Circuit Court for Frederick County
Case No.: C-10-CR-21-000837

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 331

September Term, 2023

DEARIL GREEN, III

v.

STATE OF MARYLAND

Berger,
Reed,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 5, 2025

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

Appellant, Dearil Green, III, was indicted in the Circuit Court for Frederick County, Maryland, and charged with motor vehicle theft, possession with intent to distribute controlled dangerous substances, various driving offenses, resisting arrest, fleeing or eluding police, and other related offenses. After he was convicted by a jury on all charges submitted, and after his motion for new trial was denied on the record in open court, Appellant was sentenced to an aggregate sentence of thirty-three (33) years' incarceration, with all but twelve (12) years suspended, with credit for time served, to be followed by four (4) years' supervised probation. On this timely appeal, Appellant asks us to address the following questions:

1. Did the lower court err in failing to suppress the fruit of Mr. Green's warrantless stop?

2. Did the lower court err in failing to rule upon the admissibility of Mr. Green's prior conviction before he elected not to testify?

For the following reasons, we shall affirm.

BACKGROUND

<u>Motions Hearing</u>

Around 4:00 p.m. on November 18, 2021, Deputy First Class Sean Sheehy, an eight-year veteran of the Frederick County Sheriff's Office and a member of the Pro-Active Criminal Enforcement ("PACE") Unit, observed a 2000 silver Chevrolet Prizm displaying a Virginia registration plate drive by him while he was on patrol near Monocacy Boulevard and Interstate 70. As part of his regular duty assignment with the PACE unit, Deputy Sheehy ran the registration number and "received a wanted stolen vehicle hit." Deputy

Sheehy informed the other members of his police team and followed the Chevrolet to the parking lot in front of Barnes & Noble at the nearby Francis Scott Key Mall in Frederick.

After the car parked, a male got out of the driver's seat, while two other occupants remained inside the vehicle. The driver, identified in court as Appellant, went into Barnes & Noble. Meanwhile, the police officers on the scene, including Corporal Brett Welsh, Deputy Brady Parson and Deputy Chad Smith, all wearing clothing identifying them as part of the sheriff's office and driving unmarked police cars, decided to wait nearby. As they did so, Corporal Welsh called communications to try to confirm that the Chevrolet was, in fact, stolen. Corporal Welsh would testify:

> Sure. Before Dep. Sheehy informed us that the driver was returning to the vehicle, I conducted a little bit of research into the vehicle theft report itself. And I learned that the vehicle was reported stolen the night prior on November 17th through Alexandria Virgina Police Department. I looked that report up in LInX, which is a police database, and I was able to read that report. I learned that in that report, the owner was a Muhammed Adnan subject, and I believe he was from Alexandria. He left his vehicle in the curb running. When he came out a couple minutes later, his car was gone, so he reported it to the police. I looked up Mr. Adnan's information, ran his Virginia [sic] license photo, and I learned that he did not match the description of the suspect that Dep. Sheehy provided me or any of the passengers in the vehicle.[1]

[1] Information about a vehicle's status is available through the "National Crime Information Center" ("NCIC"), a computer system "through which licenses, vehicle registrations, and outstanding warrants are checked[.]" *Byndloss v. State*, 391 Md. 462, 469 (2006). Confirmation of the status of the vehicle is pertinent in this case because this Court has explained that an initial report that a vehicle is stolen, standing alone, does not provide probable cause under the Fourth Amendment. As we noted in *Randall v. State*, 223 Md. App. 519 (2015), *cert. denied*, 457 Md. 414 (2018):

> Launched in 1967, NCIC, as of 2014, contains over 13 million active records and averages 12 million transactions per day. *National Crime*

(continued)

There was testimony concerning when, exactly, the initial stolen vehicle report was confirmed. For instance, the motions court and Deputy Sheehy had the following colloquy:

> THE COURT: All right. So let me ask you this, if you don't mind, [Prosecutor].
>
> PROSECUTOR: Sure.
>
> THE COURT: [Defense Counsel] was probably going to ask you this anyway, but so why didn't you -- you got a hit that the car was stolen. Why didn't you stop this individual when you saw him first get out of the car?
>
> THE WITNESS: We would've had the hit confirmed and we wanted to develop a plan to get that vehicle stopped --
>
> THE COURT: Uh-huh.

> *Information Center*, Federal Bureau of Investigation, https://www.fbi.gov/about-us/cjis/ncic (last visited June 19, 2015), http://perma.cc/F73U-PE32. As explained by the FBI,
>
> > Criminal justice agencies enter records into NCIC that are accessible to law enforcement agencies nationwide. For example, a law enforcement officer can search NCIC during a traffic stop to determine if the vehicle in question is stolen or if the driver is wanted by law enforcement. The system responds instantly. *However, a positive response from NCIC is not probable cause for an officer to take action*. NCIC policy requires the inquiring agency to make contact with the entering agency to verify the information is accurate and up-to-date. Once the record is confirmed, the inquiring agency may take action to arrest a fugitive, return a missing person, charge a subject with violation of a protection order, or recover stolen property.
>
> *Id*.

Randall, 223 Md. App. at 539-40 n.12 (emphasis added); *accord Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 236 (2014).

THE WITNESS: -- in a spot. So usually we'll follow the vehicle, hoping that they'll stop and pull into a parking lot to avoid them fleeing the scene in the car.

THE COURT: Okay. And they did, in this case, right?

THE WITNESS: Correct.

THE COURT: All right. So you did actually get full confirmation. You not only had the hit now, but you had confirmation that the vehicle was stolen prior to any interaction with Mr. Green?

THE WITNESS: We didn't get that confirmation until he had returned to the vehicle.

THE COURT: Okay. Had you had an encounter with him at that point?

THE WITNESS: No.

THE COURT: Okay. So before you had any encounter with him, before you said any words to him, you had a confirmation that the vehicle was stolen.

THE WITNESS: On my computer, yes, sir.

THE COURT: You had a hit, now you had a confirmation.

THE WITNESS: Yes, sir.

THE COURT: Okay.

The deputy would later clarify that the confirmation did not come until later during the encounter:

[PROSECUTOR]: And you indicated that you received that confirmation before Mr. Green got to the hospital, to your knowledge?

A. That's right.

THE COURT: Well, it's before he had any encounter with him, right?

THE WITNESS: We learned that the vehicle -- we got the hit confirmation when he was in the ambulance about to be transported.

THE COURT: Okay. Because I thought when I asked you if you had confirmation that the car was stolen prior to any encounter with Mr. Green, I thought you said yes.

THE WITNESS: No, I didn't. We didn't have that actual confirmation until he was in the ambulance --

THE COURT: Okay.

THE WITNESS: -- about to be transported to the hospital.

THE COURT: All right. Gotcha.

Corporal Welsh's testimony is more helpful. He testified that he provided dispatch with the registration for the Chevrolet at 4:22 p.m. Corporal Welsh testified that the "police information specialist" then would "go through the NCIC process to get a hit confirmation through the originating agency." The corporal agreed this was "typical process or protocol" to confirm such things as "stolen cars; wanted persons; stolen property; [and] missing persons." Corporal Welsh received confirmation at 4:46 p.m. that the Chevrolet was, in fact, stolen.[2]

Meanwhile, as this transpired, the police team waited outside the mall for Appellant to emerge. Deputy Sheehy further explained the reason why the police team waited in such situations, instead of immediately apprehending the driver of the suspected stolen vehicle, was because, "[u]sually stolen vehicles, like I explained before, flee, or the occupants of

[2] To summarize, Deputy Parson testified he was called to respond to the mall at around 4:06 p.m. As indicated, Corporal Welsh contacted dispatch to confirm the vehicle's status at 4:19 p.m. and gave them the registration at 4:22 p.m. On cross-examination, Deputy Sheehy agreed that the police forms used to document this encounter provided that Appellant was "in custody" at 4:37 p.m. on the day in question, and that the confirmation that the Chevrolet was, in fact, stolen, came at 4:46 p.m.

the vehicle will flee. So, we try to get in a more controlled environment for ourselves. Parking lot, parked into a spot where they're kind of blocked in." Deputy Sheehy had been involved in high-speed car chases before and testified the police wanted to avoid the accompanying danger and safety risk of such a chase. The court then asked him:

> THE COURT: Well, why didn't you stop him before, as soon as you saw him get out of the car? So it wouldn't -- I mean, obviously, he couldn't flee in the car then.
>
> THE WITNESS: We didn't have the confirmation yet, and we developed a plan to, when he returned to the vehicle, to take him into custody.
>
> THE COURT: Okay. Because that's where I was confused. Because then, but you still didn't have confirmation when he came back out, but you did accost him.
>
> THE WITNESS: So we were going to detain him as soon as he had returned back to the vehicle.
>
> THE COURT: Okay.
>
> THE WITNESS: Because by the time we had all got into the parking lot and got set up, he'd walked into the store.
>
> THE COURT: All right. And you were going to detain him based upon the fact that you had a alert --
>
> THE WITNESS: Correct.
>
> THE COURT: -- that the car was stolen.
>
> THE WITNESS: Correct.

Approximately fifteen (15) minutes after the Appellant went into Barnes & Noble, he exited the mall near the Sears entrance. When he emerged, Appellant was carrying a full black bookbag, alternatively described during the hearing as a backpack, on his back. Agreeing this was not the "primary focus," Corporal Welsh testified without objection that

Appellant's behavior was consistent with shoplifting, based on his training, knowledge and experience. Deputy Sheehy also testified that, based on his training and experience, it was not uncommon for shoplifters to steal a bag to carry stolen items out of the store. However, on cross-examination, Corporal Welsh acknowledged the possibility that people might legitimately purchase an item such as a book bag and then wear it out of a store afterward.

Appellant walked back to the driver's side of the Chevrolet and placed the bookbag in the back passenger seat. He then walked to the driver's side door. At that point, it is undisputed that the police drove up to the Chevrolet and blocked it in from behind. According to Deputy Sheehy, "[w]e drove and -- drove up, parked behind the vehicle. There was a vehicle parked in front of the silver Chevy, so it was blocked in. We pulled behind it and exited our vehicles." Deputy Parson also testified during the hearing that, when the officers first pulled their vehicles up behind the Chevrolet, it was their intention to detain Appellant for questioning, primarily in relation to the report that he was driving a stolen vehicle, but also on the suspicion of shoplifting.

Once they blocked in the Chevrolet, Deputy Sheehy and the other officers got out of their vehicles and yelled, "police, stop, don't move." Appellant did not comply with this command. Instead, Appellant "ran towards the front of his vehicle, [then] through the parking lot, about 30 to 40 yards." Two officers, Deputy Parson and Deputy Smith, pursued Appellant and were able to detain him, again, after approximately thirty (30) to forty (40) yards. Deputy Sheehy confirmed that the police knew it was possible that Appellant would

flee when they approached the vehicle. Therefore, they assigned roles to who would chase him in that event, and who would remain with the car and its occupants.[3]

Deputy Parson provided specific detail about the foot chase, as follows:

> So DFC Sheehy advised Mr. Green not to move; he began to backpedal. As he began to backpedal, I exited my car, he turned around and looked at me, and then ran between my car and the suspect vehicle. I took chase via foot. Mr. Green and I had a small altercation, a tackle, little bit of wrestling match approximately 30 yards from there. Upon doing so, PCP vile [sic] came out from his person as well as other articles of clothing or -- excuse me, other articles -- a phone. And then DFC Smith also cut oss [sic] -- cut us off at the chase, and he began to assist me in arresting -- excuse me -- in placing Mr. Green in handcuffs.

The motions court inquired further and Deputy Parson maintained that Appellant was not handcuffed until after the PCP vial came out and fell from his person during the "wrestling match." He also testified that he did not confirm the vial contained suspected PCP until after Appellant was in handcuffs. But, he was able to smell it and testified that PCP "has a very distinct smell" and that it was "[u]sually packaged in some sort of non-porous container."[4] Deputy Parson also testified that "[d]uring the struggle, [Appellant] began reaching for his waistband so we immediately patted him down for handguns or knives," but they did not search him at the scene because Appellant was twisting his body around and was not cooperating. Deputy Parson further testified that he was concerned that

[3] The other occupants of the Chevrolet were questioned and eventually released. The owner of the Chevrolet, Mr. Adnan, was contacted and retrieved his stolen vehicle about three hours later.

[4] Deputy Parson earlier testified to his training and experience, which included his familiarity with the color and smell of PCP.

Appellant was trying to retrieve a weapon or destroy contraband. When asked if there was a concern for officer safety during the struggle, Deputy Parson replied, "Absolutely." On cross-examination, Deputy Parson agreed that his report provided that he told Appellant he was under arrest when they were struggling in the parking lot.

Pursuant to Appellant's request that he was experiencing "a little bit of chest pain" and "some trouble breathing," Appellant was taken to Frederick Health Hospital.[5] Appellant was ultimately searched at the hospital. In addition to the vial containing 59 grams of PCP and a cell phone that fell off Appellant's person in the mall parking lot, police recovered a total of 12 grams of crack cocaine, stored in separate green and yellow baggies, and a black folding knife with a silver blade when he was searched at the hospital.[6]

Court's Ruling

The court found this was a valid Terry stop first, as follows:

> First of all, with the issue of whether there was a reasonable articulable suspicion to conduct what is called a "Terry stop" of the defendant initially. The testimony from the police officer, from the Frederick County Sheriff's Office in this matter, indicated that he was basically performing a routine function of checking vehicles as they passed, and it turned out, when a call was made in about this particular one, that there was a stolen vehicle; that he identified the vehicle that the defendant was in as a stolen vehicle.
>
> More -- while that was not confirmed at that time, more information came in, eventually, that the -- prior to the stop -- that the vehicle had just been stolen the day before; I believe within the last 24 hours. And a

[5] Deputy Parson testified that, once they arrived at the hospital, Appellant again tried to flee from the police to no avail.

[6] After Appellant was taken from the scene, the bookbag was retrieved from the Chevrolet and searched. Deputy Sheehy then went to Dick's Sporting Goods store inside the mall and confirmed that the bag and its contents, three sweatshirts still with their tags attached, were stolen.

description was given of the owner of that vehicle who I think was -- I know it was -- it was a male -- and I don't want to describe him as a Middle Eastern male, but I think that's correct.

[PROSECUTOR] Mr. Audnon (phonetic sp.).

THE COURT: Yes. Mr. Audnon was a Middle Eastern male. The officer -- the deputies from the sheriff's department followed the vehicle. It pulled into a shopping area mall in Frederick County. At that time, the deputy observed this defendant leave the vehicle from the driver seat. He did not, obviously, match the description of the owner of the vehicle.

Went into a sporting goods store and came back out with a backpack, which the deputy, at least believed at that time, could have been stolen since he had gone in without the backpack. It did not come out in any kind of packaging as you would typically expect from something that was purchased. And he suspected at that point that the backpack may have been stolen.

Now, that alone, obviously, would not necessarily arouse too much suspicion. Some people do, the Court acknowledges, make purchases, and then, for example, you purchase shoes in a store, you put them on, and you walk out with them on because you want to wear your shoes out. However, it's one piece of the entire scenario here.

At that point, the officer gets out to make an inquiry of the defendant. He begins to flee. And a vial that the officer described as one that looked -- appeared to contain suspected phencyclidine, fell from the defendant's person to the ground, along with some of the other defendant's belongings.

At that time, the defendant was pursued; he was apprehended. And at that point, he was ultimately taken to the hospital and when eventually searched at the hospital, contraband was found on him. And I think a test was done of the PCP vial and it was determined that it was indeed PCP that fell off.

Was that done on the --

[PROSECUTOR]: I don't believe there --

THE COURT: I'm trying to keep the facts right.

[PROSECUTOR]: -- is a preliminary test on the (unintelligible 11:43:47). (Unintelligible 11:43:48).

> THE COURT: Okay. All right. But anyways -- suspected phencyclidine based on the officer's observations of it once he picked it up.
>
> [PROSECUTOR]: And the odor was (unintelligible 11:43:55).
>
> THE COURT: And the odor he also detected as well, which the officer testified on his training and experience, would lead him to believe that it was phencyclidine.
>
> So the Court does find that based on those factors that were considered a certainly reasonable articulable suspicion was present, and therefore the officer acted properly in trying to conduct a Terry stop of the defendant at the mall based on all that information.

The court then continued by addressing whether there was probable cause to arrest Appellant, stating:

> The question then arises as whether there was probable cause for an arrest. The Court will incorporate all of the factors that it found, and all of the facts that it found, in whether a Terry stop was appropriate in this case and add to it that, at that point, the defendant fled from the deputies on foot as they attempted to lawfully stop him as a recent driver of a stolen vehicle. That was approximately 4:36, 4:37 p.m. if I'm not correct -- if I'm correct.
>
> The witnesses, again, confirm the vehicle was stolen, there was a stolen vehicle hit approximately ten minutes thereafter, which allows the police in this Court's interpretation of the law to quote/unquote "take action". The deputies discovered the suspected phencyclidine in plain view contemporaneous with the defendant's flight, immediately searched it as such, and established that it came from the defendant's possession and properly seized it.
>
> It was confirmed that the defendant had stolen merchandise that he had put in the car just before his detention, all prior to the 5 -- I can't remember the time -- was it 5:30? 5:20?
>
> [PROSECUTOR]: It was 5 -- 5:20 according to (unintelligible 11:45:33).

> THE COURT: 5:20 detention at the hospital.[7] The facts solicited discretionary also established that the defendant himself delayed a search of his person in this case. However, the Court -- the deputies in this case had reasonable articulable suspicion to stop the defendant from the outset, and because the defendant fled from the police, and the police did not need -- therefore, the police did not need to confirm that the car was stolen in order to conduct the Terry stop in the first place, nor did the hard take down, or the arrest, constitute an arrest requiring probable cause in this case because the presence of the defendant's flight is a special circumstances.
>
> So looking at the case from a totality of the circumstance, which the Court is required to do, in making a determination as to whether probable cause exists, and for the reasons that I have cited, as -- as the -- the -- pieces of the four corners that the Court looked at in the totality of the circumstances, the Court does find that the police acted properly in this matter within the confines of the Fourth Amendment to the United States Constitution, and therefore, the motion to suppress is denied.[8]

Trial

At trial, the three officers who testified at the motions hearing offered similar testimony as before. In brief, and supplementing that testimony, the jury heard that on November 18, 2021, at around 4:00 p.m., Appellant was seen driving a 2000 silver Chevrolet Prizm that had been reported stolen the day before from Muhammad Adnan, a Door Dash delivery driver, while he was working in Old Town Alexandria. Appellant parked that vehicle in front of the Barnes & Noble bookstore at the Francis Scott Key Mall

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[7] Looking to the facts in the light most favorable to the prevailing party, the police confirmed the bookbag and its contents were stolen from Dick's Sporting Goods. Although the specific time is not clear, the police learned this information after Appellant was transported from the scene to the hospital.

[8] The court also found Appellant lacked standing to challenge the recovery of any items found in the stolen car.

in Frederick, Maryland, and then went inside. Appellant emerged from the mall, further down near a Sears, carrying a full bookbag, and returned to the vehicle.

Based primarily on the preliminary information that Appellant was driving a stolen vehicle, the police approached the Chevrolet, identified themselves and told Appellant to stop. Appellant turned and fled. Appellant was apprehended after a short foot pursuit, and during the struggle, a vial of suspected PCP came from his person. After he was in custody, and within fifteen to twenty minutes of his arrival on the scene, Corporal Welsh received confirmation that the Chevrolet was, in fact, stolen a day earlier from Mr. Adnan in Alexandria, Virginia.

At Appellant's request, Appellant was transported to the hospital where he was searched incident to this arrest. In all, including the items recovered at the scene and the hospital, 58.256 grams of PCP and approximately 13 grams of crack cocaine were recovered in connection with this case. The State's expert opined this quantity and the manner of packaging were consistent with distribution. In addition, a black bookbag was found inside the Chevrolet, and the assistant store manager at Dick's Sporting Goods confirmed that the bag and its contents, three sweatshirts, were stolen that day. Photographs of a man matching Appellant's description inside the store were admitted into evidence and displayed for the jury.

We shall set forth additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends the motions court erred in denying his motion to suppress the fruit of the warrantless stop in this case because he was arrested without probable cause when his vehicle was blocked in and the officers commanded him to stop with the intent to take him into custody. The State disagrees, responding that the officers first sought to detain Appellant based on reasonable, articulable suspicion that he was driving a stolen vehicle. The State continues that reasonable, articulable suspicion ripened into probable cause when Appellant did not submit to authority and fled, and when the vial of PCP fell from his person. We concur.

"When reviewing a trial court's denial of a motion to suppress, we are limited to information in the record of the suppression hearing and consider the facts found by the trial court in the light most favorable to the prevailing party, in this case, the State." *Washington v. State*, 482 Md. 395, 420 (2022) (citing *Trott v. State*, 473 Md. 245, 253-54 (2021)). "We accept facts found by the trial court during the suppression hearing unless clearly erroneous." *Id*. "In contrast, our review of the trial court's application of law to the facts is *de novo*." *Id*. "In the event of a constitutional challenge, we conduct an 'independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Id*. (cleaned up); *accord State v. McDonnell*, 484 Md. 56, 78 (2023).

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961),

guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has often said that "'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Richardson v. State*, 481 Md. 423, 445 (2022) (*quoting Riley v. California*, 573 U.S. 373, 381-82 (2014), in turn quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). "Evidence obtained in violation of the Fourth Amendment will ordinarily be inadmissible under the exclusionary rule." *Richardson*, 481 Md. at 446 (quoting *Thornton v. State*, 465 Md. 122, 140 (2019)).

However, considering the "significant costs" of the exclusionary rule, it is "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Richardson*, 481 Md. at 445 (quoting *State v. Carter*, 472 Md. 36, 55-56 (2021), in turn quoting *Utah v. Strieff*, 579 U.S. 232, 237 (2016)); *see also Herring v. United States*, 555 U.S. 135, 140 (2009) ("[E]xclusion 'has always been our last resort, not our first impulse,' [*Hudson v. Michigan*, 547 U.S. 586, 591 (2006)], and our precedents establish important principles that constrain application of the exclusionary rule"). Thus, in assessing the reasonableness of the government intrusion against the individual's personal security, *see Trott, supra*, 473 Md. at 255, we apply "a totality of the circumstances analysis, based on the unique facts and circumstances of each case." *State v. McDonnell*, 484 Md. at 80 (citing *Missouri v. McNeely*, 569 U.S. 141, 150 (2013)); *see also State v. Johnson*, 458 Md. 519, 534 (2018) (reaffirming that appellate courts do not "view each fact in isolation," and that the totality of the circumstances test "precludes a 'divide-and-conquer analysis'") (citation omitted).

"Under the Fourth Amendment, 'subject only to a few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable.'" *In re D.D.*, 479 Md. 206, 223 (2022) (quoting *Grant v. State*, 449 Md. 1, 16-17 (2016) (footnote omitted)). Indeed, "'[t]he default rule requires that a seizure of a person by a law enforcement officer must be supported by probable cause, and, absent a showing of probable cause, the seizure violates the Fourth Amendment.'" *Id*. (quoting *Crosby v. State*, 408 Md. 490, 505 (2009) (citation omitted)).

Generally, the police may stop and detain a person based on reasonable articulable suspicion that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000). Further, they may frisk that person if they suspect they are armed and dangerous. *See Sellman v. State*, 449 Md. 526, 541 (2016) ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.") (quoting *Terry*, 392 U.S. at 27). They may even place the person in handcuffs if there is a genuine concern for officer safety. *See Chase v. State*, 449 Md. 283, 309, 311 (2016) ("[W]e have recognized

that fear for officer and public safety can justify a continued detention by police" and "the use of handcuffs per se does not ordinarily transform a *Terry* stop into an arrest.").

However, the police may not arrest a person without probable cause that the arrestee has committed or is committing a crime. *See, e.g.*, *Pacheco v. State*, 465 Md. 311, 323 (2019) ("By its express terms, the condition precedent to a search incident to arrest is that the police have made a lawful custodial arrest of the person, that is, an arrest supported by probable cause that the arrestee has committed or is committing a crime.") (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003)); *see also Brown v. State*, 261 Md. App. 83, 94 (2024) ("Probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.") (citations omitted); *see also* Md. Code, Crim. Proc. § 2-202 (providing police may perform a warrantless arrest for crimes committed or attempted in the presence of a police officer, when there is probable cause to believe a crime is being committed in the presence of police officers, or when there is probable cause to believe a felony has been committed or attempted, whether or not in the presence of the police officer).

The determinative issue here is when the Appellant was arrested. The legality of an arrest is reviewed *de novo*. *Longshore v. State*, 399 Md. 486, 499 (2007); *accord Jones v. State*, 194 Md. App. 110, 131 ("The determination of whether an arrest was supported by probable cause, however, is a legal conclusion that appellate courts review *de novo*.") (citing *Longshore*, *supra*, at 499), *cert. denied*, 417 Md. 385 (2010). "An arrest requires

either physical force (as described above) or, where that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis omitted). This Court has explained:

> An arrest is the "detention of a known or suspected offender for the purpose of prosecuting him for a crime." *Longshore v. State*, 399 Md. 486, 502, 924 A.2d 1129 (2007) (quoting *Bouldin v. State*, 276 Md. 511, 516, 350 A.2d 130 (1976)). A detention normally occurs where there is a "touching by the arrestor or when the arrestee is told that he is under arrest and submits . . . ." *Longshore*, 399 Md. at 502, 924 A.2d 1129 (quoting *Bouldin*, 276 Md. at 516, 350 A.2d 130). "[W]hile a formal arrest occurs when an officer informs the suspect that he or she is under arrest, a *de facto* arrest occurs when the circumstances surrounding a detention are such that a reasonable person would not feel free to leave." *Reid v. State*, 428 Md. 289, 299–300, 51 A.3d 597 (2012).

Williams v. State, 246 Md. App. 308, 333 (2020); *see also Wilkes v. State*, 364 Md. 554, 586 (2001) ("In sum, 'an arrest is the taking, seizing or detaining of the person of another, *inter alia*, by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.") (citation omitted).

Looking at the totality of the circumstances, Appellant became a person of interest after police learned that the vehicle he was driving had been reported stolen in Old Town Alexandria the day before. Although Maryland Courts have suggested that a report of a stolen vehicle is not probable cause in and of itself, *see, e.g. Randall, supra*, 223 Md. App. at 539 n.12, we have no trouble concluding that the report provided reasonable articulable suspicion that criminal activity was afoot. *See Hatcher v. State*, 177 Md. App. 359, 394 (2007) ("More than that, the officers had reasonable articulable suspicion pursuant to *Terry* once they discovered that the vehicle had been stolen."); *see also Blasi v. State*, 167 Md. App. 483, 509 (recognizing that, during a traffic stop, it is reasonable to "(1) investigate

the driver's sobriety and license status, (2) establish that the vehicle has not been reported stolen, and (3) issue a traffic citation" within a reasonable period) (citation omitted), *cert. denied*, 393 Md. 245 (2006).

Adding to this information, albeit not as strongly, was the officer's suspicion, articulated at the motions hearing, that Appellant may have stolen the bookbag when he emerged from the mall. *See generally United States v. Benson*, 686 F.3d 498, 502 (8th Cir. 2012) (concluding that officer had reasonable, articulable suspicion that suspect had committed shoplifting), *cert. denied*, 568 U.S. 1105 (2013); *United States v. Murphy*, 387 F. Supp. 2d 586, 591 (E.D. Va. 2005) (officer had reasonable, articulable suspicion, based on dispatch call, that suspect had just shoplifted at a grocery store), *aff'd*, 201 F. App'x 185 (4th Cir. 2006); *Mathis v. State*, 823 S.E.2d 89, 92 (Ga. Ct. App. 2019) (accepting officer's testimony, based on his training and experience, that suspect may have been involved in, among other things, shoplifting, and upholding a *Terry* detention to investigate and "resolve the ambiguity"); *cf. Sellman v. State*, 449 Md. 526, 560-61 (2016) (listing shoplifting as a minor crime that, standing alone and without other attendant circumstances, would not justify a protective frisk) (citation omitted).

Then, after the police approached Appellant in the mall parking lot and ordered him to stop, Appellant fled the scene, suggesting consciousness of guilt. *See State v. Sizer*, 230 Md. App. 640, 657 (2016) ("The very fact of flight evidenced consciousness of guilt"), *aff'd*, 456 Md. 350, 374 (2017) (recognizing that flight is a pertinent factor in analyzing reasonable, articulable suspicion for a *Terry* stop). And, although we agree there was a clear show of authority when the police blocked in the reported stolen vehicle, *see Swift v.*

State, 393 Md. 139, 153 (2006) (recognizing that conduct such as blocking in a person suggests they are not free to leave), Appellant did not submit to that authority and was not seized until later when, during the "wrestling match," while Deputy Parson feared for his safety, Appellant was placed in handcuffs. *See Hodari D.*, *supra*, 499 U.S. at 629 (concluding that because Hodari D. did not submit to the officer's "show of authority" during a foot chase, and he was not "seized" until he was tackled). As the *Hodari D*. Court explained:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.

Id. at 626.

Further, even to the extent that the only evidence that Appellant was armed was a general concern for officer safety and Appellant's resistance to being detained, merely handcuffing a suspect to prevent flight does not automatically convert a *Terry* detention into an unlawful arrest. *See Elliott v. State*, 417 Md. 413, 429 (2010) (recognizing "certain limited circumstances when the use of force will be considered reasonable as part of an investigative detention: where the use of force is used to protect officer safety or to prevent a suspect's flight") (citing *Longshore, supra*, 399 Md. at 509); *Carter v. State*, 143 Md. App. 670, 681 (concluding flight upon seeing police officers approach is a "factor at least worthy of consideration" in determining whether there was justification for a *Terry* stop), *cert. denied*, 369 Md. 571 (2002); *cf. Thornton v. State*, 465 Md. 122, 145-46 (2019)

(holding that frisk was unlawful where it was only based on the defendant's furtive movements while sitting in a vehicle in a high-crime area when police approached to cite him for a non-arrestable traffic offense).

Instructive is our reported case, *Brown v. State*, 261 Md. App. 83 (2024), filed after briefing in this appeal. There, Officer Wesley Harris stopped a silver Infiniti sedan at 3:00 a.m. on June 11, 2021, because the vehicle's registration light was not illuminated. *Brown*, 261 Md. App. at 89. The pertinent facts were as follows:

> The vehicle pulled into a residential area and backed into a parking space. Officer Harris observed the occupant, whom he identified as [Brown], exit the vehicle. The recording from Officer Harris's body-worn camera was played, and it showed that Officer Harris instructed [Brown] to remain in the vehicle. [Brown] kept walking toward Officer Harris and stated: "I don't have my license." When Officer Harris reiterated that [Brown] should remain in the vehicle, [Brown] "took off" on foot. Officer Harris ran after [Brown]. [Brown] then stumbled and fell, and, with some difficulty, Officer Harris placed [Brown] in handcuffs. Officer Harris questioned [Brown's] actions, stating: "All this for a fucking license? Are you stupid?" [Brown] responded: "Because I don't want to go to jail, man."

Id. at 89-90.

Although Brown admitted that he drank "a lot," namely, a half pint of cognac, and although the officer smelled alcohol on Brown's breath, Officer Harris did not conduct any field sobriety tests. *Id.* at 90. The officer also agreed that Brown's eyes were not bloodshot, his speech was not slurred, and he was coherent and alert. *Id*. Nevertheless, Brown was arrested for driving under the influence. *Id*. Officer Harris then searched the Infiniti but found no evidence of drinking. The officer did, however, find a plastic bag containing smaller plastic baggies of crack cocaine. *Id*. at 90-91.

In the motions court and on appeal, Brown argued there was no probable cause to arrest him for driving under the influence and that the search of his vehicle was not a lawful search incident to arrest. *Id.* at 91. This Court affirmed the motions court's ruling denying the motion to suppress. *Id*. at 91, 97-98, 104.

Concerning the arrest, Brown argued that probable cause was lacking because the arrest was only based on his admission that he drank a half pint of cognac and because the officer smelled alcohol on his breath. *Id.* at 94. The State disagreed, adding that Brown fled after exiting his vehicle. *Id*.

After recounting the law concerning probable cause, including determining whether probable cause supports an arrest, we examined "the events leading up to the arrest" and then decided "whether these historical facts, viewed from the stand-point of an objectively reasonable police officer, amounted to probable cause." *Id.* at 94 (quoting *Pacheco v. State*, 465 Md. 311, 331 (2019) in turn quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). We concluded the facts supported Brown's arrest for driving while under the influence of alcohol. *Id.* at 95-98. We acknowledged Brown's argument that the evidence was lacking because the officer did not conduct field sobriety tests, and because there was no evidence of poor driving, slurred speech or bloodshot eyes. Still, we nevertheless stated that "in addressing probable cause, we look at the totality of the circumstances." *Id.* at 96 (citing

State v. Johnson, 458 Md. 519, 534-35 (2018)). Under that totality, there was probable cause to arrest Brown. *Id.* at 97-98.[9]

Also aiding our review is *Rosenberg v. State*, 129 Md. App. 221 (1999), *cert. denied*, 358 Md. 382 (2000). Two police officers, responding to a call of suspicious activity at around 10:00 p.m. on the streets of Silver Spring, found Rosenberg seated on the ground in front of an open telephone equipment box. *Id.* at 231. Several wires had been pulled out and it appeared that Rosenberg, who admitted he was not an employee of the telephone company, had been tampering with the contents of the equipment box. *Id.* at 231-32. A canvas bag filled with tools and wires was on the ground near Rosenberg, and one of the police officers recognized one tool as being the type used by telephone repair persons. *Id.* A cursory inspection of Rosenberg's bag revealed several lists of 1-800 and 1-900 numbers. *Id.* at 232. Looking into Rosenberg's car, one of the officers observed a "Bell Atlantic" hardhat, and that officer recalled an earlier report of a break-in involving a Bell Atlantic truck. *Id.*

The two officers called for more police to respond to the area, and about fifteen minutes into the encounter, Rosenberg asked to leave. *Id.* at 232. Police told him he could not leave until his car was searched. *Id.* at 233. After being briefed, Sergeant Goldberg arrived on the scene and contacted a representative from Bell Atlantic and Detective Angelino, a special investigator. *Id.* Based on the scene, Detective Angelino thought they

[9] We also held it was reasonable to believe there would be evidence of the driving under the influence in the vehicle, justifying its search incident to the lawful arrest. *See Brown*, 261 Md. App. at 103-04.

"had a possible theft of equipment." *Id.* It was at about this point that Rosenberg was placed under arrest. *Id.*

On appeal, Rosenberg conceded that police had enough information to conduct a *Terry* stop to investigate the suspicious behavior. *Id.* at 238. However, Rosenberg argued that the *Terry* stop evolved into an unlawful warrantless search and arrest. *Id.* at 238. This Court disagreed and found that not only was there reasonable suspicion supporting the *Terry* stop, but also after the investigation revealed suspicious items in the canvas bag, as well as the company hard hat in the vehicle, "the officer's reasonable, articulable suspicion ripened into probable cause to arrest appellant for molestation or destruction of property." *Id.* at 243.

Similarly, in this case, the totality of the circumstances available to the deputies from the Frederick County Sheriff's Office outside the Francis Scott Key Mall on the afternoon of November 18, 2021, considered on appeal in the light most favorable to the State as the prevailing party, show that Appellant was driving a vehicle that had been reported stolen the day before in Old Town Alexandria. He appeared to have shoplifted a bookbag from inside the mall. When he saw the deputies, and after they ordered him to stop, he fled. As the deputies wrestled with him to take him into custody, a vial of PCP fell from his person.

As our decisions have made clear, "[b]oth reasonable suspicion and probable cause move in the same direction along the same continuum of mounting suspicion. The only difference between them is quantitative." *Freeman v. State*, 249 Md. App. 269, 282 n.2 (2021). Indeed, "[a] *Terry* stop may yield probable cause, allowing the investigating

officer to elevate the encounter to an arrest or to conduct a more extensive search of the detained individual." *Crosby v. State*, 408 Md. 490, 506 (2009).

Appellant places great weight on the testimony from the officers that they intended to take him into custody even before he came back out of the mall. Specifically, he argues that the police intended to take him "into custody before initiating the encounter and before any flight." The testimony at issue during the motions hearing was as follows. Deputy Sheehy testified that, as they were waiting for Appellant to come out of the mall, "[w]e didn't have the confirmation yet" about the stolen vehicle, "and we developed a plan to, when he returned to the vehicle, to take him into custody." Deputy Parson agreed with the motions court when it asked that it was his "intention to detain [Appellant] and seek further information about the stolen vehicle" and that there also was "some information that there might have been a shoplifting as well and you wanted to talk to him about that[.]" And finally, Corporal Walsh confirmed that the four officers planned to "[t]ake the driver into custody and detain – and detain the passengers upon the driver returning to the vehicle."

Notably, the officers never testified that they were going to *arrest* Appellant based on the report of the stolen vehicle alone. The testimony was that they would take him into custody, which is a clearly reasonable means of effecting a lawful *Terry* stop. *See Carter v. State*, 143 Md. App. 670, 677 ("The appellant solemnly insists that he 'was not free to leave.' Of course, he wasn't. That's why this was a *Terry*-stop requiring the Terry level of Fourth Amendment justification."), *cert. denied*, 369 Md. 571 (2002).

Ultimately, we are reminded of the maxim that the United States Supreme Court set forth 100 years ago, and which remains the law defining probable cause today. Probable

cause exists when "the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief" that a crime was being committed or attempted to be committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925); *see also Maryland v. Pringle*, 540 U.S. at 370 ("[T]he probable-cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'") (citations omitted). And, that standard "does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983); *see Freeman*, 249 Md. App. at 302 ("[T]he establishment of probable cause does not require proof to the 'preponderance of the evidence' level.") (citing *State v. Johnson*, 458 Md. at 535); *see also Kaley v. United State*s, 571 U.S. 320, 338 (2014) ("Probable cause . . . is not a high bar"). Under that standard and considered in the totality of the circumstances as they were known to the sheriff's deputies, we are persuaded Appellant's arrest was supported by probable cause. The court properly denied the motion to suppress.[10]

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[10] Appellant argues the fruit of the warrantless arrest may not be saved under the inevitable discovery doctrine. *See generally Williams v. State*, 372 Md. 386, 415 (2002) (permitting the admission of otherwise tainted evidence if that evidence would have been found through lawful means). Although it is arguable the narcotics on Appellant's person would have been discovered after the stolen vehicle report was confirmed and Appellant searched incident to a lawful arrest, the State never raised inevitable discovery, the motions court did not decide the case on that ground, and we decline to consider it further. *See White v. State*, 248 Md. App. 67, 108 (2020) ("The burden of proof is cast upon the State to prove its entitlement to the Inevitable Discovery exception. This presupposes some discussion of and serious consideration of the various factors that enter into such an exception.").

II.

Appellant next asserts the trial court erred by not ruling on whether he could be impeached with a prior conviction and by misstating the standard for impeachment with a prior conviction. The State responds that neither of these issues are preserved and notes that Appellant does not ask for plain error review. The State continues that, although the issue was raised in Appellant's amended motion for new trial, "[r]aising errors for the first time in a motion for new trial is not a substitute for preservation." *Washington v. State*, 191 Md. App. 48, 121 n.22 (2010) (citation omitted), *cert. denied*, 415 Md. 43 (2010).

As will be explained, we conclude, for the reasons that follow, because the specific issue was not raised until Appellant filed an amended motion for new trial beyond the ten-day time limit of Maryland Rule 4-331 (a), the circuit court was without jurisdiction to consider the new trial motion. Moreover, as will be explained, even were we to consider the issue, we agree with the State that the Appellant's arguments are not preserved, that they do not warrant plain error review, and that the court did not abuse its discretion in denying the amended motion for a new trial.

Addressing these issues chronologically, about one month before trial, Appellant filed a Motion to Preclude the State's Use of Other Crimes Evidence at Trial and a Request for Hearing. Two weeks later, Appellant filed an Amended Motion on similar grounds. This was followed about a week later by the State's filing of a Motion in Limine to Include Evidence of an Impeachable Conviction. The State proffered that, within the past fifteen (15) years, Appellant was convicted of possession of controlled dangerous substances with the intent to distribute. The State brought this motion to the trial court's attention prior to

jury selection and the court, after confirming that Appellant was aware of this issue, stated that it reserved on the motion. The court stated, "I think I'll hold it because you'll decide whether your client's going to testify and why do it if –[.]" Defense Counsel deferred, merely stating that "the issue only then is, is it more prejudicial than probative."

This issue did not arise again until just before the State called its last witness, Detective Keith Johnson. The following colloquy transpired:

> THE COURT: Okay. And then [Defense Counsel], you will begin your case. Do you have any -- know how many witnesses you intend to call?
>
> [DEFENSE COUNSEL]: I don't know if Mr. Green intends to testify or not. I don't suspect he does.
>
> THE COURT: Okay. He can if he wants, but we'll figure that out. He doesn't have to decide that right now.
>
> THE DEFENDANT: I don't want to testify, but I would like for my lawyer to call some of the officers back because I feel like --
>
> THE COURT: Okay. You can talk to [Defense Counsel] about that. I just – I'm just trying to get a time frame, Mr. Green.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm not trying to limit anybody. …

At the conclusion of the State's case-in-chief, the court asked Defense Counsel if he wanted to call Appellant to testify. Defense Counsel then inquired of his client, in its entirety, as follows: "Do you wish to testify or no? No." There was no audible response by Appellant during this exchange. Because of the brevity of that inquiry, the court took it upon itself to explore Appellant's decision, as follows:

> THE COURT: Okay. I'm going to advise you a little quicker on that, okay.

THE DEFENDANT: Okay.

THE COURT: I'm going to advise you a little further on that.

Mr. Green, you understand you have an absolute right to testify in this case?

THE DEFENDANT: Yes.

THE COURT: Okay. But the choice is yours. If you choose to testify, the State will cross-examine you and can bring up whatever it is they think they can bring up to try to denigrate your testimony, do you understand that?

THE DEFENDANT: Yes.

THE COURT: But you also have the absolute right not to testify. If you choose not to testify, which it sounds like that's the decision you're at least making at this point in time, I will instruct the jury, if you want me to, that they cannot infer anything negative from the fact that you have refused to testify. If you wish me not to mention it at all, I won't mention it at all. That choice is yours. But you --

[DEFENSE COUNSEL]: I submitted an instruction that says that they can't take your testimony --

THE COURT: All right. So you --

[DEFENSE COUNSEL]: Your lack of testimony –

THE COURT: You prefer me to make that instruction; is that correct?

THE DEFENDANT: Yes.

THE COURT: Okay. That's fine. So have you had a chance to talk to [Defense Counsel] about this?

THE DEFENDANT: About --

[DEFENSE COUNSEL]: Testifying.

THE COURT: About testifying?

THE DEFENDANT: Yes.

> THE COURT: Okay. And you've made the decision that you would like not to testify; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Then I will instruct the jury they're to infer nothing from that. Understand?
>
> THE DEFENDANT: Yes.[11]

On August 25, 2022, and within ten (10) days of the August 17, 2022, verdict convicting him on all counts submitted to the jury, Appellant filed a Motion for New Trial pursuant to Maryland Rule 4-331 (a). Notably, in that written motion, Appellant *did not* raise any claim with respect to the issue presented on appeal, namely, possible impeachment with a prior conviction, and instead argued that the evidence was insufficient to sustain the verdicts, specifically, the court should have entered judgment on the charges of obstructing and hindering, as well as fleeing and eluding.[12]

Approximately one month later, on September 30, 2022, Appellant filed an amended Motion for New Trial. For the very first time, Appellant alleged error in the court's rulings on the prior conviction issue, adding the following to the original motion for new trial:

> 4) That on 8/3/2022 a Motion in Limine and associated Memorandum was filed to preclude the use of other bad acts evidence. That Motion was never heard prior to trial. In fact, it was judicially decided not to hear that Motion until trial. At trial, and at the end of the State's Case the Parties

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[11] After this, the Defense rested its case. There was no further discussion of this issue during trial.

[12] At sentencing, when the court heard argument on the motion, the court agreed with Appellant and entered judgments of not guilty on those counts.

> approached the Court to determine if the Defendant wanted to testify. At that time, not knowing what bad acts would or could be used to impeach him, he elected not to testify. The Courts failure to predetermine the Defendant's Motion in Limine affected his decision as he could not know what impeachment the State would be able to use. Burnside v. State, 459 Md. 657, 188 A.3d 881 (2018).

The State filed an Opposition to Defendant's Motion for New Trial (Amended) and asserted that the standard of review for this issue was whether the trial court properly exercised its discretion. The State distinguished *Burnside, supra*, and cited and discussed *Dallas v. State*, 413 Md. 569 (2010), in arguing that no such abuse of discretion was present in this case. The State also argued: "the Defense theory and theme presented in opening to the jury was vague," "the Defense in this case elected to call no witnesses to present a defense consistent with any particular theme or factual circumstance," and "the Defense also made clear to this Court out of the presence of the jury the Defendant's willingness to consider pleading guilty to the charging document in exchange for a time-served disposition involving substance abuse treatment." The State continued that "under the circumstances of this case, this Court had no factual or legal basis" to weigh the risk of unfair prejudice against the probative value of the prior conviction, that Appellant's election not to testify was "therefore undoubtedly sound trial strategy," and his decision "was unequivocal."

The court heard argument on the motion at the start of the sentencing hearing. Relying primarily on *Burnside, supra*, Appellant argued the court erred in not ruling on the question of whether the State could impeach Appellant with a prior conviction should he elect to testify. Absent such a ruling, counsel continued that the Appellant was unable to

make an informed decision and that this constituted grounds for a new trial under Md. Rule 4-331 (a).

In response, the State maintained that the court did not abuse its discretion at trial, noting "the speed with which Mr. Green told this Court that he was electing and the confidence with which Mr. Green told this Court he was electing not to testify." The State also noted that there was no "consistent theme" by the defense and that, therefore, there was no basis to "make that credibility determination," necessary for balancing admission of the evidence. The State also suggested defense counsel invited any error by not properly preserving this issue at trial. Finally, the State asked the court to consider that Appellant had indicated, prior to trial, a willingness to plead guilty in exchange for "the opportunity of treatment."

After hearing a short rebuttal by the defense, the court denied the amended motion for a new trial as follows:

> All right. The Court is here again on a motion for a new trial that was filed in this case. I've already made my rulings on Counts VI and XIV. This is an overall motion. The Court has considered the briefs and motions that were filed, the responses by the State, and all the arguments by counsel, and the relevant cases that are germane to this particular case.
>
> In this matter, the defendant was asked about his, at the bench, at a bench conference, his election whether or not to testify. The defendant elected not to testify in this case. As the State pointed out, his decision was, was unequivocal; it was clear and it was concise, and it was made quickly. He, clearly, did not want to or elect to testify. The Court does find there is distinguished, this case is distinguished from *Burnside*, having reviewed that matter; and, therefore, the motion for a new trial is denied.

Before we address the arguments raised on appeal, we question whether we have jurisdiction to decide this issue. *Johnson v. Johnson*, 423 Md. 602, 605-06 (2011) ("[A]n

order of a circuit court must be appealable in order to confer jurisdiction upon an appellate court, and this jurisdictional issue, if noticed by an appellate court, will be addressed *sua sponte*"); *see also County Council v. Offen*, 334 Md. 499, 508 (1994) ("Ordinarily, an appellate court will consider only those issues that were raised or decided by the trial court, unless the issue concerns the jurisdiction of the court to hear the matter."); *McDonald v. State*, 61 Md. App. 461, 467-68 (1985) ("Questions of jurisdiction, as distinguished from venue, can always be raised for the first time on appeal.").

On August 25, 2022, within ten days of the August 17, 2022, verdict, Appellant filed a motion for new trial under Maryland Rule 4-331 (a). However, that motion *did not* include any claim that the court's ruling on the proposed impeachment with a prior conviction was suspect. The present claim was not included as a ground for the new trial *until* September 30, 2022, approximately one month later.

Pertinent to our discussion, Maryland Rule 4-331 (a) provides: "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." *See also* Md. Code, Crim. Proc. § 6-105 (providing that courts shall hear a motion for new trial within 10 days after the motion is filed and that the hearing may be extended by written agreement or order). This Court has stated that Rule 4-331 "*calls for literal compliance*." *Love v. State*, 95 Md. App. 420, 438 (discussing Rule 4-331 (c)) (emphasis added), *cert. denied*, 331 Md. 480 (1993); *see also Tull v. State*, 240 Md. 49, 52 (1965) (stating that "[t]he trial court had no power to grant a new trial under [the forerunner to Rule 4-331 (a)]," in a case of a motion for a new trial filed after the statutory deadline); *Giles v. State*, 231 Md. 387, 388 (1962) (holding that a motion for a new trial filed after

the then-applicable three-day deadline was properly denied as untimely); *Ware v. State*, 3 Md. App. 62, 65-66 (1968) (citing *Giles v. State*, 231 Md. 387, and *Tull v. State*, 240 Md. 49, for the proposition that "the Court of Appeals of Maryland held that a trial court had no power to grant a new trial under [the forerunner to Rule 4-331] except pursuant to a timely motion"); Md. Rule 1-204 (a) (expressly providing that a court may not shorten or extend the time for filing a motion for new trial).

In *Ware, supra*, this Court held that the 10-day time limit prescribed under the predecessor to Rule 4-331 (a) for granting new trials "in the interest of justice" could not be waived even by stipulation of the parties. *Ware*, 3 Md. App. at 66. In that case, an amendment made after ten days to a motion filed within the proper period was disallowed, because the amendment added new grounds not asserted in the initial motion. *Id*. The Court viewed the amendment as the functional equivalent of an untimely motion for a new trial, stating that a motion for a new trial cannot, after the time for the original motion has expired, "*be amended in such manner as to make it an entirely different motion*." *Id*. (emphasis added).

The Maryland Supreme Court also has discussed the effect of the time limits in Rule 4-331 in *Campbell v. State*, 373 Md. 637 (2003). The Court cited with approval the decisions of this Court in *Ware* and *Love*, and its own decision in *Tull*, each construing the time limits for filing for a new trial as decisive of whether the court had the power to hear the issue. *Id*. at 656-57. The Court concluded ultimately that the trial judge had no discretion under Rule 4-331 (a) to hear a motion for a new trial based on a motion timely

filed but amended to add new or additional grounds after expiration of the time to add the pertinent grounds for the motion. *Id*. at 661. As the Court stated:

> The Maryland rule governing motions for a new trial in criminal cases is not intended as a cure-all for every perceived flaw in a trial. It is designed only to allow for correction of certain flaws and is restricted by filing deadlines and other procedural requirements. … Literal compliance with the time limit established in section (a) is a commensurate and reasonable requirement given the broad basis for moving for a new trial provided in section (a).

Id.[13]

Under current law, Maryland 4-331 (a) is a jurisdictional rule and imposes a ten-day rule on motions for new trial filed based on the "interest of justice" rationale. The Appellant did not include the present claim in his original motion. Although raised belatedly in the amended motion, the issue is evidentiary and does not relate to the sufficiency claims made in the timely motion for new trial and is an entirely new and different claim. Accordingly, we hold the amended motion was not timely filed under Rule 4-331 (a). For that reason, both the circuit court and this Court lack jurisdiction to consider this issue.

That being said, we are aware of recent developments in the Maryland Supreme Court distinguishing between Maryland Rules that may be jurisdictional or merely claim processing rules subject to waiver and forfeiture. Indeed, in the most recent case, there were a number of concurring and dissenting opinions on the issue, albeit with respect to

[13] The Court ruled also distinguished premature motions filed under Rule 4-331 (c), concerning newly discovered evidence, filed after conviction but before sentencing, because the court retained its fundamental jurisdiction over the case prior to sentencing. *Campbell*, 373 Md. at 665.

Maryland Rule 4-345, which concerns the circuit court's ability to revise a sentence within five years of disposition. *Compare State v. Thomas*, 488 Md. 456, 481–86 (2024) (discussing *Rosales v. State*, 463 Md. 552, 568 (2019), and holding that, unlike Maryland Rule 8-202 (a), which is a claim processing rule subject to waiver and forfeiture, Maryland Rule 4-345 is jurisdictional and the circuit court's deferral of the motion beyond the temporal limit was tantamount to a denial), *with id.* at 477 (Biran, J., concurring) (concluding 4-345 is a mandatory claim processing rule that may be waived or forfeited by the State), *and id.* at 511 (Eaves, J., concurring and dissenting) (concluding that 4-345 is jurisdictional but circuit court abused its discretion by deferring ruling on the motion in a timely fashion). Accordingly, to the extent that these recent cases have opened the door to an interpretation that Maryland Rule 4-331 (a) is only a claim-processing rule, meaning that Appellant's new trial claim was properly presented and the State waived any argument that the amended motion was untimely by not arguing that ground either in the circuit court or this Court, we also conclude the circuit court did not abuse its discretion in denying the amended motion for a new trial. We explain our alternative reasoning.

First, we acknowledge that Appellant's claim on this second question presented is two-fold. Appellant argues the court erred by not conducting any inquiry into the admissibility of his prior conviction for possession with intent to distribute. Appellant also argues the court erred when it misadvised him that the State could "bring up whatever it is they think they can bring up to try to denigrate your testimony[.]"

Notably, the second claim concerning the court's "misadvisement," was never made in the amended motion or during argument before the circuit court. Maryland Rule

8-131 (a) is clear: "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, ..." *Accord Lopez-Villa v. State*, 478 Md. 1, 19-20 (2022). The purpose of the preservation rule "is to 'prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court.'" *Peterson v. State*, 444 Md. 105, 126 (2015) (quoting *Grandison v. State*, 425 Md. 34, 69 (2012)). We have no difficulty holding that Appellant's argument with respect to the language used by the court informing him that the State could "bring up whatever it is they think they can bring up," is not preserved for our review. Moreover, Appellant does not seek plain error review, and we decline to consider this issue under that doctrine. *See Ray v. State*, 206 Md. App. 309, 351 (2012) (declining to review for plain error where appellant did not ask the court to do so), *aff'd*, 435 Md. 1 (2013); *Garner v. State*, 183 Md. App. 122, 151-52 (2008) ("In that the [defendant], strangely, does not even ask us to overlook non-preservation, this contention may qualify as an instance of non-preservation squared."), *aff'd*, 414 Md. 372 (2010).[14]

As for Appellant's primary argument, that the court did not conduct any inquiry concerning the State's proposed impeachment with his prior conviction of possession with intent to distribute, the State also argues this claim is not preserved and does not warrant

[14] "Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014). As this Court has explained, "[a]ppellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)), *cert. denied*, 458 Md. 593 (2018).

plain error review. We tend to agree with the State that Appellant's failure to raise any objection at trial undermines his appellate claim. *See* Md. Rule 8-131 (a). And we discern no reason to exercise our plenary review to address this unpreserved issue under the plain error doctrine. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis omitted).

That being said, the issue is more complex than the State suggests. Both parties direct our attention to *Burnside v. State*, 459 Md. 657 (2018), and *Dallas v. State*, 413 Md. 569 (2010). The pertinent evidentiary rule provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

Md. Rule 5-609 (a).

Generally, the most relevant factors in determining whether the probative value of admitting the evidence outweighs the danger of unfair prejudice are: "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." *Burnside*, 459 Md. at 671 (citation omitted).

Historically, this rule was subject to the following caveat, *i.e.*, that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Dallas v. State*, 413 Md. 569, 579 (2010) (quoting *Luce v. United States*, 469 U.S. 38, 43 (1984)); *see also Williams v. State*, 99 Md. App. 711, 716 (1994) (failure to raise argument that trial court did not do balancing required by impeachment rule is waived if not raised at trial), *aff'd*, 344 Md. 358, 371-72 (1996). The Maryland Supreme Court discussed this caveat in *Dallas* and *Burnside*.

In *Dallas*, Isaac E. Dallas was charged with possession of marijuana, possession of cocaine, and possession of cocaine with the intent to distribute. *Dallas*, 413 Md. at 573. At trial, before presenting his case, Mr. Dallas asked the court for a ruling "that the State be prohibited from impeaching [Mr. Dallas] with his prior convictions of distribution and possession of cocaine with the intent to distribute[.]" *Id*. at 573. The court denied this request and ruled that the prior convictions were admissible for purposes of impeachment. *Id*. After a short recess, the court rescinded its ruling and opted instead to wait until after the defendant testified. *Id*. at 574. After the court made this decision, Mr. Dallas chose not to testify, and he was ultimately convicted of all charges. *Id.* at 575.

On appeal, Mr. Dallas contended that the trial court erred by refusing to rule on the admissibility of his prior convictions before he testified. *Id.* at 575. After providing that the standard of review was abuse of discretion, the Maryland Supreme Court concluded that the trial court did not abuse its discretion in declining to rule on the admissibility of Mr. Dallas's prior convictions before he took the stand. *Id*. at 588. Recognizing that "trial courts should rule on motions *in limine* as early as practicable, which often is before the

defendant elects whether to testify or remain silent," *id.* at 585, the Court noted the trial court's explanation that "in light of the similarity between the pending charges and prior convictions, it was necessary to await [Mr. Dallas's] testimony before deciding whether the probative value of the proposed impeachment evidence outweighed the danger of unfair prejudice to [Mr. Dallas]," *id*. at 587. Because the trial court expressed concern about the "plausib[le]" scenario of Mr. Dallas untruthfully testifying that he "had never before distributed illegal drugs," the Court held that "the trial court did not abuse its discretion by deferring its ruling on the admissibility of the proposed impeachment evidence until after [Mr. Dallas] testified." *Id*. at 587-88. However, the Court also stated that if Mr. Dallas had "complain[ed] at the time that the [trial] court's delay chilled his right to make an election," then "the trial court might well have opted to provide an *in limine* ruling before [Mr. Dallas] made his election," and the Court of Appeals would have been more willing to find an abuse of discretion. *Id*. at 588.

In *Burnside*, after the defense put on several witnesses, Mr. Burnside asked the court to determine whether, if he testified, the State would be allowed to impeach him with his prior conviction. *Burnside*, 459 Md. at 665-66. When "asked if he wished to testify in light of the potential impeachment," the following conversation ensued:

> BURNSIDE: I just know that if my past is going to be used against me, then I would not like to be testifying because it would be bias, it would be biased me to the charges I'm facing right now.
>
> DEFENSE COUNSEL: You are saying you would be afraid you would be prejudiced?
>
> BURNSIDE: Yes[.]

> * * *
>
> THE STATE: Your honor, I do have the case that uh (inaudible) if he takes the stand and he opens the door than he would be subject to impeachment. . . .
>
> THE COURT: That's—It is a balancing test but I don't think I need to make the balancing decision before he testifies. I think it's his decision whether he wants to testify or doesn't want to testify. If he takes the stand and the State attempts to bring up his prior conviction then we will have a determination at that time, but I'm not going to preliminarily make that decision.
>
> BURNSIDE: I choose to exercise my Fifth Amendment right to remain silent and not testify due to his Honor's previous objections for anything I say on our behalf.
>
> DEFENSE COUNSEL: So, it is your decision not to testify.
>
> BURNSIDE: Yes, I don't want to testify. I won't get no justice.

Id. at 666-67 (cleaned up). Notably, Mr. Burnside's attorney never objected to the court's decision not to make an advance ruling.

When Burnside reached the Maryland Supreme Court, the Court considered whether, despite the lack of an objection, Mr. Burnside had properly preserved his claim that the trial court abused its discretion by failing to make an advance ruling under Rule 5-609(a). *Id.* at 677. The State contended that the issue was not preserved because "defense counsel never asked the trial court to make an advance ruling." *Id*. In Mr. Burnside's view, however, the issue was preserved because "his counsel's and his own protests put the trial court on notice that the defense wanted a ruling prior to making an election." *Id*. The Supreme Court agreed with Mr. Burnside, concluding that "defense counsel sought an advanced ruling regarding the admissibility of the prior conviction and that the decision was decided by the trial court." *Id*. The trial court did so "when it denied defense counsel's

request stating, 'If he takes the stand and the State attempts to bring up his prior conviction then we will have a determination at that time, but I'm not going to *preliminarily* make that decision.'" *Id*. (emphasis in original). Accordingly, the Court held that the issue was preserved. *Id*.

As for the merits, the Court was asked to consider whether the trial court abused its discretion by delaying a ruling on impeachment by a prior conviction. *Id.* at 676. Distinguishing the case from *Dallas*, the Court noted that Mr. Burnside "was explicit as to his reason not to testify; he did not want to be judged in this case by his past conviction, because to do so would be prejudicial." *Id*. at 679. Indicating that *Dallas* was still good law, *id*. at 679, 682, the Court concluded that there was "nothing in the record . . . to suggest[] that this was a 'rare' circumstance that required the judge to delay his ruling." *Id*. at 679. The Court also noted that "the trial court had before it three well-established principles that such a ruling was necessary before Mr. Burnside elected to testify or not." *Id*. at 681. First, the trial court was aware of a defendant's constitutional right to testify. *Id*. Second, the trial court understood that the danger of prejudice to a defendant from impeachment by a prior conviction is greater when the prior offense was "identical or similar" to the offense for which the defendant is on trial. *Id*. In such situations, and where the "theory of defense [is] clear," then "the trial judge [does] not need to wait to hear [the defendant's] testimony before ruling on the Rule 5-609 motion." *Id*. at 683. Finally, "the trial court had guidance from [the Supreme Court] stating [in *Dallas*] that '[m]any are the times when a trial court *can* and, therefore, *should* decide a motion *in limine* involving a Rule 5-609 issue before the defendant makes the election.'" *Id*. at 682 (emphasis in

original) (quoting *Dallas*, 413 Md. at 586). Accordingly, the Court held that "the trial court failed to exercise its discretion when it declined to conduct a Rule 5-609 balancing test prior to Mr. Burnside's election to not testify. The trial court's failure to exercise its discretion constituted an abuse of discretion." *Id*. at 683.

There are clear differences distinguishing this case and *Dallas* and *Burnside*. First, in both those cases, there were unequivocal requests that the court rule on the question of whether the State could impeach the defendant with the prior conviction. In contrast, there was no such request at Appellant's trial.[15] Next, and considering guidance from *Burnside*, *see* 459 Md. at 683, we acknowledge that the prior offense of possession with intent to distribute was similar to the charges against Appellant in this case. And yet, Appellant's defense strategy focused on challenging the credibility of the police officers. And the State's case was based on Appellant driving a stolen car, shoplifting, and having controlled dangerous substances directly on his person. Under these circumstances, weighing the probative value of the prior conviction against the danger of unfair prejudice arguably would have been speculative without testimony from the Appellant or some sort of proffer by the defense or a theory suggesting Appellant's credibility was at issue. And finally, unlike *Burnside* and *Dallas*, there was no claim that the trial court's decision here would influence whether Appellant decided to testify.

[15] To the extent that Appellant relies on his pretrial motions *in limine* to preclude the State from admitting other crimes evidence, there was no reference to those motions immediately prior to Defense Counsel's brief and unambiguous inquiry asking Appellant whether he wanted to testify at trial. It is well settled that, even when an argument is raised in a motion *in limine,* there needs to be a contemporaneous, and timely, objection when the evidence is elicited at trial. *See Reed v. State*, 353 Md. 628, 643 (1999).

In sum, we conclude that, even if the amended motion for new trial is properly before us, the circuit court properly exercised its discretion in denying the amended motion for new trial.

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

The correction notice(s) for this opinion(s) can be found here:

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