UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0739

September Term, 2015

CHARLES MORRIS

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: March 9, 2017

A jury in the Circuit Court for Baltimore City convicted Charles Morris, appellant, of second-degree murder and related offenses. The court sentenced appellant to an aggregate term of imprisonment of 50 years. Appellant noted an appeal and presents three issues for our review:

> 1. Did the trial court err in admitting mugshots of Appellant?
>
> 2. Did the circuit court abuse its discretion in permitting a witness for the State to testify that she went to the police after receiving threats?
>
> 3. Did the sentencing court impermissibly consider Appellant's history of arrests that did not result in convictions and his decision to go to trial?

For the reasons that follow, we answer all three questions in the negative and, accordingly, affirm the judgments of the trial court.

BACKGROUND

Around 11:00 p.m. on the night of February 18, 2013, Latosha McKnight was at home watching television. She was soon joined by her friend Dave Armstrong. Armstrong and McKnight spoke about purchasing marijuana from appellant, whom they also knew as "Man." McKnight attempted to call appellant "two or three times" but did not get a response.

Then, through her apartment window, McKnight saw appellant approaching the building, and she told Armstrong. Armstrong went into the hallway of McKnight's apartment building to speak with appellant. McKnight heard appellant and Armstrong arguing; appellant accused Armstrong of "disrespecting" him. Because this argument was

occurring right outside McKnight's door, she opened it, told Armstrong and appellant to quiet down, and went back inside.

Suddenly, McKnight heard a "pop," followed shortly by appellant and Armstrong entering her apartment. Appellant asked Armstrong if he hit him. Then, the two went back into the hallway. McKnight called 911 and said that someone had been shot.[1] McKnight went into the hallway to check on Armstrong. When McKnight opened her door, she saw Armstrong lying on the ground, bleeding, and appellant was coming back in the building from outside.

At the same time that McKnight opened her door, her upstairs-neighbor, Deneen Craig, was coming downstairs asking "what the f [*sic*] was going on." Craig stated that she was asleep and woke up when she heard a commotion in the hallway. Craig tried to help Armstrong, and she noticed that Armstrong was holding a $10 bill in his hand. At some point – Craig stated that it was about a minute after she came downstairs – appellant came into the hallway and also tried to assist Armstrong. McKnight testified that appellant was apologizing to Armstrong and saying, "Don't die on me. Don't die on me. He pulled a knife. He pulled a knife." Appellant was also telling Armstrong to "hold on."

Police and emergency responders arrived shortly thereafter – indeed, at about the same time as appellant, according to Craig – and transported Armstrong to the hospital where he was later pronounced dead. An autopsy revealed that Armstrong died of a single bullet that entered his body on the left side of his chest, near the armpit, punctured his left

[1] The 911 call was played for the jury.

lung, and exited through his back near the spine. Dr. Carol Allen, the medical examiner, stated that Armstrong would have had significant blood loss, and there was no stippling.[2]

Detective Gregory Boris responded to the scene of the shooting and led the investigation.[3] In securing the hallway of the apartment building, Rodney Montgomery, a crime laboratory technician, recovered a metal fragment, as well as a partially opened knife. McKnight indicated that Armstrong habitually carried a knife and identified the recovered one as Armstrong's. Additionally, despite the nature of Armstrong's wound, police did not recover a firearm.

That night, Detective Boris interviewed McKnight, Craig, and appellant at McKnight's apartment. McKnight testified that she was not truthful with police at this time because she was scared; appellant was sitting on her couch while she spoke with Detective Boris. A couple of days later, however, McKnight went to the police because "[p]eople from the complex" were threatening her. McKnight told Detective Boris that appellant shot Armstrong over an argument. Detective Boris had McKnight identify appellant in a photographic array, and McKnight indicated that appellant was the shooter. Police also had Craig identify appellant in a photo array, and she wrote that she came downstairs in response to a gunshot; appellant arrived about a minute after she did.

[2] The court accepted Dr. Allen as an expert in forensic pathology. Dr. Allen explained that stippling is unburned gunpowder that is deposited on someone when a gun is fired from close range – usually within two feet.

[3] All law enforcement officers in this case are members of the Baltimore City Police Department.

The jury acquitted appellant of first-degree murder, but convicted him of second-degree murder, use of a handgun in the commission of a crime of violence, wearing/carrying a handgun, and possession of a firearm by a prohibited person. The court merged appellant's conviction for wearing/carrying a handgun into the other firearms offenses and sentenced appellant to an aggregate prison sentence of 50 years. Appellant noted this appeal.

We will present more facts as necessary below.

DISCUSSION

I. EVIDENTIARY ISSUES

A. Parties' Contentions

Appellant contends that the trial court committed two errors concerning the admission of evidence. First, appellant argues that the admission of the photographic arrays in which McKnight and Craig identified appellant was either irrelevant or relevant, but unduly prejudicial. Appellant contends that his picture in the arrays is clearly a mugshot and may have led the jury to conclude that he had a criminal record, thereby depriving him of a fair trial.

Second, appellant argues that the court erred in permitting McKnight to testify that she went to police a few days after the incident because she received threats. Appellant contends that McKnight's testimony amounted to inadmissible hearsay. Alternatively, appellant concedes that McKnight's testimony may not have been offered to prove the truth of the matter asserted, but it may have compelled the jury to assume that *he* made the threats to McKnight, and the testimony was, therefore, overly prejudicial.

The State responds that the trial court committed no error as to the admission of these pieces of evidence. The State contends that the photographs used in the arrays were not obviously mugshots, and, moreover, appellant's identity as the shooter was at issue in this case. Accordingly, the State argues that the arrays were probative and relevant.

Furthermore, the State contends that McKnight's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Rather, McKnight testified about the threats in order to explain why she went to the police and also to rehabilitate her credibility in the face of a prior inconsistent statement.

B. Standard of Review

This Court has noted that we utilize a two-step process to review a court's decision to admit evidence: "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*.'" *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). If we determine that the evidence is relevant, then we determine whether the court, nevertheless, abused its discretion in admitting it. *Id.* (citing *Suchoza*, 212 Md. App. at 52-53).

"'The admission or exclusion of evidence is a function of the trial court which, on appeal, is traditionally viewed with great latitude.'" *Halloran v. Montgomery Cnty. Dep't of Public Works*, 185 Md. App. 171, 195 (2009) (quoting *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 641 (1997)). "'A trial court abuses its discretion only when 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.'" *Baker v. State*, 223

Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09 (2014), *cert. denied*, 438 Md. 143 (2014)).

C. Analysis

i. The Photographic Arrays

As a preliminary matter, the State contends that appellant's contention as to the photographic arrays is not preserved for our review. The Maryland Rules require an objection when a question is asked or objectionable evidence is offered. *See* Rule 2-517(a); Rule 5-103(a)(1); *Holmes v. State*, 119 Md. App. 518, 523 (1998). If a party fails to make a contemporaneous objection, then, ordinarily, the issue is waived for appellate review. *See* Rule 8-131(a).

In this case, appellant objected to the photographic arrays in a pretrial motion, which the trial court denied. As such, to preserve the issue for appeal, appellant was required to object again when the arrays were offered as evidence at trial. *See Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 763 (2007) (citing *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244, 261 (2001), *aff'd* 378 Md. 70 (2003)), *aff'd* 403 Md. 367 (2008).

The following occurred during McKnight's direct examination:

> [STATE'S ATTORNEY]: Let me show you what's been marked for identification as State's Exhibit 6 and I'll ask you to take a look at that (inaudible). Do you recognize that?
>
> [MCKNIGHT]: Yes.
>
> Q: What is that?
>
> A: Yes. Um, a photo array. It has six people on it.
>
> Q: Did you recognize any – who showed you that?

A: Detective Boris.

Q: Okay; and do you recall how he showed it to you?

A: Yes.

Q: How did he show it to you?

A: Face down.

Q: Okay, so the pictures were face down?

A: Yes.

Q: Okay; and there's a caption.

[] Which, if I may read, Your Honor? These –

THE COURT: Um, no; you may not read.

[STATE'S ATTORNEY]: Uh, it begins with –

THE COURT: But, if she wants to read –

[STATE'S ATTORNEY]: Sure.

[] It begins with: The six photographs. Can you read that for me, please?

[MCKNIGHT]: The six photographs or [sic] this form may or may [not] contain the picture of the subject in connection with the investigation. When looking at the photos, keep in mind the individuals may not appear exactly as they did on the date of the incident; because features, such as hairstyles and facial hair, beards and mustache [sic] may be changed.

Photographs may not always display the true complexion of the person and can be affected by the quality of the photographs. After reviewing each photograph, please indicate whether you have made any identification in connection with this investigation.

Q: And, did you put your initials there?

A: Yes.

Q: And, after you put your initials there, what if anything did you do?

A: Wrote a statement.

Q: Okay, did you – can you flip that over for me? Did you pick out anyone?

A: Yes.

Q: Who did you pick out?

A: Charles.

Q: And did you sign your name above that?

A: Yes.

Q: Okay; and on the back – I interrupted you. I apologize. You stated that you wrote a statement?

A: Yes.

Q: What did you write?

A: Charles shot Dave over an argument.

Q: Were those your own words?

A: Yes and no.

Q: And, did the detectives tell you what to write?

A: Yes and no.

Q: Explain yes and no.

A: Because I said that Charles shot Dave because he pulled the knife.

Q: Okay, so you're clarifying that's why he shot him?

A: Yes.

Q: Okay. You're – were you outside when Dave got shot?

A: No.

Q: Why are you saying that it was because he pulled a knife?

A: Because I saw the knife and I know it was Dave's knife.

Q: Okay, any other reason why you say that?

A: No.

Q: Did the Defendant say anything about pulling a knife?

A: Yes.

[STATE'S ATTORNEY]: Your Honor, I'm going to offer into evidence State's Exhibit 6.

THE COURT: **Subject to previous objections** –

[APPELLANT'S COUNSEL]: **Yes, ma'am.**

THE COURT: -- (continuing) **ruled on and preserved herein by reference –**

[APPELLANT'S COUNSEL]: **Yes, ma'am.**

THE COURT: **Over those objections, renewed?**

[APPELLANT'S COUNSEL]: **They are, Your Honor.**

THE COURT: The exhibit is admitted.

(Emphasis added).

When the State asked Craig about her photo array, the following colloquy ensued:

[STATE'S ATTORNEY]: I'm sorry. Consistent with what we did prior with the photo array, I'm going to mark this photo array.

THE COURT: Yes, please do. Let the record reflect that that exhibit number is now –

THE CLERK: 11.

THE COURT: -- (continuing) NO. 11 – State's 11.

(Whereupon State's Exhibit NO. 11 was Marked for Identification.)

[APPELLANT'S COUNSEL]: Yes.

THE COURT: And, that would be a photo array involving Deneen Craig.

[STATE'S ATTORNEY]: Yes. And –

THE COURT: **Oh, one second. And, you're going to ask the questions. And, at the end, counsel, I'll ask for your –**

[APPELLANT'S COUNSEL]: **Thank you.**

THE COURT: Okay. You may proceed.

[STATE'S ATTORNEY]: Thank you.

[] I'm going to show you what's been marked for identification only as State's Exhibit NO. 11 and ask you to take a look at that.

[CRAIG]: Um-hum.

Q: Do you recognize that?

A: Um-hum.

Q: What is that?

A: Um, Charles' mug shot, wanted picture.

Q: Okay.

A: Yeah.

Q: Okay; and did you sign your name to any of those pictures?

A: Yes, I signed my name to his.

Q: Okay; and on the back, did you write anything?

A: Yes.

Q: What did you write?

A: After hearing a shot, I went to help the victim. About a minute later, Charles came running, trying to console the victim. And, about a minute after, the police arrived.

Q: Okay.

A: Um-hum.

Q: Are those your own words?

A: Yes.

Q: The police didn't tell you what to write?

A: He tried.

Q: He tried?

A: Um-hum.

Q: Okay, did anybody tell you who to pick out?

A: He pretty much asked me do I know who Charles is? And he told me to circle Charles (inaudible) the picture.

Q: Do you remember testifying at a previous proceeding with regard to the photo array?

A: No. You mean in a court proceeding?

Q: Yes.

A: I don't recall.

Q: You don't recall?

A: No.

Q: All right. So, this is the first time that you're telling us that the police told you who to pick out?

A: Oh, you mean from the last time that we came? It was a – you know, a hearing; but, yeah, um-hum.

Q: Okay, do you remember telling at the time that nobody told you who to pick out?

A: No.

[STATE'S ATTORNEY]: Um, Your Honor, the State is going to offer into evidence at this time State's Exhibit 11.

* * *

THE COURT: Any objection?

[APPELLANT'S COUNSEL]: **No objection.**

THE COURT: **Let the record reflect that the previous objections to this exhibit have been made, noted, and incorporated herein by reference. All exceptions duly preserved in the record over those objections; it's admitted**.

[APPELLANT'S COUNSEL]: **Thank you, Your Honor.**

(Emphasis added).

Rule 2-517(a) requires objections to the admission of evidence to be made "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." A court may grant a continuing objection to a line of questioning, *see* Rule 2-517(b), but that did not occur in this case. When the State sought to admit McKnight's photographic array, appellant renewed his previous objection. When the State sought to admit Craig's photo array, however, appellant's counsel explicitly stated that he had "[n]o objection." The trial court, nevertheless, noted appellant's previous objections.

The admission of similar evidence without objection renders harmless the admission of evidence that was objected to. *See Yates v. State*, 202 Md. App. 700, 709 (2011), *aff'd*, 429 Md. 112 (2012); *Davis v. State*, 8 Md. App. 327, 329 (1969). The photographic arrays are slightly different in this case (arrangement of photographs altered and different pictures used), but otherwise similar. In this case, we conclude, however, that appellant's counsel made it apparent to the court that he objected to the admission of the photographic arrays, which is sufficient to preserve the issue for review. *See* Rule 2-517(c). Appellant clearly objected when the State sought to introduce McKnight's array, and the record indicates that the court understood appellant to object to Craig's array, as well, notwithstanding the fact that appellant explicitly stated that he had "[n]o objection" to Craig's array. The better practice, however, would have been to explicitly object.

Turning to the merits, appellant contends that the court committed error in admitting the arrays because they were irrelevant. Appellant argues that because both McKnight and Craig knew him, his identity was not at issue. Accordingly, a photographic array identifying him is not relevant or probative of any fact in this case. Alternatively, appellant contends, the arrays were overly prejudicial because they were clearly mugshots.

Rule 5-401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is not admissible, Rule 5-402, and a court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 5-403.

Appellant cites *Arca v. State*, 71 Md. App. 102 (1987), in support of his argument that the arrays were irrelevant in this case. Arca was charged with first-degree murder, and "[t]here was no question but that he did, in fact, kill [the victim]; through counsel, he conceded that in opening statement." *Id.* at 103. Arca admitted to killing the victim, but he argued it was in self-defense. *Id.* at 103-04. We recognized that "[i]n most cases where police photographs are offered, the identity of the defendant, either as the criminal agent or as a recidivist for enhanced punishment purposes, is at issue, and the photographs are offered to help establish that identity." *Id.* at 105 (citing Annotation, *Admissibility and Prejudicial Effect of Admission, of "Mug Shot," "Rogues' Gallery" Photograph, or Photograph Taken in Prison, of Defendant in Criminal Trial*, 30 A.L.R. 3d 908 (1970)). In that case, however, the identity of Arca as the shooter was not at issue, and "[t]he State had absolutely no need for the photographs[.]" *Id.* at 106. We concluded that the photographs "simply were not relevant to any issue that the jury would be asked to decide." *Id.*

Moreover, the photographs used in *Arca* were – although "sanitized" – clearly mugshots. *Id.* The photographs shown to the jury had the chestplate, containing identification numbers, covered up, but they "still showed the front and profile view commonly associated with police 'mug shots.'" *Id.* Because Arca asserted the defense of self-defense, this Court reasoned that "[t]he potential for undue prejudice in this case is more than speculative[,]" in that "the jury's decision could well have been influenced by

the thought that [Arca] had a prior record and was consequently a bad person." *Id.* Accordingly, we reversed Arca's conviction and remanded for a new trial. *Id.* at 106-07.

This case is clearly distinguishable from *Arca*. Whereas Arca admitted to shooting his victim, appellant claimed that he did not. Indeed, appellant's theory of the case was that he was nearby when Armstrong was shot and rushed to his aid. Accordingly, appellant's identity as the shooter was at issue in this case, and the photographic arrays were, therefore, relevant and probative of that fact.

Furthermore, the photographs used in both McKnight's and Craig's arrays are not clearly mug shots, as they were in *Arca*. There are no chestplates, no side profile view, no indication of height – nothing that indicates that the police took the photographs for mug shots. There is little danger, therefore, that the jury would have inferred that appellant had a criminal record from the photographs. The jury, in fact, knew that appellant had a criminal record because the parties entered a stipulation to that effect.[4] We note that Craig called the photo appellant's "mug shot, wanted picture," in her testimony, but this was a passing reference, and appellant did not object. We are, accordingly, not persuaded that the court abused its discretion in admitting the arrays.

ii. McKnight's Testimony

Appellant contends that the court abused its discretion in permitting McKnight to testify that four days after Armstrong was killed, she went to the police because she had

[4] The State charged appellant with possession of a regulated firearm after conviction of a disqualifying crime, pursuant to Maryland Code (2003, 2011 Repl. Vol., 2014 Suppl.), Public Safety Article ("P.S.A."), § 5-133. The parties stipulated that appellant "has been previously convicted of a crime that would prohibit his possession of a regulated firearm."

received threats. Appellant argues that McKnight's testimony amounted to inadmissible hearsay. Alternatively, appellant concedes that McKnight's testimony may not have been offered for the truth of the matter asserted, but by admitting it, the court permitted the jury to misuse it as substantive evidence, in that the jury may have assumed that *he* made the threats. As we have noted, we generally review the admissibility of relevant evidence for abuse of discretion. *See Smith*, *supra*, 218 Md. App. at 704 (citing *Suchoza*, 212 Md. App. at 52-53). "Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. 1, 7-8 (2005) (emphasis omitted) (quoting Rule 5-802). We review *de novo* whether evidence is hearsay. *Id.* at 8.

Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See also Stoddard v. State*, 389 Md. 681, 703-04 (2005) ("If the words are uttered out of court, then offered in court to prove the truth of the proposition – *i.e.* of the 'matter asserted' – they are hearsay under our rules.").

During McKnight's direct examination, the following colloquy occurred:

> [STATE'S ATTORNEY]: Now, did you tell the police what you've told us here?
>
> [MCKNIGHT]: No.
>
> Q: Why not?
>
> A: I was scared.

Q: Now, did you ever speak with the Homicide detectives after this night [February 18, 2013]?

A: Yes.

Q: Tell us what happened, then.

A: About four days later, I went down there. About four days later, I went down there because people started sending me threats.

[APPELLANT'S COUNSEL]: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: What do you mean?

[MCKNIGHT]: People from the complex.

Q: What were they threatening you about?

A: Um, his –

THE COURT: Counsel? Counsel? I'm going to sustain the objection as to what other people said.

The State contends that McKnight's statement as to receiving threats was not offered to prove the truth of the matter asserted and is, therefore, not hearsay. We agree. The State was not attempting to prove the veracity of McKnight's statement; rather, McKnight offered this testimony to explain why she went to the police, which is permissible. *See Frobouck v. State*, 212 Md. App. 262, 283 (2013) (noting that testimony explaining why officers went to a property was not offered for truth of matter asserted); *Fair v. State*, 198 Md. App. 1, 31-32 (2011) (finding that evidence of verbal act demonstrating why declarant acted in a certain way is admissible and is not hearsay).

The State also argues that McKnight's testimony was offered in an attempt to rehabilitate her credibility after defense counsel had attacked it in his opening statement. Rule 5-616(c)(1) provides that a "witness whose credibility has been attacked may be rehabilitated by [p]ermitting the witness to deny or explain impeaching facts[.]" We have recognized that "'[w]hen a witness is impeached by a prior inconsistent statement, evidence explaining the inconsistency is clearly admissible for the purpose of rehabilitating the witness's credibility.'" *Claybourne v. State*, 209 Md. App. 706, 743 (2013) (quoting *Washington v. State*, 293 Md. 465, 469 (1982)).

In our view, the State's argument correctly states the law, but responds to a contention appellant did not raise. If appellant had objected to McKnight's testimony that she was scared on the night of the incident, then her testimony of going to the police four days later would be rehabilitative of her credibility and explanatory of her prior inconsistent statement to the police. Instead, appellant objected to her testimony that she received threats, which does not rehabilitate her testimony as to a prior inconsistent statement.

Moreover, we are persuaded that there was no danger of unfair prejudice from the testimony that McKnight received threats. Appellant argues that the jury would have assumed that appellant made the threats to McKnight. She testified explicitly, however, that "[p]eople from the complex" threatened her. There was no evidence that appellant currently lived in the complex. In fact, McKnight testified that appellant used to live next door to her, but no longer resided at the complex at the time of this incident. The court, therefore, did not abuse its discretion in permitting McKnight to testify about threats she received prompting her to go to the police four days after the attack.

II. SENTENCING CONCERNS

At sentencing, prior to imposing sentence, the court made the following remarks to appellant:

> [Appellant], first, I will tell you, you have a beautiful daughter. She obviously loves you and cares about you; and it's obvious that, after reading your background, someone's doing something right, because she seems to be concerned about graduating and doing the right thing.
>
> But, you've been doing wrong for a very long time. And, when I first got this case, I now know more about you than I did before. And, what I know about you isn't based on what I read. It's about what you did.
>
> Because, when we first started talking about this case – and, like I do with all cases that come in front of me, I try to get a sense of what a fair disposition might be. It's what we call plea bargaining. It's before the trial even happens.
>
> I haven't heard any witnesses. I just know what the State's scenario is. The defense attorney comes in, tells me a little bit. I get a little brief, you know, summary of your background all on paper.
>
> I don't know you, you don't know me; but I try to use my background; my experience, having been here for a while, to figure out what an appropriate sentence would be. **And, you turned that down and you went to trial.**
>
> **And, what I learned about you is that you knew how to play the system and you started playing it hard. You were playing the system hard. Only difference is, you had a prosecutor who's been playing the system better.**
>
> She had a very good idea of who you were and what you were about and she waited for you to play the system. She waited for you to give her more nails for her coffin she was building for you. And, you walked right into it. You walked right into it.
>
> And, she played you. In your own words. And, what she hit me with is the reality of what in the dark in the night that you sleep with by yourself; and it isn't a nice man and it isn't a good person.

> It's the reality of what you're capable of; and that's murder, straight up. And, the fact that you're willing to do anything to get yourself off. Your lawyer had a case; a means to defend you, and you even sucker punched him and took whatever little help he had to give you away by your own action.
>
> Over a $10 bag of marijuana, you took a life; a life of a man who has a lot of people who love him seriously for the good he was doing in his life and the way in which he was dealing with his family. I see evil and I see you, just who you are; straight up, a murderer.
>
> **And, I'm going to sentence you, because I'm looking at this background of yours and you never get caught. Stet, stet, stet, stet, stet, stet, stet, stet. Armed robbery; stet, stet, stet, stet, *nolle prosse* [sic], *nolle prosse* [sic].**
>
> **You never get caught on anything. You get arrested, but you never get caught on anything. You never get caught on anything; and these are all violent crimes; but you never get caught. You never get convictions.**
>
> **So, I can't convict you; nor can I sentence you for anything other than this case.** And, for this case, 50 years is what you're going to get. You're going to get 30 years on that murder and you're going to serve a consecutive 20 years.

(Emphasis added).

A. Parties' Contentions

Appellant contends that in sentencing, the sentencing judge took into account two impermissible considerations: 1) appellant's decision to forego a plea deal and go to trial; and 2) appellant's arrest record. Appellant argues that a sentencing court cannot take these factors into consideration, and his sentence should, therefore, be vacated. Appellant concedes that he failed to object at sentencing, but he contends that *Abdul-Maleek v. State*, 426 Md. 59 (2012), stands for the proposition that this Court has the discretion to address this error.

The State responds that this issue is not preserved and does not merit plain error review. Furthermore, the State contends that even if the issue was preserved, the court properly sentenced appellant and did not take into consideration any impermissible factors.

B. Standard of Review

The Court of Appeals has noted: "It is well settled that '[a] judge is vested with very broad discretion in sentencing criminal defendants.'" *Jackson v. State*, 364 Md. 192, 199 (2001) (quoting *Poe v. State*, 341 Md. 523, 531 (1996)). "However, '[a] judge should fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Id.* (quoting *Poe*, 341 Md. at 532). Notably, there are only three grounds for appellate review of sentences: "'(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits.'" *Ellis*, 185 Md. App. at 551 (emphasis omitted) (quoting *Jackson*, 364 Md. at 200).

C. Analysis

Sentencing is no exception to the requirement that litigants preserve issues for appellate review with a timely objection. *See Ellis v. State*, 185 Md. App. 522, 550 (2009) (citing *Reiger v. State*, 170 Md. App. 693, 700-01 (2006)). Indeed, "allegations of impermissible considerations at sentencing are not 'illegal sentences' subject to collateral or belated review and 'must ordinarily be raised in or decided by the trial court[.]'" *Abdul-Maleek*, 426 Md. at 69 (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

Pursuant to Rule 8-131(a), however, this Court may exercise its discretion to reach an unpreserved issue. The Court of Appeals has noted that in deciding whether to review such an issue, "we should '[f]irst . . . consider whether the exercise of . . . discretion will work unfair prejudice to either of the parties. . . . Second, the appellate court should consider whether the exercise of its discretion will promote the orderly administration of justice.'" *Abdul-Maleek*, 426 Md. at 70 (quoting *Bible v. State*, 411 Md. 138, 151-52 (2009)). Moreover, an appellate court should review an "unpreserved claim only where the unobjected to error can be characterized as 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial' by applying the plain error standard." *Abeokuto v. State*, 391 Md. 289, 327 (2006) (quoting *Richmond v. State*, 330 Md. 223, 236 (1993)).

In this case, we decline to exercise our discretion to review appellant's unpreserved issue because we are not persuaded that the sentencing court committed plain error. Even assuming *arguendo* that we were persuaded the trial court did commit plain error, however, we would still affirm the judgment.

In reviewing the considerations of a sentencing judge, "we examine the record to determine whether 'the sentencing judge was motivated by impermissible considerations reflecting ill-will or prejudice,' or whether 'his comments might lead a reasonable person to infer that he might have been motivated by ill-will or prejudice.'" *Ellis*, 185 Md. App. 551 (quoting *Jackson*, 364 Md. at 207).

Impermissible considerations at sentencing include whether a defendant chose to enter a plea of not guilty and proceed to trial. *See Johnson v. State*, 274 Md. 536, 539-45

(1975) (remanding for resentencing where sentencing court stated that Johnson may have gotten a more lenient sentence had he not elected to go to trial). Similarly, "bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted may not be considered by the sentencing judge." *Henry v. State*, 273 Md. 131, 147 (1974) (citing cases).

On the other hand, as this Court has explained:

> In Maryland, a sentencing judge is vested with almost boundless discretion. *Jennings v. State*, 339 Md. 675, 664 A.2d 903 (1995); *State v. Dopkowski*, 325 Md. 671, 602 A.2d 1185 (1992); *Logan v. State*, 289 Md. 460, 425 A.2d 632 (1981); *Johnson v. State*, 274 Md. 536, 336 A.2d 113 (1975). *A defendant's sentence should be individualized "to fit 'the offender and not merely the crime.'" Smith v. State*, 308 Md. 162, 167, 517 A.2d 1081 (1986) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949)). Consequently, the defendant's sentence "*should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime*." *Jennings*, 339 Md. at 683, 664 A.2d 903; *Dopkowski*, 325 Md. at 679, 602 A.2d 1185 (1992).
>
> *The trial court is not limited to a consideration of prior convictions*. "To aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning *the convicted person's reputation, past offenses*, health, habits, mental and moral propensities, social background and *any other matters that a judge ought to have before him* in determining the sentence that should be imposed." *Smith*, 308 Md. at 169, 517 A.2d 1081 (quoting *Bartholomey v. State*, 267 Md. 175, 193, 297 A.2d 696 (1972)). *A trial court may consider uncharged or untried offenses, or even circumstances surrounding an acquittal*. *Smith*, 308 Md. at 172, 517 A.2d 1081.

Anthony v. State, 117 Md. App. 119, 130-31 (1997) (emphasis added).

In this case, we are not persuaded that the sentencing court impermissibly considered appellant's decision to go to trial. The court's remark that appellant "turned [a plea agreement] down" and went to trial is simply a statement of fact. A reasonable person

would not infer that the sentencing court was punishing appellant for his decision to go to trial.

Nor are we persuaded that the sentencing court impermissibly considered appellant's arrest record in sentencing him. We do find it interesting that the court accused the appellant of "gaming the system", which is not a crime. In fact, lawyers are paid to use all of their knowledge and experience in the legal system and to "zealously represent" their clients. The fact that he has more than one nol pros or stet could be used to draw a different conclusion about why he has had so much success in the legal system. Perhaps the appellant had been the focus of the ongoing but unsuccessful investigation. This assertion by the court makes this case more interesting, but the court explicitly stated it could not convict or sentence appellant for his prior arrests, and we are unpersuaded that the court's comments as to appellant's numerous arrests and "never get[ting] caught" could lead a reasonable person to infer that the court was impermissibly considering appellant's arrest record in sentencing. Clearly, the court was not considering "bald accusations of criminal conduct," it was considering the crimes for which appellant had been arrested and charged. Therefore, the court acted within its discretion in considering appellant's lengthy arrest record. Accordingly, we affirm.

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