

Circuit Court for Baltimore City
Case No. 120363014

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 943

September Term, 2022

DEMARIO HENRY

v.

STATE OF MARYLAND

Wells, C.J.,
Nazarian,
Beachley,

JJ.

Opinion by Nazarian, J.

Filed: January 23, 2024

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

In October 2020, Decarla Jackson spent the evening walking around a Baltimore neighborhood with Demario Henry, the father of her child. But the leisurely stroll took a turn when the two ran into Niesha Holley, Mr. Henry’s girlfriend. Ms. Jackson and Ms. Holley argued over a dispute the two had had on social media. The argument escalated to a physical fight, and eventually both Mr. Henry and Ms. Holley shot Ms. Jackson. Mr. Henry was arrested and charged with multiple crimes.

During his trial, the State and defense counsel stipulated—at a bench conference at which Mr. Henry was not present—that (1) Mr. Henry had prior convictions that disqualified him from possessing a regulated firearm, and (2) the handgun Mr. Henry had used constituted a regulated firearm. After the State rested its case-in-chief, Mr. Henry moved for judgment of acquittal as to one of the charges, but not the charge for being a prohibited person in possession of a regulated firearm. The court denied the motion and the jury convicted Mr. Henry of being a prohibited person in possession of a regulated firearm and acquitted him on all other charges. On appeal, Mr. Henry asserts that (1) his constitutional right to confrontation was violated when the bench conference was held in his absence, and (2) the judgment for motion of acquittal reached the firearm charge and should have been granted. We affirm.

I. BACKGROUND

A. The Shooting

In the evening of October 5, 2020, Ms. Jackson became upset when she heard negative rumors about Mr. Henry, the father of her child. Ms. Jackson texted Mr. Henry about the rumors, and although the contact led initially to a dispute, the two decided to meet up in the Greenmount neighborhood of Baltimore. After talking and spending time at a Chinese restaurant, they left together on foot. When they arrived at a dimly lit portion of the block, they noticed a car was parked in the middle of the street. Sitting in the car was Ms. Holley, Mr. Henry's girlfriend.

Mr. Henry and Ms. Jackson approached the car to talk to Ms. Holley. But the interaction quickly escalated once Ms. Jackson and Ms. Holley began arguing over a “social media beef [they] had,” and they started fighting physically. During the fight, Mr. Henry got into Ms. Holley's car and drove away. At that point, Ms. Jackson began walking away. A few moments later, Ms. Jackson ran into Mr. Henry and Ms. Holley once again and another dispute arose. As Ms. Jackson walked, Ms. Holley grabbed a gun from under her car seat and shot Ms. Jackson once. Mr. Henry began yelling at Ms. Holley and then shot Ms. Jackson multiple times. After recovering from her wounds, Ms. Jackson informed police that Mr. Henry and Ms. Holley shot her.

Mr. Henry was arrested and charged with (1) attempted murder in the first degree, (2) attempted murder in the second degree, (3) use of a firearm in a crime of violence, (4) wearing, carrying, and transporting a handgun, (5) wearing, carrying, and transporting a loaded handgun, and (6) possession of a handgun by a prohibited person.

B. The Trial

On May 27, 2022, during a bench conference, the State and the defense stipulated that: (1) Mr. Henry had a prior conviction and (2) the gun Mr. Henry used to shoot Ms. Jackson constituted a regulated firearm. This discussion occurred at around 9:40 a.m. The transcript indicates that Mr. Henry did not enter the courtroom until 10:01a.m., so he was absent not only from the bench, but from the courtroom itself during the bench conference. At no point, though, did defense counsel raise any objection relating to Mr. Henry's absence. The stipulation ultimately was included in the jury instruction the circuit court gave to the jury:

Now, the defendant, Mr. Henry, is also charged with possessing a regulated firearm after having been convicted of a crime that disqualifies him from possessing a regulated firearm. In order to convict the defendant, the State must prove and again, these are elements, that the defendant knowingly possessed a regulated firearm and that the defendant was previously convicted of a crime that disqualifies him from possessing a regulated firearm. The State and the defendant agree and stipulate that the gun in this case was a regulated firearm

The State and the defense also agree and stipulate that the defendant was previously convicted of a crime that disqualifies him from possessing a regulated firearm.

At the end of the State's case, defense counsel moved for judgment of acquittal. By its terms, the motion referred to the charge for attempted murder in the first degree, and that charge only:

Your Honor, I'd make a motion for judgment for acquittal. Really I'm making my motion for judgment of acquittal, the attempted first degree count. The issue in the case is that basically the State's theory—not basically, the State's theory

of the case is that there is . . . an ongoing fight, shots get fired, the gun, he grabs the gun and he fires more shots. So in terms of pre-meditation, the time to be able to contemplate the reasons for and against . . . and all of these other issues, I don't believe in the light most favorable to the State, the State has made the pre-meditation argument.

After some additional colloquy, the court denied the motion. After the defense rested (it didn't put on any evidence), the court instructed the jury, then brought the parties to the bench and offered an opportunity for the defense to make any motions. The defense then renewed the motion it had made before, and the court denied it:

THE COURT: I neglected to ask if the defense wanted to make motions at the end of all evidence.

[DEFENSE COUNSEL]: I would make a motion and just renew my previous—

THE COURT: All right. And the State renews its response?

[THE STATE]: Yes.

THE COURT: All right. The Court believes that the evidence in the case requires it to deny the motion and allow the jury to consider the charges. Thank you.

The jury found Mr. Henry guilty of being a prohibited person in possession of a handgun but acquitted him on all of the other charges. Mr. Henry was sentenced to ten years of incarceration and he appealed the judgment.

II. DISCUSSION

Mr. Henry raises two issues on appeal¹ which we rephrase: whether we should review for plain error the claims that (1) the circuit court violated his right to confrontation when it held a bench conference in his absence, and (2) the circuit court erred in denying his motion for judgment of acquittal. For reasons stated below, we affirm the circuit court’s judgment.

In general, this Court will not decide “any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court *may* decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” Md. Rule 8-131(a) (emphasis added). As the Supreme Court of Maryland has explained, this is a rare event:

¹ Mr. Henry’s brief lists his Questions Presented as:

1. Did the trial court err when it instructed the jury that they did not have to consider an element of a crime charged against Appellant due to a stipulation that the court solicited from Appellant’s counsel at a bench conference in Appellant’s absence and without Appellant ever having waived his fundamental right of confrontation?
2. Did the trial court err in denying Appellant’s motion for acquittal when the only testimony that the State presented regarding Appellant possessing a firearm was directly contradicted by the State’s police witness stating conflicting facts?

The State’s brief lists its Questions Presented as:

1. Should this Court decline to review for plain error Henry’s confrontation claim?
2. If preserved, did the trial court properly deny Henry’s motion for judgment of acquittal?

“It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.”

Ray v. State, 435 Md. 1, 23 (2013) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)).

Similarly, our Court has emphasized that the “‘plain error doctrine’ 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.” *Morris v. State*, 153 Md. App. 480, 507 (2003). Finally, and importantly, “[t]here is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused.” *Jones v. State*, 379 Md. 704, 713 (2004)).

A. The Alleged Confrontation Error Is Neither Plain Nor Extraordinary.

The *first* issue raised by Mr. Henry is that the circuit court violated his right to confrontation when it held a bench conference discussing a stipulation in his absence. Although this may or may not have been problematic, it does not constitute an error so significant that it warrants plain error review.

Our courts have “long recognized the right of a criminal defendant to be present at all stages of a trial.” *Pinkney v. State*, 350 Md. 201, 208 (1998). “The right to be present at trial is a common law right guaranteed by Article 5 of the Maryland Declaration of Rights, and is also ‘to some extent protected by the Fourteenth Amendment to the United States Constitution, and is guaranteed by Maryland Rule [4-231].’” *Id.* at 209 (quoting *Williams v. State*, 292 Md. 201, 211 (1981)). “The 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.” *Id.* However, the right to be present is limited by the Maryland Rules. Rule 4-231(b) provides that “[a] defendant is entitled to be physically present in person at a preliminary hearing and every stage of trial, except . . . at a conference or argument on a *question of law*.” (Emphasis added). The explicit exclusion of issues relating to “questions of law” may suggest that bench conferences involving questions of fact could create a right to be present during trial. *Cf. Nesby v. State*, 853 S.E.2d 631, 633 (Ga. 2021) (“bench conferences that deal with questions of law and consist of ‘essentially legal argument about which the defendant presumably has no knowledge’ or those that deal with logistical and procedural matters, ‘bears no relation, reasonably substantial, to the fullness of his opportunity to defend against the charge’” (*quoting Heywood v. State*, 743 S.E.2d 12, 16 (Ga. 2013))).

But it’s not obvious that that was the case here. Mr. Henry was absent from a bench conference involving a stipulation during which both parties agreed that (1) Mr. Henry had a prior conviction, and (2) the handgun used was regulated. Both points of agreement embodied in this stipulation are factual—to be sure, facts going directly to the elements of this particular offense, but facts all the same. And even if the circuit court should not have held a bench conference without Mr. Henry, doing so was not an “obvious” or “clear” error. Both the State and Mr. Henry’s counsel discussed the possibility of a stipulation with the circuit court. The circuit court could reasonably have believed it was proper to hold the bench conference with Mr. Henry’s counsel. *See* Md. Rule 19-301.2(a) (“An attorney may

take such action on behalf of the client as is impliedly authorized to carry out the representation.”). After all, there is no distinct and well-understood rule entitling defendants to be present during a bench conference involving a stipulation. *Compare United States v. Frady*, 456 U.S. 152, 163 (1982) (at the federal level, “recourse may be had . . . only on appeal from a trial infected with error so ‘plain’ the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it”). Even assuming for the moment that the court erred, the error didn’t rise to the level of “clear” or “obvious.”

This also isn’t an extraordinary case. *See Martin v. State*, 165 Md. App. 189, 197 (2005) (explaining that plain error review is only reserved for extraordinary cases or those that must be reviewed to assure a fair trial). This isn’t a situation where exercising plain error review allow us to address an issue of broader importance. *See In re J.J.*, 456 Md. 428, 447-48 (2017) (appellant argued, for the first time on appeal, that “before admitting a child victim’s out-of-court statement for the truth of the matter asserted, [the juvenile court] must first find that the child is ‘truth competent.’” The Supreme Court of Maryland stated that “[n]otwithstanding Mr. J’s failure to raise the issue before the juvenile court, we shall exercise our discretion . . . as it is likely to be raised in future cases.”). The Court has also exercised review where doing so would “promote the ‘orderly administration of justice.’” *Abdul-Maleek v. State*, 426 Md. 59, 70 (2012) (*quoting Bible v. State*, 411 Md. 138, 151-52 (2009)) (“[W]e are constrained nonetheless to remand this case for resentencing because the court’s explicit reference to Petitioner’s exercise of his de novo appeal right” could lead

reasonable people to infer the court may have been motivated by impermissible considerations.). This case involves a stipulation entered voluntarily by Mr. Henry’s attorney—it is unlikely that other appellants will raise the same issue in the future or that exercising plain error review could correct or avoid future injustice. We decline to exercise our discretion to review Mr. Henry’s confrontation argument in this case for plain error. *See Yates v. State*, 429 Md. 112, 132 (2012) (“The plain error standard gives a reviewing court a great deal of latitude to decide whether to exercise its discretion.”).

B. Mr. Henry Never Moved For Judgment Of Acquittal For The Handgun Charge, Meaning There Is Nothing To Review.

Second, Mr. Henry argues that “[t]he trial court improperly denied [his] motion for acquittal as no rational jury could find possession of a handgun beyond a reasonable doubt[.]” But he never gave the circuit court an opportunity to decide whether he should be acquitted of the handgun charge, and that affords us no opportunity to exercise appellate review. And even if Mr. Henry had requested plain error review—which he hasn’t—there would be no basis for that either.

For a circuit court to grant a motion for judgment of acquittal, the defendant must identify the charge(s) at issue and state the grounds for dismissal with sufficient particularity:

A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State, and in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

Md. Rule 4-324(a). “The language of Rule 4-324(a) ‘is mandatory, and review of a claim

of insufficiency is available only for the reasons given by the appellant in his motion for judgment of acquittal.” *Cagle v. State*, 235 Md. App. 593, 604, *aff’d*, 462 Md. 67 (2018) (quoting *Whiting v. State*, 160 Md. App. 285, 308 (2004)).

Mr. Henry did move for judgment of acquittal based on the alleged insufficiency of evidence, only as to the charge for attempted first-degree murder. His motion didn’t mention the handgun charge at all, and even reading the transcript with the greatest flexibility, there is no way we can construe it to include the charge for prohibited person possessing a regulated firearm. Rule 4-324(a) required him to move for acquittal either by the close of all evidence or at the end of the State’s case, and because he didn’t his “legal assertions are unpreserved for our review.” *Claybourne v. State*, 209 Md. App. 706, 749 (2013). And although Mr. Henry hasn’t requested plain error review for this issue, we couldn’t conduct it even if we wanted to. “[N]o Maryland case has utilized the plain error doctrine to reverse a trial judge’s denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered.” *Id.* at 750 (quoting *McIntyre v. State*, 168 Md. App. 504, 528 (2006)). Put another way, the circuit court could not have erred by failing to consider and grant a motion that never existed.

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