UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1927

September Term, 2013

JERRY HARCUM

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Friedman,

JJ.

Opinion by Kehoe, J.

Filed: July 29, 2015

Following a two-day jury trial in the Circuit Court for Baltimore County, the Honorable Robert E. Cahill, Jr., presiding, Jerry Harcum[1] was convicted of nineteen criminal charges, including assault, armed robbery, armed car-jacking, kidnaping, theft, and illegal possession of a firearm. The trial court imposed sentences totaling one hundred and ten years. On appeal, appellant presents three issues, which we have re-worded:

> I. After excluding appellant from the courtroom for disruptive behavior, did the trial court err: (1) by not informing appellant on the record that he could return upon a promise of acting appropriately; (2) by not providing appellant stand-by counsel; and (3) failing to arrange for a means by which appellant could view the proceedings remotely; or 4) by failing to provide appellant the opportunity to present an opening statement?
>
> II. Did the trial court commit plain error when it allegedly permitted two witnesses to give hearsay testimony?

We will affirm the trial court.

Background

Where, as in this case, appellant does not challenge the sufficiency of evidence, we shall confine our recitation of facts to those which are necessary to provide context for the issues raised in this case. *Joyner v. State*, 208 Md. App. 500, 503 n.1 (2012).

The charges against appellant arose out of his alleged involvement in a series of armed robberies that took place in Baltimore County on November 29, 2011. Appellant's trial occurred over the course of two days. Appellant represented himself at trial. In pre-trial motions and court papers, appellant asserted that he was a "living beneficiary" and, as such,

[1] Alternatively referred to as Jerry Harcum-Bey in the trial.

he was not Jerry Harcum, and did not know anyone by that name. He repeated that, because he was a "living beneficiary" of the State government, the circuit court did not have jurisdiction over him.[2]

On the first day of trial, appellant was generally disruptive[3] and was removed from court for his behavior. Throughout the first day of trial, the trial court gave appellant a total of four opportunities to return to the courtroom and participate if appellant promised to behave appropriately. Of these four opportunities, the trial court had appellant returned to the courtroom three of the four times, and directly informed him that he could remain if he behaved; the first time, immediately after removing appellant from the courtroom, the trial court asked a deputy to inform appellant that he could return if he behaved. On the second day of trial, the trial court again gave appellant the opportunity to remain upon a promise to behave, and appellant remained in court for the duration of the day. Below, we provide more specific detail on the interactions between appellant and the trial judge.

[2] Appellant's position appears to have been a variation upon the "sovereign citizen" or "flesh and blood" defense, discussed in *Stewart-Bey v. State*, 218 Md. App. 101, 108-10 (2014)

[3] Appellant's disruptive behavior mostly stemmed from consistent interruptions of the judge and prosecution. In addition to consistently interrupting and speaking out of turn, appellant made accusations against the judge—such as stating that he had "blatantly been denied [his] due process," and that the judge had tried both his uncle and father and "found both of them guilty, and there's no way possible [he] c[ould] receive a fair trial . . . with this Judge on the case."

I. The First Day of Trial

1. Before the Jury Was Selected

Before the jury selection, the trial court discussed appellant's plea and established jurisdiction over appellant. Appellant displayed disruptive behavior by continuously interrupting the judge and prosecutor, and claiming to not understand anything the judge told him. The trial court explained to appellant his rights on two occasions, while also informing him that if his disruptive behavior continued, the trial court would exclude him from the courtroom. Although appellant's disruptive behavior continued, the trial court elected not to exclude him. Some examples of the discourse between the trial judge and appellant are as follows:

> THE COURT: I think I must make a record of the fact that each time I try to talk to you, Mr. Living Beneficiary, or Mr. Harcum-Bey, or whatever—
>
> [APPELLANT]: Objection. I don't understand.
>
> THE COURT: —it is that you wish to be called, keep interrupting me, and you keep stopping me from saying the things I wish to say, that I'm required to say, I believe, in order that you understand your rights.
>
> [APPELLANT]: Objection. I don't understand.
>
> THE COURT: We cannot have a trial under circumstances where you continue to interrupt me or you continue to interrupt Mr. Beakley and/or Mr. Wright—
>
> [APPELLANT]: Objection. I don't understand.
>
> THE COURT: —and where you continue to interrupt witnesses under the circumstances.

[APPELLANT]: Objection. I don't understand.

THE COURT: We simply cannot conduct the business of the Court under these circumstances.

[APPELLANT]: Objection. I don't understand. Let the record show on the record, for the record, that I do not understand.

THE COURT: Okay. Do you wish to be present during the course of the trial, Mr. Harcum-Bey?

[APPELLANT]: I do not understand.

THE COURT: You don't understand whether– the question I just asked?

[APPELLANT]: I do not understand.

[THE COURT]: Okay. What is it about the question that I asked that you don't understand?

[APPELLANT]: I do not understand.

THE COURT: Okay. So you are just going to keep saying that I do not understand?

[APPELLANT]: I do not understand.

THE COURT: Okay. Well, under the circumstances, I will explain a couple of things to you.

The trial court proceeded to explain to appellant that it would enter a plea of not guilty to all charges against appellant pursuant to Md. Rule 4-242(b)(4).[4] The court then provided appellant with a detailed explanation of the trial process. This explanation ended with the following:

> THE COURT: . . . . [Y]ou must understand that there are limits on what can happen here . . . . It is important because you have a right to be present during all critical stages of your own trial. You have a right to be in this courtroom sitting at that trial table listening in while everything that is important happens during the course of the trial . . . . [Y]ou have a right to sit there and, and watch their testimony. You have a right to ask them questions, which is what I referred to as cross examination.
>
> So you have a right under our prevailing laws to be present here in Court during all important parts of this trial, and that includes jury selection.
>
> The presence of the Defendant in a criminal trial is a right that is fundamental to our Anglo-American jurisprudence. It is embodied in Maryland Rule 4-231,[5] which simply states that a Defendant shall be present at all times when required by the Court. The Defendant is entitled to be

[4]Rule 4-242(b)(4) states:

> **(b) Method of Pleading.**
> . . . .
> (4) Failure or Refusal to Plead. If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

[5]Rule 4-231 states:

> (a) When Presence Required. A defendant shall be present at all times when required by the court. A corporation may be present by counsel.
> (b) Right to Be Present--Exceptions. A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

physically present in person at . . . every stage of the trial except for . . . circumstances that don't apply here.

Rule 4-231 also indicates under Subsection (c) that the right to be present . . . can be waived by a Defendant who voluntarily absents himself or herself after the proceeding has commenced . . . or who engages in conduct that justifies exclusion from the courtroom . . . .

So you have a right to be here at all important times. You can always waive that right. if you wish to waive —

[APPELLANT]: I object.

THE COURT; — that right by telling me that you don't want to be present during your trial, you have a perfect right to do that. I don't think it's advisable, but you have a perfect right to say, I don't want to be in the courtroom during this trial, I want to be in the lockup.

* * * *

The more important consideration for me, and I think for you, is that you can be excluded from this courtroom by me if you engage in conduct that justifies exclusion from the courtroom.

So far I have observed you to be completely disruptive every time except for now that I have tried to talk[,] you have interrupted me and tried to stop me and talk over me . . . .

So I warn you now that if you continue with that type of conduct, you are going to reach a point where I conclude that the State can't put its evidence on in a sensible and rational way because you continue to interrupt that, you continue to interrupt me, you have given me no choice but to exclude you from the courtroom.

* * * *

So I say that by way of reasonable and fair notice to concerning the consequences of what I imagine might be your future conduct.
Now, during the Court — yes, sir.

[APPELLANT]: Let the record show I do not understand.

* * * *

THE COURT: [I]f you continue to do this when this jury comes up here, I'm going to remove you from this courtroom . . . . I do not want to do that . . . . It is important that you understand the rules, and these are the rules . . . .

I will again inform you that my job is to be a vigilant guardian of the right of an accused to confront and cross examine his or her accusers. I take that responsibility with the utmost seriousness . . . . I will only do it if I believe that we cannot conduct fair, orderly and just administration of this trial under the circumstances. But you are demonstrating and you are making a clear record of the fact that you have no interest in engaging in a fair trial.

2. Jury Selection

Appellant was not disruptive during the jury selection process; his only statements during this process were: "Objection. I don't understand[,]" whenever the trial court asked if a juror was acceptable to the defense. Aside from these objections, he did not disrupt the jury selection process and he was not excluded from the courtroom.

3. Opening Statement

Prior to the State's opening statement, the judge informed the jury that appellant's decision to wear his prison jumpsuit[6] were not to be considered when deciding his innocence or guilt, and reminded the jury that appellant should be presumed innocent. The trial court

[6]Earlier in the day, the trial court reminded appellant that there was a "freshly, dry-cleaned and pressed Brooks Brothers suit . . . along with a nice blue shirt, that I am . . . offering to loan to Mr. Harcum-Bey."

instructed the prosecution to proceed with its opening statement, but appellant began to speak before the prosecution had an opportunity to begin. Appellant engaged in a speech about the Maryland Constitution. The trial court responded: "I am not going to put you out of Court, but you are sorely testing my patience." When appellant continued to speak, the trial court stated: "If you do not let [the prosecutor] speak, I'm going to have the deputies take you back."

Appellant continued to interrupt, and the trial court ordered the deputies to remove him from the courtroom. After appellant was escorted out of the courtroom, the court told the deputy: "[P]lease advise [appellant] if he wishes to promise that he will not be disruptive, I will invite him back into the courtroom immediately." The prosecution then proceeded to give its opening statement. Immediately following the prosecutor's opening statement, the trial court stated: "[W]e are going to take one more very quick recess before we call the first witness." The trial court then requested that the deputies bring appellant back into the courtroom.

4. The First Witness, Robert Ausby

When appellant was returned to the courtroom, the trial court stated:

> I wanted to bring [appellant] back in to Court before the first witness is called to again invite him to attend and participate in this trial within the bounds of reason, so long as he can promise me that he won't be disruptive under the circumstances.

The trial court then explained to appellant:

> You have the right to be present and face your accuser . . . a witness to the incident allegedly . . . and, in fact, you have a right to ask him questions about what he saw and heard on November 29, 2011 . . . .
>
> What you do not have a right to do, as I have tried to explain, is to disrupt the questioning of the attorneys who will be asking Mr. Ausby questions, or make any speeches. If you do that, I will again have no option but to put you out of the courtroom and we will proceed in that way. If you promise me that you will not disrupt these proceedings, I will allow you to stay in the courtroom during the course of the direct and cross examination of Mr. Ausby. If you do not make that promise, I'm going to have to, I'm going to have to put you back in the cell.

Appellant did not make any such promise but continued to state that he did not understand what was occurring and continued to interrupt both the court and the prosecutor. Nevertheless, the trial court decided: "I'm going to tolerate it as long as I think it is not affecting the order of the administration of the trial." After more discourse between the trial court and appellant, the following occurred:

> THE COURT: Well, for the time being, I'm going to err on the side of again giving [appellant] a chance to be present and exercise his rights of confrontation . . . . If he interrupts the question, the orderly questioning of Mr. Ausby in any way other than to say the word objection . . . I will exclude him from the courtroom once again as I think I'm obliged to do—
>
> [APPELLANT]: Objection. I do not understand anything that the Judge—
>
> THE COURT: —and I will give him the opportunity—
>
> [APPELLANT]: —is stating right now.
>
> THE COURT: —to promise that he will comport his conduct—
>
> [APPELLANT]: I do not understand. I do not agree—

THE COURT: —in this Court.

. . . .

THE COURT: Again, what I have tried to explain is that what you do not have a right—

[APPELLANT]: I don't understand it.

THE COURT: —to do is disrupt the questioning—

[APPELLANT]: I object. I don't understand.

THE COURT: —that is about to occur or to make speeches—

[APPELLANT]: I object. I don't understand.

THE COURT: —during the course of that testimony. If you do that, I will have no option—

[APPELLANT]: I object. I don't understand.

THE COURT: —but to put you out. . . . Okay. Get the jury.

. . . .

[PROSECUTION]: Mr. Ausby, go ahead and have a seat please. . . .

[APPELLANT]: Objection. On the record, for the record, and let the record show the jurors, before they drag me out again, which they will, the Maryland Constitution, Article 23, states, and the criminal (inaudible)—

[PROSECUTION]: Judge, I'm going to object again. . . .

THE COURT: Okay. You may proceed. The objection is overruled. You may proceed with your questioning.

DIRECT EXAMINATION

> [PROSECUTION]: Mr. Ausby, how old are you?
>
> [APPELLANT]: I object. I don't understand.
>
> THE COURT: The objection is now sustained. Please take [appellant] back to his cell. . . . Okay. Ladies and gentlemen, I would again instruct you before we commence with the direct examination of this witness, the last thing I would ever do is deny a person his or her rights to confront her accusers, in this case the witness you are about to hear from.
>
> I have no option and have had no option but to do this. And so, again, I, I order you not to hold this against [appellant][.]

During appellant's absence, the prosecution engaged in direct examination of Mr. Ausby. When the prosecution had finished its direct examination, The trial court stated:

> Well, the Court has found [appellant] has waived his right to be present and, therefore, accordingly, he's waived his right to cross examine the witness. Mr. Ausby, you are free to go, sir.

The trial court then sent the jury out for lunch. Prior to taking their own lunch recesses, the following colloquy occurred between the trial court, the deputy, and the prosecution:

> THE COURT: I'll . . . ask you . . . if you can go back and ask [appellant] if he wishes to return to Court under the promise that he will not interrupt, and so forth, and then you can come back out and we'll put his response on the record if he wants to come back out. Keep trying.
>
> [PROSECUTION]: . . . I have absolutely no doubt that [appellant] is going to come out and be disruptive . . . .
>
> THE COURT: That may well be, but I am a warrior for the right to confront, and I think I recognize what [appellant] is doing, but I have to think about

> protection of his constitutional rights and the fact that he might change his mind . . . . [I]t is my desire to accord him every oppotunity to participate in a sensible way during the course of this trial.

5. The Testimony of Detective William Keitz, Officer Jessica Beale, and Tabitha Bounds

Appellant was returned to the courtroom once more; the trial court informed him: "I ask you if you, if you will agree—I'm delighted to invite you back into the courtroom to attend your own trial." However, appellant did not agree to behave, and continued to interrupt the trial court. The trial court warned him again "I will continue to conclude . . . that you are aware of your rights and you're voluntarily waiving . . . your right to be present." When appellant continued his disruptive behavior, the trial court stated:

> I will offer you one last chance to promise me that you will behave yourself, you will sit quietly and simply say the word objection during the course of direct testimony and not repeat these, these mantras that you have, and then ask questions on cross examination.

When appellant continued his behavior, the trial court again repeated:

> [I]f you change your mind and you wish to come out here and make a commitment that you will behave yourself, I will invite you back into the Court at a moment's notice. You just let the deputies know that you have changed your mind and wish to comport yourself with some element of decorum and propriety and I will bring you back into the Court.

Appellant was then escorted back to his cell. After Appellant was returned to his cell, the prosecution examined three witnesses—Detective Keitz, Officer Beale, and Tabitha Bounds. During the direct examination of Ms. Bounds, the deputies informed the court that

appellant promised he would behave and wanted to return to the courtroom. The court took a brief recess to bring appellant back into the courtroom.

6. Remainder of Ms. Bounds's Testimony

Upon appellant's return to the courtroom, the trial court once again explained to appellant that he would be permitted to remain in the courtroom so long as he did not disrupt the proceedings. However, immediately following this explanation, appellant engaged in his disruptive behavior:

> [APPELLANT]: . . . . Could you answer these questions for me?
>
> THE COURT: . . . . I'm not answering any questions, sir. What you do not have a right to do is disrupt the ongoing questioning of these attorneys or the ongoing answers of witnesses by doing anything other than saying the word objection and ending there. If you, if you agree to abide by those rules, I will allow you back in the courtroom and I will allow you to cross examine this witness, Ms. Bounds, if you wish to do that. But if you are going to continue to disrupt the proceedings by interrupting lawyers and witnesses, I will, I will have no option but to return you to the cell.
>
> . . . .
>
> [APPELLANT]: You are not going to answer my questions?
>
> THE COURT: What's your question?
>
> . . . .
>
> [APPELLANT]: . . . if you support the constitution, I need my grand jury transcript so I can cross examine the witnesses after they give their statements.
>
> THE COURT: This is simply the same thing that you have done time and time and time again. You are obviously not agreeable to sitting at the trial table and

> not disrupting the questioning or the answering of the witnesses, and, accordingly, I have no option but to again remove you from the courtroom.

Appellant was removed and the prosecution finished its examination of Ms. Bounds; the remainder of the day's trial was conducted without appellant returning to the courtroom.

II. The Second Day of Trial

Unlike the first day of trial, appellant was present for the entirety of the second day. Six witnesses were called—Juan Faidley, Detective Goldsmith, Detective Ford, Sergeant Gusman, Detective Stach, and Detective Carroll—and appellant cross-examined all of them. He also made a closing argument.

Analysis

I. Exclusion of Appellant from the Courtroom

Appellant contends that his convictions must be reversed for four reasons connected to his removal from the courtroom during his trial:

First, the record does not affirmatively show that, when he was initially removed, the court did not advise him on the record that he could return to the courtroom if he promised to refrain from disruptive behavior;

Second, the court erred in failing to appoint stand-by counsel for him;

Third, the court erred by failing to advise him that he had the right to make an opening statement at the close of the State's case; and

Fourth, the court erred by failing to provide him with a means of remotely viewing the courtroom proceedings.

(1) Advice as to the Right to Return to the Courtroom.

When appellant was removed from the courtroom during the prosecutor's opening statement, the trial court instructed "Toby," otherwise unidentified in the record but apparently one of the deputies who was in the process of escorting appellant from the courtroom, to "please advise [appellant] if he wishes to promise that he will not be disruptive, I will invite him back into the courtroom immediately." Appellant asserts that his convictions must be reversed because the record does not affirmatively show that this advice was relayed to him by a deputy.

The landmark decision in this area is *Illinois v. Allen*, 397 U.S. 337 (1970), in which the Supreme Court held that:

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. at 343 (footnote omitted).

This Court applied *Allen* in *Biglari v. State*, 156 Md. App. 657 (2004). In *Biglari*, the defendant discharged counsel in the middle of trial. After the State closed, the defendant

called at least one witness and attempted to call another one. At that point, he was removed from the courtroom for repeated outbursts of disruptive behavior. He was not advised that he could return to the courtroom if he promised to behave appropriately. *Id.* 663–64. After Biglari was removed from the courtroom, the trial court proceeded to give the jury its final instructions and the State made its closing argument. On appeal, Biglari asserted that the trial court erred when it ordered him to be removed from the courtroom and continued the trial in his absence. Although we reversed Biglari's convictions, we did so for a different reason.

After discussing *Allen,* we cited with approval *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989) and *North Carolina v. Sweezy*, 291 N.C. 366, 533–35 (1976); and *California v. Booker*, 69 Cal. App. 3d 654, 355–56 (1977). In all of these cases, the trial courts ordered the defendants to be removed from the courtroom but, in each case, the trial judge promised the defendant that he could return upon a promise to behave.

We concluded that:

> Appellant is not entitled to a new trial merely because it was the prosecutor, rather than the circuit court, who first suggested that appellant be removed from the courtroom. Nor is appellant entitled to a new trial merely because he was removed from the courtroom when he refused the command to proceed with his case. *Error occurred, however, when appellant was not afforded the opportunity to return to the courtroom upon a promise to behave properly.*
>
> While there is no question that the trial judge has broad discretion to control the conduct in his or her courtroom, trial in absentia should be the extraordinary case, undertaken only after the exercise of a careful discretion by the trial court. We are persuaded that, after delivering jury instructions, the circuit court should have (1) sent the jury to the jury room, (2) brought appellant back into the courtroom, (3) advised appellant of his right to take

> exceptions to the jury instructions, (4) advised appellant that his right to present a closing argument was contingent upon his promise to conduct himself properly, and (5) informed appellant that, if he did promise to conduct himself properly, he could remain in the courtroom for the closing argument phase of the proceedings. We therefore hold that, because the circuit court did not inquire of appellant whether he would "conduct himself properly" during closing arguments, appellant is entitled to a new trial.

156 Md. App. at 674 (quotation marks, brackets, citation and footnote omitted).

Returning to the present case, appellant was removed from the courtroom several times. Appellant does not assert that the trial court's advisements were inadequate on any occasion other than the first. Appellant does not dispute that, very shortly after the trial court ordered him to be removed for the first time, the trial court instructed a deputy to "please advise [appellant] if he wishes to promise that he will not be disruptive, I will invite him back into the courtroom immediately." Instead, appellant argues that reversal is required because "[t]here is no indication as to when, if ever, this crucial information was actually relayed to the [a]ppellant."

In response, the State argues there is a rebuttable presumption that public officers properly perform their duties. The State contends that "it is not the State's burden to show that the court's message was relayed to [appellant]; rather it is [appellant's] burden to show that the message was *not* relayed to him." (Emphasis in original.) We agree with the State.

The Court's analysis in *Black v. State*, 426 Md. 328 (2012), is instructive. In that case, Black was convicted of various offenses after a jury trial. In the record was an envelope containing five jury notes. Three of the notes were date and time stamped and

contained responses from the trial judge to the jury. Two of the notes were neither time nor date stamped and neither contained a response to the question contained on the note. The record also contained affidavits from the trial judge, the prosecutor, and the defense counsel, each stating that the affiant had no recollection of either note. The trial judge's affidavit included a description of his normal practices regarding jury notes, practices that were followed with regard to Note 1–3 but not for the remaining two notes. *Id.* at 334–35.

In the Court of Appeals, Black contended that the trial court had erred because, although the notes were in the record, the trial court had not disclosed the note as required by Rule 4-326(d).[7] *Id.* at 336. The Court began its analysis by noting that, in order for Rule 4-326(d) to be triggered, there must be evidence on the record that the trial court actually received the alleged communication. *Id.* In that context, the Court stated:

> [W]e have held that there is a presumption of regularity which normally attaches to trial court proceedings, *although its applicability may sometimes depend upon the nature of the issue before the reviewing court*. To overcome

[7]Rule 4-326(d) states in pertinent part:

(d) Communications with Jury

(1) Notification of Judge; Duty of Judge. A court official or employee who receives any written or oral communication from the jury shall immediately notify the presiding judge of the communication. If the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication (A) in writing, or (B) orally in open court on the record.

> the presumption of regularity or correctness, the appellant or petitioner has the burden of producing a sufficient factual record for the appellate court to determine whether error was committed.

Id. at 337 (quotation marks, brackets and citations omitted; emphasis added).

Denicolis v. State, 378 Md. 646, 657–58 (2003), presented a situation in which the presumption of correctness did not apply:

> It is true that a trial court's actions and decisions are generally presumed to be correct and that it is the appellant's burden to produce a record sufficient to show otherwise. That assumes, of course, the ability of the appellant to produce such a record, which ordinarily is the case. Here, petitioner's ability to establish the circumstances under which the note in question was received and what, if any, reaction there was to it was hampered by the fact that neither he nor his attorney were informed about the note until after the verdict was returned, the jury was discharged, and sentence was imposed. No better record than the one that exists could be made under such a circumstance, at least for purposes of a direct appeal.

Denincolis does not apply to the case before us because appellant was certainly aware that he did not receive an advisement from the court itself when he was removed from the trial for the first time. He would have been equally aware that the deputy failed to inform him of the court's advisement outside of the court's presence. Under either scenario, appellant could have objected to the court's procedure upon his return to the trial later that morning. An objection would have given the trial court an opportunity to make an appropriate inquiry of the deputy.

In sum, we conclude that this is a case in which the presumption of correctness should apply. We proceed under the presumption that the deputy obeyed the court's instruction to

"advise [appellant] if he wishes to promise that he will not be disruptive, I will invite him back into the courtroom immediately." It is appellant's obligation to produce a "sufficient factual record for the appellate court to determine whether error was committed," *Black*, 426 Md. at 337, and appellant has failed to meet that burden. In other words, had appellant objected, the State or, for that matter the trial court itself, could have called the deputy as a witness to provide a factual basis by which we could assess appellant's claim of error.

(2) Stand-By Counsel[8]

Appellant argues that the trial court abused its discretion by not providing him with stand-by counsel because "it was well within the purview of the trial court's discretion to appoint stand-by counsel to act as a guardian of the proceedings and ensure the sanctity of fairness." The State asserts that a court is under no obligation to provide stand-by counsel after a defendant has knowingly and voluntarily discharged his lawyer.[9] We agree with the State.

[8]After oral argument, the State filed a motion seeking permission to file a supplemental brief on this issue. We granted the motion and the State filed a supplemental brief.

[9]The State also asserts that appellant's appellate counsel waived this contention during oral argument. We interpret appellate counsel as conceding that the trial court was under no constitutional obligation to appoint stand-by counsel under the fact of this case but that the trial court abused its discretion in failing to do so. *See Parren v. State,* 309 Md. 260, 264 (1987) ("There is no right vested in a defendant who has effectively waived the assistance of counsel to have his responsibilities for the conduct of the trial shared by an attorney.").

Appellant, in essence, is contending that he is entitled to hybrid representation. Hybrid representation entails a situation where a defendant has either: 1) invoked his right to assistance of counsel under the Sixth Amendment, but also personally participate as "co-counsel" in the trial; or 2) invoked his right to self-representation, but also retains a lawyer to assist at trial. *Parren v. State*, 309 Md. 260, 264 (1987). "The right of self-representation is independent of the right to the assistance of counsel." *Id.* at 263 (citing *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975); *Leonard v. State*, 302 Md. 111, 119 (1985)). "The rights 'are mutually exclusive and the defendant cannot assert both simultaneously.'" *Id.* (quoting *Leonard*, 302 Md. at 119.)

In *Parren*, the Court of Appeals concluded that, a trial court retains the *discretion* to permit a self-represented defendant to have a lawyer participate in the trial, but that defendants have no right to any type of hybrid representation. *Id.* at 264–65. The trial court's discretion to allow a self-represented defendant to have an attorney to participate is derived from the court's general power to control the conduct of the trial. *Id.* at 265. However, even when the trial court exercises this discretion, the attorney's participation "never reaches the level of 'representation' nor does the participant attain the status of 'co-counsel.' When a defendant appears *pro se*, it is he who calls the shots, albeit, perhaps, with the *aid, advice and allocution* of counsel *in the discretion* of the trial judge." *Id.* (emphasis added).

Maryland's appellate courts have not yet addressed whether a trial court should appoint stand-by counsel when a self-represented defendant is removed from the courtroom

for disruptive behavior. Other jurisdictions have addressed the issue and the decisions are split.

Some jurisdictions have concluded that, when a self-represented defendant is removed from the courtroom for disruptive behavior, the trial court is required to provide stand-by counsel to take up the defendant's case in his absence. *See, e.g., People v. Cohn*, 160 P.3d 336 (Colo. Ct. App. 2007); *United States v. Mack*, 362 F.3d 597 (9th Cir. 2004). Other jurisdictions have concluded that a trial court's failure to provide stand-by counsel to a self-represented defendant is not error when the defendant unequivocally asserts their right to self-representation. *See, e.g., Clark v. Perez*, 510 F.3d 382 (2008); *State v. Eddy*, 68 A.3d 1089 (R.I. 2013). Upon examining the reasoning behind the courts' decisions in these cases, as well as Maryland law on this issue, we adopt the latter rule—that it is in the court's discretion to appoint stand-by counsel.

Jurisdictions that require stand-by counsel for self-represented defendants that are removed from court are typically predicated on one of two theories. Some courts have concluded that a defendant's right to self representation is "terminated" when a self-represented defendant acts disruptively and is removed from the courtroom—thus mandating a replacement counsel. *See, e.g., Mack*, 362 F.3d at 601 ("A defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding."); *Saunders v. State*, 721 S.W.2d 359, 363–64 (Tex. App. 1985) (requiring "that stand-by counsel be available to represent the accused in the event that

termination of the defendant's right of self-representation is necessary.") Other jurisdictions have cited a public interest larger than the individual's right to self-representation being at stake when stand-by counsel is not appointed. *See, e.g., Cohn*, 160 P.3d at 342 ("A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself) (quoting Chief Justice Berger concurrence in *Mayberry v. Pennsylvania*, 400 U.S. 455, 467–68 (1971)).

Those courts that have concluded that it is within the trial court's discretion to appoint stand-by counsel have anchored their reasoning to the defendant's absolute right to *choose* to represent himself—thereby affirmatively *choosing* to not be represented by counsel. For instance, in *Clark*, the Second Circuit stated that the defendant had "intelligently waived her right to counsel, [and] unequivocally asserted her right to self-representation," and that her choice to be absent from the courtroom was a strategic choice that was part of her "*de facto* political protest defense." 510 F.3d at 396.

Torres v. U.S., 140 F.3d 392 (2nd Cir. 1998) is a similar case. The defendant in *Torres* chose to represent herself. She refused to participate at trial in any fashion and, from time to time, was removed from the courtroom either at her request or because she disrupted the court proceedings. Fifteen years later, she filed a motion to vacate her conviction and sentence. The petition was denied by the District Court. On appeal, she asserted that the trial court had violated her right to counsel by "'[a]llowing [her] to proceed without counsel in

the face of her stated intention to withdraw from the proceedings' [and that] a decision to proceed *pro se* is inconsistent with her decision not to participate, and that, therefore, the district court should have appointed counsel on her behalf." *Id.* at 401. The Court concluded that her contentions were "unavailing." *Id.* It reasoned: "Just as district courts should not compel a defendant to accept a lawyer she does not want, they should not interfere with the defendant's chosen method of defense." *Id.* at 402. The Court went on to state:

> There is no dispute that district courts must make a defendant "aware of the dangers and disadvantages of self-representation . . . . However, courts must remember that the Sixth Amendment right to waive counsel, like all procedural protections for a criminal defendant, stems in part from the sanctity of freedom of choice.

Id.

Pending instruction from our Court of Appeals on this matter, we conclude that the reasoning in *Clark* and *Torres* is more closely aligned to Maryland case law. In *Harris v. State*, 344 Md. 497, 505 (1997), the Court of Appeals explained a defendant's right to choose between self-representation or to be represented by counsel and a trial court's discretion to appoint stand-by counsel. It began by stating: "To avail him or herself of the right of-self representation, a defendant must knowingly and voluntarily waive the right to counsel." It went on to explain that, even when a trial court *does* appoint stand-by counsel, it does so to "assist a defendant's exercise of the right of self-representation, and . . . assist the court in maintaining some measure of control over the proceeding." *Id.* at 506 (internal quotations omitted). The Court specifically stated that a stand-by counsel's representation

is not permitted to "rise to the level of representation." *Id.* "[T]here can be but one captain of the ship, and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef." *Id.* (quoting *Parren*, 309 Md. at 264).

Harris and *Parren* emphasize that in Maryland, we hold the defendant's right to choose between self-representation and representation by counsel to be of paramount importance. Once a defendant has chosen self-representation, his or her voluntary absence from the courtroom is not a "termination" of self-representation, but is merely a waiver of the right to be present in court. We believe this is especially true in instances such as the case before us, where appellant's "sovereign citizen" defense was analogous to the ideological defenses raised in *Clark* and *Torres*. Appellant made it clear that he wished to waive his right to assistance of counsel and instead invoke his constitutional right to self-representation. We conclude that the trial court did not err in providing counsel to appellant for the periods when he waived his right to be present at trail because of his disruptive behavior.[10] We will not disturb his constitutional right to represent himself.

(3) Remote Access

Appellant also contends that his exclusion from the courtroom was improper because the trial court did not provide him a way to review the evidence "such as a closed circuit

[10]Our answer might be different if appellant had requested counsel for the periods when he was removed from the courtroom.

television feed, an after-hours showing of the trial testimony, or a chance to listen to the testimony which had been recorded." Appellant offers no support for his contention that the trial court was obligated to provide him with a method to review the evidence. The relevant question is whether appellant waived his right to know the evidence presented against him when he waived his right to be present pursuant to Rule 4-231(b).[11] In this regard, we believe that decisions of the Court of Appeal's analysis in *Pinkney v. State*, 350 Md. 201 (1998), is instructive.

Pinkney failed to appear for trial. After ascertaining that Pinkney had received notice of the trial date and that he was not incarcerated, the trial judge concluded that he had waived his right to be present for trial by his failure to appear and ordered that he be tried *in absentia. Id.* at 206–07. The Court of Appeals reversed the conviction, holding that the trial court had failed to make an adequate inquiry as to the circumstances surrounding Pinkney's failure to be present.[12] In its analysis, the Court first noted that the decision whether to conduct a trial *in absentia* is a discretionary decision for the trial court. *Id.* at 213. In exercising its discretion, a trial court must balance "the right of the defendant to be present at trial, and the need for the orderly administration of the criminal justice system." *Id.* In this weighing process, the court must first consider whether the circumstances

[11]The relevant text of Rule 4-231(b) is contained in note 3, *supra.*

[12]Pinkney later claimed to have suffered a seizure on the morning of trial. 350 Md. at 208.

surrounding the defendant's absence were "sufficiently deliberate to constitute . . . an acquiescence to the trial court proceeding in his or her absence." *Id.* at 215–16. However, "[a] trial *in absentia* should not follow, *ipso facto*, every time the trial court finds that the defendant waived the right to be present at trial . . . .Trial *in absentia* is not favored."*Id.* at 217. The Court explained:

> The discretion of the trial court to try an absent defendant should be exercised after a review of all the appropriate concerns and with the recognition that the public interest and confidence in judicial proceedings is best served by the presence of the defendant at trial. Other countervailing interests limiting the exercise of a trial court's discretion in such circumstances include the State's interests both in an accurate determination of guilt and in public confidence in the judiciary as an instrument of justice. Moreover, the defendant's presence assures that the trial court is keenly alive to a sense of [its] responsibility and to the importance of [its] functions.

Id. 218–19 (quotation marks and citations omitted; bracketed language in original). That a defendant is self-represented is "of great significance" in this analysis. *Id.* at 223.

Returning to the case before us, we believe that there is very little conceptual difference between conducting an entire trial *in absentia* and conducting portions of a trial in that manner. In either scenario, whether to proceed *in absentia* is a decision that a trial judge must make in the exercise of his or her discretion. The trial court repeatedly warned appellant that continuing disruptive behavior could result in his removal from the courtroom and that trial would proceed in his absence. There is no doubt that appellant deliberately

waived his right to be present at his trial.[13] The confidence of the public in the judiciary as an instrument of justice are not furthered by allowing parties to deliberately disrupt and delay trials. There is no doubt in our mind that the trial court was "keenly alive to a sense of [its] responsibility and to the importance of [its] functions." *Pinkney,* 350 Md. at 219. Moreover, appellant did not ask to be allowed to view the proceedings remotely. His argument that the trial court should have afforded remote access is purely an appellate afterthought.

After weighing the considerations articulated in *Pinkney*, we conclude that the trial court handled appellant's disruptive behavior well within the bounds of its discretion.

(4) Opening Statement

Appellant contends that the trial court committed reversible error by failing to give appellant an opportunity to make an opening statement. On the first day of the trial, appellant was removed from the courtroom immediately prior to the prosecution's opening statement, and was returned prior to the first witness being called. On the second day, the following exchange occurred between appellant and the trial court:

> [APPELLANT]: . . . . When do I get to address the jury? I never gave an opening statement to address the jury.
>
> THE COURT: I know. You chose not to.

[13]In his brief, appellant does not assert that the trial court abused its discretion in removing him from trial.

Later the trial court explained:

> [T]hen you mentioned for the first time that you didn't think you were given an opportunity to give an opening statement. I think you were given an opportunity to give an opening statement and I will . . . . I will give you an opportunity to give a closing argument as well after [the prosecution] gives a closing argument.

A defendant in a criminal case may make an opening statement "either right after the prosecutor's opening statement, or as long as the defense is going to present some evidence thereafter, after the State has presented its case-in-chief and 'rested.'" Joseph F. Murphy, MARYLAND EVIDENCE HANDBOOK 83 (3d ed. 1999). As the trial judge noted, and we discussed *supra*, by waiving his right to be present in the courtroom, appellant also waived his right to engage in participating in the phases of the trial that he was absent for. After the prosecution made its opening statement, the court was prepared to move on to the first witness. Had appellant been present at that time, he would have been entitled to make an opening statement following the prosecution's. However, appellant had forfeited this right.

A defendant may still have an opportunity to make an opening statement—after the prosecution has rested its case—if he is going to present evidence. *Id.* In the present case, appellant did not present any evidence. Therefore, the court was under no obligation to provide appellant with an opportunity to make an opening statement.

Nevertheless, appellant contends that the trial judge had an elevated duty to provide him with an opportunity to make an opening statement because appellant has a fundamental constitutional right to make an opening statement. Specifically, he states:

> '[T]he right to present closing argument is a fundamental constitutional right which applies in both jury and non-jury cases, applies equally to *pro se* defendants and applies even in cases where the evidence appears to be overwhelming.' (quoting *Biglari*, 156 Md. App. at 657). Surely the same is true of opening arguments, which is the first impression that a jury gets regarding the evidence of the case.

We do not believe this is an accurate statement of the law. Opening statements and closing arguments serve different purposes. In *Herring v. New York*, 422 U.S. 853 (1975),[14] the Supreme Court concluded that a defendant in a criminal trial has a fundamental right to make a closing argument "no matter how strong the case for the prosecution may appear to the presiding judge." The Court reasoned:

> [T]he essence of the English criminal trial was argument between the defendant and counsel for the Crown . . . . As the rights to compulsory process, to confrontation, and to counsel developed, the adversary system's commitment to argument was neither discarded nor diluted. Rather, the reform in procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the 'fragmented' factual argument that had been typical of the earlier common law.
>
> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only *after* all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. *Only then* can they argue their inferences to be drawn from all the testimony, and point out the weaknesses of the adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt . . . . In a criminal trial, which is in the end basically a factfinding process, *no aspect of such advocacy could be*

[14]We note that *Holmes v. State*, 333 Md. 652, 658 (1994) cited to *Herring* to conclude that the right to present a closing argument is a fundamental constitutional right.

> *more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment*.

Id. at 860–62 (emphasis added).

Thus, in *Herring*, the Court reasoned that it is the very essence of closing argument—and what it represents in a criminal trial—that gives a defendant the fundamental right to make a closing argument. The purpose of an opening statement, on the other hand, is "to orient the jurors so that they can follow the evidence as it unfolds during the trial. *It is not* the purpose of an opening statement to argue the merits of the case or to discuss the pertinent law." *Calhoun v. State*, 297 Md. 563, 596 (1983); *see also Hartman v. Meadows*, 243 Md. 158, 162 (1966) ("[T]he purpose of an opening statement is to acquaint the judge and jury with the facts that counsel hopes and expects to prove, leaving arguments until the proper time, later.")

Appellant gives no reason as to why an opening statement should be given the same status as a closing argument—indeed, the divergent purposes of a closing argument and opening statement convinces this Court that the reasoning in *Herring* is wholly inapplicable to an opening statement. For this reason we conclude that appellant had no fundamental right to make an opening statement and the trial court was under no obligation to give him an opportunity to make one after appellant forfeited his initial opportunity.

In conclusion, the trial court demonstrated commendable patience throughout the trial. Appellant's sole trial tactic was to disrupt the trial proceedings. Balancing the public's

interest in a fair and orderly trial with the appellant's right to be present posed an exceptionally difficult challenge and we cannot fault the court's handling of this case.

II. Plain Error

Lastly, appellant contends that the trial court committed plain error during the prosecution's questioning of Mr. Ausby and Officer Beale. He contends that Mr. Ausby and Officer Beale's testimony amounted to hearsay evidence, and that the court's admission of the evidence resulted in appellant being denied his right to a fair trial. Specifically, appellant asserts that he was denied a fair trial because:

> Appellant was tried and convicted by a jury in a proceeding in which he was not present, not represented by counsel, and the trial court failed to enforce basic rules of evidence in order to ensure the integrity of the evidence presented to the jury for their deliberation.

As we have already discussed, *supra*, appellant bears sole responsibility for the facts that he was not represented by counsel and that he was not present when the witnesses in question testified. Nonetheless, appellant asks us to review the trial court's decision to admit the evidence under the plain error doctrine.

In *McCree v. State*, 214 Md. App. 238 (2013), this Court discussed the standard for when we may exercise our discretion to engage in plain error review. We stated that plain error review is reserved to "address unpreserved errors by a trial court which 'vitally affect a defendant's right to a fair and impartial trial.'" *Id.* at 271 (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). We also noted that our discretion to exercise plain error review should be

"rarely exercise[d]" since, for considerations of fairness and judiciary efficiency, all challenges should be first raised before 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." *Id.* (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). We should engage in plain error review only when we are confronted with an outcome-affecting error of such magnitude that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quotation marks and citation omitted).

As we have previously explained, the trial court did not err in excluding appellant from the portion of the trial when the questioned testimony was elicited. Assuming, for purposes of analysis, that the trial court's failure to interject itself *sua sponte* into the examination of the two witnesses was error, we are not persuaded that the responses from Mr. Ausby and Officer Beale had a material impact on the jury's verdicts. Two other victims, Ms. Bounds and Mr. Faidley, also described their assailant and the jury watched video recordings of two of the assaults, including the assault on Mr. Ausby. The controverted testimony was cumulative and, in our view, its admission did not substantially affect the outcome of the trial. We decline to exercise our discretion to provide plain error review.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.