UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2660

September Term, 2015

GARFIELD SMITH, III

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: November 7, 2016

Appellant, Garfield Smith, III, was convicted by a jury in the Circuit Court for Harford County of fourth degree burglary and second degree assault. After he was sentenced to three years for fourth degree burglary and a consecutive sentence of ten years, all but five years suspended, for second degree assault, to be followed by five years supervised probation, appellant timely appealed and presents the following question for our review:

> Were the sentences imposed on Mr. Smith based on improper sentencing considerations?

For the following reasons, we shall affirm.

BACKGROUND

During the early morning hours of August 15, 2014, after Gina Dowling and Jerome "Rommy" Featherstone had gone to bed at Dowling's residence in Harford County, Dowling heard knocking at her front door. Dowling got up, went to the peephole, and saw appellant, her ex-fiancée, standing outside. Although she had invited appellant over when she saw him at a bar earlier that same evening, Dowling decided to ignore appellant and went back to bed.

About ten minutes later, Dowling heard a "big bang," which sounded "like the door was kicked in." In fact, unknown to Dowling at that time, the deadbolt lock to her front door had been broken.

When she got out of bed this time, appellant was already standing in her bedroom door, blocking her way. Knowing that the light in Dowling's ceiling fan did not work, appellant screwed in a light bulb and stated that "he wanted to see the nigga." Appellant

was "angry," and "had a knife in his hand . . . ." Dowling testified that the blade of the folding pocketknife was open. Appellant also may have physically touched Dowling as he entered the room.

Once the light was on, and after recognizing Featherstone, appellant shook Featherstone's hand, and left without further incident. After Dowling called 911, appellant was later arrested that same day at another woman's residence. Notably, after police arrived at this other location, appellant tried to leave by climbing out a window. A knife, as well as bags of marijuana, were recovered from this other woman's residence.

Appellant testified on his own behalf at trial and, although denying that he kicked Dowling's front door down, he did admit that he knocked on it "pretty hard," and claimed that "[w]hen it opened, I was in a state of shock." Testifying that he thought something might be wrong because Dowling did not answer, appellant admitted he entered her apartment, holding a knife at his side. After realizing Dowling was with Featherstone, another of Dowling's ex-boyfriends, appellant testified that he put the knife away.

Appellant explained that he was "drunk, did not intend to harm anyone, and was originally under the impression that he was going to have sexual relations with Dowling. Further, as for when he was arrested at the second woman's residence, appellant denied that he was trying to leave through a window. Appellant also testified that the photograph of the knife admitted into evidence was not the same knife that he had with him that evening.

We shall include additional detail in the following discussion.

DISCUSSION

Appellant contends that his sentences must be vacated because the trial court relied on two impermissible sentencing considerations, namely, his prior acquittal for first degree murder in an unrelated case, and conduct by a third party that took place during this trial. The State responds that this claim is not properly preserved for appellate review and is without merit in any event.

Generally, trial judges have "very broad discretion in sentencing." *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (internal quotation marks omitted) (citing *Jones v. State*, 414 Md. 686, 693 (2010)). Judges are "accorded this broad latitude to best accomplish the objectives of sentencing – punishment, deterrence, and rehabilitation." *Poe v. State*, 341 Md. 523, 531 (1996) (quoting *State v. Dopkowski*, 325 Md. 671, 679 (1992)). A sentencing court should "fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Jackson v. State*, 364 Md. 192, 199 (2001) (quoting *Poe*, 341 Md. at 532 (internal citation omitted)). Because of the broad latitude afforded judges at sentencing, appellate courts will only review a sentence on three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Abdul-Maleek*, 426 Md. at 71; *accord Cruz-Quintanilla v. State*, 228 Md. App. 64, 68, *cert. granted*, __ Md. __, No. 256, Sept. Term, 2016 (2016).

A. The prior acquittal.

Appellant first claims the court erred in considering his acquittal for first degree murder in an unrelated case. Pertinent to this issue, appellant's pre-sentencing investigation ("PSI") provides that he was found not guilty of first degree murder, as well as a number of other offenses, in Case Number 12-K-13-335 in the Harford County Circuit Court on February 6, 2014. This information came up briefly at the sentencing hearing when the State discussed appellant's "lengthy, hardened criminal history." The State observed that appellant's history included numerous assaults, sex offenses and malicious destruction cases while a juvenile, and two cases of receiving stolen property as an adult. Turning to the acquittal for first degree murder, the following ensued:

> [PROSECUTOR:] As [Defense Counsel] eluded to, there was a first degree murder charge of which he was entirely acquitted. I'm not going to make major hay over that in today's sentencing, but I only bring that up in the sense that after that gracious gift from a jury of 12 citizens in this county –
>
> [DEFENSE COUNSEL]: Objection. Characterization.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Mr. Smith then, as the courts have always allowed, the facts and circumstances surrounding the charges for which he was acquitted, Mr. Smith has absolutely failed to reform his conduct despite that very good event for him. All he did to reward the community was accrue this charge and continue to engage in behavior that was criminal. . . . [1]

[1] The prosecutor clarified that appellant was charged with fighting with another inmate while he was incarcerated on the aforementioned murder charge, and was charged with two driving offenses after he was acquitted.

As will be discussed in more detail, the prosecutor then addressed several incidents that suggested appellant may have been involved in witness intimidation of the victim, Gina Dowling. Thereafter, and after hearing again from defense counsel, the court stated "I do think that Mr. Smith is a danger to others. He doesn't really think about the consequences of his actions" and "I think he believes that he can get away with whatever he wants to." As conceded by appellate counsel, the court did not refer to the first degree murder acquittal. It did, however, explain that it was exceeding the sentencing guidelines due to "the brazen nature of this offense and given your record."

On appeal, in responding to appellant's complaint that the court impermissibly relied on his first degree murder acquittal, despite the lack of any comments directly addressing that offense, the State asserts that this issue was not preserved because defense counsel's specific objection was to the "[c]haracterization" of the prosecutor's argument.

"Under Maryland Rule 8-131(a), a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Sharp v. State*, 446 Md. 669, 683 (2016); *see also Abdul-Maleek*, 426 Md. at 69 ("[S]ubject to the appellate court's discretion under Maryland Rule 8-131(a), the defendant is not excused from having to raise a timely objection in the trial court"); *Brecker v. State*, 304 Md. 36, 39-40 (1985) (holding that appellant waived argument that court erred in not inquiring into his ability to pay restitution where that ground was not raised at sentencing). As this Court has reemphasized:

> In *Reiger v. State*, 170 Md. App. 693, 700, 908 A.2d 124 (2006), we observed that such objections should be brought to the attention of the

sentencing judge while there is an opportunity to clarify the court's motivations:

> **When, as in this case, a judge's statement from the bench about the reasons for the sentence gives rise to the claim of impermissible sentencing considerations, defense counsel has good reason to speak up.** A timely objection serves an important purpose in this context. Specifically, it gives the court opportunity to reconsider the sentence in light of the defendant's complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns. *See* Md. Rules 4-342, 4-345. As recognized in the rule, it is the availability of an opportunity to ask for and obtain immediate relief from the sentencing court that determines whether a contemporaneous objection is necessary. **Simply stated, when there is time to object, there is opportunity to correct**. *Cf. Graham v. State*, 325 Md. 398, 411, 601 A.2d 131 (1992) (defense counsel had adequate time to object to trial court's failure to disclose entire contents of jury's note and waived right to appeal on that point by failing to do so).

170 Md. App. at 701, 908 A.2d 124 (footnote omitted) (emphasis added).

Horton v. State, 226 Md. App. 382, 419 (2016).

Here, although defense counsel did not specifically argue that the court could not consider his acquittal on the prior first degree murder charge, we are persuaded that the objection was sufficient to bring this point to the court's attention. *See Sharp*, 446 Md. at 683-84 (holding that issue whether sentencing court considered Sharp's decision to plead not guilty was preserved by counsel's argument afterwards that clearly took issue with the court's comments on the matter); *see also* Md. Rule 4-323 (c) ("For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court").

However, although preserved, appellant does not prevail on the merits. We note that appellant's argument is premised entirely on what the sentencing court did not say. Appellant asserts: "since the judge did not say that he was not relying on the acquitted charges in determining an appropriate sentence in this case, it is reasonable to infer that the judge did consider the prosecutor's comments that he believed to be proper and, therefore, did rely on the acquitted charges in the murder case."

We recognize that, ordinarily, "*when they stand alone*, bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted may not be considered by the sentencing judge." *Henry v. State*, 273 Md. 131, 147 (1974) (citations omitted, emphasis added). But, that does not mean we agree with appellant's unsupported suggestion that the court should have stated, on the record, that it expressly was not considering the prior acquittal.[2]

A similar argument to appellant's was rejected by this Court in *Craddock v. State*, 64 Md. App. 269 (1985). There, Craddock's PSI listed several arrests without providing

[2] We note that the law recognizes a distinction between evidence that amounts to bare allegations of criminal conduct resulting in an acquittal and evidence amounting to more detailed information concerning that conduct. Maryland cases provide that a court may, in its discretion, consider the latter in fashioning an appropriate sentence. *See, e.g., Logan v. State*, 289 Md. 460, 481 (1981) (recognizing that a court may, however, "consider reliable evidence concerning the details and circumstances surrounding a criminal charge of which a person has been acquitted") (quoting *Henry*, 273 Md. at 147-48); *Curry v. State*, 60 Md. App. 171, 183 (1984) (observing that "an acquittal does not necessarily establish the untruth of all the evidence introduced at trial and, therefore, the trial judge is not obliged to ignore evidence of the defendant's involvement in an alleged offense 'at a level less than would warrant his conviction of those crimes'") (quoting *Henry*, 273 Md. at 150), *cert. denied*, 302 Md. 130 (1985). No such details concerning appellant's prior murder charge were included in the PSI or introduced at disposition.

information of their final disposition. *Craddock*, 64 Md. App. at 278. Craddock argued the State could not prove that the sentencing court did not rely on those prior arrests. *Id.* We disagreed:

> True, the sentencing judge would have erred had he considered a bare list of prior arrests that did not result in convictions. *See Henry v. State*, 273 Md. 131, 147, 328 A.2d 293 (1974). The burden of proof on this issue, however, rested with the appellant, and not with the State. *Cf., United States v. Garcia*, 693 F.2d 412 (5th Cir.1982) (defendant must show that judge relied on improper information).
>
> We find no evidence in the record to support an inference that the judge considered appellant's prior arrests in imposing the relatively light sentences of four years on the daytime housebreaking count (as compared to the statutory maximum of ten years), concurrent with two years for theft (as compared to a statutory maximum of 15 years). Moreover, appellant's counsel explicitly reminded the judge that he could not consider the bare fact that appellant had prior arrests. We will not speculate as to whether the sentencing judge nevertheless relied upon these arrests. Judges are presumed to know the law. *Hebb v. State*, 31 Md. App. 493, 499, 356 A.2d 583 (1976).

Craddock, 64 Md. App. at 278-79 (1985); *see also Cruz-Quintanilla*, 228 Md. App. at 71 (observing that, even if evidence of gang membership was improperly admitted, there was no indication that the sentencing court gave the defendant an increased sentence due to his gang membership).

Ultimately, we are not persuaded that the court impermissibly relied on appellant's prior acquittal in sentencing.

B. Conduct by a third party during the trial**.**

Appellant also asserts that the court impermissibly considered the actions of a third party during trial. During the victim's, Gina Dowling's, testimony on the first day

of trial, the court was advised that an individual was recording the proceedings on his cellphone. After the witness and the jury were excused for the day, the following ensued:

> THE COURT: It has been brought to my attention that a gentleman in the back was using his cell phone to record the proceedings.
>
> GENTLEMAN IN GALLERY: It's not recording.
>
> THE COURT: What were you doing with your cell phone?
>
> GENTLEMAN IN GALLERY: I was on my phone.
>
> THE COURT: Why were you on your cell phone in a courtroom while proceedings were ongoing despite the many signs about not using cell phones while here?
>
> GENTLEMAN IN GALLERY: I don't know. I was texting somebody at first.
>
> THE COURT: Texting them about what?
>
> GENTLEMAN IN GALLERY: Where I was at.
>
> THE COURT: About where you were. Well, you know what? I am keeping this overnight. So you are free to go. It will remain here safely guarded at the court, and then tomorrow after these proceedings are over, it will be returned to you.
>
> [PROSECUTOR]: Your Honor, on that issue, I haven't decided exactly what the State intends to do with that occurrence today in court. Deputy Garrett from the Harford County Sheriff's Office happened to be sitting near this gentleman. There is a very strong possibility I may ask him to investigate this, look into this as a case of witness intimidation or tampering and may ask a magistrate to issue a Search Warrant for the phone to find out what content was recorded, if any, for the record, that would meet the definition of any criminal defendant's –
>
> THE COURT: Well, it's going to remain in the Court's custody until or if that happens.
>
> [PROSECUTOR]: Thank you, Your Honor.

The next day, prior to testimony, the court agreed to issue an order prohibiting anyone, other than law enforcement, from using any electronic devices until the case was concluded. The prosecutor then informed the court that it was preparing a search warrant to obtain further information from the aforementioned cellphone.

The conduct of this third party did not arise again until sentencing. Addressing whether this conduct was tantamount to some type of witness intimidation, the State informed the court that the victim, Dowling, was afraid of appellant:

> She was afraid because Mr. Smith had reached out to her on numerous occasions during the pendency of this case and had either, as she put it, on the one hand made sweet talk to her to try to prevent her from cooperating, testifying and appearing in court, and on the other hand what she characterized as made veiled threats against her and her physical safety if she would cooperate and testify. I think the word she used when I spoke to her the other day, he had said something to the effect to her of "if I get locked up, my home boys know what to do."

After reciting efforts to get Dowling to come to court to testify, which included relocating her, and maintaining surveillance on appellant, who apparently was visiting her address on a regular basis, the State addressed the conduct of the third party at issue:

> Furthermore, Your Honor, as the Court recalls, that evening during Ms. Dowling's testimony there was the incident with the civilian in the courtroom using what appeared to be a cellular phone to record, take pictures during the proceeding. That individual would be identified later as Winston Worrell, who is known to the Sheriff's Office Gang Suppression Unit as being associated with Mr. Smith. As the Court may know, we had a search warrant executed on the seized cell phone and there is a very clear picture from Mr. Worrell's phone of the court proceedings that occurred that day, reflecting myself, Mr. Smith, Ms. Dowling on the stand, [Defense Counsel], and Your Honor. Mr. Worrell is taking pictures of that.
>
> Deputy Moro is very familiar with Mr. Smith and his ties to the gang community. He is a validated Crip and she would testify, unless the Court wants to hear from her, that witness intimidation is a very important

> method of control and domination in the gang community, particularly with this set of Crips with which he is affiliated.

Defense counsel responded by first addressing the sentencing guidelines and appellant's prior offenses. Then, counsel continued, not by objecting to these comments by the prosecutor, nor on the grounds that the court should not consider the State's suggestion that appellant was involved in intimidation, but instead, by arguing against the State's interpretation of the facts:

> Additionally, the State went to some lengths to describe a pattern of attempted intimidation by my client. The Court saw and heard and observed Ms. Dowling testify. I was not under any impression whatsoever that that lady was intimidated at all. At all. At all. So if my client is supposed to have been associating with, confirmed I believe it was described, a confirmed Crip who was supposed to be sitting in the courtroom trying to eyeball her and intimidate her from testifying, there was nothing about her testimony, I submit to this Court, that showed she had been intimidated. The Court I'm sure has seen instances where someone is panting mysteriously, although it's not mysterious because they are, in fact, intimidated. That lady had no problem telling it just as it happened. She was quite honest and frank. The State did not have to engage in tooth extraction to get her to tell what happened that evening. I saw nothing, I sensed nothing when she came in that showed my client had in any way intimidated her. And they were in a romantic relationship. I submit that is very important. Those folks were planning on getting married.

Thereafter, in sentencing appellant, the trial court commented as follows:

> This is not just a domestic situation where Mr. Smith broke in to Ms. Dowling's home. This is a crime against even the State of Maryland. If the two of you had been left to your own devices, you would have worked it out. We are sick of this. We are sick of this kind of behavior, sick of your association with someone else who thinks that they can come into court and actually videotape the proceedings. I get that that's not up to you, but the fact that someone that you know thought that they could do that, that says something about the character of the company you keep, of the people whose company you keep. That's what I'm holding you accountable for with respect to Mr. Worrell. But it is for your own behavior, the fact that if

> you hadn't known Mr. Featherstone, I do wonder what would have happened in this instance.
>
> I don't have to find that Ms. Dowling was intimidated in this case. I don't know whether she was intimidated or not. What I do know is this: the day that she decided that the two of you should no longer be engaged and the fact that now she recognizes that she needs to have no further contact with you, those are all smart, intelligent decisions on her part because you don't have your act together and you think you can do whatever you want to. Going and sitting in front of her house, calling her up, threatening her. I don't have to find she was intimidated, I just have to find that she was brave enough to do the right thing, come to court, tell the truth so that you could be held accountable. That's what I'm going to remember about Ms. Dowling.

We are persuaded that any issue as to these specific remarks by the court was not preserved for our review. Primarily, appellant never objected to the court's remarks, nor did he ever argue that the court could not consider Worrell's conduct. Instead, appellant's counsel argued that there was insufficient evidence to suggest that Dowling was, in fact, intimidated. Certainly, that was a reasonable response, but that is not the same as an appellate argument that the court relied on impermissible considerations when it sentenced him on the burglary and assault convictions.

Apparently recognizing the preservation problem, appellant asks this Court to exercise its discretion, under Maryland Rule 8-131(a), to excuse the procedural default and consider the issue on appeal. In *Abdul-Maleek, supra*, the Court of Appeals considered whether the trial judge erred by considering appellant's exercise of a *de novo* appeal in the circuit court. Although the Court found that the issue was not preserved, the Court recognized that Rule 8-131 permits an appellate court to consider issues deemed to have been waived for failure to make a contemporaneous objection. *Abdul-Maleek*, 426

Md. at 68-69. The Court noted that this discretion should be exercised with caution, and only after considering whether an exercise of this discretion will work unfair prejudice to either of the parties and will promote the orderly administration of justice. *Id.* at 70. After a review of the circumstances, the Court in that case decided to review the sentence, reasoning that further review would not prejudice either party and would promote the orderly administration of justice by allowing the Court to examine the trial judge's comment that appellant exercised his right to a *de novo* appeal during sentencing. *Id. See also Sharp*, 446 Md. 683 n. 10 (noting that the *Abdul-Maleek* Court exercised its discretion to review an unpreserved issue); *Horton*, 226 Md. App. at 418-19 (same).

We are not persuaded that deviation from the standard rules of preservation is in order in this case. Although the court commented on Worrell's conduct, it made clear that it was not making a finding whether the victim, Dowling, was intimidated. It also made clear, through other comments, that it was appellant's own conduct toward Dowling that informed the sentence.

Furthermore, even if preserved, we are not entirely persuaded that the court would have erred had it stated it was relying on Worrell's conduct during the proceedings. Indeed, in *Jennings v. State*, 339 Md. 675 (1995), the Court of Appeals observed that a trial judge may base his sentence on "perceptions . . . derived from the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from

living in the same community as the offender." *Id*. at 684-85 (*quoting Johnson v. State*, 274 Md. 536, 540 (1975)). As the Court earlier had explained:

> In other words, to aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed.

Reid v. State, 302 Md. 811, 820 (1985) (quoting *Bartholomey v. State*, 267 Md. 175, 193 (1972)); *see also Logan*, 289 Md. at 480 ("In the pursuit of this indispensable but often perplexing duty, a broad range of information may be mustered by the judge as an aid to his determination").

In sum, the prosecutor here informed the court that a witness could be called to testify that appellant and Worrell were known associates. And, Worrell's conduct certainly could have been grounds for direct criminal contempt of the court's order prohibiting cellphones in the courtroom. *See* Md. Rule 16-208(b)(2)(B) (prohibiting photograph and video recordings in the courtroom); Md. Rule 16-208(c) (setting forth that violators of these provisions are subject to criminal contempt). It is also arguable that Worrell's conduct amounted to witness intimidation and/or obstruction of justice. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), §§ 9-302 (inducing false testimony); 9-303 (retaliation for testimony); and 9-306 (obstruction of justice) of the Criminal Law Article. Because this issue concerns the reliability of information at a sentencing hearing, and not the sufficiency of evidence, we discern no reason why the court could not have, had it chosen to, consider the third party conduct as it related to appellant and an

appropriate sentence. *See Anthony v. State*, 117 Md. App. 119, 131 ("A trial court may consider uncharged or untried offenses, or even circumstances surrounding an acquittal") (citation omitted), *cert. denied*, 348 Md. 205 (1997); *see also Johnson v. State*, 75 Md. App. 621, 642 (reasoning that circumstantial evidence may satisfy the reliability standards applicable to sentencing proceedings), *cert. denied*, 316 Md. 675 (1989). Considering that the court expressly stated it was not determining the victim was intimidated, we conclude that this issue is neither preserved nor does it hold merit to warrant a new sentencing proceeding.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.