Circuit Court for Baltimore City
Case No. 11929009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0721

September Term, 2020

MICHAEL LEWIS

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 1, 2021

Michael Lewis ("Lewis"), was convicted by a jury in the Circuit Court for Baltimore City of possession of cocaine with intent to distribute and attempted distribution of cocaine. The court sentenced Lewis to fifteen years' imprisonment for the possession of cocaine with intent to distribute conviction and a concurrent term of five years' imprisonment for the attempted distribution conviction. On appeal, Lewis presents the following questions for our review:

1. Did the [circuit] court err in imposing separate terms of incarceration for possession of cocaine with the intent to distribute and attempted distribution of cocaine?

2. Did the [circuit] court err in considering, and ruling upon, a motion *in limine* to impeach one of the State's critical witnesses outside of [appellant's] presence?

We shall answer both questions in the negative.

BACKGROUND

The facts of this case are undisputed.

On September 17, 2019, Baltimore City Police Detective Charles Baugher learned at a "debrief" about a person using a certain phone number to facilitate the delivery of controlled dangerous substances ("CDS"). He was also informed that the person used a silver Honda vehicle to deliver the drugs. Armed with that information, Detective Baugher sent a text message to the aforementioned phone number. The response to that message indicated that the prospective seller was willing to meet with him to sell him the CDS. Following an exchange of additional text messages, the detective received a phone call from the same number he had used previously to contact the prospective seller; he spoke

with a woman who agreed to meet him at a designated McDonald's restaurant and sell him cocaine and heroin.

On September 23, 2019, Detective Baugher went to the McDonald's restaurant at the agreed-upon time, called the same number he had dialed previously to contact the seller, and this time, spoke to a man who said he would arrive in approximately five minutes. Thereafter, Detective Baugher observed a silver Honda enter the McDonald's parking lot and park about forty feet from where he was located. Shortly thereafter, a Pontiac station wagon arrived in the parking lot. Detective Baugher observed a female passenger, who was carrying paper currency, exit the Pontiac and enter the silver Honda. The detective observed the female and the driver of the Honda lean in together briefly before the female exited the Honda and returned to the Pontiac station wagon.

After the Pontiac left the parking lot, two police vehicles blocked the silver Honda in its parking space, as the driver attempted, unsuccessfully, to back out of the space. Detective Baugher saw the driver throw a "can" out the passenger window of the Honda, which landed nearby. At trial, the detective identified appellant as the driver of the Honda.

Once appellant was apprehended, Detective Baugher obtained appellant's phone and determined that appellant's phone had the same number as the phone he had received a call from when the agreement to sell drugs had been made.

Detective Baugher testified that the can that had been thrown from the Honda was a "stash can." When that can hit the ground, forty-seven plastic baggies containing cocaine spilled out of it.

Baltimore City Police Detective Raymond Burgos testified that on September 23, 2019, he was assigned to assist Detective Baugher with an arrest. Detective Burgos identified appellant as the individual who he arrested. He testified that as he approached the Honda, he observed appellant, who was seated in the driver's seat, throw an iced tea can or "stash jar" out the passenger's side window. When the can hit the ground, the narcotics contained inside the can spilled out. Video footage from Detective Burgos' body camera, as well as the body camera of Detective Christopher Lehman, were introduced into evidence and viewed by the jury. That video footage corroborated police testimony concerning what happened after appellant's car was stopped.

DISCUSSION

I.

Appellant argues that the trial court erred in imposing separate, but concurrent, sentences for his convictions for possession with intent to distribute cocaine and attempted distribution of cocaine. According to appellant, his convictions should have merged because his convictions were based upon the same actions, and under the required evidence test, the act of possessing cocaine with intent to distribute is, as a matter of law, subsumed within any attempt to distribute that substance to another. Appellant asks us to remand the case to the circuit court with instruction to merge the conviction of possession with intent to distribute cocaine (for which he was sentenced to fifteen years imprisonment) into the conviction of attempted distribution of cocaine, for which he was sentenced to a concurrent five year term). In other words, according to appellant, his sentence of fifteen years imprisonment should be reduced to five.

The State argues that the circuit court properly imposed separate sentences because the charges do not share the required element of possession, and therefore, merger is not warranted under the required evidence test nor, according to the State, is merger required under any theory. In the alternative the State argues that even if we were to conclude that the crimes merged, appellant would not automatically be entitled to a ten year reduction of his sentence. The State is correct in that regard. *See Twigg v. State*, 447 Md. 1, 28 (2016).[1]

Although another merger theory is advanced, appellant's major argument is that the crime of possession with intent to distribute merges into the common law crime of attempted distribution of cocaine under the required evidence test.

In *McGrath v. State*, 356 Md. 20, 23-24 (1999), the Court said:

> Under Maryland common law principles, "the normal standard for determining whether one offense merges into another is what is usually called the 'required evidence test.'" *Miles v. State*, 349 Md. 215, 219 (1998). *See, e.g.*, *State v. Lancaster*, 332 Md. 385, 391 (1993); *Eldridge v. State*, 329 Md. 307, 319 (1993); *In re Montrail M.*, 325 Md. 527, 531 (1992); *Biggus v. State*, 323 Md. 339, 350 (1991); *Williams v. State*, 323 Md. 312, 316 (1991);

[1] The *Twigg* Court, 447 Md. at 28, adopted the holding of *State v. Wade*, 998 A.2d 1114, 1120 (Conn. 2010), *viz.*:

> [T]hat "the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent") (internal quotation marks omitted)[.]

That holding, as applied to this case, would mean that if appellant is right about the necessity to merge the crime of possession with intent to distribute cocaine into the crime of attempted distribution of cocaine, the circuit court, on remand, could, in its discretion, impose a fifteen year sentence for the attempted distribution conviction even though originally he received only a five year (concurrent) sentence for that offense.

Snowden v. State, 321 Md. 612, 616 (1991). We have explained the required evidence test as follows (*State v. Lancaster*, *supra*, 332 Md. at 391-392):

> "The required evidence test '"focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter."' *Snowden v. State*, *supra*, 321 Md. at 617, quoting *State v. Jenkins*, 307 Md. 501, 517 (1986). Stated another way, the '"required evidence is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not,"' there is no merger under the required evidence test even though both offenses are based upon the same act or acts. '"But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other,"' and where both 'offenses are based on the same act or acts, . . . merger follows. . . .' *Williams v. State*, *supra*, 323 Md. at 317-18, quoting in part *Thomas v. State*, 277 Md. 257, 267 (1976).
>
> "When there is a merger under the required evidence test, separate sentences are normally precluded. Instead, a sentence may be imposed only for the offense having the additional element or elements. * * *
>
> "When applying the required evidence test to multi-purpose offenses, *i.e.*, offenses having alternative elements, a court must 'examin[e] the alternative elements relevant to the case at issue.' *Snowden v. State*, *supra*, 321 Md. at 618."

And later, in *Lancaster* we stated (332 Md. at 409-410):

> "Under this Court's decisions, the required evidence test is not simply another rule of statutory construction. Instead, it is a long-standing rule of law to determine whether one offense is included within another when both are based on the same act or acts. *See Hagans v. State*, 316 Md. 429, 445-53 (1989). . . . [T]he test i[s] fully applicable to determine merger issues involving common law crimes, including common law crimes for which there is no statutorily prescribed penalty. *See, e.g.*, *In re Montrail*, *supra*, 325 Md. at 532. ('The required evidence test "applies to both common law and statutory offenses"'). . . ."

The parties agree as to what the State is required to prove when a defendant is charged with possession of a CDS with the intent to distribute. They are at odds however, as to whether, in order to prove the common law offense of attempted distribution of cocaine, the State is required to prove that the defendant possessed the CDS either actually or constructively.

The crime of possession with intent to distribute a controlled dangerous substance requires the State to show: 1) the person possessed a controlled dangerous substance; 2) in a quantity sufficient to indicate specific intent to distribute the drug to another. Md. Code (2002, 2012 Repl. Vol.) §5-602(2) of the Criminal Law Article.

In *Townes v. State*, 314 Md. 71, 75 (1988), the Court of Appeals said:

> An attempt to commit a crime is, in itself, a crime. A person is guilty of an attempt when, with intent to commit a crime, he engages in conduct which constitutes a substantial step toward the commission of that crime whether or not his intention is accomplished. *Cox v. State*, 311 Md. 326, 329-31 (1988); *Young v. State*, 303 Md. 298, 311 (1985).

The legal principles set forth in *Townes* are reflected in the Maryland pattern jury instructions that the trial judge used in the case *sub judice* when he instructed the jury. Maryland Pattern Jury Instructions ("MPJI")-Cr. 4:02 reads:

ATTEMPT

> The defendant is charged with the crime of attempted [distribution of cocaine]. Attempt is a substantial step, beyond mere preparation, toward the commission of a crime. In order to convict the defendant of attempted [distribution of cocaine], the State must prove:
>
> (1) that the defendant took a substantial step, beyond mere preparation, toward the commission of the crime of [distribution of cocaine]; and

> (2) that the defendant intended to commit the crime of [distribution of cocaine].

As can be seen, under the pattern jury instructions, it was not necessary to prove that the defendant possessed the cocaine in order to convict him of attempted distribution of that drug.

Strongly supporting the State's position that to prove attempt to distribute cocaine the State need not prove that defendant possessed that drug, either actually or constructively, is the case of *Skrivanek v. State*, 356 Md. 270 (1999). In *Skrivanek*, the defendant was charged with possession of CDS with intent to distribute after he made a purchase of marijuana from an undercover police officer. *Id*. at 274. The trial court entered judgment in favor of the defendant as to the possession charges, apparently because it was unconvinced that the State had established actual possession of the marijuana as a matter of law. *Id.* at 278. On its own initiative, the trial court submitted to the jury the lesser included offenses of attempt to possess marijuana with intent to distribute and attempted possession of marijuana. *Id*. at 280. The jury convicted defendant of attempted possession with intent to distribute marijuana. *Id*.

On appeal, Skrivanek argued that the State was required to show that he actually or constructively possessed the marijuana in order to create an inference that he intended to distribute it. *Id*. at 284-85. The Court of Appeals rejected Skrivanek's argument, explaining:

> If this argument were correct, there could be no crime of attempt to possess with intent to distribute a large quantity of drugs; any attempt would, at the same time, amount to the completed crime. Such a result contradicts the holding in *Grill v. State*, 337 Md. 91, 94 (1995), where this Court stated that

> the "[f]ailure to consummate the intended crime is not an essential element of an attempt." It is sufficient that "a defendant [has] a specific intent to commit a particular offense and … perform[s] some overt act in furtherance of that intent that goes beyond mere preparation." *Id.*

Id. at 285. Later in the opinion, the *Skrivanek* Court said:

> Courts in other jurisdictions have held that actual possession is not a necessary element of the crime of attempt to possess CDS with the intent to distribute. *See United States v. Jones*, 102 F.3d 804, 808 (6th Cir.1996); *United States v. Rosalez-Cortez*, 19 F.3d 1210, 1217 (7th Cir.1994); *United States v. Mims*, 812 F.2d 1068, 1078 (8th Cir.1987). In *Jones* and *Rosalez-Cortez*, the defendants had been negotiating to purchase substantial quantities of drugs from undercover agents who were posing as drug dealers. In each case the arrest was made before the defendants actually obtained possession of the drugs, the defendants were convicted of attempted possession with intent to distribute, and the appellate courts sustained the convictions against challenges to the sufficiency of the evidence. In *Jones*, the arrest was made after the defendants showed the undercover agents four firearms which were to be bartered in partial exchange for the purported drugs, which had not yet been displayed to the defendants. *Jones*, 102 F.3d at 807. In *Rosalez-Cortez* the transaction took place on a large parking lot. After the defendants had delivered $54,000 to the undercover agents, the defendants drove with the agents in the agents' car to the defendants' car into which the defendants planned to move the purchased cocaine, which had not yet changed hands. *Rosalez-Cortez*, 19 F.3d at 1217.
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> In *Mims* one of the defendants, Einfeldt, was convicted of knowingly and intentionally using a communication facility to facilitate an attempt to possess heroin with intent to distribute, in violation of 21 U.S.C. § 843(b) and (c). The Government's case was made through taps of the telephone of one Sage, a drug dealer who was under surveillance. Sage terminated negotiations with Einfeldt before any contract was formed for the sale of drugs to Einfeldt. In affirming Einfeldt's conviction, the Eighth Circuit held that the substance of certain telephone conversations evidentiarily satisfied the attempt element of the federal offense. *Mims*, 812 F.2d at 1079.

Id. at 285-86.

Although the crime at issue in *Skrivanek* was attempting to possess CDS with the intent to distribute and here the crime at issue was attempted distribution of CDS, we see

no meaningful distinction insofar as whether there was a need to prove actual or constructive possession.

Consider the following hypothetical: A prospective drug buyer in Easton, Maryland phones his drug supplier in Cambridge, Maryland and asks the latter to sell him a pound of cocaine. The prospective seller agrees to make the sale but tells the prospective buyer that he will have to pick up the cocaine from a "stash house" on Maple Street in Trappe, Maryland, which is about seven miles from Easton. Unbeknownst to the prospective buyer or seller, the phone conversation is recorded by the Maryland State Police pursuant to a court approved wiretap. The prospective seller, immediately after the call, gets in his car and starts driving towards Trappe. At that point, there would be sufficient evidence to show, by the supplier's actions, an intent to distribute. When he turns from Route 50 onto Maple Street, the State Police, based on what the police heard on the wiretap, arrest the prospective seller. The substantial step element was proven when the supplier turned onto Maple Avenue. We see no reason, based on *Townes* and *Skrivanek*, why, under the facts in this hypothetical, that such proof would not be sufficient to convict even though the supplier was not shown to have possessed cocaine.

Appellant cites no case that supports his position that the State must prove that he possessed cocaine in order to convict him of the crime of attempted distribution of cocaine. He does cite *Anderson v. State*, 385 Md. 123 (2005), but that case had nothing to do with the elements necessary to prove attempt. *Anderson* stands for the unremarkable proposition that to prove distribution of CDS, the State must prove that the defendant possessed the CDS either actually or constructively. *Id*. at 132-33.

In sum, the elements necessary to meet the required evidence test were not met. The attempted distribution of cocaine charge required proof of a fact that the possession with the intent to distribute did not – a substantial step toward the distribution of the cocaine. Likewise, the possession with the intent to distribute charge required proof of a fact that attempted distribution does not – possession, either actual or constructive, of the cocaine.

Besides the required evidence, there are two other methods a defendant can use to prove that two convictions merge, i.e., the rule of lenity and principle of fundamental fairness. *Carroll* v. *State*, 428 Md. 679, 693-94 (2012). But before addressing those two methods, we pause to consider the peculiar case of *Johnson v. State*, 350 Md. 127 (1998). In *Johnson*, the Court disposed of Willie Lee Johnson's appeal in an order that read, in its entirety, as follows:

> In light of the confession of error made by the State in its brief, and the Court having concluded that the conviction for attempted distribution of cocaine should merge into the conviction of possession with intent to distribute cocaine it is this 10th day of June, 1998,
>
> ORDERED, by the Court of Appeals of Maryland, that the sentence of ten years for attempted distribution of cocaine be, and it is hereby, vacated and the judgments are otherwise affirmed.

350 Md. at 128.

Johnson was not cited in the briefs filed by either party to this appeal, nor has *Johnson* even been cited in any reported opinion. The reason no reported case has cited it is probably because it is impossible to discern which of the three types of merger the court

thought applicable.[2] It can be inferred, however, that the Court did not believe that both crimes require that the State prove that the defendant possessed the CDS. If it had, the Court would have merged the convictions with the fewest elements (possession with intent to distribute a CDS) into the conviction with the one additional element (distribution of a CDS). But the *Johnson* Court did the opposite, it merged the attempted distribution conviction into the possession with intent to distribute conviction. Moreover, if merger is required under the required evidence test, one of the convictions should have been vacated, but in *Johnson*, only a sentence was vacated. *See Newton v. State*, 280 Md. 260, 279 (1977). In this case, if we were to simply vacate appellant's sentence for attempted distribution of cocaine, appellant would gain nothing because the trial judge imposed a concurrent sentence for that conviction. Because the *Johnson* Court never explained the exact reason for its order, it is impossible to view *Johnson* as having any significant precedential authority.

It is possible, of course, that the *Johnson* Court vacated the sentence for attempted distribution of cocaine based on the doctrine of fundamental fairness. In *Carroll v. State*, 428 Md. at 694-95, the Court said:

> Fundamental fairness is "[o]ne of the most basic considerations in all our decisions . . . in meting out punishment for a crime." *Monoker* [*v. State*], 321 Md. [214] at 223 [(1990)]; *Khalifa v. State*, 382 Md. 400, 434 (2004) observing that additional reasons for merger include "historical treatment, judicial decisions which generally hold that offenses merge, and fairness") (quoting *McGrath v. State*, 356 Md. 20, 25 (1999)). In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are "part and parcel" of one another, such that one crime is "an

[2] The Court of Appeals no longer has the briefs filed in *Johnson* and therefore, we have been unable to determine why the State confessed error.

> integral component" of the other. *Monoker*, 321 Md. at 223-24. This inquiry is "fact-driven" because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes. *Pair v. State*, 202 Md. App. 617, 645 (2011).
>
> Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences.

(Footnotes omitted.)

In this appeal, appellant argues that his convictions should be merged under the doctrine of fundamental fairness. But at sentencing, in the trial court, appellant's counsel never made such an argument. As we have previously held, a sentence that violates the doctrine of fundamental fairness is not an illegal sentence and therefore, if a defendant wishes to preserve the fundamental fairness issue for appeal, he or she must raise the issue before the sentencing judge. As we recently said in *Clark v. State*, 246 Md. App. 123, 139 (2020):

> And yet, even more dispositive is that "[a]lthough a defendant may attack an illegal sentence by way of direct appeal, the fundamental fairness test does not enjoy the same 'procedural dispensation of [Md.] Rule 4-345(a)' that permits correction of an illegal sentence without a contemporaneous objection." *Potts* [*v. State*], 231 Md. App. [398] at 414 [(2016)] (quoting *Pair*, 202 Md. App. at 649). Appellant admits at the beginning of his argument that he did not argue at sentencing that his sentences were fundamentally unfair. Consequently, Appellant did not properly preserve his fundamental fairness argument for appellate review.

(Emphasis added.)

Lastly, we turn to the rule of lenity. In *Clark*, we said:

> The rule of lenity—a principle of statutory interpretation—can require the merger of sentences even when the required evidence test has not been satisfied. *Pair*, 202 Md. App. at 637. In *Walker v. State*, we outlined the scope of the rule, stating:

> [The rule of lenity] is purely a question of reading legislative intent. If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so-called 'Rule of Lenity,' by which we give the defendant the benefit of the doubt.
>
> *Walker v. State*, 53 Md. App. 171, 201 (1982) (internal citations omitted). Because the rule of lenity is "a matter of legislative intent," it is only applicable "where at least one of the two offenses subject to the merger analysis a statutory offense." *Latray* [*v. State*], 221 Md. App. [544] at 555 [(2015)] (citing *Pair*, 202 Md. App. at 638). If offenses merge under this rule, "the offense carrying the highest maximum authorized sentence is ordinarily considered to be the greater offense. Thus, 'the offense carrying the lesser maximum penalty merges into the offense carrying the greater penalty.'" *Miles v. State*, 349 Md. 215, 221 (1998) (quoting *Williams v. State*, 323 Md. 312, 322 (1991)).

246 Md. App. at 135.

Here, appellant was convicted of a statutory crime (possession with intent to distribute) and a common law misdemeanor (attempted distribution). In his brief, appellant accurately defines the rule of lenity, but he devotes not one word toward an explanation as to why the rule is here applicable. In fact, he does not even argue that the rule <u>is here applicable</u>. That constitutes a waiver. *Diallo v. State*, 413 Md. 678, 692-93 (2010) ("'[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal'") (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)); *Health Services Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 664 (1984) ("This Court has consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review."); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994) ("[W]here a party initially raised an issue but

then failed to provide supporting argument, this Court has declined to consider the merits of the question[.]"). *See also*, Md. Rule 8-504(a)(5).[3] Because appellant has failed to present any argument that would support a conclusion that the rule of lenity is here applicable, we shall not decide that issue.

II.

Appellant argues that the trial court erred in considering, and deciding, in his absence, a motion *in limine* concerning the impeachment of a critical witness. The State responds that appellant's claim is not preserved because it was not raised at trial, and, in any event, defense counsel impliedly waived appellant's presence by raising the motion in his absence. The State further argues that appellant's presence was not required because the motion addressed the admissibility of evidence, which is a legal issue. We agree with the State that trial counsel impliedly waived appellant's presence. Moreover, even if not waived, appellant's presence was not required during a hearing on a legal, rather than a factual issue.

Prior to trial, outside of appellant's presence, his counsel informed the court that he had received some disclosures from the State which "revealed [] that in 2017, [Detective] Baugher was under investigation for possibly planting evidence in a case" in a matter that

[3] It does not appear that the appellant suffered any prejudice by his counsel's failure to explain why the rule of lenity was applicable, because both offenses carried the same maximum penalty (20 years). *See* Maryland Code Annotated, Criminal Law Article, sections 5-608 (penalty for distribution of cocaine and possession with intent to distribute cocaine) and 1-201 (conviction for attempt cannot exceed punishment for the crime attempted). Therefore, applying the principles set forth in *Miles*, 349 Md. at 221, there was no "greater offense" into which either offense could merge.

"received some publicity." Defense counsel requested that he be permitted to question the detective in front of the jury for purposes of impeaching him under Maryland Rule 5-608(b) concerning the charge of misconduct. The court denied defense counsel's request, explaining that "[a]bsent some evidence that these [illegal actions] actually occurred, the mere fact of an investigation is not enough for me to be satisfied under the rule that it would be admissible to impeach him."

Appellant entered the courtroom a short time after the denial of the motion, but, in his client's presence, defense counsel again raised the issue of impeaching Detective Baugher with evidence of prior misconduct under Md. Rule 5-608(b). The court inquired as to whether defense counsel had any documentation, such as a personnel file, supporting his claim of the detective's alleged prior misconduct. Defense counsel indicated that he would try to locate documentation to support his claim. The court agreed to reconsider defense counsel's request if he presented the court with some evidence "that constitutes a reasonable, factual basis for asking the question[.]"

That afternoon, following a lunchtime recess, the trial judge and counsel returned to the courtroom to begin *voir dire*. Prior to appellant's return to the courtroom, his counsel presented additional materials regarding the investigation of Detective Baugher and asked the court to review those materials in-camera. After doing so, the court reiterated its prior ruling, noting that the additional materials did not provide a sufficient factual basis for the impeachment of the detective. The record reflects that appellant returned to the courtroom following the judge's ruling.

"Maryland has long recognized the right of a criminal defendant to be present at every stage of the trial." *Tweedy v. State*, 380 Md. 475, 490 (2004); *Collins v. State*, 376 Md. 359, 375 (2003) (citing *Pinkney v. State*, 350 Md. 201, 208-09 (1998)). The Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]" U.S. CONST., Amend. VI and Article 21 of the Maryland Declaration of Rights. Thus, "'[t]he constitutional right of a defendant to be present at trial is rooted largely in the right to confront witnesses and is also protected in some situations by the Due Process Clause where the right of confrontation is not implicated.'" *State v. Hart*, 449 Md. 246, 265 (2016) (quoting *Pinkney*, 350 Md. at 209).

The constitutional right to be present at all stages of trial is not absolute, however, and includes limitations. *Id.* Md. Rule 4-231(b) provides "[a] defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except … at a conference or argument on a question of law[.]" The right to be present may also be waived by a defendant "who, personally or through counsel, agrees to or acquiesces in being absent." Md. Rule 4-231(c). Historically, in Maryland, the right to be present could only be waived "'by the defendant himself and be done expressly.'" *Hart*, 449 Md. at 265 (quoting *Williams v. State*, 292 Md. 201, 216 (1981)). In *Williams*, the Court of Appeals modified the common law rule and permitted waiver by counsel, under certain circumstances.

> Where the right of confrontation is not implicated, and where there is involved no other right requiring intelligent and knowing action by the defendant himself for an effective waiver, a defendant will ordinarily be bound by the action or inaction of his attorney … [I]f the defendant himself does not affirmatively ask to be present at such occurrences or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived.

Hart, 449 Md. at 266 (quoting *Williams*, 292 Md. at 218).

Maryland Rule 8-131 defines the scope of appellate review and provides, in pertinent part: "Ordinarily, the appellate court will not decide an[ ] ... issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). An issue which has been waived is not reviewable on appeal. "Generally, a waiver is the intentional relinquishment of a known right or conduct that warrants such an inference." *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007); *see also Owens v. State*, 399 Md. 388, 419 (2007) ("Generally, 'most rights, whether constitutional, statutory or common-law, may be waived by inaction[.]'") (quoting *State v. Rose*, 345 Md. 238, 248 (1997)). Waiver "extinguishes the waiving party's ability to raise any claim of error based upon that right." *Brockington*, 176 Md. App. at 355 (citing *United States v. Olano*, 507 U.S. 725, 733-34 (1993)). The waiving party "may not complain on appeal that the court erred in denying him the right he waived, in part because, in that situation, the court's denial of the right was not error." *Brockington*, 176 Md. App. at 355.

In this case, defense counsel impliedly waived appellant's presence. On all three occasions when the motion was argued, it was appellant's counsel who brought up the issue. And, on two of those occasions, appellant's counsel plainly knew that appellant was

not at his side. Moreover, even assuming that defense counsel did not, by his inaction, waive appellant's presence, appellant's presence was not required, as the motion addressed a legal issue, i.e., the admissibility of evidence.

Generally, "a criminal defendant does not have the right to be present at every bench or chambers conference that may be conducted during the course of the trial." *Haley v. State*, 40 Md. App. 349, 353 (1978). We recognize that "[t]here are occasions when such conferences constitute not a stage of the trial but rather a suspension of the trial while the court takes up collateral matters or questions of law which must be resolved before the case can continue." *Id*.

A criminal defendant has no right to be present at a stage of the trial involving questions or arguments of law. Md. Rule 4-231(b). Generally, discussions regarding the admissibility of evidence, which are essentially legal in nature, do not implicate a defendant's right to be present. *See State v. Tumminello*, 16 Md. App. 421, 436-37 (1972) (no right to be present during bench conferences addressing legal question of admissibility of evidence, even though discussions necessarily involved some factual discussion); *see also Brown v. State*, 272 Md. 450, 476-77 (1974) (no right to be present in chambers for discussion of a procedural rule regarding photographic evidence); *Brown v. State*, 225 Md. 349, 350-53 (1961) (no right to be present for legal arguments in chambers regarding proposed jury instructions); *Sewell v. State*, 34 Md. App. 691, 698 (1977) (no right to be present at in-chambers conference on question of disclosure of the identity of an informant, where it was "exclusively a discussion of law" and no testimony was taken).

Here, appellant's right of confrontation was not implicated, as no witness testimony was elicited or cross-examination conducted. Importantly, there were no facts at issue at the time of the *in limine* argument. The legal issue was whether Detective Baugher could be impeached pursuant to Md. Rule 5-608(b) when, according to defense counsel's proffer, in 2017, the detective "was under investigation for possibly planting evidence in a case," but counsel had no proof that the officer was guilty of the offense for which he was being investigated. Because the State objected, the court correctly declined to admit the evidence unless appellant established "a reasonable factual basis for asserting that the conduct of the witness occurred." *See* Md. Rule 5-608(b). Appellant's counsel thereafter never established such a factual basis. Had there been some dispute of fact, appellant might well have had a right to be present at the hearings on the motions. But here, the absence of evidence was conceded by defense counsel. There was no violation of appellant's right to be present during critical stages of the trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.