Circuit Court for Frederick County
Case Nos. C-10-CR-22-000013 & C-10-CR-22-000142

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

Nos. 1071 & 1073

September Term, 2022

KENNY MARTINEZ-MELARA

v.

STATE OF MARYLAND

Graeff,
Albright,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 8, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Kenny Martinez-Melara, appellant, was charged as an adult in the Circuit Court for Frederick County, in two separate cases, with assault and firearm-related crimes that he committed when he was 16 years old. Defense counsel filed in each case a motion to transfer to juvenile court, which the circuit court denied. Appellant subsequently pled guilty to an agreed statement of facts in each case. The court convicted appellant: (1) in Case No. C-10-CR-22-000013, of first-degree assault and possession of a firearm by someone under 21 years old; and (2) in Case No. C-10-CR-22-000142, of two counts of reckless endangerment and unlawfully wearing and carrying a firearm. The court imposed an aggregate sentence of 15 years, all but 6 years suspended.

In these consolidated appeals, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err by misapplying the burden of proof at the reverse waiver hearing?
2. Did the circuit court err in denying the motions to transfer appellant's cases to juvenile court?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

These consolidated appeals arise from the denial of appellant's motions to transfer jurisdiction to the juvenile court in two separate criminal cases. In the circuit court, the two-day hearing on appellant's transfer motions was consolidated. Before examining that evidentiary record and ruling, we briefly discuss the charges in each case.

I.

Appeal No. 1073—December 20, 2021 Shooting

On December 21, 2022, appellant was charged in the District Court of Maryland with first-degree assault, second-degree assault, armed robbery, two counts of possession of a firearm by a person under 21, reckless endangerment, carrying a loaded handgun on his person, and carrying a handgun on his person. These charges arose from the non-fatal shooting of K.B., the victim, on December 20, 2021.[1] The next day, appellant moved to transfer the case to juvenile court, and the District Court ordered a transfer study. On January 13, 2022, the State filed in the Circuit Court for Frederick County a criminal information with the same eight charges.

II.

Appeal No. 1071—December 21, 2021 Assaults

On February 8, 2022, appellant was charged in the District Court of Maryland with two counts of first-degree assault, two counts of reckless endangerment, possessing a regulated firearm under the age of 21, transporting a handgun in a vehicle, and using a firearm in the commission of a crime of violence. These charges arose from two incidents on December 21, 2021, during which appellant allegedly threatened individuals with a handgun and stated: "I shot somebody yesterday so I can do it right now." On March 22, 2022, the State filed a criminal information with those same charges in the Circuit Court for Frederick County. Appellant moved to transfer the case to juvenile court.

[1] For privacy, we refer to the victim by initials.

III.

The Reverse Transfer Hearing

On June 29–30, 2022, the court held a hearing on appellant's two transfer motions. It was undisputed that, based on appellant's birth date in May 2005, he was 16 years old at the time of the crimes, and the circuit court had exclusive original jurisdiction. *See* Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 3-8A-03(d) (juvenile court does not have jurisdiction over a child at least 16 years of age alleged to have committed first-degree assault or use of a firearm in a crime of violence). By the time of the transfer hearing, appellant was 17 years old.

In the prosecutor's opening statement, he stated that the defense bore the burden of showing that transferring jurisdiction to the juvenile court was appropriate:

> The State's position is what the Court is going to find at the conclusion of the testimony and the evidence presented, and the argument today, the Court's going to find not only do the five factors all weigh against transferring this defendant to the juvenile court, but the Court will be able to make a finding that this defendant is not amenable to treatment in the juvenile court. Further, the DJS programming is inefficient and insufficient, and it will not help to promote the public safety or the rehabilitation of this defendant.
>
> The Defense bears the burden of proof [that] transferring jurisdiction to the juvenile court is in the interest of the child or society, and after today's hearing, the State's position is the Court will not be able to find that, and we will certainly be asking this case to remain in the adult jurisdiction.

Appellant called three witnesses from the Department of Juvenile Services ("DJS"), an expert in psychology and clinical assessment who worked with appellant at the Western Maryland Children's Center ("WMCC"), an expert in psychology and neuropsychology

who tested and interviewed appellant, and a social worker with the Maryland Office of the Public Defender ("OPD"). The State, in addition to eliciting evidence from appellant's witnesses, presented testimony by the Frederick City Police Department investigator who led the inquiry into appellant's involvement in the armed assaults on December 20 and 21, 2022.

A.

Appellant's DJS Case Manager

Chavone White, a DJS Case Management Specialist, had been appellant's probation officer since November 2021, as a result of prior charges that were filed in juvenile court. She had prepared a transfer waiver report in the prior matter, which included "a social history" featuring things that were concerning enough to merit a psychological evaluation. While that evaluation was in progress, appellant was charged with the offenses at issue in these appeals.

Appellant was arrested on December 22, 2021, but in accordance with "COVID protocol," he was not moved from the Frederick County Detention Center to WMCC until February 9, 2022. During his first three months at WMCC, appellant was disciplined for three incidents, on March 24, April 16, and April 22, 2022. The first incident involved having a "smashed pill in [a] paper towel," the second involved "flipping tables and throwing chairs" requiring physical restraints, and the third was a fight with another youth, requiring "staff . . . to get in between them and restrain them and . . . escort them into a safe place." The incident when appellant was flipping tables was deemed "an attempt to

circumvent facility security." When Ms. White testified that appellant's behavior had since improved, the court clarified that the period of improvement had been only two months, "from April to now."

During the prior school year, appellant's third attempt at the ninth grade, he had close to 50 unexcused absences and multiple suspensions. When he was in WMCC's GED program, however, his grades improved from failing to a 3.0 GPA.

Appellant's mother reported that she feared appellant and there were weapons and drugs in the home. Despite the DJS providing in-home, inpatient, and outpatient options for services, appellant continued to use substances.

Ms. White acknowledged that DJS internal policy did not allow her to make a recommendation in court. Nevertheless, she recommended, both in her report and in court, that appellant's cases be transferred to juvenile court, and he be provided substance abuse treatment and other services at a staff-secure facility like Morningstar Youth Academy, which she identified as "a therapeutic group home," or a hardware-secure facility like Victor Cullen Center, which she later testified was closed for renovations. If placed in a juvenile facility, appellant's post-release options included outpatient aftercare and "step-down" programs for "maybe six months" or "longer if [there was] a need."

Ms. White testified that appellant's self-reported substance abuse was very severe. It was linked to him getting "involved in certain things," and it needed to be addressed. Although staff-secure placements were available to appellant, there had been no referrals to any of these programs.

Ms. White acknowledged that both of the armed assaults occurred while appellant was under predisposition supervision for a prior matter. Appellant violated that supervision based on his role in the newly charged incidents, as well as by attending only one of the substance abuse treatment sessions arranged through DJS. "[O]ne of the conditions of his predisposition supervision was to obtain the assessment and follow all recommendations."

In response to Ms. White's testimony that she believed appellant was amenable to treatment in the juvenile system, the court asked her how, noting that appellant had been given an opportunity for treatment, and he did not take it. Ms. White responded that appellant had been "recommended to Austin Addiction [Center] . . . before [she] got the case," and she did not have much time to follow up or work with appellant "to make sure that he went back [to] assessment with Austin Addiction."

After completing a placement in the juvenile system, the period of probation could be between one and three years of supervision. In addition to substance abuse treatment, the recommendations for appellant included "continued educational programming, individual therapy for . . . coping skills to reduce the likelihood of him engaging in acting out behavior and exploit trauma that he has experienced."

DJS probation could continue beyond appellant's 18th birthday, which he would reach in about ten months, until the age of 21. Ms. White admitted that she was not "currently supervising any youth that" were 19 or 20 years old, but she testified that DJS does supervise such individuals.

B.

Expert Witnesses in Psychology

Dr. Steven Zuniga, who began working with appellant at WMCC, testified as an expert in psychology and clinical assessment. He read the police reports in the two cases, conducted appellant's intake assessment, reviewed appellant's prior DJS records and social history, observed appellant's psychiatric telehealth sessions regarding medications, and interviewed appellant and his mother before completing his transfer waiver report.

Dr. Zuniga assessed appellant with a low-average to average IQ, with drug and alcohol abuse problems for which appellant acknowledged needing help. Appellant's testing and evaluation indicated that he held grudges, perceived that he was being treated differently from others, resented those he perceived as having slighted him, envied others experiencing success, was easily insulted or slighted, and had elevated levels of depression and feelings of inadequacy. Dr. Zuniga characterized appellant as "a young man who wants help but is also kind of suspicious of the help."

Appellant rated high in the area of social risk factors, given his gang involvement and that he was the leader of the gang. Appellant's mother struggled to manage his behavior, given "contextual factors," including their high crime area with drug sales, gangs, and a lack of "family members or caregivers or other adults who are capable and available to him to offer emotional support and helpful guidance."

Appellant reported that "he's always been around war," which was not unusual given that he emigrated from El Salvador, where he had seen things "that we would not

normally experience." Appellant had significant trauma history, including "being hit or hurt badly, seeing things within the family, being threatened, hit or hurt badly in the school or community," and being "stabbed, shot at, robbed by threat, attacked, seeing someone in the family hit or hurt badly, seeing someone in school hit or hurt badly, [and] seeing someone violently die." These experiences contributed to paranoia, hyperarousal, depression, nightmares, inability to experience positive feelings, and other residual effects.

Although appellant had no record of violent behavior before age 14, appellant posed a significant safety risk to the community given "his history of violence." Dr. Zuniga recognized that appellant's past supervision failures, consisting of not attending appointments or following through with some of the court stipulations, warranted a high rating for risk of noncompliance.

Appellant had risk factors for additional violence, including "violent fantasies"; a poor record of managing past conflicts at school, home, and in the community; "low interest or commitment to school"; and a history of risk-taking impulsivity, including "engagement in dangerous and potential[ly] harmful activities such as drug use, gang involvement, [and] substance use." Although appellant exhibited high risk-taking impulsivity with low empathy, problem-solving, and commitment to school, Dr. Zuniga nevertheless believed that, "if you engage someone in therapy, . . . especially around his substance abuse issues . . . and he works on that, he can show improvement that will ameliorate some of that impulsiveness, that risk taking."

Dr. Zuniga recommended a structured, secure environment so that appellant could get trauma-focused therapy, substance abuse treatment, family therapy, and engage in the "academic studies" that he needed. Although Dr. Zuniga was unable to assess whether appellant actually could get the treatment he was recommending in a DJS program, Dr. Zuniga testified that appellant would be amenable to treatment in the juvenile system because "he has demonstrated on his own the capacity to reach out" to express that he wants treatment, and he responds well to being in a structured, secure environment.

On cross-examination, Dr. Zuniga acknowledged that appellant's intake report indicated a high level of drug and alcohol use. Appellant's mother was the single provider for the family and struggled financially, so the money appellant made by dealing drugs could be a continuing risk factor. Dr. Zuniga testified that these factors collectively could "add to a high risk of future violence or dangerousness to the community." Nevertheless, Dr. Zuniga recommended a structured, secure environment for appellant.

Dr. Joseph Gorin testified as an expert in psychology and neuropsychology. He conducted a neuropsychology evaluation of appellant for "different aspects of brain function," and "the five factors of transfer." He reviewed the DJS transfer summary regarding appellant, a psychiatric evaluation by Dr. Andrew Good, Dr. Zuniga's report, and appellant's school records. He also interviewed appellant's mother.

The intelligence assessment indicated that appellant had low-average intelligence. The tests indicated, however, that although appellant might struggle "in terms of traditional intelligence," he could take in feedback and use it productively. Dr. Gorin testified that

appellant's "overall neuropsychology profile is okay," which was "better than we might have expected given his general level of intelligence."

Based on personality assessments, Dr. Gorin testified that appellant had a "[n]egative self-concept" and tendencies "to blame others for his problems," and he was "very self-centered." Dr. Gorin concluded that appellant was prone "to anger and aggression," had potentially antisocial attitudes, and exhibited depression.

Noting "some trauma in his background," Dr. Gorin identified appellant's "vulnerabilities" as "the drugs, the depression, some impulsivity, [and] some history of violence." Citing Dr. Zuniga's findings about appellant's background, drug use, and depression, Dr. Gorin diagnosed appellant with post-traumatic stress disorder and major depression.

Because these conditions are addressable through various treatments, he opined that appellant was amenable to treatment in the juvenile system. He recommended "psychotherapy that's trauma informed and that's different than general psychotherapy," combined with a "strong substance abuse recovery program." In his view, "a secure structured program would be good because those tend to have a more therapeutic environment."

Dr. Gorin stated that he was not aware of appellant's "several behavior episodes" at WMCC until the morning of the hearing. When asked why, if "it's been well-documented prior to being detained that [appellant] did not attend recommended or ordered treatment as he should have," he should "be considered amenable now," Dr. Gorin answered that

appellant had not been compelled to attend treatment sessions as he would in a secure environment, and he recently seemed to be motivated to go to therapy in order to feel better.

Dr. Gorin considered "the nature of the offense" after reviewing the charges, including that "both cases allegedly involved a firearm and one allegedly involve[d] a shooting related injury." Dr. Gorin felt that made "his amenability even more important" because "the seriousness of the offenses mean we've really got to do something here with this kid."

With respect to public safety, Dr. Gorin acknowledged that there were risks if appellant was not incarcerated, but he explained that he viewed amenability to treatment in light of "the adolescent brain and how it works." He noted that "the frontal lobe of the brain, which is in charge of executive function . . . planning, organizing, [and] inhibiting impulses," is the last part of the brain to mature, usually "in our mid or even late twenties." Dr. Gorin testified that treating appellant over the next six or seven years, while his brain was still growing, was "quite crucial" because that could "stack the odds against him becoming a career criminal." In Dr. Gorin's opinion, if appellant did not receive the recommended intervention, he would present an increased risk to public safety.

In making his recommendation, Dr. Gorin did not review the police reports or statement of charges regarding "the details of the offenses charged." Nor did Dr. Gorin know about appellant's gang leadership; appellant did not tell him that. Likewise, appellant did not disclose one of his two prior juvenile incidents.

Dr. Gorin conceded that, according to the testimony he heard from prior witnesses that morning, the treatments for trauma, depression, and substance abuse he was recommending were also available "in the adult system." He acknowledged that such treatment takes some time and requires "one step at a time" until "you achieve the desired result." In Dr. Gorin's view, the treatment program for appellant would require "many months or a small number of years." He agreed that appellant was "a risk to the public safety if he was not incarcerated at this time," and appellant's "front[al] lobe would still be at the same or similar stage of development on his 18th birthday," when there would be no possibility of transferring to juvenile court.

C.

Witnesses Regarding DJS Resources

Melissa Rice, a DJS Resource Specialist Supervisor, testified that she met with Dr. Good, Amy Goss, Ms. White, and Assistant Regional Director Frank Duncan on January 14, February 7, and March 30, 2022. They concluded that appellant "needed substance abuse treatment, individual therapy focused on coping skills to reduce the likelihood of him reengaging or acting out behavior, and exploring the trauma that he has experienced, continuing his educational programming, assisting his mother with some various services and various services in the community as well." They recommended a "staff secure" level of care, as opposed to a "hardware secure" facility, i.e., one with a fence around it.

Morningstar Youth Academy and the Youth Centers could accommodate appellant's treatment needs in a staff-secure facility. Those programs "are around six

months . . . depending on the youth's progress." Nothing had been sent to any of those programs, however, because appellant had not been adjudicated, which "determines where he ultimately can be referred to."

Ms. Rice explained that aftercare could include "step-down" options in less restrictive programs, which might include community-based residential programs, such as a group home, therapeutic foster homes, and independent living programs, although "they are few and far between in the State of Maryland."

On cross-examination, Ms. Rice admitted that the first team meeting addressed only appellant's original case, concerning destruction of property. Ms. Rice acknowledged that data showed that "among the identifying programs, the average . . . stay is approximately four to five months." The "average stay for probation period is 439.3 days, so a little over a year."

Ms. Goss, a Case Management Specialist Supervisor for DJS, testified that case managers function as probation officers. She had not personally met appellant, but she reviewed all the paperwork and participated in the transfer consultations. In her experience, the typical length of a DJS placement is six to nine months.

On cross-examination, Ms. Goss acknowledged that, during appellant's predisposition supervision in his prior juvenile case, he violated multiple conditions of his supervision, by "[c]ontinuing to use [drugs and alcohol], committing new offenses, not following a curfew, [and] not following house rules." She was familiar with the cases leading to this appeal, including the police reports and the statement of charges. Ms. Goss

acknowledged that appellant was charged with shooting one victim during an armed robbery, then firing more shots at him as he fled, and then, on the following day, pointing another gun at multiple victims while threatening to shoot one and pulling the trigger on the other, although the gun did not discharge. Appellant would be turning 18 in less than a year, and "DJS directs 18-year-olds to adult programming."

On redirect, Ms. Goss explained that violating predisposition supervision does not necessarily mean that a juvenile cannot be supervised, because juveniles may have compliance issues especially early on. DJS had supervised youth with adjudicated offenses, such as armed robbery, and after a youth turns 18, there are still programs in which the youth can participate.

D.

Social Work Expert

Kathleen Cook, a licensed clinical social worker with OPD, testified as an expert in clinical social work. She was familiar with DJS programs in general and reviewed the relevant charging documents, DJS records, educational records, medical records, and psychiatric records, including the evaluations by Drs. Zuniga, Good, and Gorin.

After interviewing appellant and his mother, Ms. Rice prepared a psychosocial assessment of appellant's "clinical presentation," including mental health, family history, and legal history, in order to "identify the presenting problems and how those problems can be addressed." She reported that appellant was raised primarily by his mother, with

his father involved only in his life for the first year, and currently incarcerated for stabbing appellant's mother and grandmother in appellant's presence.

Appellant's mother remarried and had a second child, who was ten years old. Child Protective Services became involved based on allegations appellant made that his stepfather abused his mother. Appellant reported that he threatened his stepfather with a knife "because he was just so sick of seeing his mom getting beaten all the time and crying all the time." Appellant received inpatient psychiatric treatment after that incident.

Appellant's mother told Ms. Cook that appellant grew up in "very high crime areas" in Frederick, with a lot of violence, gang activity, and drug use and distribution. In sixth grade, appellant told his mother that he witnessed a shooting and saw the victim crawling on the ground, soaked in blood. In 2020, appellant was stabbed in the hand.

In Ms. Cook's view, these traumas affected appellant's safety, stability, and security in a manner that "contributed to his behavioral and emotional issues." After he began high school at age 14, appellant started using drugs and alcohol and "hanging out with people who were involved in criminal activity." He stopped going to school.

Ms. Cook reviewed the charging documents, appellant's prior offenses, his social history, his failure to complete substance abuse treatment, his behavior at WMCC, and documentation regarding appellant's drug dealing and gang activity. She weighed the serious nature of the charged offenses heavily. Although she concluded that appellant was not amenable to treatment in the community given his "very complex set of needs" stemming from his history of substance abuse, trauma, truancy, and gang activity, she cited

improvements in his grades and behavior at WMCC as factors indicating that he had the "capacity to engage in and benefit from treatment."

When the court asked Ms. Cook to focus on "what kind of therapy" would help prevent appellant from shooting someone else, she explained that trauma-focused cognitive behavioral therapy was "the gold standard for trauma treatment for youth" because it might reduce the likelihood that a juvenile who committed violent offenses would commit similar offenses in the future. Ms. Cook testified that appellant's complex needs included "trauma-specific, evidence-based therapy" that was specifically designed for youth and available only in DJS programs. This specialized therapy is not available in adult facilities such as the Patuxent Institution, or in the Youthful Offender Program.

Appellant's substance abuse was a major issue that was linked to his education. In Ms. Cook's view, school was a big factor because, if appellant went back to the community and was not going to school, she was concerned that he would get back with the gang.

The court then asked for any statistics or data showing "the success rate for people with similar allegations . . . who remained in the juvenile system." Ms. Cook did not have specific data, but she cited studies and research indicating that the best way to rehabilitate youth who commit violent offenses is developmentally appropriate treatment. The court noted that "this is not an easy one," so "I'm asking a lot of questions because I'm digging deep and thinking hard." Ms. Cook acknowledged that she could not guarantee that the treatment would be successful.

The court then asked Ms. Cook to address whether appellant could be treated successfully within the juvenile system given that he would turn 18 in less than a year. The court acknowledged that the juvenile court may retain jurisdiction until age 21, but it stated that it had to consider appellant's age because "[w]e all know that that doesn't happen almost ever. We just do." The court asked if there was "enough time from now to whenever normally he would be . . . cut loose and we would have no jurisdiction over him to get this done?" Ms. Cook could not say "one way or the other," noting that "this offense is very, very serious," but his needs would not be met in an adult correctional facility. She stated that the adult system typically operates under punitive approaches that are not as effective for children as positive reinforcement. Ms. Cook could not answer the court's question about specific programs and placements that would be available to appellant in the juvenile system "given all his needs and all the factors."

The court then asked Ms. Cook why "the average time that a juvenile is in the system seems rather short?" When Ms. Cook replied that juvenile placements are not "time-limited" like adult sentences, because it depends on each youth's progress, the court asked: "[I]s this enough time . . . . for rehabilitation?" Ms. Cook answered: "I think . . . that's a fair criticism," but "I think that it would certainly be enough time for him to make the treatment gains."

On cross-examination, Ms. Cook agreed that appellant was at high-risk and admitted that she did not review the police report and did not "know every detail" about the charged offenses. Appellant was "currently not amenable to treatment in the community." If

appellant were to be convicted in adult court before he was 18 years old, he would serve his sentence at the Patuxent Institution until he turned 18. Ms. Cook confirmed that inpatient substance abuse treatment is available to incarcerated adults, but she explained that the treatment did not include "the extracurricular, pro-social extracurricular activities, mentoring, things like that."

E.

Police Investigator

The State called Detective Kyrie Yackovich, a member of the Frederick City Police Department and the primary investigator for both the shooting on December 20, 2021, and the two assaults on December 21. When police responded to the shooting, K.B. had "a bullet wound to his upper torso." He reported that he knew appellant from school and arranged "to meet up with the defendant to smoke marijuana." When he went to the meeting place, the victim "was jumped from behind." He saw appellant in the passenger seat of a vehicle belonging to his co-defendant's mother. When the victim refused to hand over his property, he was robbed, "pistol-whipped, and then . . . shot one time while he was on the ground," with the bullet lodged near his clavicle. "He got up and ran back to the residence" where he had been prior to the meeting, and he heard "another shot . . . fired in his direction."

The next day, appellant admitted that, while helping a friend look for a family member, he brandished a .22 caliber firearm at a victim while demanding a ride. When the victim ran to "the neighboring house and called police," appellant followed, continuing to waive the firearm and demanding a ride.

Later that evening, appellant overdosed on drugs and was transported to Frederick Health Hospital. He was then discharged into police custody, early the next morning. Appellant claimed ownership of a firearm, and he admitted striking and shooting the victim on December 20, after his accomplice attacked the victim from behind to rob him. Appellant also advised that he had created a gang, which was called "Never Lacking Gang" or "NLG."

F.

Closing Arguments

In closing argument, counsel for appellant asked the court to "take a chance on" appellant based on the expert opinions "that he is somebody that we can save," and there was not much of a chance, if he was not transferred to juvenile court and given these services. The many negative influences in the adult system, including "be[ing] around tough hardened . . . adult criminals," would work against him in the future. Offering him the state-approved programs to address his "diagnosed trauma, other mental health conditions, substance abuse, all this very serious stuff" that could be addressed in the juvenile system, plus aftercare and "step-downs," would give him a chance to be successful.

Counsel argued that the factors weighing against appellant were the nature of the offense and public safety, but these had "to be looked at in the context of amenability." He asserted that appellant's "options in the juvenile system will help reduce his chance of reoffending [more] than anything in the adult system has to offer," and when he returned to the community, the court could keep him on probation for up to three years, until "his 21st birthday."

The State argued that appellant was "simply not amenable to treatment in juvenile court." Indicators that appellant was not amenable to treatment in the juvenile system included appellant's heavy drug use, his prior offenses, the fact that he "was already on supervision when this offense was committed," his deliberate violations of his prior supervision conditions requiring substance abuse treatment, his gang leadership, his serious disciplinary incidents during detention, his inconsistent disclosures to his mental health providers, and the short time left for juvenile commitment. Appellant could get substance abuse treatment and therapy in the adult system, and he did not establish any specific DJS placement or program that would rehabilitate him within the short period he would remain eligible for services within the juvenile system. Counsel noted that Dr. Gorin said treatment would take "many, many months to a few years," and a "six to nine [month] commitment [was] not going to do that." The prosecutor continued:

> This individual is alleged to have shot the victim in the commission of an armed robbery. His criminal sentencing guidelines in this case are four to nine years, not four to five months. That is DJS programming and then coupled with the changes in the law that have recently occurred, the limitations on probation, DJS programming is woefully inefficient and

> insufficient to protect the safety of the community when considered in . . . proportion with the defendant's amenability and the gravity of the offense.
>
> As the Court heard, length of probation from Juvenile Services averages a little over a year, and this is before the changes in the law. Felony probation is capped to one year or up to three years if a good cause finding is made by the Court. . . .
>
> He'll be 18 next May and at which point you've heard community-based options do become . . . limited. Placement options become limited. . . .
>
> Further, it's . . . been [the State's] experience that, . . . should he be committed and released on probation, that DJS actively tries to prevent placement for people over the age of 18 for violations of probation; and commitment for technical violations is now forbidden under the law, which is why I stressed these types of technical violations because what are we talking about? Not . . . attending treatment; not using; possession of drugs; all technical violations, he couldn't be committed for those on a [violation of probation].

The State argued that the nature of the case was critically important. Appellant shot a victim with a gun acquired from "a friend, likely a gang member." After ditching that gun, appellant got another one the next day. Bragging that he shot someone the night before, he pulled the trigger, but "the gun didn't discharge, thankfully." In these circumstances, "[t]his is as close as you get to a murder without there actually having been murder." The prosecutor argued: "That is not the . . . behavior of someone who is amenable to treatment." "[I]t's the burden of the [d]efense to show transfer [is] in the best interest of the defendant or to society," and "that burden has not been met."

In rebuttal, defense counsel argued: "[I]f there's a burden on us, I think we certainly meet that burden" based on the "good prognosis" by the experts. Defense counsel stated that, because "[t]here's no reason to believe that DJS programs are not competent . . . I

think it's clear that we've met our burden" for "the [c]ourt to take a chance on" transferring appellant's cases to juvenile court.

G.

The Reverse Transfer Ruling

On July 11, 2022, the court announced its ruling from the bench. The court found that, on the date of the offense, the defendant was 16 years old, with a date of birth in May 2005. At the time of the transfer hearing, the defendant was 17 years old, and would turn 18 in May 2023. The court found that the defendant had no known mental or physical difficulties, but he did have a substance abuse problem. The court noted that appellant had two major infractions while in detention, and that he previously had been placed in the juvenile system, but he failed to avail himself of services relating to his substance abuse problem. Appellant had attendance and academic struggles in high school, but he had been taking classes in juvenile detention and had maintained a B average. There were "at least two potential residential programs that might offer the therapy and counsel[ing] resources recommended by . . . the expert witnesses that testified as to the needs of the defendant and the defendant's amenability to treatment." The court continued:

> The offenses which the defendant is alleged to have committed are extremely violent in nature. In Case No. C-10-CR-22-13, the defendant is alleged to have shot the victim of robbery which he is alleged to have perpetrated. In Case No. C-10-CR-22-142, the defendant is alleged to have pointed a firearm at the victim and threatened his life. Both offenses obviously and notably involve the use of a firearm.
>
> The Court finds based on the evidence in this case that the defendant bragged about his involvement in shooting the robbery victim the night

> before he was arrested. The Court notes he has three prior offenses and was on supervision when these offenses occurred.
>
> The Court finds that the defendant's mother by her own admission admits that she cannot control her son. Despite the opinions of psychologists, and that the defendant is amenable to treatment, his past history of failure to even show up for treatment services, and his continuing involvement in the criminal justice system while on juvenile probation conveys to this Court that the defendant has not proven upon a preponderance of the evidence that he is amenable to treatment.
>
> The Court's opinion and ruling is that the defendant is not amenable to treatment, is balanced with his age, his history of substance abuse and failure to seek treatment while on juvenile supervision, the violent nature of the offenses charged, and the serious threat to public safety that the defendant has proven himself to be.
>
> Therefore, having considered all of the factors required under Maryland law and all relevant case law including Davis v. State, the Court denies the defendant's motion to transfer. The Court will also note it's considered all the factors required under Maryland law and all relevant case law, and again does not find [by] a preponderance of the evidence that the transfer of its jurisdiction to the juvenile court is in the interest of the child or to society, and . . . the defendant's motion to transfer these matters from criminal court to juvenile court is denied.

DISCUSSION

Before addressing appellant's two contentions, we set out the applicable law regarding trials for juveniles. As the State notes, there is no constitutional right to be treated as a juvenile in the prosecution of a criminal offense. *In re Samuel M.*, 293 Md. 88, 95–96 (1982) ("Treatment as a juvenile is not an inherent right but one granted by the state legislature; therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved.") (cleaned up).

The Maryland legislature has provided, in CJ § 3-8A-03(d)(4), that the juvenile court does not have jurisdiction in a case where the defendant was at least 16 years old at

the time of the offense and is charged with first-degree assault or use of a firearm in the commission of a crime of violence. The court has the authority, however, to transfer a criminal case falling within its original jurisdiction to the juvenile court under certain circumstances. Md. Code Ann., Crim. Proc. Art. ("CP") § 4-202(b) (Supp. 2022), provides:

> Except as provided in subsection (c) of this section, a court exercising criminal jurisdiction in a case involving a child may transfer the case to the juvenile court before trial or before a plea is entered under Maryland Rule 4-242 if:
>
> (1) the accused child was at least 14 but not 18 years of age when the alleged crime was committed;
>
> (2) the alleged crime is excluded from the jurisdiction of the juvenile court under § 3-8A-03(e)(1), (4), or (5) of the Courts Article; and
>
> (3) the court determines by a preponderance of the evidence that a transfer of its jurisdiction is in interest of the child or society.

In ruling on a transfer request, the court must consider the following five factors: "(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety." CP § 4-202(d).

With that background, we address appellant's contentions.

I.

Burden of Proof

Appellant contends that the circuit court erred in placing the burden on the defense to prove that transfer to the juvenile court was warranted. Although he acknowledges that prior appellate cases have stated that the juvenile has the burden of persuasion in a juvenile

case, he argues that the juvenile should not have that burden, which "implicates due process principles." He asserts that, if this Court concludes that he waived this argument by failing to assert it below, "this Court should still exercise plain-error review to address the merits" of the issue.

The State contends that the issue is not preserved for review because it was not raised below and is "obvious appellate after-thought." It asserts that we should decline to engage in plain error review.

This Court ordinarily will not review an issue unless it has been raised in or decided by the trial court. *See* Md. Rule 8-131(a). Although we may exercise our discretion to address unpreserved issues, appellate courts should rarely exercise such discretion because

> considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007). *Accord Ray v. State*, 435 Md. 1, 23 (2013).

Here, the issue raised on appeal was not raised below. The prosecutor stated, on several occasions, that the defense had the burden to prove that transfer was appropriate, and defense counsel did not object. Indeed, in rebuttal to the prosecutor's statement in this regard, defense counsel stated: "[I]f there's a burden on us, I think we certainly meet that burden." The issue is not preserved for this Court's review.

Although we can review unpreserved issues for plain error, such review is rare. *See Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). Plain error review involves four steps:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [ ] proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Beckwitt v. State, 477 Md. 398, 464, *cert. denied*, 143 S. Ct. 216 (2022). *Accord Mungo v. State*, ___ Md. App. ___, ___, No. 1658, Sept. Term, 2021, slip op. at 36 (filed July 25, 2023). As indicated, relief for plain error is a "a rare, rare phenomenon," reserved for only the most egregiously unfair cases. *Morris*, 153 Md. App. at 507.

Here, relief is not warranted under the plain error doctrine. After the briefs were filed in this case, this Court, in *Rohrbaugh v. State*, 257 Md. App. 638, 654 (2023), held, consistent with prior case law, that a juvenile charged with crimes over which the circuit court has exclusive original jurisdiction has the burden of proving, by a preponderance of the evidence, that transfer to the juvenile court is in the interest of the child or society. There was no error here, much less plain error.

II.

Denial of Reverse Transfer Motions

Appellant next contends that the circuit court erred in denying the motions to transfer jurisdiction to the juvenile court. He asserts that the court "erred as a matter of

law by failing to undertake the appropriate analysis required by" *Davis v. State*, 474 Md. 439 (2021).

As indicated, a court may transfer a case if it determines that transfer of its jurisdiction is in the best interest of the child or society. CP § 4-202(b)(3). In making that determination, the court must consider the following five factors: "(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety." CP § 4-202(d).

In *Davis*, 474 Md. at 464, the Supreme Court of Maryland[2] recognized that this statutory framework has

> an eye toward [both] the welfare of the child and public safety, which, in our view are inter-related, [because] the court needs to make an assessment of whether it is likely that the child would benefit from an available DJS program better than he or she would from anything likely to be available in the adult system and whether that would reduce the likelihood of recidivism and make the child a more productive law-abiding person.

Such "quality assessments . . . can be based on evidence of how those programs or kinds of programs have worked with other children, from actual data or from reliable studies." *Id*.

For these reasons, the Court explained, the five statutory factors in CP § 4-202(d)

> are not in competition with one another. They all must be considered but they are necessarily interrelated and, analytically, they all converge on amenability to treatment. The age of the child, for example, may, in some

[2] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

> circumstances, be critical in determining whether he or she is legally eligible for waiver or transfer, but beyond that, in determining whether jurisdiction *should* be waived or transferred has relevance only in connection with public safety and amenability to treatment, as we have defined it.

Id. at 464–65.

As this Court recently explained in *Rohrbaugh*, the Court in *Davis*

> reasoned that, while considerations such as public safety are important, the overarching question is whether there is "a program [in the juvenile system] that can provide immediate safety to the public and make recidivism less likely[.]" If so, the Court concluded, "absent some other circumstance, the child should be transferred to . . . the juvenile system." "If, on the other hand, there is no program in the juvenile system available to the child that is "competent to address the issues defined" and "from which the child likely can benefit in a way that will produce better results than anything in the adult system and significantly lessen his danger to the public, a reverse waiver request should be denied[.]"

Rohrbaugh, 257 Md. App. at 663 (quoting *Davis*, 474 Md. at 465–66).

As indicated, the defendant bears the burden on a motion to transfer jurisdiction to the juvenile court. *Id.* at 662. The decision whether to transfer jurisdiction to the juvenile court is with the circuit court's discretion. *Davis*, 474 Md. at 451. We will reverse a court's discretionary decision only for an abuse of discretion, which occurs only when that decision is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Faulkner v. State*, 468 Md. 418, 460 (2020) (quoting *King v. State*, 407 Md. 682, 697 (2009)).

Appellant has not made such a showing. We disagree with appellant's contention that the circuit court did not engage in the balancing analysis required by *Davis*. The court addressed each of the requisite factors. It found that appellant was 16 years old at the time

of the offense, was 17 years old at the time of the hearing, and would turn 18 in May 2023. It found that appellant had no known physical or mental difficulties, other than a substance abuse problem. The court made clear that it was focusing on appellant's amenability to treatment, and found that he was not, based on his failure to take advantage of services offered, his being on supervision when charges were filed, and his infractions during his pre-hearing detention. The court stated that it balanced these findings with appellant's age, "the violent nature of the offenses charges and [appellant's] serious threat to public safety," to conclude that transfer of jurisdiction to the juvenile court was not in the interest of appellant or to society.[3]

In *Rohrbaugh*, 257 Md. App. at 665, the court properly considered "the limited time Mr. Rohrbaugh would be subject to the juvenile court's jurisdiction; the waning availability of services in the juvenile system for juveniles who are nearing age 21; [and] the nature and extent of Mr. Rohrbaugh's mental health needs." Here, the court questioned the witnesses regarding the likelihood that services in the juvenile system would help appellant, given the short time before appellant would turn 18 and the need for more long-term services. We cannot conclude that the court abused its discretion in denying the motions to transfer.

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[3] The juvenile's age at the time of the hearing can be relevant to the overarching question whether there is "a program [in the juvenile system] that can provide immediate safety to the public and make recidivism less likely." *Rohrbaugh v. State*, 257 Md. App. 638, 662–63 (2023) (quoting *Davis v. State*, 474 Md. 439, 465 (2021)).

NOS. C-10-CR-22-000013 AND C-10-CR-22-000142 AFFIRMED. COSTS TO BE PAID BY APPELLANT.