Circuit Court for Montgomery County
Case No. 129658

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 624

September Term, 2018

JONATHAN HEMMING

v.

STATE OF MARYALND

Fader, CJ
Graeff,
Wells,

JJ.

Opinion by Wells, J.

Filed: July 3, 2019

A Montgomery County jury convicted Jonathan Hemming of attempted first-degree murder, first degree assault, two counts of use of a handgun in the commission of a felony, one count of being in possession of a firearm having been disqualified by conviction, one count for being in possession of ammunition having been disqualified by conviction, and resisting arrest. The circuit court sentenced Hemming to a term of Life on the first-degree attempted murder count, and 20 years on each use of a handgun count, to run consecutively to each other and consecutively to the attempted murder sentence. The court imposed concurrent sentences of 25 years for first degree assault, one year for illegal possession of ammunition as a disqualified person, 15 years for possession of a handgun by a disqualified person, and three years for resisting arrest. The total term of incarceration being Life plus 40 years.

Hemming filed a timely appeal and presents the following questions for review:

1. Did the circuit court abuse its discretion in refusing to bifurcate the counts charging possession of a regulated firearm by a disqualified person and possession of ammunition by a person who is disqualified from possessing a regulated firearm, with those counts being tried by the court, and the remaining counts being tried by the jury in a single trial?
2. Is the evidence insufficient to sustain the conviction for the first-degree assault on Detective Bullock and the related charge for use of a firearm in the commission of that assault?
3. Did the trial court err in imposing a consecutive sentence on count 7, use of a firearm in the commission of a crime of violence, where the court mistakenly

believed that such a sentence was required "by law?"

For the reasons we shall discuss, we answer questions 1 and 2 in the negative. We answer question 3 in the affirmative, vacate the sentence on count 7, and remand for re-sentencing.

BACKGROUND

The Montgomery County Police Department's Special Investigations Division ("SID") is a group of plainclothes police officers whose duties include conducting investigations into crimes involving gangs, narcotics, or vice. Of significance in this case is SID's additional duty of serving arrest warrants and bringing suspects in for interviews with other police investigators. The Appellant, Jonathan Hemming, came to SID's attention when an investigator wanted Hemming brought in to talk about an investigation. As it happened, Hemming had an open warrant for his failure to appear in the District Court on a minor drug matter. At an investigator's request, SID was to locate Hemming, arrest him on the open warrant, and bring him to the investigator.

The SID officers charged with finding Hemming included Seargent Charles Bullock, Detective Don Oaks, and Detective Volpe.[1] According to the testimony of Seargent Bullock, on May 18, 2016, those three, plus several others, found Hemming at a residence on Spring Street in Gaithersburg. The team began surveilling Hemming, who was driving a Honda Civic at the time. In their unmarked police vehicles, the team

[1] Volpe's first name is not stated, and his name is spelled "Bolpe" in part of volume II of the trial transcript. He is called "Volpe" in the parties' briefs and it is by that name we refer to him. If we are mistaken, we sincerely apologize.

followed Hemming and his female passenger to an office building off Shady Grove Road and Comprint Street. There, Bullock testified that he watched Hemming and the woman go into an office building and returned to the Civic after about 30 to 45 minutes.

The team had agreed that they would perform what Bullock called "a soft take down" of Hemming. What Bullock meant was that the officers would approach Hemming, inform him of the arrest warrant, talk to him, and try to get him to agree to peacefully surrender. The officers decided to initiate the arrest by having Volpe, who drove a large unmarked police pick-up truck, back into the Civic's rear bumper. As the Civic was parked facing an office building and had cars parked on either side of it, Volpe's "big Chevy pick-up" would essentially serve to immobilize Hemming's vehicle. Bullock testified that is exactly what happened immediately after Hemming got behind the wheel and the woman got into the passenger seat. Bullock said that Volpe backed his truck into the Civic and activated the lights and siren "for a few seconds" to alert Hemming that it was a police vehicle that had him blocked in.

Bullock testified that he and Oaks approached the driver's side door. Although he and Oaks wore street clothes, they both wore clothing or accoutrements that announced who they were. For example, Bullock wore his police identification badge around his neck and wore an armband that said "police." Similarly, Oaks wore a black vest and a "florescent" armband with the word "police" printed on it. As he approached the driver's side door of the Civic, Oaks announced that he was a police officer and that he had a warrant for Hemming's arrest. Bullock recounted that Hemming, at first, seemed "calm" and "cooperative," and opened the driver's door, as if to alight from the vehicle. Bullock

witnessed a struggle quickly develop when Hemming then tried to shut the door and Oaks grabbed it to keep it open. Oaks then "got in between the door and post." Bullock, who said that he was behind Oaks and on his left side, could not offer much assistance because of the "very tight space" between the cars, Oaks' large size,[2] and the fact that the Civic "is a very small car." In his effort to assist Oaks, Bullock got in the backseat behind Hemming. Bullock witnessed Oaks "wrestling" with Hemming for "what felt like an eternity." Bullock admitted that he was unsuccessful in helping his partner extract Hemming from the car as Hemming was "a big guy" struggling within the confines of the Civic.

Oaks confirmed that the SID team's plan was to arrest Hemming in a "cordial" and "low key" manner. Oaks testified that when he approached Hemming's car, he yelled "police." Hemming opened the driver's side door, but then "looked right at [Oaks]" and tried to shut the door. Oaks realized that "it started going bad in one second." Oaks was able to yank the door open and wedge his leg in the doorway. Although Oaks was trying to hold on to Hemming, he was unsuccessful as Hemming's shirt ripped. Oaks noted that during the struggle, Bullock was in the rear seat behind Hemming while Volpe was in the front passenger seat. All three policemen were trying to extract Hemming from the car. During the struggle, Oaks noticed that Hemming had "a black cylindrical object in his left hand." Oaks testified that Hemming held a rod or screwdriver in his right hand and was "slapping" the bottom of the cylinder with the rod. While demonstrating for the jury the positions of his body and Hemming's during the struggle inside the "tight space inside the

[2] Bullock testified that Oaks is 6' 5" tall.

car," Oaks testified that the cylinder was pointed at his face Oaks told the jury that although he was confused about what the cylindrical object was at the time, he learned that the object was, in fact, a "slap" or "zip" gun, a type of homemade shotgun. During Oaks' demonstration, he testified that if the gun had discharged it could "hit anywhere on [Oaks'] body."

Volpe testified that after he removed a woman from the Civic's front passenger seat, he got inside to help Oaks and Bullock. Once he was inside the car, Volpe saw the metal pipe in Hemming's hand, but did not know what it was. He called out a warning to his partners. Volpe noted that Hemming had what looked like "a 12-penny nail" in one hand and the pipe in the other. To Volpe "it seemed like [Hemming] was trying to put his hands together." Hemming tried three times to "put the pin in the pipe." At that point Volpe tased Hemming. After that, Oaks pulled Hemming from the car. Volpe noted that Hemming never pointed the pipe at himself or the woman who was seated in the car.

The State's case in chief concluded with the expert testimony of Ronald K. Davis, an officer with the United States Department of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). Davis testified that a zip or slap gun is an improvised firearm designed to discharge a shotgun shell by manually igniting a firing pin at the bottom of a metal cylinder. Two zip guns were found on Hemming's person at the time of his arrest. Davis noted that both zip guns each held a live shotgun round. Davis testified that the shotgun shells in this case were "double O's" intended to kill "big game at close range" by discharging shot in a spread fashion. Davis' testing revealed that both zip guns were operable. Davis opined that both zip guns met the definition of a "handgun" under

Maryland law. The live shotgun shells found in the zip guns and in Hemming's pockets after his arrest, in Davis' opinion, met the definition of "ammunition" under state law.

Hemming testified that he and his wife, Mary Regis, were at her neurologist's office on the morning of his arrest. Hemming told the jury that his wife suffered from a variety of health problems, including what he described as a "cyst" in her brain. According to Hemming, Regis was in pain, but cut off from her pain medication, and was unlikely to get any better. Hemming said that the reason he had the zip guns in the car was because he and his wife planned to kill themselves if his wife got bad news from her doctor. One zip gun was for him; the other was for her. He testified that he could not afford a real gun, so he made the zip guns from information he found on the Internet. According to Hemming, his wife's prognosis was as they feared, so they were about to drive to another location and kill themselves when someone blocked his car. Hemming told the jury that he did not realize the men who approached his car were policemen. He explained that he was not trying to shoot anyone. According to Hemming, he moved one zip gun from the Civic's center console "out of the way to get the stuff that was underneath it." Hemming emphasized that he told the police that he only wanted to kill himself, not the arresting officers.

On rebuttal, Detective Demitri Ruvin testified that he was the investigator who asked that SID bring Hemming in for questioning. Ruvin told the jury that he had been trying to talk to Hemming about an investigation Ruvin was conducting, but that Hemming had been evading him. In one instance, Hemming tried to make Ruvin believe that he was in Florida by using a "spoofed" number. Ruvin explained that his investigation revealed

that Hemming was in fact in Maryland driving for the ride sharing company, Uber.[3] Due to Hemming's non-cooperation and believing that Hemming had information important to his investigation, Ruvin asked SID to arrest Hemming on a District Court bench warrant that had been issued after he failed to appear on a minor drug case. Ruvin revealed that Hemming gave a recorded statement after his arrest. In that statement, Hemming told Ruvin that the reason he had the zip guns was for protection from "some people that are not real happy with me."

The jury convicted Hemming of attempted first-degree murder of Oaks, first degree assault on Bullock, two counts of use of a firearm in the commission of a crime, possession of a regulated firearm by a disqualified person, possession of ammunition by a person who is disqualified from possessing a regulated firearm, and resisting arrest. The judge, in total, sentenced Hemming to a Life term, plus an additional 40 years in prison.

DISCUSSION

I. Trial Court's Discretion to Bifurcate

Hemming argues that the trial court's refusal to bifurcate counts 9 through 12 of the indictment, reflecting the counts related to Hemming being disqualified from possession of either a handgun or ammunition due to a prior felony conviction, was an abuse of discretion because the trial judge wrongly believed he had "no authority" to do so pursuant

[3] Ruvin explained that one may disguise the phone number from which one is calling by using a Google app that "spoofs" or falsely reports that the caller is in another location. In this case, Ruvin testified that Hemming spoofed his number to make it appear that Hemming was in Florida.

to Maryland Rule 4-253(c) [4] and the holding in *Galloway v. State*, 371 Md. 379 (2002). Hemming asserts that the trial court's failure to exercise its discretion was itself an abuse of discretion. In the alternative, Hemming argues that if the trial court indeed exercised its discretion, then it abused it because there was little risk of inconsistent verdicts compared to a stipulation and would have prevented prejudice to Hemming.

The State contends that the trial court properly exercised its discretion in denying Hemming's motion to bifurcate. Initially, the State argued that there was support for a conclusion that the court had no discretion to grant the motion. In any event, the State asserts the trial court's ruling reflects that it recognized its discretion and properly exercised it. The trial court concluded that because this case involves an improvised weapon that might not meet the definitions of "firearm," the risk of inconsistent verdicts outweighed any prejudice to Hemming that might result from a stipulation that Hemming was disqualified from possessing a firearm or ammunition because of an undisclosed felony conviction.

Ordinarily, we review rulings on matters of severance or joinder of charges using

[4] In pertinent part, Rule 4-253 states:

> (b) **Joint trial of offenses**. If a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges […]
> (c) **Prejudicial joinder**. If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.
> Md. Rule 4-253.

an abuse of discretion standard. *State v. Hines*, 450 Md. 352, 366 (2016). "This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. In such a case, the defendant is entitled to severance." *Carter v. State*, 374 Md. 693, 704-05 (2003). Nevertheless, our appellate courts have held that,

> where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent.

Id. (citations and quotations omitted). *McKnight v. State*, 280 Md. 604, 607-08 (1977) (severance lies within the discretion of the trial judge.)

We will find an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." "An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court,' or when the ruling is 'violative of fact and logic.'" *Kusi v. State*, 438 Md. 362 (2014) (citations omitted).

Hemming and the State rely on *Galloway* in addressing the issue of bifurcation. The facts in *Galloway* are similar to those in the present case. Galloway was charged, in part, with attempted murder, assault, use of a handgun in the commission of a felony or crime of violence (counts 1 through 7), and possession of a firearm by a convicted felon (counts 8 and 9). *Id*. at 382. As in Hemming's case, at a pretrial hearing, Galloway's counsel

expressed concern that evidence of Galloway's prior criminal record to prove the "felon in possession" counts could prejudice that jury's consideration of the other charges. *Id*. at 383. The trial court, with consent of both parties, created a special procedure ("bifurcation") where, in the same criminal trial, a jury would determine guilt as to counts 1 through 7, and the trial judge would determine guilt in respect to counts 8 and 9. *Id*. During trial, the judge and jury first heard evidence on counts 1 through 7, while only the trial court judge heard evidence of Galloway's prior convictions as it related to counts 8 and 9. *Id*. at 384. The jury rendered "not guilty" verdicts on counts 1 through 7. The following day, however, the trial court found Galloway guilty as to counts 8 and 9. *Id*.

Upon review, the Court of Appeals recognized that the bifurcation procedure used at Galloway's trial "is not expressly authorized in Maryland, or anywhere else as far as our research has revealed." *Id*. at 385. The Court of Appeals reasoned that "potential prejudice is a fundamental concern underlying a court's consideration of joint or separate trials charged with multiple criminal offenses." *Id*. at 394. The Court first looked to Maryland Rule 4-253 (joint or separate trials), noting that the Rule does not define what is meant by 'separate trials' nor does it "specifically permit or prohibit the bifurcation of a single trial." *Galloway*, 371 Md. at 395. Although the Court noted the hybrid trial procedure used in *Galloway*, the Court declined to address whether a trial judge has the discretion to grant a bifurcation in a single trial procedure. *Id*. "Our declining to address this specific bifurcation issue should not be construed as any approval or disapproval of the procedure." *Id*.

We are not compelled to decide whether a circuit court judge has the discretion to

bifurcate the decision-making function in a single trial procedure as we conclude that if the trial judge had that discretion here, he properly exercised it to deny Hemming's bifurcation request. We note that the issue arose on the morning of the first day of trial before a jury was selected. The State and Hemming's counsel alerted the judge that four of the counts in the indictment, counts 9 through 12, alleged that Hemming was a person in possession of a firearm or ammunition having been disqualified due to a prior felony conviction, the so-called "felon in possession" counts. Defense counsel stated that Hemming was willing to stipulate that he was prohibited from possessing the guns or ammunition. Counsel then said, "As a matter of fact, Judge, Mr. Hemming has authorized me to waive jury on counts 9, 10, 11, and 12, and have you hear those bench to avoid otherwise problematic testimony." The State, citing *Galloway*, informed the judge that one problem with a bifurcated jury/judge trial was that of inconsistent verdicts. "[Y]ou can see a situation where the jury acquits him of everything, and then you're basically hamstrung in your ability to find him guilty we can't really pull (sic) the jury and figure out why they acquitted him of the other charges. So that's my concern under *Galloway*."

The record shows that the trial judge and the attorneys discussed the issue over sixteen trial transcript pages. The discussion reflects that the issue that concerned the judge was the possibility of inconsistent verdicts due to a question about whether the zip guns were operable.

> [THE STATE]: I should also mention in this case, it's an improvised gun. So, you know, you wouldn't know if they were finding that he never had the intent to kill because he didn't know the gun was functional or something like that. So, from the intent side and from the, is it a gun side, you're vulnerable on both sides with you not knowing why the jury acquitted, if they

acquit.

. . .

THE COURT: And there may be an issue of whether or not it was operable?

[THE STATE]: There could be an issue as to whether or not the defendant knew it was operable.

. . .

[THE STATE]: But you know, and I think that you can infer that the defendant knew it was operable because of the, you know, he's trying to discharge it. But let's just say, in this hypothetical world of Galloway, that the jury goes back there and they're like, yeah, forget the testimony. We don't think it was operable. Therefore, he could never have formed the specific intent to kill or injure, and so they acquit him of all those charges based on that reason.

THE COURT: Okay

[THE STATE]: And you go, okay, well, I think it was him, and I think – who cares whether, you know, he intended to kill someone or injure someone. He's a prohibited person. But if they're finding that the gun is not operable, then that's an inconsistent verdict with your verdict, and you wouldn't even know why. You would assume that they found that he didn't have specific intent, but you would be wrong, right? Under that hypothetical.

. . .

THE COURT: Then you run the—you have an inconsistent verdict because the jury would have to find him guilt (sic) on one of the underlying offenses before you could have the guilty one that basically came down…

[DEFENSE COUNSEL]: So, but I don't see any—I can't see how these could be inconsistent—we're asking the court to decide if he had possession of the gun, two guns, the ammunition, and that he was a prohibited person. That's all. Whether he had possession. I don't think—I hate to tell you what the verdict might be. There's always a chance you could find him not guilty, but if you did find him guilty, and they find him not guilty of everything else, I don't see how your bench heard case would be inconsistent with that. They could just find that he had these guns but he didn't try and kill anybody. He had them. He didn't try and assault them.

The trial judge then read *Galloway*, apparently, while on the bench and discussed passages of the decision with counsel. After he finished reading *Galloway* and reviewing Maryland Rule 4-246 (waiver of jury trial), the judge said:

> THE COURT: All right. I've considered everything in this. I'm going to . . . find there's no authority under the rule to waive part of the indictment and have it tried. And in light of this *Galloway v. Maryland*, and in light of the potential of inconsistent verdicts that's been represented by the State, I am going to disallow the defendant to waive some of his counts, waive a right to a jury on some of his counts and proceed on the other counts by jury. However, to protect the defendant, I think the State's method of indicating that the defendant is a prohibited person, period, without getting into anything else, I think is about as least prejudicial as possible.

Whether the trial judge was correct in his concern about an inconsistent verdict is not the issue. We will not reverse the trial court simply because we would have not made the same ruling. *Alexis v. State*, 437 Md. 457, 478 (2014); *North v. North*, 102 Md. App. 1, 13-14 (1994). The question before us is whether, assuming the trial judge had discretion, he realized that and exercised it. We conclude that the trial judge did exercise discretion in denying Hemming's request for a hybrid judge/jury trial.

Hemming's argument, that the trial court failed to recognize its discretion when it stated he had "no authority under the rule" to bifurcate the counts, is misplaced. An abuse of discretion occurs when a court's ruling does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. *Ingram v. State*, 427 Md. 717 (2012). Abuse of discretion may also be found when the court acts "without reference to any guiding rules or principles." *Sindler v. Litman*, 166 Md. 90, 123 (2005) (internal citations omitted). An abuse of discretion may occur when a court blindly adheres to a policy, *Colter v. State*, 297 Md. 423, 430-31 (1982), a failure to

consider the particular facts of the case, *id*., or a failure to conduct an individualized determination. *Gunning v. State*, 347 Md. 332, 353 (1997). When a court is required to exercise its discretion and either fails to exercise or abuses that discretion, to do so is error and requires reversal. *Id*.

The trial judge considered *Galloway*, the applicable Maryland Rules, as well as the facts presented in this case and decided not to permit the bifurcation procedure that Hemming requested. The trial judge's careful consideration of the issues reveals a considered exercise of discretion. The fact that the judge cited "no authority" for bifurcation is not an incorrect assessment of *Galloway*'s holding. And, arguably, Hemming's assignment of error may very well turn on the judge's diction. In this instance, when the judge said that *Galloway* presented "no authority" to bifurcate, it is more likely that he meant that *Galloway* neither approved nor disapproved of the bifurcation procedure that Hemming requested. The trial judge's final thoughts on the topic establish this conclusion.

> THE COURT: But I would say just to close the loop, Judge Cathell's case, on the *Galloway* case, he may not have said, we're not deciding yes or no. He certainly seems, based on what I'm reading here, that there's absolutely no authority in the rule for bifurcation of them, and he's clearly saying more no than yes, especially when you run into a potential of inconsistent verdicts.

The judge's decision was guided by other concerns, namely, the specter of an inconsistent result as well as his reading of the applicable Rule.

> I understand the defense view[:] Judge, we don't see this as being an inconsistent verdict. There's always the potential, based on what I'm hearing from the State, and I think that by itself would be grounds not to allow the bifurcation.

> But I think actually more persuasive for me is the rule itself doesn't allow a pick and choosing of certain counts. Yes, it's going to be a little prejudicial to the defendant, but being charged with any of these crimes is prejudicial…

(paragraph separated for ease of reading.) The trial judge concluded that a majority of the Court of Appeals did not decide whether they favored or discouraged the type of hybrid trial that Hemming requested. The trial judge, in deciding not to grant Hemming's request for bifurcation, looked to *Galloway*, as both parties requested, Maryland Rule 4-253, considered the possible prejudice to Hemming, and concluded that any advantages attendant to bifurcation were outweighed by the potential of an inconsistent verdict. The judge decided that a stipulation, where Hemming agreed that he was prohibited from possessing a handgun or ammunition, without disclosing the details of the disqualifying crimes, was the less prejudicial alternative.

The fact that Hemming had agreed to the stipulation before the judge engaged in a discussion of bifurcation is not lost on us. We recall that at the start of the discussion of counts 9 through 12, Hemming's counsel announced that Hemming would simply agree that he was a prohibited person.

> THE COURT: What about [count] 10? Do you want a stipulation that he's a prohibited person?
> [DEFENSE COUNSEL]: Judge, my client is willing to sign the stipulation that four counts – I think it's 9, 10, 11, and 12, that he's a prohibited person.

Based on this record, we conclude that, if the trial judge had discretion, he properly exercised it in rejecting a bifurcation procedure in which the judge would decide certain charges and a jury decide other charges within same proceeding.

II. Sufficiency of the Evidence

Hemming next contends that the evidence presented at trial, even when viewed in the light most favorable to the State, cannot support a finding beyond a reasonable doubt that Hemming committed first-degree assault on only Detective Bullock. Consequently, the evidence presented at trial cannot further support a finding beyond a reasonable doubt that Hemming used a firearm in the commission of a crime of violence. Hemming reasons that the evidence supports the finding that Detective Oaks only was in the direct line of fire during the struggle.

The State disagrees. It contends that the evidence and testimony of the officers at the scene describe a "hectic, rapidly-unfolding struggle with [Hemming]." The State further reasons that, because Hemming himself concedes that Detective Oaks' testimony was unclear as to the location of Officer Bullock, it was a matter for the jury to determine what Oaks' testimony meant. Ultimately, the State maintains that it presented sufficient evidence at trial such that a reasonable jury could and, did in fact find, Hemming guilty of first degree assault on Bullock.

The standard for our review of the sufficiency of the evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Whiting v. State*, 160 Md. App. 285, 305 (2004). We give deference to all reasonable conclusions which any rational jury could have made in reaching its verdict. *Lindsey v. State*, 235 Md. App. 299, 311, *cert. denied*, 458 Md. 593 (2018). It is irrelevant if this Court would have made a contrary factual finding, so long as the inference the jury

made was supported by the evidence, reversal is not required. *State v. Suddith*, 379 Md. 425, 437 (2004).

Our concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (alterations in the original) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)).

Under our statutes, a person commits first degree assault when he "intentionally cause[s] or attempt[s] to cause serious physical injury to another" or "commit[s] an assault with a firearm." Md. Code Ann. Crim. Law Art. §3-202(a)(1)(2). The prerequisite is that the defendant committed a second-degree assault. *Id.* As we explained in *Snyder v. State*, Md. App. 370, 379-80 (2013), second degree assault, in addition to the statutory guidelines, "encompasses three types of common law assault and battery: (1) the 'intent to frighten' assault, (2) attempted battery, and (3) battery." Thus, to have convicted Hemming of second degree assault, the State must show beyond a reasonable doubt that Hemming "actually tried to cause physical harm to [Bullock]; that [Hemming] intended to bring about physical harm to [Bullock], and (3) that his actions were not consented to by [Bullock]." *Id*. at 380. In this case, the State's theory was attempted battery; Hemming tried to

physically harm Bullock but was unsuccessful in doing so. So, to establish first-degree assault against Bullock, the State must, "in addition to proving the elements of second degree assault, [. . .] prove . . . that [Hemming] either used a firearm to commit an assault, or that he intended to cause serious physical injury." *Id*. at 380.

Hemming argues that the evidence presented at trial was insufficient to sustain a conviction of first degree assault against Bullock, because Bullock and Oaks both testified that Bullock was in the back seat of the Civic during most of the struggle. Hemming notes that Oaks testified that during the struggle, Hemming aimed the zip gun at Oaks' face, head, and neck. while Bullock was located behind Hemming trying to help Oaks. Hemming argues that none of the officers testified that he aimed the zip gun at Bullock or at the back seat at any point during the struggle.

Hemming also contends that neither Oaks nor Volpe testified that Bullock was in the driver's side doorway while Hemming was trying to fire the zip gun. Although Oaks testified that Bullock was behind him "when *this* first started," Hemming argues that, in this context, "when this first started" refers to when Bullock and Oaks first approached the Civic. At best, Hemming contends, it is unclear how long Bullock was standing next to Oaks before he got into the back seat. Ultimately, Hemming concludes that the State's characterization of the struggle, putting Bullock in the line of fire, is based on "nothing more than speculation."

Hemming's claims are without merit. The officers' testimony at trial reveals a chaotic, quickly-changing encounter with Hemming. As we see it, there are two phases of the arrest: (1) what happened at the driver's door and (2) what happened once all three

police officers were inside the car's passenger compartment. By all accounts, at the beginning of the arrest, Hemming appeared compliant and calm. However, as all three officers at the scene testified, the arrest "started going bad in one second." All three officers' versions of events put Oaks and Bullock outside the driver's door at the beginning of the "tug-of-war" between Oaks and Hemming.

Bullock testified that he initially acted as a cover for Oaks, standing either behind or directly beside him at the beginning of the arrest. Once Hemming tried to close the door, Bullock testified that he "tried to assist Detective Oaks in any way" he could and "went to the other side" before ending up in the rear seat of the Civic. Oaks also places Bullock directly behind him when the struggle first began, but reasoned that, because Bullock is "a big guy" and "this was happening in such a tight space", he "couldn't really get in there either" so Bullock went into the backseat "trying to get [Hemming] out of the car." And, Volpe testified that Bullock "might have been behind [Oaks] somewhat" at the driver's door during the first phase of the arrest. This would mean that Bullock and Oaks were close together the entire time given the Civic's small size and the tight space between the parked cars.

A fair reading of Oaks' testimony places Bullock in the driver's doorway when Hemming was slapping the gun and, Oaks testified that at the time Bullock "was trying to get in too" and that both "were passing off each other . . . right [there] in the doorway." Oaks also testified that because neither of the police officers could fully restrain him, Hemming had full range of his wrist and hands to point the gun anywhere and "could have turned [the gun] in any direction [Hemming] wanted."

Hemming argues that, if Bullock was in the back seat when Hemming was trying to fire the zip gun, no rational juror could find him guilty of first degree assault. The foundation of this argument is that the zone of danger was confined to the front seat and driver's side doorway. We find this argument uncompelling. The record clearly established that the interior of the Civic, where the key phase of struggle took place, was small. "Tight" was the way that Oaks described the car's interior. Hemming and the State both agree that this space was so small that it was nearly impossible for Oaks, let alone Bullock, to have occupied the front area with Hemming at the same time. Even if Bullock was on the rear seat, because the interior space was so "tight," it would be reasonable to infer from the evidence that Bullock would have been within inches of Oaks when Hemming tried to fire the zip gun.

Also worthy of consideration is the type of weapon involved: a loaded improvised shotgun. Davis, the ATF expert, testified that the ammunition found in the zip gun was "Double O," or "double odd buckshot," intended to be used for "big game hunting at close range." Davis also described the buckshot being as "an anti-personnel load." In other words, this kind of "powerful cartridge" is used to kill people. When discharged, the shot fans out in what Davis described as a "spread fashion." A juror hearing Davis' testimony could reasonably conclude that if Hemming's zip gun fired inside the Civic, Bullock, who by any account was close by Oaks, was in danger of being seriously injured or killed.

We conclude that the Civic's confined interior space makes it likely that anybody within the car could have been gravely injured had Hemming successfully fired the "Double O" shotgun shell inside the car. No one disputes that Hemming's hands were not

restricted during the struggle. Oaks and Bullock testified that Hemming had enough dexterity and range of motion during the struggle to have turned the zip gun on either of the officers at any given time. Therefore, the fact that Bullock may not have been in the doorway when Hemming was attempting to fire the zip gun, but, instead, was behind the driver's seat, does not foreclose the conclusion that the jury drew, namely, that Bullock was an intended target.

Finally, we note that the ambiguities presented in the testimony about the positions of Oaks and Bullock relative to Hemming, the size of the Civic's interior space, and the type of weapon used, are precisely the types of issues that juries are charged with resolving. Based on evidence adduced at trial, we conclude that a reasonable jury could find, beyond a reasonable doubt, Hemming guilty of first degree assault on Bullock and the related handgun count.

III. Circuit Court's Sentencing on Count VII

Finally, Hemming asserts that the circuit court erred in imposing a consecutive sentence on count 7, use of a firearm in the commission of a crime of violence, because the trial court mistakenly believed that the consecutive sentence was required "by law." Hemming argues that before a mandatory consecutive sentence could be imposed, the necessary predicate is that he have a prior conviction for use of a firearm. In this instance, Hemming asserts, he was convicted of two contemporaneous counts of use of a firearm. As the record does not show that he had a prior conviction for this offense, Hemming contends that the circuit court had the discretion to impose either a consecutive or concurrent sentence for Hemming's first convictions for use of a firearm. Hemming argues

that the circuit court mistakenly believed it did not have that discretion and thus failed to exercise it.

The State argues that, despite the circuit court's apparent error, this Court should decline to reach Hemming's claim on direct appeal because Hemming's trial counsel failed to preserve the issue at sentencing. The State theorizes that Hemming's counsel intentionally declined to object to the judge's erroneous sentencing, because an objection would not have changed the sentence, "or [might have] even changed it for the worst." The State reasons that because a trial judge considers the total sentence he will impose for all convictions, the judge in this case intended to sentence Hemming to a Life term, plus 40 additional years of incarceration. The State contends that "there is no reason to think that the judge may not have altered the sentences on the other counts so that the total package would have been life plus 40 years of active incarceration, or even more." Because of these factors, so the State asserts, Hemming's counsel intentionally did not object, realizing that "any objection would be futile." Hemming's claim of error is unpreserved for this reason, argues the State.

Generally, appellate courts will not decide any issue not properly raised in and decided by the trial court unless it plainly appears by the record to have been raised in or decided by the trial court. Maryland Rule 8-131(a). However, an appellate court has the discretion to decide an unpreserved issue if to do so is necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal. *Id*. The Court of Appeals has further held that "an appellate court's review of arguments not raised at the trial level is discretionary, not mandatory." *State v. Bell*, 344 Md. 178, 188 (1994) (as quoted in *Bible*

v. State, 411 Md. 138, 148 (2009)).

The Court of Appeals has provided direction as to how appellate courts should exercise their discretion to review under Maryland Rule 8-131. First, the reviewing court "should consider whether the exercise of its discretion will work unfair prejudice to either of the parties." *Jones v. State*, 379 Md. 704, 714-715 (2004). Secondly, the court "should consider whether the exercise of its discretion will promote the orderly administration of justice." *Id*. An appellate court should "intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Robinson v. State*, 410 Md. 91, 111 (2009) (citation omitted).

The contrary is also true. Appellate courts rarely engage in direct review where, arguably, one party made a conscious, strategic decision not to preserve an issue for review. In such a case, "[i]t would be unfair to the trial court and opposing counsel . . . if the appellate court were to review on direct appeal an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent. If the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship." *Robinson v. State*, 410 Md. 91, 104 (2009); *Conyers v. State*, 354 Md. 132, 150 (1999) ("The few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics".)

The State argues that Hemming's trial counsel made a strategic decision not to

object so as not to incur a more onerous sentence. So, the State argues, we should not address his claim of error as to the sentence. Our review of the record showed that Hemming's counsel objected throughout the trial, most notably regarding the trial court's decision not to engage in the hybrid jury trial that we have discussed.

> THE COURT: And I'm assuming you would take that route, in light of the fact that the court's denying your request to bifurcate jury and non-jury. Would that be a fair statement, [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Well, my next step would have been to ask the court then to sever those counts out for a separate trial.
>
> THE COURT: Okay, and I'll deny that.
>
> [DEFENSE COUNSEL]: Okay, and, like you said, you noted my objection, *but I'll say it anyway*.

(emphasis added). The record also reveals that Hemming's counsel lodged dozens of other objections during the trial. It seems unlikely, then, that defense counsel would strategically fail to object to an erroneous sentence based on his willingness to otherwise object throughout the proceedings. We simply find no merit in the State's argument that Hemming's counsel failed to object at sentencing for strategic reasons.

The significant fact is that neither the State nor Hemming dispute that the trial judge was mistaken when he announced that the 20-year sentence on count 7 would be served consecutively to his other sentences. "That, by law will run consecutively to Count 6 and Count 1." Criminal Law Art., §4-204(c) states:

> (c)(1)(i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years
> (ii) The court may not impose less than the minimum sentence of 5 years and,

> except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
> (2) *For each subsequent violation*, the sentence *shall be consecutive to and not concurrent with* any other sentence imposed for the crime of violence or felony.

Md. Code §4-204 (emphasis added). We conclude that the judge was not obligated to impose a consecutive sentence unless Hemming had a prior conviction, not a simultaneous conviction in the same case. It is manifest that Hemming's conviction on Count 7, use of a firearm in the commission of a crime of violence, was his second conviction, but only in this case.

In this instance, we must conclude that the trial judge's failure to exercise his discretion at sentencing was done in error and, more importantly, prejudiced Hemming. We seek to promote fairness and the orderly administration of justice by ensuring criminal defendants are properly and legally sentenced. To do otherwise would deprive criminal defendants of their basic due process rights. We, therefore, vacate Hemming's sentence on count 7 and remand his case to the circuit court for resentencing in light of this decision.

THE SENTENCE ON COUNT 7 IS VACATED AND REMANDED FOR RESENTENCING. THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS OTHERWISE AFFIRMED. APPELLANT TO PAY TWO-THIRDS OF THE COSTS. MONTGOMERY COUNTY TO PAY ONE-THIRD.