from the police. Accordingly, we hold, that the evidence presented at trial was insufficient to support Jackson's conviction as an accessory after the fact. We, therefore, vacate Jackson's conviction for an accessory after the fact to murder. For the reasons stated *supra*, we affirm Jackson's convictions for first-degree murder on a theory of accomplice liability and conspiracy to commit first-degree murder.

II. Plain Error Review

Finally, Jackson contends that he was denied his right to counsel of his choice and his right to be present during critical stages of trial, when stand-in counsel waived his appearance during jury deliberations. Jackson acknowledges that this issue was not

preserved for our review and urges us to invoke plain error review. The "failure to object before the trial court generally precludes appellate review, because '[o]rdinarily appellate courts will not address claims of error which have not been raised and decided in the trial court.'" *Martin v. State*, 165 Md. App. 189, 195 (2005) (citations omitted). Indeed, "[i]t is rare for the Court to find plain error." *Newton v. State*, 455 Md. 341, 364 (2017) (quotation and citations omitted). "The plain error standard gives a reviewing court a great deal of latitude to decide whether to exercise its discretion." *Yates v. State*, 429 Md. 112, 132 (2012). In describing just how rarely our discretion should be exercised, we have previously noted that "[o]ne must remember, [] that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7–11." *Garner v. State*, 183 Md. App 122, 152 (2008). This Court reserves the exercise of its discretion for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton, supra*, 455 Md. at 364 (quotation and citations omitted). We discern no error here that would persuade us to undertake plain error review.

Jackson's arguments stem from technological complications with the Hippodrome Box Office surveillance footage originally admitted into evidence. During jury deliberations, the trial court called the parties to address a note from the jury, which asked "[t]he Hippodrome Box Office video is corrupted on the flash drive and can't be played. Can we get the file on a new drive?" Both Jackson and his attorney, Joshua Insley, were

present at the time the court read the note. Several failed attempts were made by the State to play the footage thereafter.

After an exchange about whether the video vendor was available to authenticate another copy of the footage, Jackson's attorney, as well as Barefoot's attorney, Rosemary Ranier, moved for a mistrial because of the "unique circumstances." The State sought to reopen its case and call the video vendor to authenticate a new copy of the exhibits the following day. The trial court granted the State's motion to reopen its case in light of the fact that the vendor was able to testify the next day to the authenticity of another copy of the videos, and denied the Jackson's motion for a mistrial. Both Mr. Insley and Ms. Ranier noted objections to the State reopening the record.

The following morning, when the parties returned, Jason Ott appeared and indicated that he was standing in for Mr. Insley. He stated that it was his understanding that "we're going to waive our client's presence at this time." The State indicated that the video vendor was present and that he "brought some items that the State is going to, I believe with the stipulation of counsel, introduce," to which Mr. Ott responded "[t]hat's correct." Ms. Ranier then stated:

> Your Honor, I—just so the record's clear, and you've already granted—the motion to reopen their case, but I am willing to stipulate to the items that Mr. Johansson has actually said he downloaded himself and—but understanding that I still have my ongoing objection to allowing the State to reopen their case. And I believe Mr. Insley had also asked me to convey that to Your Honor as well.

Subsequently, the replacement exhibits of the surveillance footage were admitted over Jackson and Barefoot's continuing objection. When the case was again called, Mr. Ott once more indicated that he was standing in for Mr. Insley and stated that "we're waiving" Mr. Jackson's presence. A portion of the Hippodrome Box Office footage was then played for the jurors in open court.

Shortly after, the parties were asked to address a clarifying jury question. Ms. Ranier stated that she would stand in for Mr. Ott and Mr. Insley to address the question, and waived Jackson's presence. The court read the jury question, which asked "can we get the original Hippodrome thumb drive back?" The court and counsel agreed to have the jurors to clarify what particular footage they wanted to see. The jury responded, "if we can't get the box office footage to watch on the computer, could we please watch it again on the large TV, preferably in slow motion/frames." Ms. Ranier objected to the entire video being slowed down or being played frame by frame and asked that only the video portions slowed down during trial be what was slowed down again. The court indicated that if the thumb drive went back to the jury room, they would have the capability of playing the video at any speed they wanted and frame by frame. During this exchange, the fire alarm went off and caused an evacuation of the courthouse.

When the case was recalled, Mr. Insley was present and represented that Ms. Ranier had brought him up to speed on the events that had occurred. Mr. Insley waived Jackson's presence and indicated that he was downstairs in the lockup. Mr. Insley did not object to stand-in counsel's waiver of Jackson's presence. The court indicated that it would bring

the jury back and show the video in slow motion, frame by frame. Mr. Insley joined in Ms. Ranier's objection to this procedure. The court then brought the jury back to view the video and allowed members of the jury to indicate when they wanted the video slowed down and stopped, frame by frame.

Jackson argues that he was denied his right to counsel of his choosing and his right to be present when stand-in counsel waived his presence, without any indication that Jackson was aware of or consented to the arrangement.[7] We hold, however, that Jackson has not demonstrated it was error to allow Mr. Ott or Ms. Ranier to stand-in for Mr. Insley and waive his presence. We, therefore, decline to exercise our discretion to undertake plain error review.[8]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED, IN PART, AND REVERSED, IN PART. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[7] Jackson argues there are no affirmative statements in the record that he consented to Mr. Ott and Ms. Ranier's representation, and therefore, their waiver of his right to be present, was ineffective. The State, in response, argues that it would be nearly impossible to disprove that Jackson did not authorize Mr. Ott or Ms. Ranier to appear on his behalf. We agree with the State. There is nothing in the record that indicates Jackson did not agree to this arrangement. Although stand-in counsel did not expressly indicate that they had spoken to Jackson about their representation, the record is clear that they were acting on behalf of Mr. Insley. Moreover, conversations between Mr. Insley and Jackson concerning substitute counsel would likely have occurred off the record.

[8] In light of our holding, we need not address Jackson's argument that he was prejudiced by stand-in counsel.