Circuit Court for Charles County
Case No. C-08-CR-19-000855

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 511

September Term, 2022

DEON LENNARD JOHNSON

v.

STATE OF MARYLAND

Berger,
Ripken,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: December 22, 2023

* 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).

After a mistrial and a retrial, a jury in the Circuit Court for Charles County found Deon Lennard Johnson ("Appellant"), guilty of attempted second-degree murder, possession of burglar's tools, violation of a peace order, and two counts of first-degree assault. The court sentenced Appellant to 55 years of incarceration with all but 40 years suspended and five years of supervised probation. On appeal, Appellant presents the following questions for our review, which we have rephrased:[1]

I. Did the court err in finding Appellant competent to stand trial?

II. Did the court err in employing heightened security measures at trial?

III. Did the court err in overruling Appellant's hearsay objection?

BACKGROUND

Appellant was charged and convicted of charges related to stabbing his ex-girlfriend, Kyverra Butler ("K. Butler"), and her mother, Gloria Butler ("G. Butler"), in October of 2019. K. Butler and Appellant began dating when they were in high school, and later lived together in an apartment in Waldorf. K. Butler became pregnant with their child in the summer of 2018. K. Butler and Appellant stopped dating in September 2018. The baby was born pre-maturely in December 2018 and, sadly, survived only two days.

[1] Rephrased from:

1. Did the court err in finding Appellant competent to stand trial where he did not have a rational understanding of the proceedings and was unable to assist his attorneys?

2. Did the court err in allowing or employing heightened security measures and in admitting hearsay giving rise to an inference that Appellant was dangerous?

Although they were no longer dating each other, Appellant and K. Butler remained in contact until April 2019. Appellant then "tried to contact [K. Butler] several times" by texting her from "other people's numbers because [she] had his number blocked." K. Butler's mother, G. Butler, subsequently obtained a peace order in May 2019 that prohibited Appellant from contacting G. Butler as well as prohibiting Appellant from entering the Butlers' residence.

On the morning of October 2, 2019, G. Butler was inside of her home when she saw Appellant climbing through a window into the house. Appellant was wearing a "gas mask[,]" "a black hoodie[,]" "and black pants." G. Butler told Appellant to leave, and then Appellant "came closer to [her.]" Then, G. Butler "remember[ed] being on the floor." She later learned Appellant had stabbed her 15 times: "Seven on my right arm, four in my head, one in my neck, one in my chest, one in my rotator[] cuff and then my wrist was slashed."

K. Butler also testified about the events of that morning. She explained that Appellant "looked at [her], looked at [G. Butler] and then went straight for [G. Butler] and started stabbing [G. Butler]" with a pocketknife. K. Butler then left the house, running outside. Appellant followed K. Butler with a crowbar in his hands, removed his gas mask, kissed her, and told her that G. Butler "was in the way, . . . just let her die." K. Butler was able to covertly call her niece and father so that they could "hear what was going on."

As the sound of sirens approached, Appellant "was still trying to get [K. Butler] to go with him and [K. Butler] kept telling him no[.]" Appellant then "said well if you don't want to go, then . . . I'm going to kill you, too." Appellant then stabbed K. Butler in her head, wrist, neck, shoulder, and back. Appellant ran away as police arrived. That evening,

Appellant turned himself in to a police officer in La Plata.

At the scene, the Butler residence, police recovered a crowbar and a backpack containing a gas mask. Police also recovered a cell phone "that was still laying on the steps that led up to the doorway. . . . And the cell phone was face down and the camera feature was sticking up and you could see where the flashlight feature was still on." Police obtained the subscriber information for that cell phone from Verizon. The cell phone belonged to Appellant. Appellant's DNA profile matched the DNA profile on a sample obtained from the gas mask.

Additional facts will be included as they become relevant to the issues.

DISCUSSION

I. THE COURT DID NOT ERR IN DETERMINING THAT APPELLANT WAS COMPETENT TO STAND TRIAL.

Appellant claims that the court erred in finding him competent to stand trial "[b]ecause the evidence demonstrated that [he] lacked a rational understanding of the proceedings and was not able to assist his attorneys[.]" The State argues that competent evidence established "that [Appellant] understood the proceedings and that he could assist in his defense." Thus, according to the State, the court did not commit clear error in finding Appellant competent to stand trial.

A. Background

On November 18, 2019, Appellant's trial attorney filed a "suggestion of incompetency to stand trial[.]" Two days later, the circuit court ordered a "commitment to the Maryland Department of Health for examination as to competency to stand trial[.]"

Pursuant to the court's order, Dr. Teresa Grant ("Dr. Grant") met with Appellant twice at the Charles County Detention Center in December of 2019 and prepared a competency evaluation report that same month.

According to Dr. Grant's report, Appellant graduated from high school in 2013, and he "believe[d] (but appeared unclear) that a few of his classes were special education." He had "sustained employment for the past six years." Appellant "conveyed that he used marijuana on a regular basis since the age of 18[,]" and "[h]e denied a history of using other illicit substances and maladaptive alcohol consumption." He "identified himself as medically stable." Although Appellant "stated that he 'sometimes thinks he hears voices…a word or something[,]'" and he stated that "he 'believes he can read minds[,]'" Appellant "was unable to provide specific details as it related to his assertion." Moreover, Dr. Grant reviewed multiple phone calls between Appellant and a family member, explaining:

> During those calls, [Appellant] was coached to "tell them you can read peoples' minds," discussing his case, how many charges are pending, and the process of how to be sent to a hospital as opposed to serving a sentence[] in a DOC facility. He has also been coached to feign memory deficits as "you don't remember what happened."

Dr. Grant noted that "[t]here was no overt evidence of clinical depression, mania or hypomania, anxiety, overt delusions, hallucinations, suicidal and homicidal ideations and/or intent." Moreover, Appellant's "attention and concentration were unimpaired[,]" and "[h]is insight, memory functioning, and judgment were fair."

Dr. Grant opined that Appellant was competent to stand trial based on the following forensic opinion:

> [Appellant] was administered several reliable and validated psychological measures often utilized by forensic evaluators to assess for malingering and feigning. Each measure concluded that the defendant may be malingering psychiatric symptoms and memory deficits. [Appellant] endorsed a marked level of psychiatric symptoms and memory deficits atypical and not observed in psychiatric populations. Surprisingly, the measures administered to assess his legal knowledge revealed that the [Appellant] possesses sufficient knowledge of the legal system.

After Dr. Grant completed that report, Appellant, through his counsel, entered a plea of not criminally responsible. Defense counsel also wrote to Dr. Grant, expressing concerns about Appellant's competency. More specifically, defense counsel asserted that Appellant could not discuss the facts of the case and that his "demeanor is childlike at times." As for the allegation that Appellant's family was coaching him, defense counsel represented that the family was merely encouraging Appellant to be more forthright with medical professionals about his mental health conditions.

On January 31, 2020, the court issued an order committing Appellant to the Department of Health for an evaluation to be conducted at Clifton T. Perkins Hospital Center on competency and criminal responsibility. On March 26, 2020, Dr. Danielle Robinson ("Dr. Robinson") of the Maryland Department of Health wrote to the court and expressed the following diagnostic opinion about Appellant's mental condition: "Malingering Psychotic Symptoms" and "Cannabis Use Disorder," which was "in remission in a structured environment." Dr. Robinson opined that Appellant was "Competent to Stand Trial" and "Criminally Responsible[.]"

Dr. Robinson additionally provided the court with a "competency and criminal responsibility evaluation" completed by Dr. Annette Hanson ("Dr. Hanson") and Dr. David

Ash ("Dr. Ash"). That report detailed Dr. Hanson and Dr. Ash's three interviews with Appellant, as well as their telephone interviews with K. Butler and one of Appellant's sisters, Gwyn[2] Johnson ("G. Johnson"). G. Johnson told the doctors that Appellant would claim that he could read minds, and "[h]e would stop eating the food she cooked and claimed she poisoned it." In addition, she claimed that Appellant "dug a hole in the shape of a boxing ring in the yard."

K. Butler told the doctors that she broke up with Appellant after he "asked her not to have the baby because he did not want to be a father." When Appellant attempted to attend the delivery of their child in December 2018, K. Butler "did not want him in the room with her[,]" and "[s]ecurity came and escorted him off the property." After G. Butler obtained a peace order against Appellant, he "came to the house twice, violating the order."

During Dr. Hanson and Dr. Ash's interview of Appellant, he said that he "hope[d]" that he did not have a mental illness. According to the report, Appellant was unaware of the consequences of "a successful [not criminally responsible] defense." "He estimated his chances of being found guilty at trial would be 'fifty-fifty.'" Appellant repeatedly "refused to provide his version of the" events that caused the charges against him, and he "expressed concern that he might provide information which conflicted with information given to his private defense expert."

On July 2, 2020, Dr. Kathleen Patchen ("Dr. Patchen") of the Maryland Department of Health opined in a report to the court that Appellant was competent to stand trial and

[2] Gwyn Johnson's first name is spelled as both "Gwyn" and "Gwen" in the record.

that he was criminally responsible. Dr. Patchen expressed the following diagnostic opinion about Appellant's mental condition: "Malingering Psychotic Symptoms" and "Cannabis Use Disorder," which was "in remission in a structured environment." On the same date, Dr. Hanson provided a "competency status update[,]" which indicated that Appellant "continues to do well on the ward at Clifton T. Perkins Hospital Center[,]" "[t]he treatment team reports that he is not significantly impaired by symptoms, and he . . . attained the highest possible privilege level."

On August 18, 2020, Dr. Hanson completed another "competency status update[,]" to the court which provided, in part, the following information in support of the opinion that Appellant was competent to stand trial:

> Behaviorally, [Appellant] exhibited excellent impulse control, appropriate social reciprocity, and adequate judgment during the evaluation. There was no evidence of significant psychiatric symptoms which might undermine his trial competency.

On September 1, 2020, the defense filed a report authored by Dr. Lindsay Holbein, a clinical psychologist and Dr. Christopher Wilk ("Dr. Wilk"), a forensic psychiatrist. Appellant and his aunt, Victoria Jackson ("V. Jackson"), told Dr. Holbein and Dr. Wilk details about Appellant's childhood. Appellant and V. Jackson told the doctors that he "had few friends as a child" and that "he mostly socialized with his brothers[.]" Appellant recalled that he began dating K. Butler when he was 19 years old. When Appellant spoke about his deceased baby, "his eyes began to well with tears and he stopped talking, even when Dr. Wilk asked him questions."

As to his competency to stand trial, Dr. Holbein and Dr. Wilk acknowledged that

Appellant "had a basic understanding of the roles of various courtroom personnel[,]" but "he did not fully appreciate the severity of his charges[.]" When Dr. Wilk asked Appellant about his version of the events that led to the charges, Appellant "stopped talking, stared at the walls and the ceiling, and sometimes put his head in his hands as he cried."

Dr. Holbein and Dr. Wilk rendered four diagnoses: "Other Specified Trauma and Stressor-Related Disorder[,] Social (Pragmatic) Communication Disorder[,] Borderline Intellectual Functioning[,and] Cannabis Use Disorder, Severe, In Remission, In a Controlled Environment[.]" They noted that Appellant "was described at the detention center as appearing to have some cognitive deficits and it was noted that his thought pattern was simple and childlike." According to Dr. Holbein and Dr. Wilk, malingering was ruled out because Appellant "consistently downplayed his symptoms of mental illness during [the] evaluations and he never behaved in a manner that would suggest that he was psychotic."

Dr. Holbein and Dr. Wilk determined that Appellant was incompetent to stand trial despite his "fairly good factual understanding about the nature and object of the proceedings against him." Dr. Holbein and Dr. Wilk opined "that [Appellant's] understanding was irrational because he had continuously failed to appreciate the seriousness of the charges against him because he believed that he would return home soon, despite being repeatedly informed that this was unlikely given his current legal entanglement." Lastly, Dr. Holbein and Dr. Wilk opined that Appellant "was unable to effectively assist in his defense" because "[h]e was unable to discuss important aspects of the evidence against him."

The court held a competency hearing on September 25, 2020. At the hearing, Dr. Hanson testified for the State. Dr. Holbein and Dr. Wilk testified for the defense. The above referenced reports previously provided to the court were introduced into evidence. Dr. Hanson testified about Appellant's mental state, indicating:

> I understand from the jail records that he was offered an antidepressant because he was quite upset at first. From the records he said he took one dose and then refused after that. When he came to Perkins he was never prescribed medications.

Although Dr. Hanson recognized that Appellant was unwilling to talk about the offenses, she recognized that "[t]his is not an unusual situation[,]" and "[i]n cases like that we encourage [the defendants] to speak to their attorney." Dr. Hanson concluded that Appellant had "shown no evidence of a mental illness or cognitive impairment that would undermine his trial capabilities." Thus, Dr. Hanson determined that Appellant was competent to stand trial.

Dr. Holbein and Dr. Wilk both testified for the defense and opined that Appellant was incompetent to stand trial. They concluded that Appellant's competency was restorable. Dr. Holbein believed that Appellant "had difficulty assisting in his defense" and that Appellant was "a bit irrational about . . . his understanding about the nature and object of the proceedings against him." Dr. Holbein's conclusions were based on Appellant's beliefs about his chances of success at trial and his belief "that he was still in a romantic relationship with [K. Butler.]" Dr. Holbein was also concerned about Appellant's inability to discuss the events that led to the charges against him, explaining "[h]e's been unable to communicate any sort of narrative about the time frame of the alleged incident/offense."

The parties presented their arguments as to Appellant's competency at a hearing on November 5, 2020. On November 12, 2020, the court found that Appellant was competent to stand trial. The court ruled as follows: "having reviewed all of the records of the entire case, not limited to, but including [the doctors'] reports, in addition to case law and statutes, the [c]ourt is going to find that [Appellant] is, in fact, competent to stand trial."

Following a mistrial in June 2021, defense counsel filed a new "suggestion of incompetency to stand trial[.]" The court granted defense counsel's request for a new competency evaluation. On October 13, 2021, Dr. Grant authored a new report after interviewing Appellant via videoconference on September 28 and October 7, 2021. During those interviews, Appellant "reiterated his desire to proceed to trial[,]" reasoning that "'the smallest plea they offered was 60 years…I can get that if I lose at trial…might as well go to trial.'" Appellant further "indicated that at times, it is difficult for him to discuss his version of events and explained his reasons to the evaluator." "He also stated that he provided his attorney with his potential concerns, witnesses, and evidence for consideration during the trial process." Dr. Grant opined that Appellant "has a factual and rational understanding of his legal proceedings and the ability to assist counsel in a rational manner in the preparation of his defense if he so chooses." Therefore, Dr. Grant concluded that Appellant was competent to stand trial.

On November 30, 2021, the court held another competency hearing. Dr. Grant testified for the State, and one of Appellant's trial attorneys, Abigail Thibeault ("Attorney Thibeault"), testified for Appellant. Dr. Grant testified that she "saw an improvement in [Appellant's] affect and he was much more verbal during this meeting as opposed to [her]

first meeting with him over a year ago." She further indicated that Appellant displayed no outward signs of psychiatric symptoms. She believed that Appellant was no longer malingering. Once again, Dr. Grant opined that Appellant was competent to stand trial.

Attorney Thibeault testified that she began representing Appellant in November 2019. Her "conversations with him, as well as some collateral information from family and friends, led [her] to [believe] that . . . [Appellant] may not be competent to stand trial." During the first trial, the defense team spoke with [Appellant] after each day in court, and those interactions "led [them] to believe that [they] needed to suggest incompetency" again. Appellant's assessment of the State's evidence "was starkly different than that of his attorneys." Although defense counsel did not contest that Appellant assaulted G. Butler and K. Butler, Appellant "felt very positive and optimistic about his chances of going home at the end of the week."

Following the mistrial, Appellant instructed defense counsel to argue at the retrial "that he was not there, . . . that this never happened, that it would no longer be appropriate to concede the assaultive charges." That instruction presented an ethical dilemma for defense counsel because, "although attorneys can choose whatever strategy they want, there are limitations to that because you couldn't concede guilt on something without your client's permission[.]" Attorney Thibeault believed that Appellant was unable to rationally evaluate the evidence against him.

At the conclusion of the hearing, the court again determined that Appellant was competent to stand trial, ruling that Appellant "is competent, he has a factual and rational[] understanding of his legal proceedings, he has the ability to assist Counsel in a rational

manner in preparation of his defense, if he so chooses."

B. Analysis

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). The Supreme Court of Maryland has recognized "that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Kennedy v. State*, 436 Md. 686, 692 (2014) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). Incompetent to stand trial means unable: "(1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Md. Code Ann., Criminal Procedure Article ("CP") § 3-101(f).

Competency to stand trial "is much more a function of rationality than of mental health generally[.]" *Muhammad v. State*, 177 Md. App. 188, 259 (2007), *cert. denied*, 403 Md. 614 (2008). Indeed, competency to stand trial "is far more a matter of raw intelligence than it is of balanced psychiatric judgment or legal sanity or of mental health generally." *Id*. "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180.

"[A] person accused of committing a crime is presumed competent to stand trial." *Wood v. State*, 436 Md. 276, 285 (2013). CP section 3-104(a) provides, in relevant part:

> If, before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.

The statute mandates "[t]he proper procedure the trial court must follow when determining a criminal defendant's competence to stand trial[.]" *Kennedy*, 436 Md. at 693. "'[C]ompetency to stand trial is a factual determination which will not be reversed unless it is clearly erroneous.'" *Id*. (quoting *Peaks v. State*, 419 Md. 239, 252 (2011)).

Appellant contends that, based on the weight of the evidence, the court erred in finding him to be competent. Appellant, however, does not dispute that there was evidence that supported the court's competency finding. Instead, he claims that the court "should have afforded . . . more weight" to Appellant's trial counsel's opinion of Appellant's competency. In addition, Appellant argues that the State's experts placed insufficient weight on Appellant's irrational optimism about his chances of success at trial. Appellant's contentions are not in line with the applicable standard of review. Factual determinations, such as competency to stand trial, "'cannot be held to be clearly erroneous' if 'there is any competent evidence to support' them." *Middleton v. State*, 238 Md. App. 295, 304 (2018) (quoting *Goff v. State*, 387 Md. 327, 338 (2005)). Dr. Hanson and Dr. Grant evaluated Appellant's competency and testified that he was competent to stand trial.

Specifically, Dr. Grant met with Appellant twice before the retrial. Dr. Grant noted that Appellant "explained to [her] that he is able to talk to his lawyers about his version" of the events that led to the charges, but "[h]e does not like to talk about it with a lot of other people because he doesn't want to compromise his hearing and his procedures[.]" As

for his rejection of the plea offer, Appellant told Dr. Grant that the State offered "something like 60 years" and Appellant "felt that . . . with the amount of time that the plea offer offered him, he would just . . . prefer to go to trial."[3] Dr. Grant testified that Appellant understood the nature of the evidence that would be presented at trial and that he displayed no outward signs of psychiatric symptoms. Dr. Grant observed that Appellant had no difficulty understanding his legal situation.

Hence, there was competent evidence that Appellant was able "to understand the nature [and] object of the proceeding" and "assist in [his] defense." CP § 3-101(f). Although a factor for consideration, the court was not required to give greater weight to the testimony of Appellant's attorney regarding competency. *Cf*. *Drope*, 420 U.S. at 177 n.13 (noting that a lawyer's representations about their client's competency are "a factor which should be considered."). For all these reasons, the court did not err in determining that Appellant was competent to stand trial.

II. THE COURT DID NOT ERR IN EMPLOYING HEIGHTENED SECURITY MEASURES AT TRIAL.

Next, Appellant claims that the court erred by providing a law enforcement escort for the jurors and by allowing two officers to stand on the side of the courtroom where Appellant was located during the trial. According to Appellant, these measures prejudiced him because they conveyed the message that Appellant was dangerous. The State responds by arguing that Appellant's claims are unavailing because no inherent or actual prejudice

[3] As noted *supra*, after trial, Appellant was sentenced to 55 years of incarceration with all but 40 years suspended and five years of supervised probation.

stemmed from the court's security measures.

A. Background

Appellant's first trial resulted in a mistrial after two incidents occurred. First, a juror reported that a man approached the juror "on the way to [the juror's car] after being dismissed[.]" The juror stated that the man said Appellant "was innocent and didn't do anything." The juror indicated that, "[i]t was me and another juror walking to our car. This made me uncomfortable, I don't feel safe. [The man] stands and watches us leave to our cars." Later, a different man proclaimed in the courtroom that Appellant was "innocent" and that [Appellant] had a "breakdown."

The State asked the court to bar those two men from the retrial and for the jury to be "escorted to their vehicles[.]" Appellant's counsel was unopposed to barring the two men from the courtroom. However, Appellant's counsel objected to providing a security escort for jurors because such a security measure "gives the impression that [Appellant] and/or his family is dangerous, that the subject nature of this trial is that it's dangerous and it, therefore, weighs, and it makes it look as if the [c]ourt, the [c]ourt staff . . . believes [Appellant is] guilty[.]" In the alternative, Appellant's counsel suggested releasing the jury before everyone else:

> I think during the [first] trial what we ended up doing at times was releasing the jury and holding everyone else in the [c]ourtroom. My preference would be to do that and if we needed to wait, you know, 10 minutes and say, you know, if you're in the [c]ourtroom you have to wait 10 minutes before exiting, just to give them enough time to get to their cars, I wouldn't have an issue with that, but I would prefer that to having the jury feel like the [c]ourt's decided you need police escorts.

The court took the matter under advisement. The court subsequently ruled that the jury would "have a designated parking area and they will be escorted in and out because it's, the way that they get to it is a secure area. . . . So they'll be escorted in and out and escorted over to the parking area."

During voir dire, Appellant's counsel asserted that "it's been abundantly clear that the Bailiffs are here essentially guarding . . . [Appellant]." Defense counsel also argued that the officers were "disproportionately" on the same side of the room as Appellant. As a result, Appellant's counsel requested "that there be potentially an Officer also positioned on the Prosecution's side of the room." The State deferred to the court on that request. The court initially denied the request of Appellant's counsel, stating that "the [c]ourt is not in a position to Order the Charles County Sheriff's Office to have a certain number of Officers assigned to a case." When defense counsel asserted that the court had the authority to control the Sheriff's Office in this regard, the court reconsidered the request and ultimately denied it, reasoning:

> [T]here are two Sheriffs in the room, one is seated by the door where the potential jurors are going to come up and the other Sheriff is probably several feet away from the Defendant.
>
> I don't, and I'm looking out the door, I don't see any other Sheriffs around that I can ask as a favor to come sit in here, so I don't think that it is biased, so that's denied.

B. Analysis

"The right to a fair trial is guaranteed by the Sixth Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment." *Smith v. State*, 481 Md. 368, 392 (2022). "A fair criminal trial requires that the jurors 'be without

bias or prejudice for or against the defendant and that their minds be free to hear and impartially consider the evidence and render a fair verdict thereon.'" *Id.* (quoting *Hunt v. State*, 345 Md. 122, 146 (1997)).

"A finding either of actual prejudice or inherent prejudice is sufficient to demonstrate a violation of the Sixth Amendment." *Id*. at 393. "To prove actual prejudice, the defendant must show some actual prejudicial effect on the jurors based on what transpired in the courtroom." *Id*. By contrast, "[a] showing of inherent prejudice does not require proof that the complained-of practice actually affected the jurors' decision-making process." *Id*. Inherent prejudice occurs when the challenged practice presents "an unacceptable risk . . . of impermissible factors coming into play." *Id*. (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). "This is a difficult showing to make." *Smith*, 481 Md. at 393. "'Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.'" *Id*. (quoting *Estelle v. Williams*, 425 U.S. 501, 504 (1976)).

It is within the sound discretion of the trial judge to make decisions on "the method and extent of courtroom security." *Miles v. State*, 365 Md. 488, 570 (2001). The Supreme Court of the United States has acknowledged that not "every practice tending to single out the accused from everyone else in the courtroom must be struck down." *Holbrook*, 475 U.S. at 567. "Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance," the U.S. Supreme Court has "never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal

conduct." *Id*. "The prejudice posed by security measures, and whether a compelling state interest outweighs that prejudice, must be measured on a case by case basis." *Hunt*, 321 Md. at 410.

When faced with a challenged security measure, appellate courts should engage in the following inquiry:

> look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Holbrook, 475 U.S. at 572.

The Supreme Court of Maryland has emphasized that "some security is necessary or desirable in most, if not all, criminal trials." *Bruce v. State*, 318 Md. 706, 718 (1990). Thus, "not all security measures will result in prejudice to the defendant." *Id*. Some courtroom practices, such as restraining a defendant in view of the jury, are so "unmistakable" and "pose such a threat to the fairness of the factfinding process that they must be subjected to close judicial scrutiny." *Holbrook*, 475 U.S. at 568–69 (quotation marks and internal citation omitted). However, other security procedures, including the use of uniformed security officers inside the courtroom, may support a "wider range of inferences[,]" so that these measures "need not be interpreted as a sign that [the accused] is particularly dangerous or culpable." *Id*. at 569.

In *Holbrook*, the U.S. Supreme Court held that the presence of police officers in a courtroom is not inherently prejudicial, explaining:

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.
>
> To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy. However, reason, principle, and common human experience, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

Id. (cleaned up).

Here, preliminarily, Appellant argues that the court failed to exercise its discretion in response to defense counsel's request to station an additional officer on the prosecution side of the courtroom. We disagree. To be sure, "[f]ailure of a court to recognize or exercise its discretion 'for whatever reason – is by definition not a proper exercise of discretion.'" *Brown v. State*, 470 Md. 503, 553 (2020) (quoting *State v. Alexander*, 467 Md. 600, 620 (2020)). In particular, when the court is "exercising that discretion" concerning matters of courtroom security, "the decision must be made by the judge personally; it may 'not be delegated to courtroom security personnel.'" *Wagner v. State*, 213 Md. App. 419, 476 (2013) (quoting *Whittlesey v. State*, 340 Md. 30, 84 (1995)). Here, after defense counsel noted that the court retained the authority to control the Sheriff's Office, the court

verbalized the positioning of the officers in the courtroom, considered the availability of additional officers, saw no "other Sheriffs around that [the court] can ask as a favor to come sit in [the courtroom,]" determined that the positioning of the officers in the courtroom was not biased and denied Appellant's counsel's request. Under those circumstances, the court's deliberative process did not amount to an exercise of discretion.

Turning to whether the court's exercise of discretion was proper, Appellant has not shown actual or inherent prejudice stemming from the law enforcement officers' positioning in the courtroom or from the jurors' security escort. The Supreme Court of Maryland's decision in *Bruce*, 318 Md. 706, is instructive. In *Bruce*, defense counsel objected to the presence of "at least four marshals that are in suits, plain clothes, in the courtroom, in addition to approximately two bailiffs that are in the courtroom[;]" the "close proximity to the defendant . . . of a uniformed sheriff's deputy in the courtroom and a bailiff"; and an instance when jurors inadvertently saw handcuffs being removed from the defendant as they entered the courtroom. *Id*. at 720–21. The Court held that those security measures were reasonable and not inherently prejudicial, contrasting them with "shackling during trial, which can only be justified by compelling state interests in the specific case" and "an extensive security force so close to the defendant that it could create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Id*. at 721-22 (internal quotation marks and citations omitted).

Returning to the present case, the circumstances here involve less extensive courtroom security than the security measures that were upheld in *Bruce*. Here, the courtroom contained two officers. One of the officers was seated by an entrance to the

courtroom and the other officer was seated behind Appellant and defense counsel. There were no officers seated behind the prosecution. However, the security officers' asymmetrical positioning does not change our conclusion. Indeed, the court observed that the officer closest to Appellant was "probably several feet away from [him]." *See Holbrook*, 475 U.S. at 569 (holding that, "[i]f they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status."). Unlike the inadvertent unshackling in front of the jury in *Bruce*, there is no indication that the jury here saw the officers have any physical contact with Appellant. Although Appellant argues that the court could have employed less restrictive measures, a "reviewing court should not determine whether less stringent security measures were available to the trial court, but rather whether the measures applied were reasonable and whether they posed an unacceptable risk of prejudice to the defendant." *Hunt*, 321 Md. at 408.

Similarly, the jury's security escort was a reasonable measure that did not convey inappropriate messages to the jury. As the U.S. Supreme Court recognized in *Holbrook*, "[o]ur society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." 475 U.S. at 569. Here, the court explained that the jurors required a security escort to reach their "designated parking area[,]" which was "a secure area." The presence of a security escort did not suggest that Appellant was dangerous under these circumstances. The jurors could rationally infer that the security escort was required to gain access to the designated parking area.

For all these reasons, the court did not err in employing heightened security measures at trial.

III. THE COURT DID NOT ERR IN OVERRULING APPELLANT'S HEARSAY OBJECTION.

Last, Appellant argues that the court erred in overruling his objection to G. Butler's testimony during his counsel's cross-examination of G. Butler. The State responds that there was no hearsay basis for striking G. Butler's testimony and that any related error would be harmless.

A. Background

Defense counsel's objection and the court's ruling stemmed from the following portion of cross-examination:

> [DEFENSE COUNSEL]: Fair to say that [Appellant] was very upset when [the baby] died?
>
> [G. BUTLER]: I don't know. He was barred from the hospital.
>
> [DEFENSE COUNSEL]: You all told him he could not come to the hospital?
>
> [G. BUTLER]: No, no, security barred him from the hospital.
>
> [DEFENSE COUNSEL]: Your Honor, objection, move to strike. There's no foundation for that, it's hearsay.

The parties then approached the bench and the following occurred:

> THE COURT: So she, if you could just state so [the State is] clear what you want stricken.
>
> [DEFENSE COUNSEL]: Yes, I would just like stricken when she said the security banned him from the hospital because it's hearsay. . . . I didn't ask who banned him, I just said did you all ban him from the hospital.

[THE STATE]: Right, so I mean you can clarify that, I don't know what the basis of her knowledge for the security banning him for is. She may have been there.

[DEFENSE COUNSEL]: But it would be hearsay.

[THE STATE]: But if she was there when he was banned, I don't know.

[DEFENSE COUNSEL]: It still would be hearsay[.]

THE COURT: But if she was there –

[DEFENSE COUNSEL]: -- and it would be a confrontation issue.

THE COURT: So what I'll do is I'll reserve and then let -- the State can voir dire . . . or you can voir dire her --

[DEFENSE COUNSEL]: Well it's always going to be hearsay –

THE COURT: -- on who was there.

[DEFENSE COUNSEL]: -- no matter what –

THE COURT: Well if she heard it, if she was there, it's not hearsay.

[DEFENSE COUNSEL]: Yes, it is, because --

THE COURT: If she was there --

[DEFENSE COUNSEL]: --it's someone else's statement.

* * *

THE COURT: Denied.

B. Analysis

Maryland Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801(a) defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." "Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005).

Generally, "orders and commands are not factual assertions." *Wallace-Bey*, 234 Md. App. at 539. "A command, absent some indication that it communicates something other than its literal meaning, does not assert a proposition that could be true or false, and so it cannot be offered for its truth because it would not be assertive speech at all." *Id*. (cleaned up). G. Butler's response on cross examination was not a statement offered for the truth of the matter asserted but was a response to defense counsel's question that included "[y]ou all told him he could not come to the hospital?" The response was synonymous with saying it was not her that told Appellant he could not be there and included what amounted to a command. Therefore, G. Butler's testimony that security banned Appellant from the hospital, i.e., that security ordered Appellant not to enter the hospital, was non-hearsay.

Even if this testimony amounted to inadmissible hearsay, we would determine that the error was harmless. To prevail under a harmless error analysis, the State must convince

the appellate court "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). "In order for the error to be harmless," a reviewing court "must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict." *Weitzel v. State*, 384 Md. 451, 461 (2004).

The State argues that the jury heard that Appellant was banned from the hospital even without G. Butler's response in cross examination. We agree. Appellant's counsel did not object to G. Butler's previous testimony that "[Appellant] was barred from the hospital." Appellant's counsel's motion to strike was limited to G. Butler's subsequent testimony: "I would just like stricken when she said the security banned him from the hospital because it's hearsay." No testimony was presented as to the reason behind Appellant being banned hence the impact of such testimony was of minimal significance. As a result, the evidence that was admitted on this issue was cumulative because the jury heard that Appellant was barred from the hospital regardless of whether the court sustained the objection. Similarly, the evidence established that Appellant had been ordered to stay away from the Butlers' residence. Moreover, the State correctly notes that "[i]t was virtually uncontested . . . that [Appellant] repeatedly stabbed K. Butler and G. Butler[.]"

When conducting harmless error review, we weigh "the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case." *Rosenberg v. State*, 129 Md. App. 221, 254 (1999). Given the insignificance and cumulative nature of the challenged testimony, the presence of corroborating evidence, the

limited extent of the alleged error, and the overall strength of the State's case, we are convinced that the admission of the challenged testimony was harmless beyond a reasonable doubt.

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