Circuit Court for Frederick County
Case No. C-10-CR-18-000024

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2324

September Term, 2018

RONALD EUGENE DIXON

v.

STATE OF MARYLAND

Wright,
Kehoe,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 10, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury sitting in the Circuit Court for Fredrick County convicted Ronald Eugene Dixon, appellant, of constructive criminal contempt, non-support of a minor child, forging a private document, possessing a forged private document, and issuing a forged private document. The court imposed a total of 28 years of imprisonment, all but five years suspended, and three years of probation upon his release from prison.[1] Appellant raises the following five questions on appeal, which we have rephrased for clarity:

I. Did the administrative judge err when it: A) denied appellant's motion for postponement, and B) violated Md. Rule 4-215(d) by finding that appellant had waived his right to counsel by inaction?

II. Did the trial court err in trying appellant in abstentia when he was late returning from a lunch break?

III. Did the trial court err in preventing appellant from mounting a defense?

IV. Did the trial court err in denying appellant's motion of judgment of acquittal on the three forged, private document charges?

V. Did the trial court err in not merging appellant's forged, private document convictions for sentencing purposes?

For the following reasons, we shall reverse appellant's three forged document convictions and vacate those sentences. We shall affirm the judgments in all other respects.

[1] Specifically, the trial court sentenced appellant to eight years of imprisonment, all but three years suspended, for contempt; a concurrent three year sentence, all suspended, for non-support of a minor child; a consecutive ten year sentence, all but two suspended, for forging a private document; a concurrent three year sentence, all suspended, for possessing a forged document; and a consecutive ten year sentence, all suspended, for issuing a forged document.

STATEMENT OF FACTS

The State accused appellant of crimes related to violating a child support order and forging a document that he then presented to the Motor Vehicles Administration ("MVA") that advised the MVA to reinstate his driving privileges, which had been revoked because of his failure to pay child support. Because of the nature of the questions asked on appeal, we shall provide only a brief overview of the facts elicited at appellant's trial.

Appellant and Beth Dixon married in 2007, and a child, T., was born to them in 2010. They divorced and in September 2014, Ms. Dixon obtained a child support order giving her sole legal and physical custody of T. with visitation with appellant every other weekend and every Wednesday evening. The order also directed appellant to pay Ms. Dixon $1,483 a month in child support. Ms. Dixon testified that appellant never paid any child support under the order and had sent her text messages stating that he did not intend to pay. At the time the underlying charges were filed against appellant, he was $44,490 in arrears.

Near the end of 2017, the MVA suspended appellant's driver's license for failure to pay his child support obligation.[2] On December 8, 2017 appellant presented a typed "statement of compliance" to the MVA that was purportedly signed by a child support enforcement agent for the Department of Social Services. The agent whose name was on

[2] Sometime in late 2016 or early 2017, appellant had his driver's license suspended for the first time for failure to pay his child support obligation. On March 3, 2017, the Department of Social Services issued a "statement of compliance" informing the MVA that appellant's license could be reinstated because he had begun making payments.

the document testified, however, that she neither created nor signed the document, and she did not authorize appellant to sign on her behalf. She testified she would not have authorized the document because appellant had not made any child support payments.

DISCUSSION

I.

Appellant's first argument on appeal is not a paradigm of clarity but we discern that he is making two claims of error by an administrative judge on August 2, 2018, based on the same underlying factual allegation. First, appellant argues that the administrative judge erroneously denied his postponement request by relying on his representation that the Office of the Public Defender ("OPD") advised him that he was ineligible for OPD services, when only a District Court Commissioner ("DCC") can make a determination regarding eligibility for OPD services. Second, appellant argues that the administrative judge erred when she failed to comply with the requirements of Md. Rule 4-215(d) governing waiver of counsel by inaction, because the administrative judge never explicitly found that he had an unmeritorious reason for appearing without counsel, and, even if the judge made an implicit finding, the judge's finding was premised on the belief that the OPD advised appellant that he was ineligible for its services when only a DCC can make that determination. The State disagrees that the administrative judge erred, positing that there is no evidence to support appellant's factual allegation that he had advised the administrative judge that the OPD found him ineligible for OPD services, and the administrative judge properly, albeit implicitly, found appellant had waived his right to counsel by inaction. We agree with the State and shall address each argument in turn.

"The right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights." *Jones v. State*, 175 Md. App. 58, 74 (2007) (citing *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) and *Walker v. State*, 391 Md. 233, 245 (2006)), *aff'd*, 403 Md. 267 (2008) (footnote omitted). A defendant in a criminal prosecution therefore has a constitutional right to have effective assistance of counsel and the corresponding right to reject that assistance and represent himself. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932) (recognizing the constitutional right to the effective assistance of counsel) and *Faretta v. California*, 422 U.S. 806, 807 (1975) (recognizing the constitutional right to defend oneself). *See also Snead v. State*, 286 Md. 122, 123 (1979) (recognizing that a defendant has both the constitutional right to the assistance of counsel and the right to proceed *pro se*). Effective October 1, 2017, the Maryland General Assembly enacted legislation that changed who determines whether an individual qualifies as indigent for OPD legal services from the OPD to a DCC. *See* Laws of 2017, Chapter 606, § 1 and Md. Code Ann., Crim. Proc. Art. § 16-210(d).

Although appellant's arguments focus on the administrative judge's ruling on August 2, 2018, we shall relate the procedural events leading up to that hearing to place appellant's arguments in context. Appellant made his initial appearance on March 30, 2018, in circuit court pursuant to a summons issued by that court when the State filed a criminal information. *See* Md. Rule 4-213(c) (governing a defendant's initial appearance in circuit court following a summons). Because he appeared without counsel, the court advised him of his rights pursuant to Md. Rule 4-215(a), including making certain that he had a copy of the charging document; advising him of the nature of the charges against him

and allowable penalties; and informing him of his right to, and the importance of, counsel. As to his right to counsel, the court advised appellant:

> So sir, you are facing a very significant period of loss of your liberty. I would suggest that you may want to contact counsel to represent you in this matter. If you cannot afford an attorney, you may obtain the services of the Public Defender's Office. To apply for their services, you go out to our Frederick County Adult Detention Center on Marcy's Choice Lane.
>
> Take with you your paystubs, a list of your assets and your bills, and your tax returns, and they will see if you qualify based on that information, to have them represent you in this matter. Or you could obtain counsel of your choosing – private counsel of your choosing.
>
> You are not required to obtain an attorney, but the legal system is often a very complex place to travel and to navigate through, and lawyers know the system and how it works. So it is up to you whether you do or you do not, but I am here to advise you that you have the right to, should you so choose.
>
> Now, you can't wait until just before your trial date to obtain an attorney, because the [c]ourt won't do that. We're going to bring you back in 30 days. If you don't have a lawyer, we're going to advise you again. If you don't get a lawyer after that, in all likelihood, your case proceeds to trial without counsel. That's your choosing.

A month later, on April 30, 2018, appellant appeared again without counsel at a pretrial conference. During the conference, appellant informed the court, among other things, that he believed he should e-file his motions rather than raise his motions orally, to which the court agreed. When asked by the court whether he intended to proceed to trial without counsel, appellant answered that it "would depend on the outcome" of his motions. The judge "cautioned" appellant not to wait too long or he "might not be able to have counsel available" on his trial date. Appellant said he understood.

About two months later, on June 27, 2018, appellant appeared for a third time without counsel at a motions hearing. While discussing what motions were pending, the court asked appellant whether he had talked to a lawyer, and he responded: "Yes, I have, Your Honor, and I've had several lawyers represent me in these proceedings as they have continued throughout the past five years[.] The court reminded appellant that at his initial appearance, the judge had:

> advised you of your rights to have a lawyer. She advised you of the nature of the charges that you were facing. She advised you that if you could not afford a lawyer, you could go to the Office of the Public Defender, that if you qualified for the services of the Public Defender, the Public Defender would provide a lawyer for you.

Later during the hearing, the court advised appellant again about his right to counsel, stating:

> Sir, I'm going to tell you one more time, you have the right to have a lawyer to represent you. A lawyer could be helpful if you have any defenses. A lawyer can help you prepare these defenses and present them to the [c]ourt. A lawyer can help to protect your constitutional rights. A lawyer can help you to negotiate with the State. A lawyer can help you to conduct a trial. A lawyer can help you – even if you are found guilty, a lawyer could be helpful in bringing information to the judge's attention that could be helpful to you so that you receive a fair sentence.
>
> You may hire or make private arrangements with a lawyer of your own choice, or you can make application to the Office of the Public Defender. If you qualify for the services of the Public Defender, the Public Defender will provide a lawyer for [you]. It's important that I tell you, as I'm sure Judge Solt, as I'm sure Judge Martz-Fisher did, that if you come to court for your trial without a lawyer, I or Judge Martz-Fisher or Judge Solt or another judge of this court could find that you've waived your right to be represented by a lawyer and force you to go forward without one.
>
> Now, we're going to note on the worksheet that once again, the defendant has been advised of his rights pursuant to 4-215.

Before an administrative judge that same day, appellant requested a postponement of his July 25, 2018, trial date, not because he did not have counsel, but because he had been unable to file his motions in a timely manner due to the "misinformation" given to him by the State and the court about e-filing. The judge granted his postponement request and gave him a copy of Md. Rule 4-252, governing the filing of motions in circuit court. Trial was postponed to August 2, 2018.

At a motions hearing scheduled on July 31, 2018, appellant failed to appear. At the hearing, the court and counsel affirmed that they had both received "an overnighted" letter from appellant asking the court to postpone the hearing and the trial date. Appellant asserted in his letter that he had not received timely notice of the hearing date; he did not assert that he had untimely notice of the trial date. The court denied the motion to postpone either date.

On the date of trial, August 2, 2018, appellant made his fourth appearance in court without counsel. He requested a postponement because of the "multiple motions still pending[.]"[3] When the court explained that there were no outstanding motions, appellant nevertheless requested a postponement. Appellant was brought before an administrative judge, who asked him why he wanted to postpone his case. For over three-typed pages of transcript, appellant spoke of his concerns, namely, that he was not prepared for trial

[3] On June 21, 2018, appellant filed a motion requesting unspecified oral recordings. The court denied the motion five days later without a hearing. On June 27, 2018, appellant filed a motion requesting a change of venue from Frederick County to Montgomery County. On July 3, 2018, the court denied the motion for change of venue.

because he had not received adequate notice of the motions hearing, and he had erroneously believed that there was a pending motion. The following colloquy occurred:

> THE COURT: I do have one question for you. Have you applied for the services of the Office of the Public Defender? You can apply for the office, services of the Office of Public Defender in any jurisdiction whether – and if you meet their qualifications, whether you apply in Montgomery County or Frederick County or Prince George's County or Washington County, if you meet their qualifications, they will represent you at no charge. Have you – and, and I see, it looks like you've been advised of that previously. Have you applied for their services?
>
> [APPELLANT]: *Yeah, I applied, I requested an attorney in Montgomery County, but they said I wasn't eligible based on the fact that I had a part-time job and the fact that the case was in Frederick County.* I had used Frederick County public services before and, in fact, the lawyer in that case was one of the witnesses that was going to be called in reference to the Defense as well. So, based on the fact that I wasn't a resident of Frederick County, I wasn't aware that I was still eligible to use the services of Frederick County.
>
> THE COURT: Like I said, if you qualify for the services of the public defender, you qualify for the services of the public defender in a case that's filed anywhere in the state.
>
> * * *
>
> THE COURT: It is not based on where you live or where the charges are. If you're eligible for their services, you're eligible for their services.
>
> [APPELLANT]: Okay. So, if I'm not eligible based on my income in Montgomery County –
>
> THE COURT: You can't, you're, you –
>
> [APPELLANT]: -- then I wouldn't be –
>
> THE COURT: Eligible here as well, that's correct. Okay.

(Emphasis added).

The State opposed the motion to postpone. The State informed the court that appellant had been repeatedly advised of his right to counsel, the State was prepared for trial, all motions have been resolved and ruled on, and the trial date had been set since June 28, 2018, more than a month prior. The court then asked appellant, if he had anything to add. For three pages of typed transcript, appellant advised the court, namely, that he had been unfairly treated by the State and the court system. Appellant made no comment on his right to counsel other than stating:

> It's clear that the State is determined to deny me an opportunity to represent myself and while I was informed on multiple occasions to seek legal counsel, as I mentioned earlier, the opportunities to do that are slim and none. I mean I've been able to seek some legal advice that's been free, but as far as being able to provide a lawyer, I haven't been able to do that.

The judge denied appellant's postponement request, ruling:

> In this instance, it is part of the difficulty of a case that's in a posture like this is that [appellant] is representing himself and is unaware of the procedures and the requirements of the law and of what notice is required and how things are supposed to proceed. And it's a delicate balance between recognizing that [appellant] does not know those things versus the clear rulings of the [c]ourt that if you elect to represent yourself, you're bound by the rules, even though you're unaware of what those rules are.
>
> And in this case, there [] were a number of things that were filed relatively at the last moment that were ruled on by the [c]ourt prior to trial, which needed to be ruled on prior to trial. One is, you know, motion to quash subpoena and all of those other matters, the motion to change venue and all of those other matters, the results of which were located in the, were identified in the electronic filing system and were available for everyone to review at that time.
>
> I'm just not convinced based on everything that has been presented that postponing this case would change any of that at this time. And I do note that in response to my questions that [appellant] acknowledges that he was advised of his right to counsel, that he did apply for the services of the Public Defender.

> He was deemed ineligible for that and the record is clear that he was told that if he appears for trial without an attorney, that the [c]ourt could make him go forward. And I'm just not convinced based on everything before me that it would be a denial of equal protection and, and [appellant's] due process rights to grant the postponement request.

A.

Appellant argues on appeal that the administrative judge on August 2, 2018 erred when she denied his postponement request by "deferring to [his] understanding of what [the] OPD told him." Specifically, appellant argues that in denying his postponement request the administrative judge erroneously relied on his representation that the OPD determined he was ineligible for its services, when only the DCC can decide eligibility for OPD services. He argues that he was harmed because he "forced to go to trial without any determination regarding financial eligibility," and that this could have been avoided if the judge, instead of relying on his representation that the OPD found him ineligible for OPD services, at the very least "(1) ensured that [he] understood that he could visit a District Court Commissioner to determine OPD eligibility and/or (2) determined whether [he] willingly decided to not see a District Court Commissioner."

Md. Rule 4-271(a)(1) provides that "[o]n motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date." "An appellate court reviews for abuse of discretion a trial court's ruling on a motion to postpone." *Howard v. State*, 440 Md. 427, 441 (2014) (citing *Ware v. State*, 360 Md. 650, 706 (2000), *cert. denied*, 531 U.S. 1115 (2001)). "[T]he party challenging the discretionary ruling on a motion for a postponement has the burden of demonstrating a *clear* abuse of discretion[.]" *State v.*

Taylor, 431 Md. 615, 646 (2013) (quotation marks and citation omitted). An "abuse of discretion" occurs "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Nash v. State*, 439 Md. 53, 67 (quotation marks and citation omitted), *cert. denied*, 135 S.Ct. 284 (2014). Furthermore, "a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks, citation and emphasis omitted).

We agree with the State that the record does not support appellant's claim that he advised the judge that the OPD found him ineligible for OPD services. When the administrative judge asked appellant if he had applied for representation by the OPD, appellant said that he had "requested an attorney in Montgomery County" but "they" said he was not eligible, in part, because he had a job. This is insufficient to support appellant's claim that he was advised by the wrong agency, that the judge was aware that he was advised by the wrong agency, or that his statement was so ambiguous that the judge was under an obligation to advise him that the DCC made OPD eligibility determinations and inquire whether he had been informed of his ineligibility by the DCC.

To support his argument that the judge should have inquired further, appellant cites *State v. Walker*, 417 Md. 589 (2011). In *Walker*, the Court of Appeals held that although the OPD had declined to represent the defendant and although the defendant never requested court-appointed counsel, the trial court had an independent duty to conduct an inquiry to determine if the defendant was entitled to court appointed counsel when the defendant stated that she was told she was ineligible for OPD services and she could not

afford an attorney. *Walker*, 417 Md. at 605. The Court of Appeals reversed Walker's convictions and held that because the trial court is the "'ultimate protector'" of the constitutional right to counsel, the trial court could not have properly found that the defendant knowingly and voluntarily waived her right to counsel under Md. Rule 4-215(b) without inquiring into whether the defendant was entitled to court-appointed counsel. *Id.* at 607-08.

Walker does not support the argument appellant raises. Appellant is not arguing that the judge erred by not inquiring into his right to court-appointed counsel. Rather, appellant uses *Walker* for the proposition that if "a circuit court may not defer to OPD when OPD did make eligibility determinations, the circuit court certainly may not defer to OPD when OPD does not even have a role in determining eligibility anymore." As explained above, appellant's argument that he informed the administrative judge that the OPD, rather than a DCC, found him ineligible is not supported by the record. Accordingly, appellant's claim is without merit.

B.

Appellant next argues that the administrative judge on August 2, 2018, failed to comply with the requirements of Md. Rule 4-215(d), governing waiver of counsel by inaction, because the judge never explicitly found that he had an unmeritorious reason for appearing without counsel, and even if the judge made an implicit finding, the judge's finding was premised on the belief that the OPD advised appellant that he was ineligible for its services when only a DCC can make that determination. The State argues that appellant's arguments are without merit because the administrative judge properly, albeit

implicitly found that appellant waived his right to counsel by inaction, and the record does not support appellant's contention that the OPD, not the DCC, advised him of his ineligibility for OPD services. We agree with the State.

Md. Rule 4-215(d) was adopted to protect a defendant's constitutional right to counsel and provides:

> (d) **Waiver by Inaction – Circuit Court.** If a defendant appears in circuit court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the circuit court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

"The provisions of the rule are mandatory and a trial court's departure from them constitutes reversible error." *State v. Hardy*, 415 Md. 612, 621 (2010) (quotation marks and citation omitted). We review a circuit court's compliance with Rule 4-215 de novo, but we review the court's decision regarding whether to grant or deny a defendant's request to discharge counsel for abuse of discretion. *Taylor*, 431 Md. at 630.

As the State correctly points out, a judge need not render an "explicit" ruling under Rule 4-215(d) but may implicitly find a defendant's reason(s) for not having counsel to be meritorious or non-meritorious. *See Broadwater v. State*, 171 Md. App. 297, 326-28 (2006) (rejecting the appellant's argument that the circuit court erred by failing to make an

explicit finding that the reason given for appearing without counsel was meritorious), *aff'd,* 401 Md. 175 (2007); *Webb v. State*, 144 Md. App. 729, 747 (2002) ("The court, after listening to the explanation, implicitly found the reason was non-meritorious."). Therefore, contrary to appellant's argument, the administrative judge did not err in not making an "explicit" finding that appellant had waived his right to counsel by inaction. Moreover, we are persuaded that the court did not abuse its discretion in finding, albeit implicitly, that appellant had waived his right to counsel by inaction.

In response to the administrative judge's questioning, appellant stated that he had applied for OPD services but was found to be ineligible, in part, because he had a job. Appellant offered no other explanation for the failure to obtain an attorney over a period of over four months. Appellant offered no information that required follow-up, such as a change in his financial situation or lack of knowledge. The court, after listening to the explanation, implicitly found his stated reasons were non-meritorious. Hearing after hearing, appellant was warned that it was his obligation to obtain an attorney if he wanted to be represented. He refused to do so. He said he had been represented by "appointed counsel" and by the OPD in Frederick County on previous occasions. We agree with the State that it appears appellant was content to wait until he believed that the court had ruled on his pretrial motions before deciding whether to obtain representation, despite being warned that this could result in his having to represent himself. Moreover, as we have stated above, there is no support for appellant's argument that appellant advised the judge that he was found ineligible for OPD services by the wrong agency. Accordingly, we are

persuaded that the administrative judge did not abuse her discretion in implicitly finding that appellant had waived his right to counsel by inaction.

We are mindful of what we said in *Broadwater*, *supra*:

> In a desperate effort to keep the trial traffic flowing, we encourage a trial judge to warn a defendant in stern terms that he may be forced to trial without a lawyer if he fails to make timely efforts to obtain one. *To reverse the trial judge in this case would be to tell judges generally that their stern words are, when push comes to shove, a meaningless bluff. We would be telling them that* in their efforts to keep a beleaguered production line moving *they may admonish litigants about the perils of failing to adhere to time limits, but that they are then powerless to back up their words with action*. We decline to do so.

Broadwater, 171 Md. App. at 327–28 (quoting *Felder v. State*, 106 Md. App. 642, 651-52 (1995)) (emphasis added in *Broadwater*).

II.

Appellant argues that the trial court abused its discretion by trying him in abstentia because the court failed to find that he knowingly and voluntarily waived his right to be present and the record does not support such a finding. The State disagrees, as do we.

On the day of trial, appellant telephoned the clerk's office and asked whether his case was still scheduled for trial. When told that it was, he said he would be late. When he appeared for trial, he advised the court that there were "multiple motions still pending[.]" When it was pointed out that there were no motions still pending, appellant asked for a postponement, which an administrative judge denied. Appellant then told the trial court that he was not ready for trial. He asked for a two-hour postponement, stating that he had not brought any of the documents or witnesses he needed because he thought the trial would be postponed. The court advised appellant that they would proceed with

jury selection and opening statements and then break over lunch, at which time he could "go get whatever you need and come back."

After the jury was selected and opening statements were made, the court recessed for lunch, instructed the jurors to return by 1:20 p.m., and instructed the parties to return no later than 1:25 p.m. so they could address the State's motion in limine before trial resumed. Appellant asked for more time to prepare for his case – insisting he needed to retrieve documents from Germantown and his seven-year-old daughter, who he hoped to call as a witness, from Rockvillle. The court told appellant that he was giving him almost an hour and a half, which was longer than it normally allotted for lunch recess, and that the trial needed to finish that day. Appellant acknowledged that "it's going to be my responsibility" to get to court on time.

The court reconvened at 1:50 p.m. Appellant was not present. The court elected to proceed with trial, and mid-way through the State's direct examination of its first witness, appellant's ex-wife, appellant appeared with his daughter. When the court informed appellant that the court had held off until 1:50 p.m., appellant responded, "I understand that" but explained that he felt compelled to retrieve his daughter and certain documents.

A defendant is entitled to be physically present in person at every stage of trial, except for certain exceptions not relevant here. *See* Md. Rule 4-231(b). The right to be present, however, may be waived by a defendant:

> (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom; or

(3) who personally or through counsel, agrees to or acquiesces in being absent.

Md. Rule 4-231(c). When faced with non-appearance of the defendant, in determining whether to proceed with trial, the trial court "must balance two competing interests: the right of the defendant to be present at trial, and the need for the orderly administration of the criminal justice system." *Pinkney v. State*, 350 Md. 201, 213 (1998).

"Before trying a defendant *in abstentia*, the trial court must both (i) find a knowing and voluntary waiver of the right to be present at trial and (ii) exercise sound discretion in determining whether to proceed with the trial of an absent criminal defendant." *Id.* (citations omitted). To find a knowing and voluntary waiver, the court must be satisfied that "the defendant was aware of the time and place of trial, and that the non-appearance was both knowing and sufficiently deliberate to constitute an agreement or acquiescence to the trial court proceeding in his or her absence." *Collins v. State*, 376 Md. 359, 376 (2003) (quotation marks and citation omitted). A court need not make an explicit ruling for "there are occasions when a finding of voluntary absence may be inferred from the circumstances." *Reeves v. State*, 192 Md. App. 277, 295 n.5 (2010) (citations omitted). Moreover, evidence of voluntariness that comes to light after a trial court proceeds in the defendant's absence may be considered in determining whether the trial court's decision was correct. *Id.* at 295.

At the outset the State argues, citing *Reeves, supra*, that appellant has waived his abstentia argument for our review because he did not "expressly" object to being tried in abstentia at trial, sentencing, or in a post-trial motion. We noted in *Reeves* that a failure to "expressly" object to being tried in abstentia "might" waive an appellate argument on that issue, but declined to so hold because we had not found a Maryland case addressing preservation in such a situation (even though we noted that other jurisdictions had found waivers in similar situations) and the State had not argued non-preservation. *Id.* at 293 (citation omitted). We likewise decline to hold that a defendant must make an express objection to being tried in abstentia to preserve the issue for appellate review, finding that appellant's argument is in any event meritless.

Appellant does not contend that he was unaware of when he was to appear in court following the luncheon recess, only that his actions were not "sufficiently deliberate" given the rainstorms he encountered in trying to return to court.

Here, appellant was notably charged with, among other things, refusing to follow a court order. Appellant failed to appear for a motions hearing on July 31, and he showed up late and unprepared for trial on August 2. He requested a postponement, which an administrative judge denied, and when he asked the trial court for a two-hour delay, the court adjusted its schedule and gave him an additional half an hour over the luncheon recess. Appellant was advised of the time he was to be back, and he said he understood. When he returned, it was clear that his tardiness was not the result of an unexpected illness or accident but because he had elected to retrieve his documents in Germantown and his

daughter in Rockville, which he knew before he left that he did not have enough time to do because he had asked for more time.

Contrary to appellant's argument, a court is not required to telephone him directly before proceeding without him or call area hospitals to ascertain why he was late. Under the circumstances, we are persuaded that appellant made a knowing and voluntary choice to retrieve those items knowing that he might be late, and we find no abuse by the trial court in proceeding in abstentia. *Cf. Lewis v. State*, 91 Md. App. 763, 770-71 (1992) (finding no abuse of discretion in proceeding with a trial in abstentia when the defendant did not return from lunch in the middle of trial, after being told that the trial would resume at a particular time, and in the absence of any explanation for the defendant's absence or objection to proceeding with the trial).

III.

Appellant argues that the trial court committed reversible err when it prevented him "from introducing relevant evidence." Specifically, he claims that the trial court erred in preventing him from challenging the validity of the underlying child support order and calling his daughter as a witness. We agree with the State that appellant's arguments are without merit. We shall address each argument in turn.

A. Underlying child support order

> It is a settled principle of Maryland law that, when a tribunal having jurisdiction issues to a person an order, that person may not refuse to obey the order on the theory that it is unlawful or unwarranted and, in a later collateral proceeding such as a contempt action or other disciplinary action like the present one, defend by attacking the earlier order. Instead, that person is required to challenge the order directly[.]

Maryland State Bd. of Physicians v. Eist, 417 Md. 545, 567 n.14 (citations omitted), cert. denied, 565 U.S. 820 (2011). *Cf. Early v. Early*, 338 Md. 639, 656 (1995) (whether a father should have been held in contempt for violation of the child support order is distinct and separate from the question of whether that order was valid); *Save-Mor Drugs, Bethesda, Inc. v. Upjohn Co.*, 225 Md. 187, 190-91 (1961) (a contemnor who is prosecuted for criminal contempt may not attack the order collaterally in a contempt proceeding). *See also Marsh v. State*, 22 Md. App. 173, 184 (1974) (stating that a "litigant will not be permitted to make the decision whether he will or will not obey the order of a court of competent jurisdiction" and even though an order may be based on erroneous facts or an erroneous conception of the law, "it must be obeyed until such time as it is stricken out on application, or reversed on appeal, or otherwise ceases to be a vital and subsisting direction of a court with proper jurisdiction over the parties to the case.") (quotation marks and citation omitted).

On September 12, 2014, the Circuit Court for Frederick County issued the underlying child support order. Appellant never appealed that order directly. In the present contempt case, appellant has never argued nor does he argue on appeal that the Frederick County circuit court did not have jurisdiction to issue the underlying child support order.[4]

[4] We note that appellant had filed a motion in the instant proceedings to change venue from Frederick County to Montgomery County. A venue challenge is not the same as a jurisdictional challenge for waiver purposes. *See Guarnera v. State*, 23 Md. App. 525, 528-29 (1974) (explaining that venue, which may be waived, refers to a "particular place or county in which a court of appropriate jurisdiction may properly hear and determine the case in the first instance" whereas jurisdiction, which may not be waived, refers to "the right to hear and determine a cause . . . in the sen[s]e of power rather than in the sense of (continued)

Accordingly, we find no error by the trial court in precluding appellant from collaterally attacking the underlying child support order in the present contempt case.

B. Appellant's seven-year-old daughter as witness

Appellant argues that the trial court erred in precluding him from calling his seven-year-old daughter "about other forms of support" he allegedly provided to her when she stayed with him. He argues that this testimony was relevant "to counter the State's theory that he knowingly and willfully refused to provide his daughter with support." He argues that even if his daughter's testimony was not relevant, it was admissible under the doctrine of "curative admissibility" when the State elicited from Ms. Dixon that appellant "did not provide assistance other than child support." Appellant's argument is without merit.

Md. 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." Even evidence that is relevant may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case, but by whether it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is

selection of place.") (quotation marks and citation omitted), *cert. denied*, 274 Md. 728 (1975).

being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quotation marks and citation omitted) (brackets in *Burris*)).

"Trial judges generally have wide discretion when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (quotation marks and citations omitted). An abuse of discretion occurs when the "ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice." *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks and citation omitted). Although "trial judges are vested with discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Simms*, 420 Md. at 724 (citation omitted). *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."). Accordingly, "we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in M[d.] Rule 5-403." *Simms*, 420 Md. at 725 (citation omitted).

The State moved to preclude appellant from calling his daughter as a fact witness about his payment of his child support obligation. Appellant agreed with the court that she did not know whether he had paid any money pursuant to the order. Nonetheless, he argued that her testimony was relevant to prove that he did not have to comply with the court ordered payments because he supported his daughter in other ways, by spending time with

her and by providing her with food, housing, and clothing when he had visitation with her. The court disagreed with appellant and granted the State's motion.

Appellant admitted to the trial court that his daughter could not provide any information about whether he had paid money pursuant to his court ordered child support obligation, the issue before the court. Parents are required by law to support their children.

> When the parents and child live together, so that the child is in the parents' joint physical custody, it is presumed that each parent fulfills that parent's obligation of support to the child directly. When the parents live apart, however, it is presumed that the parent in whose custody the child resides fulfills his or her obligation of support directly; the other parent's support obligation then must be translated into dollars and paid to the custodial parent, for the child's benefit.

Knott v. Knott, 146 Md. App. 232, 247-48 (2002) (quotation marks and citations omitted). For the above reasons, we find no error by the court in not allowing appellant's daughter to testify whether appellant provided her with food and housing while she was visiting him. Appellant's curative admissibility argument fares no better.

Under the doctrine of curative admissibility, a trial court may admit inadmissible evidence to counter other inadmissible and prejudicial evidence where the latter evidence was admitted without timely objection or a timely motion to strike. *Clark v. State*, 332 Md. 77, 89 (1993) (noting that the doctrine, which is infrequently invoked, only comes into play when a granted request to the court's "discretion to grant a belated motion to strike the evidence" is insufficient to erase the prejudice caused by the admission of the inadmissible evidence) (citation omitted)). Appellant claims that because Ms. Dixon testified that he "did not support their daughter in other ways[,]" his proffered testimony from his daughter about non-monetary forms of support that he provided during his

visitations with her became admissible. We agree with the State that appellant mischaracterizes Ms. Dixon's testimony.

"[A] parent's financial obligation to pay child support can be modified when the parent agrees to pay, for a period of time, something that would ordinarily be part of the other parent's expenditures for child support." *Guidash v. Tome*, 211 Md. App. 725, 739 (2013) (quotation marks and citations omitted). *See also Knott*, 146 Md. App. at 247-50 (2002) (evaluating a request to modify a child support arrangement where payor parent had been paying the mortgage on the home where the child resided in lieu of child support). This principle is subject to limitations: a parent may not waive or bargain away a child's right to receive support and, regardless of any parental agreement, child support must always be approved by court order. *See Guidash*, 211 Md. App. at 739-40 (citations omitted). *See also Walsh v. Walsh*, 333 Md. 492, 504 (1994) ("Even before the guidelines, this Court made it clear that agreements between the parents were not binding on a court ordering child support.") (citations omitted)) and *Corapcioglu v. Roosevelt*, 170 Md. App. 572, 606 (2006) (stating that "[a] parent may not bargain away the child's right to support, and modification of that support, from the other parent").

Ms. Dixon was asked during on direct examination whether appellant had ever given her any form of support in lieu of child support, like paying T.'s school tuition, buying her a car, or helping her to pay rent. Ms. Dixon testified that appellant had not. This was not irrelevant testimony because it showed that appellant had not given her anything of value to pay for any expenses she incurred related to T.'s care. Additionally, she testified on cross-examination that she was not asserting that appellant had failed to support T. in other

ways, other than the support order. Because the State's evidence was admissible, appellant's irrelevant evidence was not admissible under the curative admissibility doctrine. Accordingly, we find no error by the trial court in excluding it.

IV.

Appellant argues that the evidence was insufficient to sustain his three forged, private document convictions (forging a private document, possessing a forged private document, and issuing a forged private document) because the "statement of compliance" document that he was alleged to have forged was not one of the documents enumerated under the statute. *See* Md. Code Ann., Crim. Law, § 8-601(a).[5] Recognizing that he has not preserved his argument for our review because he did not move for judgment of acquittal on this ground below, he asks us to exercise plain error review and reverse. The State concedes that there was insufficient evidence to support those convictions because the document was not among the specifically enumerated documents in the statute, however, the State argues that we should nonetheless affirm the convictions because there was "ample evidence" that appellant had committed the common law crime of forgery and this is not "the kind of extraordinary circumstances that warrant plain error review."

[5] The 14 documents listed in Crim. Law § 8-601(a) include a: bond; check; deed; draft; endorsement or assignment of a bond, draft, check, or promissory note; entry in an account book or ledger; letter of credit; negotiable instrument; power of attorney; promissory note; release or discharge for money or property; title to a motor vehicle; waiver or release of mechanics' lien; or will or codicil.

Md. Rule 8-131(a) states: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court" but that we "may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." The Maryland appellate courts have not "set forth any fixed formula for determining when discretion should be exercised[.]" *State v. Hutchinson*, 287 Md. 198, 202 (1980). However, our courts have stated that an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quotation marks and citations omitted). *See also State v. Daughton*, 321 Md. 206, 210-11 (1990) ("[A]n appellate court may recognize *sua sponte* plain error, that is, error which vitally affects a defendant's right to a fair and impartial trial."). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). It bears repeating that "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003).

The State is correct, as appellant concedes, that because he did not make a motion for judgment of acquittal with any specificity, he has failed to preserve his sufficiency argument on appeal. The following colloquy occurred at trial after the State rested:

> THE COURT: All right, [appellant], are you making a motion for judgment of acquittal on all counts?
>
> [APELLANT]: I'm sorry?

> THE COURT: Are you making your motion for judgment of acquittal on all counts?
>
> [APPELLANT]: I don't understand what that means.
>
> THE COURT: You're asking the [c]ourt to determine whether or not the State has met their burden in terms of the charges against you at this stage of the trial.
>
> [APPELLANT]: Sure.

The court denied the motion.

We are mindful of the law above and the standard by which we review appeals by *pro se* litigants. The Court of Appeals has stated that although we shall liberally construe the contents of pleadings filed by *pro se* litigants, unrepresented litigants are subject to the same rules regarding the law, particularly, reviewability and waiver, as those represented by counsel. *Simms v. State*, 409 Md. 722, 731-32 n.9 (2009) (citation omitted). Nonetheless, we will exercise the discretion afforded to us under Md. Rule 8-131(a) and reverse appellant's three forgery of a private document convictions.

Here, the "statement of compliance" document is clearly not one of the documents enumerated in Crim. Law, § 8-601(a). The State admits that because of this, appellant could not have been convicted of the crimes charged. Moreover, we note that because appellant proceeded *pro se*, there can be no ineffective assistance of counsel claim or post-conviction relief. Although we could decline to exercise discretion in this case, we shall exercise our discretion because the circumstances are compelling and fundamental to a fair

judicial system. *Cf. Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007). [6]

JUDGMENTS ON THE THREE FORGING A PRIVATE DOCUMENT CONVICTIONS REVERSED AND SENTENCES VACATED; JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID 75% BY APPELLANT AND 25 % BY FREDERICK COUNTY.

[6] In the unique case of *Testerman*, the issue was whether, as a matter of law, a driver switching seats with his passenger after a traffic stop constituted "fleeing" and "eluding by other means." *Testerman*, 170 Md. App. at 336. Although Testerman's counsel did not raise the claim below in a motion for judgment of acquittal and although we recognized that ineffective assistance claims are generally best decided on post-conviction review, because the critical facts were not in dispute and the record was sufficiently developed, we considered trial counsel's strategy and legal theories and decided on direct appeal that defense counsel was ineffective for failing to articulate a motion for judgment of acquittal and reversed that conviction. *Id*. at 342-44.