UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1164

September Term, 2014

PURNELL SPENCER

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: October 15, 2015

Appellant, Purnell Spencer, was convicted by a jury in the Circuit Court for Baltimore City for the offenses of possessing a regulated firearm following a disqualifying conviction and wearing, carrying, or transporting a handgun on his person. After denying appellant's motion for new trial, the court imposed a sentence of five years' imprisonment, without parole, for possessing a regulated firearm, and a concurrent, three-year sentence for transporting a handgun.

On appeal, appellant presents the following questions to this Court, which we quote:

> 1. Was it error or an abuse of discretion to grant the State's motion *in limine,* which prevented a defense psychologist from testifying that, by the age of eight, Appellant had sustained well-documented, brain damage from lead paint poisoning, which substantially and permanently affected his mental capacity?
>
> 2. Was it error to deny the motion to dismiss the charges, where the statutes involved, on their face or as applied to Appellant, unconstitutionally burden the Second Amendment right to bear arms?

For the reasons set forth below, we answer both questions in the negative, and thus shall affirm the judgments of the circuit court.

BACKGROUND

On the afternoon of February 18, 2012, appellant and his girlfriend, Patricia Morris, were standing outside Morris's residence in the area of 1100 West Pratt Street, which was a three- to five-minute walk from Hollins Market in Baltimore City. Appellant wanted Morris to join him on a trip to Atlantic City, but she declined, and they argued while standing on the street. During their argument, appellant and Morris were approached by an

unknown black male carrying a suitcase. After the man attempted to "grab" Morris's engagement ring from her finger, appellant intervened to prevent the theft. During the struggle, the man dropped his suitcase and a handgun fell out. Both men reached for the gun, but appellant was able to grab it first, after which the man ran away.

When Morris took out her cell phone to report the attempted robbery, appellant stopped her, and they argued about whether she should call 911. Appellant did not want her to call the police for a number of reasons, including (1) if they "snitched on" the man, he might return and try to "do something" to them at her home; (2) appellant was not supposed to be around Morris under the terms of a protective order; (3) appellant was on probation and did not want to "get in trouble"; and (4) appellant thought that the police were not going to believe them. Morris, who was concerned that appellant and the man could still "get into it," told appellant that he had to turn in the gun. After Morris told appellant that her sister would be calling the police, he ran away. Morris's sister called the police and told them about appellant having a gun.

Baltimore City Police Officer Scott Lawrence responded to a call at 4:25 p.m. regarding an "assault in progress" in the vicinity of 1100 West Pratt Street. The suspect was described as a black male wearing a blue jacket and white pants. After unsuccessfully canvassing Pratt Street for about five minutes, Officer Lawrence heard a radio report that someone matching the suspect's description had just been seen at the Hollins Street Market,

which is located a few blocks north of West Pratt Street, at the intersection of Arlington Avenue and Hollins Street.

While driving by the market, Officer Lawrence spotted a man, later identified as appellant, "peeking out" of the front door of the market. Upon seeing the officer, appellant quickly went back inside the market, abandoned his blue jacket behind a booth, and then ran out one of the side doors. Officer Lawrence exited his vehicle and followed appellant into the market, gave chase, and apprehended appellant in an alley behind Hollins Street. Once in handcuffs, appellant repeatedly told the officer to just "talk to his girl." Officer Lawrence and appellant walked up to Baltimore City Police Officer Michael Gold, who had found the blue jacket lying behind of one of the stalls in Hollins Market. An unloaded Walther 9mm handgun was located inside one of the jacket pockets, as well as a number of bullets. Appellant told the officers either: "'That's my jacket, but I don't know about any gun in the pocket,' or 'that's not my gun in the pocket.'"

On March 14, 2012, appellant was indicted for possessing a firearm following a disqualifying conviction and wearing, carrying, or transporting a handgun on his person.

Prior to trial, pursuant to Maryland Rule 4-263(e), defense counsel advised the State of its intention to call Dr. Morris S. Lasson, Ph.D., Clinical Psychologist, as an expert witness. Dr. Lasson was expected to testify regarding the three psychodiagnostic evaluations he conducted of appellant in 1995, 2004, and 2013. The State was also provided with a copy of Dr. Lasson's thirteen-page Curriculum Vitae ("CV"), affirming that he is a licensed

certified psychologist in Maryland, and indicating that he has experience as an expert witness in several fields, including forensic and clinical psychology, psychotherapy, child psychology, forensic assessment and forensic neuropsychology. The CV contained a list of over thirty state and federal courts before which Dr. Lasson had been accepted as an expert witness.

According to Dr. Lasson's reports, he completed a psychodiagnostic evaluation of appellant in 1995, as well as an updated psychodiagnostic evaluation in 2004. After appellant was referred to him in 2013 with respect to the instant gun possession charges, Dr. Lasson conducted another psychodiagnostic evaluation and summarized his findings in a report dated March 6, 2013. This three-page report summarized historical factors, behavioral observations, and personality factors regarding appellant, then a twenty-three-year-old male, and drew several conclusions, including that appellant's previously diagnosed neuropsychological problems interfere with his behavior and attitude, causing "chronic impulsivity, irresponsibility, poor self reflection, social immaturity, confusion, indecisiveness and a chronic inability to analyze the consequences of his behavior."[1]

The State filed a motion in limine to exclude Dr. Lasson from testifying as an expert witness. Its reasons included that Dr. Lasson was not "properly designated as an expert," because psychologists are not medical doctors, and that, because gun possession was a

[1] Dr. Lasson's summary also included his opinion "with reasonable psychological certainty" that appellant "does not demonstrate criminal intent." (Emphasis in original).

general intent case, appellant's "alleged cognitive deficiency" would not be "relevant to the determination of guilt or innocence."

The trial court held a pre-trial hearing on the State's motion, during which defense counsel argued that Dr. Lasson, a licensed psychologist, was qualified pursuant to Section 9-120 of the Courts and Judicial Proceedings Article ("Section 9-120") to testify regarding appellant's brain damage and decreased mental capacity as the result of lead paint poisoning. *See* Md. Code (2006, 2013 Repl. Vol.), § 9-120 of the Courts & Judicial Proceedings Article. Defense counsel further argued that the State made improper assumptions about appellant's defense, without considering duress, coercion, and necessity.

The trial court rejected appellant's argument on the basis that "only doctors of medicine [may] come in here and give expert opinions." Noting that no plea of not criminally responsible ("NCR") had been filed, and, in light of *Johnson v. State*, 292 Md. 405 (1982), *disapproved of on other grounds by Hoey v. State,* 311 Md. 473 (1988), the court ruled for the State as follows:

> This may be perfect fodder for sentencing, if we should get to that point. But, with regard to trying to re-work the common law analysis and definition of what the criminal responsibility may be, one, he's not a medical doctor. I know what [Section] 9-120 says.
>
> But, this is a general intent crime. This is not specific intent. And, what the burden of proof that the State has to show is possession. That's all they have to . . . show. Now, what you defend is what you defend.

> But, what they have to show beyond a reasonable doubt is possession. And, I don't know that these mental deficiencies as possible result of lead paint poisoning get you to the point that you can present an expert to the jury to say this gentleman isn't responsible because he has lead paint poisoning. Experts can't render those legal opinions.
>
> And, this is all about—this is general intent. I keep coming back to general intent. This is all about general intent; not specific intent. And, no NCR has been filed. The State's motion in limine to exclude defendant's expert is granted.

Trial commenced on June 4, 2014, and lasted three days. During trial, the parties stipulated that appellant was charged with possession of a regulated firearm, as defined in Section 5-101(p) of the Public Safety Article, and that, having previously been convicted of second-degree assault, appellant was prohibited from possessing a regulated firearm pursuant to Section 5-133(b). *See* Md. Code (2003, 2011 Repl. Vol.), §§ 5-101(p), -133(b), (c) of the Public Safety Article ("PS"). The facts regarding appellant's previous conviction were not made part of the record.

Prior to giving jury instructions, the trial court agreed that the evidence provided a sufficient basis for the issuance of an instruction on the defense of necessity. The court explained to the jury that the "defense of necessity is available [w]hen a person is forced to choose between two evils—committing a crime or a greater evil or harm—and the defendant acted to avoid the greater harm, for the defense [of] necessity to excuse criminal conduct." The court instructed the jury that, if it found that appellant had committed the criminal act out of necessity, he should be found not guilty:

> One, [appellant] must have been in present and immediate danger of death or serious bodily harm; namely, from the attempted robbery or robbery that was described. Or have actually and reasonably believed himself or others to be in present and immediate danger of death or serious bodily injury.
>
> Two, [appellant] must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct.
>
> Three, [appellant] must not have had a reasonable, legal alternative to committing the criminal conduct for which he is alleged to have committed.
>
> And, four, [appellant] must have stopped or discontinued during the criminal conduct as soon as the danger or apparent danger ended. The burden of proof is on the State. Therefore, the State must prove beyond a reasonable doubt that the defendant did not act under necessity.
>
> If, after a full and fair consideration of all the facts and circumstances in evidence you have a reasonable doubt as to whether the defendant committed the crime charged under necessity as it has been defined, you must find the defendant not guilty.
>
> On the other hand, if the State convinces you beyond a reasonable doubt that at least some of those—one of the factors described above was absent, then you must conclude that the defense of necessity does not excuse the defendant from committing the crimes alleged.

During deliberations, in addition to a note revealing that the jury was deadlocked 10-2, there were a number of questions regarding the application of necessity, including the following: "Can the state of mind of the defendant be considered?" Eventually, the jury reached a verdict, and appellant was convicted of both offenses.

Appellant filed a motion for new trial, based upon the issues raised in the briefs before us. During the hearing on July 9, 2014, appellant emphasized that Dr. Lasson's testimony was both relevant and critical to his defense of necessity. The trial court, however, denied his motion, based upon the same logic applied in the pre-trial hearing. Said the court: "[W]ith regard to the exclusion of the psychologist, the Court rests with its previous ruling at the State's motion in limine to preclude the expert, the alleged expert, from giving that testimony." On the same day, the court imposed a sentence of five years imprisonment, without parole, for possessing a regulated firearm, and a concurrent, three-year sentence for transporting a handgun. Appellant filed his timely notice of appeal on July 10, 2014.

DISCUSSION

I. Did the trial court err by prohibiting the expert testimony of a psychologist regarding appellant's mental deficiencies from lead paint?

Appellant argues that he is entitled to a new trial based upon the trial court's abuse of discretion by preventing his expert witness from testifying that, by the age of eight, he had sustained well-documented brain damage from lead paint poisoning that substantially and permanently limited his mental capacity. Initially, the State responds that appellant's arguments have not been preserved for appellate review, because appellant took no further action after the motion in limine was granted. We disagree with the State that the issue regarding the exclusion of expert testimony has not been preserved for our review, and shall explain.

"Evidentiary rulings will not be disturbed 'absent error or a clear abuse of discretion.'" *Martinez ex rel. Fielding v. The Johns Hopkins Hosp.*, 212 Md. App. 634, 657 (quoting *Thomas v. State,* 429 Md. 85, 97 (2012)), *cert. denied,* 435 Md. 268 (2013). In particular, "the admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute a ground for reversal." *Radman v. Harold,* 279 Md. 167, 173 (1977). It is well settled, however, "that the trial court's determination is reviewable on appeal, and may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Id.* (citations omitted). A trial court's ruling will be reversible upon a determination that it is "both manifestly wrong and substantially injurious." *Wantz v. Afzal,* 197 Md. App. 675, 682 (2011) (citations and internal quotation marks omitted).

It is true that, when a motion in limine to exclude evidence is *denied*, a timely objection to the evidence must be made at trial to preserve the issue for appeal. *State Farm Fire Cas. Co. v. Carter,* 154 Md. App. 400, 408 (2003). However, when a motion in limine to exclude evidence is granted, "normally no further objection is required to preserve the issue for appellate review." *Reed v. State,* 353 Md. 628, 638 (1999); *see also Martinez,* 212 Md. App. at 658-59 ("When a trial court makes a final ruling on a motion *in limine* to exclude evidence, a party is not required to proffer the excluded evidence at trial in order to preserve its issue for appeal."). Defense counsel argued that Dr. Lasson was qualified to testify as an expert witness based upon the application of Section 9-120, but the court

granted the State's motion in limine excluding all testimony from this witness. As a result, the admissibility of the excluded testimony is preserved for our review.

First, appellant argues that the court violated Section 9-120 by ruling that "only doctors of medicine [can] come in here and give expert opinions." We agree.

Section 9-120 provides:

> Notwithstanding any other provision of law, a psychologist licensed under the "Maryland Psychologists Act" and qualified as an expert witness may testify on ultimate issues, including insanity, competency to stand trial, and matters within the scope of that psychologist's special knowledge, in any case in any court or in any administrative hearing.

In the instant case, it is undisputed that Dr. Lasson was a psychologist licensed under the Maryland Psychologists Act. Dr. Lasson was therefore eligible to testify. *See* CJP § 9-120. Despite the clear and unambiguous language of Section 9-120, the court repeatedly declared—twice during the pre-trial hearing and once during the motion for a new trial—that only a "medical doctor"—such as a psychiatrist, but not a psychologist—could testify in his court as an expert witness. Therefore, the trial court's decision to entirely exclude Dr. Lasson based upon his status as a psychologist violated Section 9-120.

Second, appellant argues that the trial court "erred when it declared that, because this was not a 'specific intent' crime, no 'mental deficiencies' resulting from 'lead paint poisoning' could possibly be relevant to the defense." According to appellant, the elements

of the defense of necessity "clearly involve matters of the state of mind and mental abilities of the brain-damaged defendant."

The State responds that Dr. Lasson's testimony regarding appellant's alleged mental deficiencies "was simply irrelevant to any material fact the jury would need to decide." The State argues that none of the five elements of the defense of necessity is influenced by the accused's mental deficiencies, because the defense is based on an objective standard. The State contends that "the subjective perceptions of the accused are not a factor," and thus appellant's subjective state of mind is irrelevant. We agree with the State and shall explain.

In *State v. Crawford*, the Court of Appeals set forth the elements of the defense of necessity to the crime of unlawful possession of a handgun:

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, **or reasonably believe** himself or others to be in such danger;
>
> (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
>
> (3) the defendant must not have **any reasonable, legal alternative** to possessing the handgun;
>
> (4) the handgun must be made available to the defendant without preconceived design; and

> (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

308 Md. 683, 699 (1987) (emphasis added).

With regard to the first and third elements, the use of the words "reasonable" and "reasonably" demonstrate that these elements are considered under the objective, reasonable person standard. As a result, appellant's actual, subjective belief regarding whether he was in danger, as well as whether he had any other alternative to possessing the handgun, is irrelevant. *See* Md. Rule 5-401 (defining relevant evidence as "evidence having any tendency to make the existence of *any fact that is of consequence* to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added)).

Similarly, the fourth and fifth elements of the necessity defense—whether the handgun was made available to appellant without any preconceived design, and whether the defendant gave up the handgun as soon as the necessity ended—are factual circumstances that have nothing to do with appellant's intent, state of mind, or belief. Rather, these elements concern the timing and circumstances of what actually occurred.

The second element—whether appellant intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct—was not actually disputed at trial. When objecting to the jury instruction on the

necessity defense, the prosecutor focused on the fifth element—whether the defendant gave up the handgun as soon as the necessity ended. The prosecutor said:

> **Factor number five, the defendant must give up possession of handgun as soon as the necessity or apparent necessity ends.**
>
> ***
>
> Your Honor, **the evidence that we have from the witnesses is that there was initially a struggle for this gun as [appellant] was being attacked; that [appellant] came into possession of the gun at that time.**
>
> There's also that testimony that the perpetrator ran away; that [appellant] and [ ] Morris stood by, having an argument about whether or not the police should be called; and that [appellant] had multiple opportunities—he wasn't required to call the police.
>
> **But he had, at that point, multiple opportunities to abandon his commission of the crime of possession of the handgun; either by leaving it there at the scene, leaving with [ ] Morris. All he had to do was walk away and no longer be associated with that.**
>
> But, instead, we heard testimony that he took the gun with him and he left the scene while the police were on the way and that he then—he was found over in the market some indeterminate point of time later.
>
> It's not real clear—one of—Officer Lawrence testified it was at least five minutes after the call—initial call came out that he heard from dispatch that they've spotted [appellant] in the market.
>
> It might have been more like ten, fifteen; but it was at least five; and [ ] Morris just testified that she believes it was about fifteen minutes that she was out waiting for the police before she left the scene. That's a little harder to factor in, because it is possible that she

> was there and that the officer who was driving through the area looking for her didn't see her.
>
> But, anyways, some indeterminate point of time, more than thirty seconds, you know, he goes over to the market and that's where the police spot him and he runs from the police and that's the point at which he ditches the gun. **So, I'd argue, Your Honor, that the—even assuming, you know, relying on the credibility of every witness, assuming everything that you've heard in testimony is true, the defense still hasn't had—made the showing of some evidence that the defendant gave up possession of the gun as soon as the need to possess the gun was over; as soon as the danger was over.**
>
> Court's indulgence one second. **I would also argue, Your Honor, that—well, strike that, Your Honor. I think it is mainly a factor—a fifth factor issue. And, based on the facts that we've heard, I don't believe that the defense is entitled to that particular instruction.**

(Emphasis added).

The argument above makes clear that the second element of the necessity defense was not in dispute. Therefore, even if Dr. Lasson's testimony was relevant to the second element, it still would have been inadmissible, because it would have been cumulative evidence. *See* Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence.").

In summary, Dr. Lasson's testimony regarding appellant's mental deficiencies would not have been admissible with regard to the defense of necessity, because it would have been irrelevant or, even if relevant, cumulative. As a result, the court's error in entirely excluding

Dr. Lasson's testimony based upon his status as a psychologist was harmless error beyond a reasonable doubt.

II. Do the statutes prohibiting gun possession violate the Second Amendment?

Appellant argues that the criminal statutes under which he was convicted, which prohibit possession of a regulated firearm following a disqualifying conviction and wearing, carrying, or transporting a handgun on his person, "on their face or as applied to Appellant, unconstitutionally burden the Second Amendment right to bear arms." *See* Md. Code (2002, 2012 Repl. Vol.), § 4-203, of the Criminal Law (I) Article ("CL"); PS § 5-133(b). Appellant notes that, although the parties stipulated at trial that appellant had been convicted previously of second degree assault, second degree assault covers a wide spectrum of behavior, from violent beatings to offensive touching. Appellant contends that,

> given the breadth of the behavior prohibited by the law of assault, and the lack of any facts, whatsoever, in the record to establish whether or not the behavior that led to his prior conviction for second degree assault actually fit any reasonable definition of 'violence,' the statutes involved were unconstitutional, both on their face and as applied to Appellant [ ].

The State responds that the Court of Appeals has ruled already that CL § 4-203 is constitutional, and that the Court's reasoning controls the outcome of appellant's challenge to PS § 5-133 as well. We agree with the State and shall explain.

The Second Amendment of the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The Court of Appeals decided the issue of whether CL § 4-203, entitled "Wearing, carrying, or transporting handgun," violates the Second Amendment in *Williams v. State*, 417 Md. 479, 481, *cert. denied*, 132 S. Ct. 93 (2011). In *Williams*, the Court summarized the recent Supreme Court Decisions of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as follows:

> In *Heller*, Mr. Heller had applied for and was denied a "registration certificate" to possess a handgun in his home, pursuant to the District of Columbia's gun control scheme. Section 7-2502.01(a) of the D.C. Code (2001) prohibited "possess[ion] or control" of any firearm, without a "valid registration certificate" . . . .
>
> ***
>
> In declaring Sections 7-2502.02(a)(4) (prohibiting the registration of handguns, without a home exception) and 22-4504(a) (prohibiting carrying a handgun within one's home, without a license) unconstitutional, **the Court emphasized that handguns were "overwhelmingly chosen by American society" for self-defense and determined that under any standard of scrutiny, "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster."** The District's trigger-lock requirement, contained in Section 7-2507.02, did not fare any better, according to the Court, because the provision "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense" within the home. Therefore, the prohibition against handguns, even within one's home, as well as the trigger-lock requirement for all firearms kept within the home, were declared unconstitutional.

> Shortly thereafter, in *McDonald*, the Supreme Court was asked to consider whether the Second Amendment applied to the States. . . .
>
> The statutes at issue were "similar to the District of Columbia's," according to the Court. . . .
>
> ***
>
> In reversing, the Supreme Court determined that the Second Amendment right to keep and bear arms "is fundamental to *our* scheme of ordered liberty," and as a result, the Due Process Clause rendered it applicable to the States. **The Court characterized *Heller* as safeguarding an individual right of "self-defense," when home possession was in issue, but, nevertheless, reiterated that regulatory schemes prohibiting handgun ownership by dangerous individuals, or prohibiting wearing, carrying, or transporting handguns in various public places outside of the home, were permissible:**
>
> > **We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."**

Williams, 417 Md. at 489-94 (brackets in original) (bold emphasis added) (footnotes and citations omitted).

Applying the holdings of *McDonald* and *Heller*, the Court of Appeals in *Williams* held that CL § 4-203 passed constitutional muster:

> Williams was convicted of wearing, carrying, or transporting a handgun in public, rather than for possession of a handgun in his home, for which he *could not* be prosecuted under Section 4-

> 203(b)(6). It is the exception permitting home possession in Section 4-203(b)(6) that takes the statutory scheme embodied in Section 4-203 outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*. . . .

417 Md. at 496. Therefore, the outcome of *Williams* forecloses appellant's challenge to his conviction under CL § 4-203.

The Court's reasoning in *Williams* also forecloses appellant's challenge to PS § 5-133, which prohibits people convicted of crimes of violence from possessing handguns. *See* PS § 5-133(b). As stated above, the Supreme Court limited its holdings in *McDonald* to prohibiting possession of firearms *inside the home*:

> We made it clear in *Heller* that **our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons** and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." **We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.**

McDonald, 561 U.S. at 786 (emphasis added) (citing *Heller*, 554 U.S. at 626-27). PS § 5-133 is exactly the type of regulatory measure prohibiting the possession of firearms by those convicted of a disqualifying crime that the Supreme Court stated that its holdings in

McDonald and *Heller* did not touch. *See McDonald*, 561 U.S. at 786. As a result, PS § 5-133 does not violate the Second Amendment.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; APPELLANT TO PAY COSTS.