Circuit Court for Montgomery County
Case No. 127689

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 963

September Term, 2016

CHRISTIAN RODRIGUEZ-HERNANDEZ

v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Reed, J.

Filed: October 1, 2019

Christian Rodriguez-Hernandez (hereinafter "Appellant"), was indicted in the Circuit Court for Montgomery County and charged with first-degree assault and conspiracy to commit first-degree assault. After his Motion to Transfer to Juvenile Court was denied, Appellant was convicted by a jury on both counts. Appellant was sentenced to ten years, with all but three years suspended, for first-degree assault, and a consecutive ten years, with all but three years suspended, for conspiracy to commit first-degree assault, to be followed by five years supervised probation. Appellant timely appealed and presents the following questions for our review:

I. Did the circuit court err in denying Appellant's Motion to Transfer to Juvenile Court?

II. Did the circuit court err in refusing to give the requested instruction on self-defense?

For the following reasons, we answer these questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 6, 2015, Terry Newell was talking with a friend outside of a Dunkin Donuts shop, located in the Randolph Hills area of Montgomery County, when a man rode by on a bicycle. Newell and this man had been involved in an earlier incident that evening at a McDonald's restaurant. This man stared at Newell for some time, then rode away from the area.

Moments later, when Newell was walking home this same man returned, accompanied by three additional men, including Appellant. The man, who had the earlier incident with Newell, was armed with a knife. Other members of the group were also armed. One man had a baseball bat, the third had a baseball, and although Newell did not see it at first, the fourth man in the group was armed with a Taser. Seeing the first man draw a knife, Newell admitted that he pulled out a knife that he carried for protection.

These four men then came upon Newell, with the first man flinging a bicycle at him as another man threw a baseball at Newell. They then chased Newell down Viers Mill Road, until Newell was able to cross Connecticut Avenue. At that time, the primary assailant approached Newell and slashed his arm with a knife, causing heavy bleeding. The second man, who had been throwing baseballs, then threw rocks at Newell, apparently striking him.

At that point, Newell decided to run back across Connecticut Avenue, still trying to flee his assailants. However, all four men, including Appellant, eventually surrounded him. It was then, as the four men were surrounding him, that one of them hit Newell with a baseball bat, splitting his hand open as a result. It was at this point that Newell saw Appellant armed with a Taser. Newell testified as follows:

> Q. Okay, why don't you tell us, tell the jury if you would, what happened with that Taser?
>
> A. Um, that Taser, um, well he didn't get me, but that's when I got surrounded almost and he was on this side and then the guy with the knife was on this side. So, it's like I'm trying to like, I don't know who is going to do what at this point, so, I'm kind of jumping around in between and next thing you know, he buzzed the Taser, bzzz, so, now I'm like really freaking out and then they're coming this way, so, I'm just in complete panic mode at this point.

Before he sustained any further injury, Newell then yelled for help and for someone to call the police. At that point, the four men backed off and left the scene. After the police and fire department arrived, Newell was transported to Suburban Hospital where he was treated for his multiple injuries. Newell eventually identified photographs of his assailants, including Appellant.

Motion to Transfer Hearing

A Reverse Waiver hearing was held on November 20, 2015 where Nicole Beatty, with the Department of Juvenile Services (the "Department"), testified that she completed a Motion to Transfer investigation report in this case. Beatty summarized her findings by recommending that Appellant be waived to the juvenile court system. In support of that recommendation, Beatty considered the necessary factors, explaining that Appellant was 17 years and 7 months old when he was charged, and that the Department could have jurisdiction until he was 21 years old. There were residential programs still available for him, including "behavior modification type programs." There were also other community-based services available for potential placement if he was waived down to the juvenile system. According to Beatty, since Appellant had not been placed with the Department before, it was unlikely he would automatically be placed on probation once he turned 18. Further, she stated that "[w]e would follow through in order to request a successful closure."

Beatty also testified that she met with Appellant and believed she could work with him. This was based on the fact that during pre-trial supervision, Appellant was tasked with certain things pursuant to a contract and had completed those tasks as assigned. Beatty also met with Appellant's father and spoke with his mother, and they both seemed "very involved and very concerned." Beatty concluded that Appellant's amenability to treatment weighed in favor of waiver to juvenile court.

However, she agreed that Appellant's mental and physical ability weighed in favor of keeping him in criminal court. Beatty explained that, although Appellant did not suffer from any mental health disorders, had never been diagnosed or treated for any mental health condition, and appeared to be of sound mind, he did suffer a very serious injury, around December 6, 2014, which caused him to lapse into a coma for some time. Appellant was still healing from broken ribs and was being treated for damage to his lungs. Beatty continued that Appellant, who was in the tenth grade at the time, missed "a tremendous amount of school" due to his injuries following the accident. However, Beatty acknowledged that, prior to his arrest in connection with this case, Appellant had a "history of being suspended." Appellant was suspended for 18 days for possessing marijuana on school property, and also was suspended for 33 days for bringing a "four and a half inch filing tool, with a sharp, silver, pointed edge" to school. Appellant also received a five-day suspension from school for assaulting another student.

Beatty then testified that the nature of the offense in this case also weighed in favor of keeping Appellant in the criminal court. She considered the injuries to the victim and the nature of the offense and recognized that Appellant did not directly inflict any of those injuries to the victim. She also did not believe that Appellant was a danger to public safety, based on the fact that he did not have a history of "violent, aggressive behavior." She testified that "[t]his appears to be a one-time offense and we believe that, although it is very serious, we can properly supervise him through the juvenile facility."

On cross-examination, Beatty was not aware that since Appellant's arrest in this case, Appellant was found in possession of a Taser at a campground in Frederick County. But, she was aware that there was a prior incident where Appellant gave a false name to police when he was caught shoplifting at a J.C. Penney. Beatty also knew of allegations that Appellant was involved in gang activity, as set forth in the police report of the underlying assault in this case. With respect to Appellant's amenability to treatment, Beatty confirmed that, although residential facilities were available, and Appellant was "eligible" for placement, she was not actually aware if any were "readily available or prepared" at the time. She also confirmed that Appellant recently tested positive for marijuana. In fact, he had recently tested positive six out of ten times.

Following examination by the parties, the circuit court then questioned Beatty. The circuit court asked her several clarifying questions about possible residential placement, Appellant's suspensions from school, and Appellant's recent interactions with police after the incident in question. The circuit court concluded its colloquy with her as follows:

> THE COURT: Okay. This is a young man who, seemingly, on at least three occasions, is running around, if you will. With a weapon. What am I to make of that? I mean – Tasers. It's not (unintelligible).
>
> MS. BEATTY: I don't [sic] how long he's had the Taser for. From the time of this offense to the time he was caught in Frederick was about a week. So, I don't know if we can say that he has had the Taser for 10 days or a year. We don't, we don't know.
>
> THE COURT: What am I to make of his alleged [sic], because nothing is presumed, and it goes one way as opposed to the other way, I'm

aware of that, of him joining a group of other young people chasing some guy down the street when three out of four of the assailant[s] had deadly weapons? Weapons that could inflict death upon somebody? What do I make of that scene in my mind of four guys chasing some guy down the street, with weapons, going after him?

MS. BEATTY: Again –

THE COURT: What does that do for me?

MS. BEATTY: The department, obviously, is concerned about that, and this is his first contact with us that's been of [sic] violent nature. That –

THE COURT: What is it that he doesn't understand that you're going to tell him? Don't do that?

MS. BEATTY: I don't know if it's what I'm going to tell him, it's what these programs can tell him and offer him.

THE COURT: Don't chase people down the street, yielding deadly weapons, trying to maim them? Don't do that, it's a bad idea?

MS. BEATTY: Well, it's some behavioral modification, and some therapy, and some, you know, unfortunately, he's still fairly new to this country and he's perhaps gotten involved with the wrong crowd and needs to be redirected. And the department can certainly help redirect him.

THE COURT: Is it a fair conclusion that there's little or no helpful family involvement here? Because they don't seem to be preventing any of this.

MS. BEATTY: I don't know that the family isn't concerned –

THE COURT: No. Is it reasonable to believe that they're capable, in the real world, of doing anything about it? And if they're not, they're not. But it'd be like a basket of activity, what have they done at all? Other than come to a meeting?

MS. BEATTY: Well they've, they've supervised him since he's been part of pre-trial services, and he's been –

THE COURT: How did that effect all his school suspensions? What about Frederick County? I mean, when you say they've supervised him –

MS. BEATTY: Right. I don't know –

THE COURT: Except when he gets caught.

MS. BEATTY: Right. I don't know. I don't know what they've done outside of –

THE COURT: Coming to your meetings.

MS. BEATTY: Exactly.

After hearing argument, the circuit court denied the petition to waive Appellant back to juvenile court. The court first observed:

> The PTSU report, which is dated November 18, 2015, it advises that the defendant was released on pre-trial supervision on July 15th, 2015. And that during the time he was supervised out of 10 tests for the use of narcotics, he had six results which were positive. So, 60 percent positive, 40 percent not positive. And while I might be willing to discount the first couple, one or two, from date of arrest, to give the body time to get clean, if you will, it suggests to me that notwithstanding the fact that somebody's been indicted for a crime first degree, and is basically out on bond pending trial, and told don't do that, he does it. Now, they haven't yet sought to revoke his bond, which is their business, but the conduct and issue is something I take into account.

In addition, the circuit court found that Appellant's age, his mental and physical condition, the nature of the offense, and public safety all weighed in favor of keeping the case in the criminal court. The circuit court however disagreed with the Department's suggestion that Appellant's amenability to treatment weighed in favor of transferring the case to juvenile court. The circuit court concluded that "I have no hesitation, respectfully, in concluding, that the factors weigh very heavily and very strongly in favor of retaining jurisdiction in adult court.” [1]

Trial

Trial in this case began on April 12, 2016. On cross-examination, Newell agreed that he was never hit with the Taser, held by Appellant and that Appellant only turned it on one time. When asked by defense counsel whether Appellant was just in the “background,” Newell disagreed, replying “he was in the pursuit the whole time.” When shown his statement to police, stating that Appellant was “standing back,” Newell explained, “no, he was right there, but when I mean he buzzed it on me, he was like right there and buzzed it, but he didn’t like, actually, go in for it.”

On redirect examination, Newell maintained that Appellant had him “cornered” with the other men. Newell also agreed with the prosecutor that Appellant was not just “standing behind,” but was “taking an active role” in the incident. On re-cross-examination, Newell acknowledged that Appellant did not produce the Taser until towards the end of the encounter.

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[1] The circuit court indicated it agreed with the Department’s recommendations that Appellant’s age and considerations of public safety weighed in favor of retention in the criminal court. However, as recognized by the parties on appeal, contrary to these findings, the Department’s recommendations as to these two factors were that they weighed *against* retention in the criminal court. Summarizing the Department’s recommendations from the report, it suggested that Appellant’s age, amenability to treatment and considerations of public safety weighed against retention in the criminal court, *i.e.*, in favor of reverse waiver. But, his mental and physical condition and the nature of the offense weighed in favor of retention of the case in criminal court. As indicated, when considering these factors together, the Department recommended reverse waiver to juvenile court.

(continued)

When Detective Joe McBride, of the Montgomery County Police Department, met with Newell at the police station a few days after the incident, Newell brought photographs of the suspects he found on Facebook. Detective McBride testified that he recognized Appellant in one of those photographs. After Appellant was arrested, Detective McBride, with the assistance of Detective Oscar Giron, a Spanish speaking interpreter, took a statement from Appellant.[2]

According to Appellant, he rode his bicycle to the area to smoke some marijuana with a few other individuals. At some point, while he was present, a fight broke out involving the group he was with and Newell. Appellant claimed that, "when the fight broke out he ran away from the fight and went back to his bike." But, Appellant agreed that he then went back to the area where Newell was being beaten and stated that "he saw the victim was bleeding from his shoulder and somewhere near his leg." Appellant agreed that someone in this group was armed with a knife and another member of his group was armed with an aluminum baseball bat during the assault. Appellant acknowledged that he knew these other three men and that he willingly went with them that day.

Detective Giron testified that Appellant stated that at one point, Newell came close to him and produced a knife. According to the detective, Appellant "admitted to pulling out a Taser and sparking the Taser in order to get the victim away from him." **[T2. 29]** Detective Giron also stated that he asked Appellant what he thought should happen to someone found guilty of the offenses that occurred that evening. Appellant replied that he

[2] Appellant spoke to the detectives after he was advised of, and indicated he understood his rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

did not want to judge anyone, "but if they, if they did something bad, they should get a punishment because it's attempted murder." Appellant explained that he came to that conclusion "because [he] saw a lot of blood."

DISCUSSION

I. Transfer Decision

Appellant argues that the circuit court erred by denying his Motion to Transfer. Specifically, Appellant asserts that the circuit court erred in its assessment of the pertinent factors and that the circuit court abused its discretion by conflating the nature of the alleged crime with the concern for public safety into one. In response, the State concedes that the court was mistaken in its understanding of the Department's recommendation on the public safety factor, but the circuit court properly exercised its discretion in considering the five factors under Section 4-202 (d) of the Criminal Procedure Article.

A. Standard of Review

The disposition of a transfer motion is committed to the sound discretion of the trial court and will not be disturbed on appeal unless that discretion has been abused. *Whaley*, 186 Md. App. at 444 (citing *King v. State*, 36 Md. App. 124, 128, *cert. denied*, 281 Md. 740 (1977)). An "'[a]buse of discretion' . . . has been said to occur 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13 (1994)), *cert. denied*, 135 S. Ct. 284 (2014).

B. Analysis

At the conclusion of the hearing, the circuit court applied the five factors set forth in Crim. Proc. § 4-202 to the facts presented before the circuit court. The circuit court was required to consider the following criteria in determining whether to grant a Motion to Transfer to Juvenile Court:

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

Crim. Proc. § 4-202 (d).

With respect to the first factor, the circuit court stated the following:

> The first factor, the age of the individual. This individual will be 18 years of age in less than a month. At the time of the alleged event in question, he was 17 years old and seven months. I agree with the department's assessment that this criterion weighs in favor of retaining the case in criminal court. For the reasons set out by the department in their report, I agree with that, and I credit it.

We agree that Appellant's age at the time of the incident weighs in favor of retaining the case in criminal court. Accordingly, we find that the circuit court did not abuse its discretion when it held that Appellant's advanced age of 17 years and seven months, at the time the incident occurred, weighed in favor of retention in criminal court. The court's ruling was very reasonable and acted within the guiding principles of CP §4-202.

The circuit court next considered the second factor. The circuit court stated the following:

> With regarding the mental or physical condition of the individual, notwithstanding that he had a very serious accident in 2014 when he was hit

> by a car. He's thankful he recovered. Largely, save for broken ribs which are still healing and he still gets tested for pulmonary function, apparently, once a month, but according to the department of juvenile services, their tests have been positive. So, which is good. To me that means for the intervention of our health care providers he has fortunately and thankfully recovered fairly well. And, you know, in terms of lung function, understanding that he is presumed to be innocent of the charges, if he is capable and able to chase somebody else down the street while wielding a weapon, his lungs must have healed to some fair degree, which is probably good in terms of the lung function.
>
> Mental condition, there are no known mental health disorders or disabilities. His being set behind in school is due, as I understand it, to his need to recuperate from the automobile accident. And I have not been advised of any learning disabilities or any, you know, particular developmental disabilities that may have impaired or impeded his ability to take advantage of our system of free public education.
>
> So, with respect to the second factor, the mental health and physical condition, I do agree with the department that this factor weighs in favor of retaining the defendant under the jurisdiction of the criminal court.

These findings are consistent with Beatty's testimony. In addition, the report listed Appellant's mental and physical condition and concluded that he had "no physical or mental dysfunction, condition or abnormality which would prohibit him from treatment in an adult program or facility." Based on our review of the record, we discern no abuse of discretion in the circuit court's conclusion on this factor.

With respect to the third factor, the Department considered Appellant's prior contacts with the juvenile system. This included several times when Appellant was placed on pre-trial supervision. According to the report, Appellant successfully completed 25 hours of community service, wrote an apology letter to some of his victims, and wrote a list of ten things he wanted to do to improve his life. The report also noted that Appellant had complied with his curfew, under the supervision of a pre-trial services worker, but had not complied with the requirement that he abstain from drugs, "given his last urinalysis was positive for marijuana." As further explained by Beatty during the hearing, the Department had also determined that Appellant was eligible for residential placement and community-based programs. Considering this, the Department found that this factor weighed against Appellant's retention in the criminal court.

The court, however, disagreed, stating:

> So, circling back to amenability to treatment. This is where I would have to respectfully disagree with the department. They are of the view that the criteria weighs against retaining the defendant in criminal court. I disagree for a number of reasons. I think it's important not to minimize the prior conduct in context. I have an individual who bring [sic] a knife to school, a public school. Four and a half inches. Call it a nail file. We can tip-toe and dance and, come one [sic]. It's not just one event. It's bringing drugs to the public schools, bringing weapons to the public schools, shoplifting, giving false identification. It's the totality of the behavior. It's not one thing, and I must say I take into account and am troubled by the additional information that subsequent to the alleged events in question, the defendant is caught in Frederick County with a weapon. I mean, okay, so he's camping. Maybe he's, maybe it's after dark in an area that closes. But nobody needs a Taser to camp. I will wait to hear at trial what camping activity is accomplished through the use of a Taser. Maybe it's something I'm missing, I don't know, but that is troubling to me. So if I look at the amenability piece as a whole coupled with -- the man's on PTSU. He keeps testing dirty. Obviously he can't comply, and while I don't discount what the DJS representative said, that while he was, if you will, under their thumb, he complied. As soon as he's not, he doesn't. Okay. That to me does not suggest amenability. And while he may not have had sort of the platinum plated treatment program, he was offered services commiserate with the offenses. But it didn't do any good. It didn't seem to make a difference while they weren't watching. While they're watching, he complied. So I have to respectfully disagree.

Based on our review of the record, the circuit court considered the Department's recommendation on this factor, both in the report and Beatty's testimony. Moreover, in its colloquy with Beatty, the circuit court distinguished between the availability of Appellant's eligibility for treatment with Appellant's amenability to said treatment. In determining that Appellant's likely rehabilitation with the Department was of concern, we are unable to conclude that the circuit court's conclusion, ultimately weighing this factor in favor of retention of Appellant's case in the criminal court, was an abuse of discretion.

As to the fourth factor concerning the nature of the alleged crime, the Department's report sets forth the allegations pertinent to this case. Four men, including Appellant, followed the victim, Terry Newell, one night from a Dunkin Donuts as he walked home. One man was armed with a knife, another with a baseball bat, a third with a baseball and a rock. Appellant was armed with a Taser. During the altercation, the individuals displayed and used these weapons against Newell, who was stabbed in the left bicep as a result. After Newell managed to escape, he later found photographs of some of the suspects on Facebook. Appellant was identified as the man who was armed with a Taser during the assault. Appellant was later interviewed by police and admitted that he was present at the time and pointed a Taser at Newell. He was also aware that two other members of his group used a knife and a bat against Newell.

The Department concluded, as part of this report, that the nature of the offense factor weighed in favor of retaining the case in the criminal court. The circuit court agreed. It stated as follows:

> Nature of the offense, the fourth factor. Again he's presumed to be innocent of the charges. I do note, however, that it is alleged that this was a stranger on stranger assault. It does not appear in this case that the defendant's alleged use of force, or his alleged participation in the activity in question was in defense of another, defense of property. It does not appear, anyway, based on the record in front of me, to have been defensive conduct

> that was engaged in in to response [sic]a threat, actual or perceived, initiated by another.
>
> The contrary, this appears to be, and it is alleged, simply, and not simply, but it is because he is presumed to be innocent of all the charges, it is alleged that the defendant and three confederates, while armed, chased down an individual in a public way. The parties doing the chasing were armed, and it was four against one. Based on the information available, the person who is alleged to be the victim tried, on at least two occasions, to sort of walk away, to distance themselves, to say okay, just keep going and he'll go his way and the other folks will go their way. That, notwithstanding the four individuals, it is alleged decided to -- carrying weapons. A knife. Baseball bat. And this defendant, allegedly a Taser, ran this guy down, where he was beaten, stabbed. And while it is true that the defendant did not, it is alleged, actually touched the alleged victim with the Taser, it is, nonetheless, reported that it was brandished and sparked. Which if true, would not be legally insufficient to prove, assuming it was by the requisite evidentiary standard. And with the requisite intent, an assault in the first degree. It's like pointing a gun and cocking the hammer, and the victim knows you do it. You don't have to shoot them. So it's, by the 10 point scale, if his conduct is true it's 7.5 at least. The individual who used the knife to cause bleeding sufficient to require a tourniquet would probably get a 10. I don't mean to act facetiously, but I'm trying to balance and weigh and evaluate his alleged conduct in the context of things. So it's clear that he was one of the runners. He chased in public way. He had a dangerous weapon, and at the very least he brandished it. It's at least a 7.5, maybe an 8 to me.
>
> The nature of the offense respectfully militates in favor of retaining the case in adult court. I just can't help but note that this all arises out of a circumstance where the alleged victim was buying donuts. Okay.

Here, the nature of the alleged crime was a strong factor weighing in favor of retaining the case in criminal court. Additionally, contrary to any suggestion by Appellant, our review of the circuit court's remarks persuade us that the circuit court was not assuming that the alleged facts proved Appellant's guilt, but rather that the charges, if true, were serious.

We addressed how a circuit court should weigh serious charges against a defendant in a Motion to Transfer in *Gaines v. State,*201 Md. App. 1 (2011). Gaines was alleged to have been one of three participants in an early morning armed robbery of a McDonald's and several of its customers. *Gaines*, 201 Md. App. at 4. During the robbery, Gaines pistol-whipped an employee, and his accomplice was alleged to have fired a gunshot at a customer, nearly hitting her in the incident. *Id*. at 4-6. Gaines and his companions were apprehended shortly after the robbery and two handguns and an air pistol were found in their possession at the time of the arrest. *Id*. at 6. Gaines, who was 17 years and 3 months old at the time, was charged as an adult with armed robbery and related offenses. *Id*. at 5-6.

Gaines requested a transfer of the charges to juvenile court. *Gaines*, 201 Md. App. at 6-7. He was denied the transfer. On appeal, Gaines alleged that the circuit court erroneously presumed his guilt in denying the motion and abused its discretion in considering the statutory factors under Crim. Proc. § 4-202. *Id*. at 12. Primarily, Gaines challenged the circuit court's consideration of the nature of the alleged crime. *Id*. at 13. We held that "the circuit court's remarks in the instant case show that it was making every effort to avoid any consideration of the level of [Gaines'] participation." *Id*. at 14. Moreover:

> [E]ven if the circuit court had weighed the level of [Gaines'] alleged participation, it would not have erred in doing so. It is difficult, if not impossible, to consider "the nature of the alleged crime," which the court must do, without considering the actions taken by the alleged perpetrators to commit that crime. Thus, we do not interpret that factor in the reverse waiver statute as being completely divorced from consideration of the actions taken by the alleged perpetrators.

Gaines, 201 Md. App. at 14.

Likewise, in this case, we conclude that the circuit court did not abuse its discretion in finding that the nature of the offense weighed in favor of retaining the case against Appellant in criminal court.

The circuit court considered the fifth and final factor, public safety, during the hearing. The Department recognized that the offense at issue was serious and that Appellant had a history of juvenile delinquency in the juvenile system. However, whereas Appellant did not actually touch the victim, and because "[Appellant] has not acquired any new charges since being placed on Pre-Trial Services," the Department concluded that Appellant was not a threat to public safety. For those reasons, the Department concluded that concerns of public safety weighed against retention of this case in criminal court.

It appears that the circuit court also misread the Department's recommendation on this factor, stating that it agreed that "the factor weighs in favor of adult court." In its analysis, the court continued:

> The group nature of the alleged activity is troubling. It's different, in my mind, in substance and in terms from two individuals having a tiff. Even if the tiff turns into a brawl, that's one thing. But when four human beings run down one human being that's telling and troubling. Because to me it indicates the alleged perpetrators have little or no regard for the value of the life of other human beings. You don't run people down in the street like they're not people. You just, well, that's my view of it.

The court then cited our opinion in *Gaines, supra*, where we discussed the public safety factor. There the circuit court considered the nature of the offense and public safety as part of a balancing of all the factors. *Gaines*, 201 Md. App. at 19. We also addressed this factor in *In re Johnson*, 17 Md. App. 705 (1973), a manslaughter by automobile case.

The 16-year-old unlicensed juvenile struck three children, killing one of them, while driving her 21-year-old boyfriend's car. *In re Johnson*, 17 Md. App. at 709-10. After the accident, Johnson and her boyfriend fabricated a story that the boyfriend was driving. When that story unraveled, Johnson was originally charged as a juvenile. *Id*. at 709. The State's Attorney sought a waiver to adult criminal court and following a hearing, the circuit court granted the waiver to criminal court. *Id*. at 711.

This Court reversed the waiver and remanded the case back to juvenile court. *In re Johnson*, 17 Md. App. at 713. We stated that it was "apparent that the hearing judge was unduly influenced by the 'nature of the offense' to the extent that the amenability of the appellant to rehabilitation was cast aside and not considered, or, if considered, was not afforded its proper weight." *Id*. at 712. Considering that there was also evidence that Johnson was "an ideal subject for the rehabilitative measures available from the Department of Juvenile Services," we concluded that the circuit court abused its discretion in waiving the case to criminal court. *Id*. at 713.

This Court distinguished *Johnson* in *Gaines, supra*, observing that whereas Johnson was considered an ideal subject for rehabilitation, due to her status as an above-average student, who was very responsible, reliable, and well-behaved, "[h]ere, in contrast, appellant has exhibited a pattern of increasingly serious brushes with the law, has performed poorly in school, and has been expelled for truancy." *Gaines*, 201 Md. App. at 20. Further, we stated that "the crime charged in *Johnson*, manslaughter by automobile, albeit a very serious offense, pales in comparison to the crimes charged here, when we consider the conduct of the accused and not just the results of that conduct." *Id.* We explained:

> Not only is the degree of culpability alleged in the instant case far greater than that alleged in *Johnson*, the threat to public safety posed by appellant exceeds that posed by the juvenile in *Johnson*. The court, in weighing the threat to public safety, here, could properly weigh the possibility that a person who participates in a brazen daytime armed holdup is likely to engage in such activity in the future, if given the opportunity, whereas someone who commits manslaughter by automobile may be deemed less likely to repeat such behavior, at least under the circumstances in *Johnson*, where drugs and alcohol were not factors in what appeared to be a simple, but tragic, accident, resulting from a momentary loss of control over a vehicle.

Gaines, 201 Md. App. at 21.

Here, Appellant suggests that the circuit court was "unduly influenced" by the nature of the offense such that considerations of public safety, and the Department's recommendation weighing against retention on that factor, were not weighed properly. We disagree. Our review of the record persuades us that, even to the extent that the circuit court may have misread some of the Department's recommendations on certain factors, the circuit court properly weighed those factors, independently, based on the allegations and the testimony from Beatty. Additionally, the circuit court made clear that Appellant was presumed innocent, while, at the same time, acknowledging the seriousness of the allegations against him. We hold that the circuit court properly exercised its discretion in denying Appellant's Motion to Transfer juvenile court.

II. Did Appellant's Statement Generate a Self Defense Jury Instruction?

Next, Appellant asserts that the circuit court erred by not giving a self-defense instruction based on his statement to Detective Giron. Specifically, Appellant argues that his statement constituted "some evidence" sufficient to warrant an instruction. The State responds that the evidence did not generate a self-defense jury instruction and the circuit court properly exercised its discretion in refusing Appellant's request. We agree.

A. Standard of Review

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Arthur v. State*, 420 Md. 512, 525 (2011) (citations omitted).

In determining whether a trial court has abused its discretion when refusing to give a self-defense jury instruction we consider "(1) whether the requested instruction is a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012) (citation omitted).

B. Analysis

At trial and prior to the circuit court's administration of the jury instructions, defense counsel requested a self-defense instruction based on Detective Giron's testimony. Defense counsel recognized that, although Appellant's action of turning on the Taser could constitute second-degree assault, it was also consistent with Appellant's statement to the detective that he turned on the Taser because he thought Newell was going to come at him during the later parts of the encounter. Defense counsel argued:

I mean, Your Honor, he was not the initial aggressor. He was not the person who pulled out a knife. He wasn't there for when the knife, for when Mr. Newell was stabbed. And, that this is after that. And, now he's there, and from his perspective, he sees this guy who's bleeding and is in some sort of panic with a knife.

How is that not reasonable to think, well, I'm here, that, and this guy's swinging a knife that I'm not in danger, that I'm not in danger of being attacked by him with that knife. I didn't raise this. I didn't initiate deadly force. I haven't been involved in this. I'm not the one that stabbed you, but you are now waving a knife at me.

The State responded:

Your Honor, I think the evidence would reflect that he was with this group of people when this whole thing started. Now, whether his intent was to be part of it or not is an issue for the jury. But, he was certainly with four people when this began which makes him the aggressor.

The evidence is also that when this thing ended, and taking it in the light most favorable to the defendant at this time, when this thing ended he, for whatever reason, showed up in the final act with four other people, the three other people that he was with.

So, again, he's now with three other people. One who has a bat, one of whom has a knife. He's got a Taser. He removes the Taser when these three or four now people are confronting the victim. That makes him an aggressor at that point. Whether he is, you know, he is with these people. Is it an unreasonable belief at that point? Yes, because he went back to it.

….

THE COURT: I'll allow you to argue it. But based on this instruction, I don't think that this evidence has been generated in this case. I'm not going to give the self-defense instruction 507. Okay. Before I print out the verdict sheet, are there any changes or objections to the jury instruction?

[THE STATE]: Not from the State, Your Honor.

[DEFENSE COUNSEL]: And, not from the defense.

During closing argument, Appellant's counsel argued that the State could not prove beyond a reasonable double that Appellant injured Newell. Specifically, Appellant's counsel argued that the evidence showed that Newell pulled out his knife first during the encounter and that Appellant only pulled out his Taser, turning it on only one time, in order to inform Newell "don't come waving that at me," and not to indicate that he was helping the other assailants. Counsel concluded by stating that Appellant stood in the back, which means that he could not have been the one to injure Newell.

Whether the Requested Instruction is a Correct Statement of the Law

During the trial Appellant's counsel argued that based on the information Appellant provided Detective Giron, that was testified about, his client was entitled to the following self-defense jury instruction. The Court read the instruction in the record.

> THE COURT: You have heard evidence that [Appellant] acted in self-defense. Self-defense is a complete defense, and you are required to find [Appellant] not guilty if all of the following four factors are present.
>
> One, [Appellant] was not the aggressor or, although [Appellant] was the initial aggressor, he did not raise the fight to the deadly force level. Two, [Appellant] actually believes that he was in imminent and, [sic] immediate and imminent danger of bodily harm. Three, [Appellant's] belief was reasonable. And, four, [Appellant] used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm.

Maryland appellate courts have held that circuit courts are encouraged to use the Maryland Pattern Jury Instructions. In *Johnson v. State,* 223 Md. App. 128 (2015) we stated the following:

> At the outset, we note that it is well-established that a trial court is strongly

> encouraged to use the pattern jury instructions. *See Yates v. State,* 202 Md. App. 700, 723, 33 A.3d 1071 (2011) (noting that we have repeatedly "recommended that trial judges use the pattern instructions"), *aff'd,* 429 Md. 112, 55 A.3d 25 (2012); *Minger v. State,* 157 Md. App. 157, 161 n. 1, 849 A.2d 1058 (2004) ("Appellate courts in Maryland strongly favor the use of pattern jury instructions."); *Green v. State,* 127 Md. App. 758, 771, 736 A.2d 450 (1999) ("[W]e say for the benefit of trial judges generally that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions.").
>
> Moreover, the pattern jury instructions are drafted by "a group of distinguished judges and lawyers who almost amount to a 'Who's Who' of the Maryland Bench and Bar." *Green,* 127 Md. App. at 771, 736 A.2d 450. Speaking for this Court in *Yates,* Judge Graeff wrote: "This Court has recommended that trial judges use the pattern instructions. Appellant has not cited any case in which a Maryland appellate court has held that a trial court committed plain error in following this recommendation and giving, without objection, a pattern jury instruction." 202 Md. App. at 723, 33 A.3d 1071 (citations and footnote omitted). At oral argument before this Court, appellant's counsel conceded that since *Yates* was published, still no opinion has reversed a trial court for giving, without objection, a pattern jury instruction.

Johnson, 223 Md. App. at 152-154.

Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 5:07 prescribes as follow:

> You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:
>
> > (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
> > (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
> > (3) the defendant's belief was reasonable; and
> > (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

After comparing the instructions, we hold that the proposed self-defense jury instruction requested by Appellant's counsel was the correct statement of the law. The proposed jury instruction is nearly identical to the Maryland Pattern Jury Instructions. Therefore, it is a correct statement of the law.

Whether the Proposed Jury Instruction Was Applicable Under the Facts of the Case

The circuit court was required to ascertain whether there was some evidence to support Appellant's proposed self-defense jury instruction. "When a defendant requests a particular jury instruction, [the Court of Appeals] has held that a party need only produce 'some evidence' to support such an instruction." *Wood v. State*, 436 Md. 276, 293 (2013) (quoting *Bazzle v. State*, 426 Md. 541, 551 (2012)). Some evidence "calls for no more than what it says 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Id*. (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). "There must be some evidence to support each element of the defense, however." *McMillan v. State*, 428 Md. 333, 355 (2012); *see also Marquardt v. State*, 164 Md. App. 95, 131 (2005) ("There must be 'some evidence,' to support each element of the defense's legal theory before the requested instruction is warranted"); *see generally* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 5:07, at 926 (2016) (providing, in part, "you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent").[3]

The first element of the proposed self-defense jury instruction states as follows: "[Appellant] was not the aggressor or, although [Appellant] was the initial aggressor, he did not raise the fight to the deadly force level." Here, the facts show that Appellant was with a group of men who chased and assaulted Newell. The Appellant was with a man, brandishing a knife and another man with a baseball bat. According to Newell, Appellant sparked a Taser one time during the assault. There was also evidence, from Appellant's statement to Detective Giron, that Appellant used the Taser "because the victim pulled out a knife and came near him. So, he sparked the Taser to keep the, keep some distance between him and the victim." However, the fact remains that Appellant was with the group of initial aggressors who attacked Newell first. Also it is reasonable for a judge to conclude under the facts in this case that the Appellant was a part of raising the fight to deadly force level. Therefore, a court could reasonably conclude that there was not sufficient evidence to support the first element of the self-defense instruction. As such, we hold that the record

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[3] Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 5:07 states: You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:

> (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
> (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
> (3) the defendant's belief was reasonable; and
> (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

shows that there was not sufficient evidence to support the first element of the proposed self- defense jury instruction.

As it relates to the second element which states that "[Appellant] actually believes that he was in imminent and immediate danger of bodily harm" the Court of Appeals has stated that "[o]nly if the record reflects, from whatever source, that, at that time, the defendant subjectively believed that he or she was in imminent danger of death or great bodily harm could the issue be generated." *State v. Martin*, 329 Md. 351, 363, *cert. denied*, 510 U.S. 855 (1993). Moreover, "not only must the defendant subjectively believe that his [or her] actions were necessary 'but objectively, that a reasonable man would so consider them.'" *State v. Marr*, 362 Md. 467, 480 (2001) (citations omitted). However, "[t]he objective standard does not require the jury to ignore the defendant's perceptions in determining the reasonableness of his or her conduct." *Id*. Rather, in making its determination, "the facts or circumstances must be taken as perceived by the defendant, even if they were not the true facts or circumstances, so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way." *Id*. (citations and emphasis omitted); *see also Rajnic v. State*, 106 Md. App. 286, 296 (1995) ("It is well-established that a defendant's claim that self-defense was necessary 'should be judged by the facts as they appeared to him, whatever they truly were.'") (emphasis and citation omitted).

The State relies on *Lee v. State*, 193 Md. App. 45, *cert. denied*, 415 Md. 339 (2010), in support of its contention that Appellant's belief of an imminent threat from Newell was unreasonable. In that case, Lee, a security guard at a bar where a shooting occurred, admitted that he shot the person he identified as the alleged assailant. *Lee,* 193 Md. App. at 50. Lee claimed that he shot this man as he was advancing toward another person in the parking lot, while the man was armed with a knife. *Id*. at 50-52. Lee argued that he was defending the people who were standing around in the parking lot behind him and that, therefore, he was entitled to a defense of others instruction. *Id*. at 55-58. We agreed with the trial court that such an instruction was unwarranted, explaining:

> The facts adduced at trial did not include "some evidence" that the appellant actually believed when he shot [the victim] that any other person-patron or coworker-was in immediate and imminent danger from [the victim], much less that he held an objectively reasonable belief of the same. The appellant's testimony that, had he retreated, "maybe one of those people would get hurt," could not support a reasonable inference that he actually believed such harm was imminent or immediate. He did not testify that he thought a patron would be killed or otherwise seriously injured if he retreated. As defense of others was not generated as a defense at trial, the appellant was not entitled to a jury instruction about it, as a matter of law.

Lee, 193 Md. App. at 65 (footnote omitted).

Here, Newell admitted that he had a knife in his possession and that he displayed it for protection. He also stated that he was "freaking out" and in "panic mode." It is notable that Newell had already been stabbed at that point in his encounter. Appellant's belief was subjectively unreasonable because he was in fact standing in front of the victim, with another person who was carrying a knife, another with a baseball bat. Specifically, Appellant approached an ongoing fight when he could have avoided it, which made it unreasonable for him to stay and to turn on his Taser. We have held that "[a]n aggressor is not entitled to a self-defense instruction if he initiated a deadly confrontation or escalated an existing confrontation to that level." *Thornton v. State*, 162 Md. App. 719, 734 (2005), *rev'd on other grounds*, 397 Md. 704 (2007). This Court explained this concept further in *Sutton v. State*, 139 Md. App. 412, 454 (2001), where we discussed *Street v. State*, 26 Md. App. 336 (1975):

> [T]he fundamental concept that the accused claiming the right of self-defense must not have been the aggressor or provoked the conflict is set forth in *Street v. State*, 26 Md. App. 336, 338 A.2d 72 (1975). There, the victim was shot and killed in an alley. A witness testified that appellant and he accosted the victim and forced him into the alley; that appellant at gunpoint demanded and was given money by the victim; that he, (the witness) took the victim's wallet from his back pocket and left the alley. Shortly thereafter he heard a shot and saw appellant run from the alley. Approximately twenty to twenty-five minutes later he saw appellant and asked him why he shot the man; that appellant said, "because the man had pulled out some scissors on him." A pair of scissors was found with the victim's clothing. This Court stated:
>
>> The only evidence of self-defense in the instant case is appellant's self-serving declaration to Roberts, that he shot the man "because the man had pulled out some scissors on him." Surely, this meager shred of evidence was too slight and doubtful in this fact situation to raise the issue of self-defense for jury consideration.
>>
>> * * * * *
>>
>> In addition to lacking factual support in the record to generate the issue of self-defense for jury consideration, *the claim of self-defense was unavailable to appellant as a matter of law because he was an aggressor engaged in the perpetration of a robbery.*

Id. at 339-340 (emphasis added).

We hold that the record shows and the facts stated above show, that there was not sufficient evidence to support the second element of the proposed self- defense jury instruction. He did not have a reasonably held belief that Newell posed an imminent threat of harm. Moreover, the record and the facts surrounding this event stated above, also shows that there was not sufficient evidence to support the third element of the proposed self-defense jury instruction because Appellant did not act reasonably.

As it relates to the last element of the proposed self-defense jury instruction, which states: “[Appellant] used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm” we find that Appellant did use more force than was reasonably necessary. Appellant had a taser and his accomplices all had weapons. As for the fact that Newell was also armed with a knife, we recognize that “a defendant ‘who was the first combatant to employ non-deadly force is entitled to assert the defense of (perfect or imperfect) self-defense against a combatant who has responded by employing deadly force.’” *Wilson v. State*, 422 Md. 533, 543 n.1 (2011) (emphasis and citation omitted). However, as we stated earlier, it was Appellant and his accomplices who pursued Newell and were armed with a variety of weapons, including a knife, a baseball bat, baseballs, and rocks in their confrontation with Newell. *See Silva v. State,* 422 Md. 17, 28 (2011) (“[T]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime”) (quoting *State v. Raines*, 326 Md. 582, 597 (1992)).

We are persuaded that Appellant was an initial aggressor in the assault against Newell and that there was not enough evidence or “some evidence” to support a self-defense instruction. As such, the circuit court did not err when it declined to Appellant’s request for the proposed jury instruction. The circuit court properly exercised its discretion in declining appellant’s request to give a self-defense instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.