Circuit Court for Washington County
Case No.: C-21-CR-20-119

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1391

September Term, 2021

TYRELL ANDERSON

v.

STATE OF MARYLAND

Berger,
Friedman,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: October 18, 2022

Appellant, Tyrell Anderson, was indicted in the Circuit Court for Washington County and charged with numerous firearms and ammunition possession offenses, traffic offenses, and recklessly discharging a firearm from a vehicle. Convicted by a jury of multiple counts of illegally possessing a regulated firearm, illegal possession of ammunition, recklessly discharging a firearm from a vehicle, as well as various traffic offenses, including fleeing and eluding and other related counts, Appellant was sentenced to an aggregate term of thirty (30) years' incarceration, with all but twenty-one (21) years suspended, and the first ten (10) years to be served without the possibility of parole, all to be followed by eighteen (18) months supervised probation. Upon this timely appeal, Appellant asks us to address the following questions:

> 1. Did the lower court err in denying [his] suppression motion?
>
> 2. Did the lower court err in failing to sever the charges against [him]?
>
> 3. Did the lower court err in imposing separate consecutive sentences for possessing the same handgun, without interruption, two days apart?

For the following reasons, we shall vacate Appellant's sentences and remand for resentencing; otherwise, the judgments are affirmed.

BACKGROUND

On the night of 25 January 2020, several witnesses heard gunshots on the residential streets of Hagerstown, Maryland. One of them, Kevin Reichenbaugh, provided the police with a video surveillance recording taken from his home security system, located at 125 North Locust Street. The video showed an unidentified individual standing up through the sunroof of a gray Acura CL (with a different color hood), firing a handgun at a residence.

Five .22 caliber shell casings were found in the road near the location and impact strike marks were found on 126 North Locust Street.

Two days later, on 27 January 2020 at approximately 5:30 p.m., Hagerstown police received additional reports of shots fired in the same area.[1] As part of the investigation, Deputy Jesse Patterson obtained a copy of a video recording from a city-owned surveillance camera. A "grayish whitish" car with a sunroof was seen in the area at around the time as the reported shots were fired. Photographs and the video were played in court for the jury.

The driver of the Acura was identified as Hope Cashwell. The passenger, who was wearing a blue jacket and a face mask, was holding a handgun. The deputy opined that the firearm was "a smaller firearm one that easily could be concealed on someone's person, in their pocket."

A vehicle matching the description of the one seen on the video surveillance from January 25th and 27th was found on January 28th in a nearby church parking lot. While police were observing the vehicle and the surrounding area, Cashwell and an African-American male, wearing a blue jacket that appeared identical to the one seen in the January 27th video, approached. After they got in the vehicle and drove out of the church parking lot, police attempted to stop the car, to no avail. Thereafter, a high speed police chase,

[1] Unlike the prior shooting incident, the police did not find any shell casings or signs of damage to the buildings in the area following the January 27th incident. In addition, there was no video of the shooting itself from that date.

which included a collision with an unidentified moving vehicle, ensued. Appellant and Cashwell were arrested at the conclusion of that pursuit.

At the time of the arrest, Appellant was wearing the same blue jacket identified earlier. Police found a vehicle inspection report connected to the Acura inside his jacket pocket. Appellant was wearing a gray, hooded sweatshirt, and a ski mask was found on his person. In addition, two .22 caliber shell casings were found on the passenger side floor board of the vehicle. No gun was recovered in this case.

As part of the State's case-in-chief, the jury heard from Hope Cashwell, the driver of the Acura. After explaining the circumstances surrounding her testimony, including that she was incarcerated presently and testifying pursuant to a plea agreement, Cashwell informed the jury that, during the time in question, she and Appellant were living together and involved in a sexual relationship. Cashwell confirmed that she was driving the vehicle seen on the night of 25 January 2020, and that Appellant was her passenger.[2] She explained also that the motivation for the shootings was that, about a week and a half earlier, she and Appellant fled from the scene of an unrelated traffic accident without providing any identifying information to the other driver.[3] Shortly after that, an unidentified person threw a brick through the window of Appellant's residence.

[2] Cashwell explained that the Acura belonged to Appellant's niece, but that it was in his possession for several months prior to the incident.

[3] Detective Shawn Weaver testified that Cashwell was involved in an unrelated hit and run case on 12 January 2020. In that case, Cashwell was driving an unidentified vehicle, notably near the same area involved herein, when she hit a vehicle, then removed surreptitiously her license plate following that incident.

On 25 January 2020, after Appellant told her he intended to retaliate for the brick incident, Cashwell drove Appellant, in the aforementioned Acura, to the residence at issue. There, after stopping momentarily, Appellant stood up through the open sunroof and fired his .22 caliber handgun at the residence. Two days later, on 27 January 2020, Cashwell and Appellant were driving in the same area when Appellant again fired five or six shots from the same handgun out the passenger side window of the moving Acura. Cashwell maintained that Appellant used the same .22 caliber handgun on January 25th and January 27th.

The next day, January 28th, Cashwell and Appellant were together again in the Acura when a police officer attempted to stop their vehicle. At Appellant's direction, she "proceeded to flee and elude the police." She saw "multiple" police cars chasing her along the approximately four mile long pursuit. During the chase, Cashwell collided with another vehicle, but Appellant told her not to stop and to keep going. At some point after this collision, Appellant threw his handgun out the window of the moving vehicle. Cashwell pulled over eventually, parked, and she and Appellant started to walk away from the vehicle, just prior to their arrest.

We shall include additional details as may be relevant to our following analysis.

DISCUSSION

I.

A.

Appellant first contends that the circuit court erred in denying the motion to suppress the fruits of his warrantless arrest because: (1) the police lacked a sufficient basis to arrest

him, as a passenger, for Cashwell's traffic violations on January 28th; and, (2) there was no probable cause to believe he was involved in the shootings on January 25th and 27th. The State disputes this contention, in light of the standard of review, and maintains that Appellant's arrest was lawful under the Fourth Amendment to the United States Constitution. We agree with the State.

At the motions hearing, the court heard from Detective Jason Dietz, a twenty-year veteran of the Hagerstown Police Department. On 25 January 2020, at approximately 11:54 p.m., Detective Dietz responded to the area near 126 North Locust Street for a report of shots fired. Police obtained surveillance video recorded by a private citizen who lived nearby. The recording showed a silver Acura, with a distinctive white hood, stop in the street in front of 126 North Locust Street. At that point, a male front-seat passenger, wearing a light colored hooded sweatshirt, stood up through the sunroof and fired several shots toward the residence. Upon further investigation, police found impact strike marks on the building, as well as five .22 caliber shell casings on the street.[4]

Two days later, January 27th, at around 5:30 p.m., there was another report of shots fired in the same area. Witnesses reported hearing as many as four gunshots. The police

[4] Photographs of the shooting were admitted as Defense Exhibit 1 at the hearing. It appears that copies are included in the record on appeal. By way of further background, the detective testified also that the next day, January 26th, a Hagerstown police officer, identified as Officer Lucas, located a vehicle matching the description of the one involved, parked near the Otterbein church parking lot. According to Detective Dietz, Officer Lucas ran the license plate tags and ascertained that the tags were associated with a Chevrolet that was involved in an apparently unrelated hit and run accident in the same area about two weeks earlier. The police theory was that Cashwell was driving the Chevrolet in the prior incident and, after the hit-and-run, switched tags between that vehicle and the Acura in question.

reviewed city-owned surveillance cameras from the area. According to Detective Dietz, that recording showed a "silver two-door sedan with a white hood and sunroof" in the area at the time of the shooting. Police determined this was the same vehicle that was seen two days earlier. Unlike the recording obtained from the private citizen on January 25th, the January 27th recording did not show shots fired, but showed only the vehicle leaving the aforementioned area. Detective Dietz also agreed, on cross-examination, that no shell casings were recovered after this second shooting and no additional impact strikes were discovered on the nearby buildings.

Because the recording from January 27th was taken during daylight hours and of better quality, the police were able to determine that the driver of the Acura was a white female, identified as Hope Cashwell. The front seat passenger was an unidentified African-American male wearing a blue leather-style jacket, with white markings near the cuffs. Detective Dietz testified that the male was wearing a black mask and appeared to be holding "a silver object in his right hand that we believed to be a handgun at the time."[5]

According to the detective, at some point, another officer with the Hagerstown Police Department obtained a "tracker warrant" for the Acura. Sergeant Jesse Duffey, also from the Hagerstown Police Department, testified that the tracker was placed on the Acura at around 11:00 a.m. on 28 January 2020 when it was parked in the Otterbein church parking lot. Subsequently, he and another police detective parked nearby, in an unmarked police vehicle, and maintained surveillance near the church. Sergeant Duffey had seen the

[5] Photographs from January 27th were also admitted as Defense Exhibit 2. Copies appear in the record on appeal.

videos from January 25th and 27th, and was aware that Cashwell and an unidentified African-American male wearing a blue leather jacket were considered to be involved.

At some point, Sergeant Duffey observed Cashwell and Appellant, whom he identified in court, approach the area and walk into the church parking lot. Appellant was wearing a blue leather jacket.

After Appellant and Cashwell walked into the parking lot, the sergeant lost sight of them as he was parked on the street. He alerted another member of the team, Detective Kevin Brashears, who could see the Acura from his vantage point inside the church. Detective Brashears testified at the motions hearing that Cashwell got into the driver's seat and a man wearing a blue jacket got into the front passenger seat. The Acura exited the church parking lot, turning onto Franklin Street. The police officers on scene contacted Detective Dietz, who was home at the time, for further instruction. Detective Dietz, in turn, contacted the State's Attorney's Office. At that time, because the subjects were leaving the area, the decision was made to stop the vehicle to investigate further the prior shooting incidents.

When a marked Hagerstown police car attempted to stop the Acura, the Acura fled. A high speed chase ensued. Due to the speed and the time of day, and considering that the Acura hit an unidentified vehicle while fleeing, and knowing that the GPS tracker was active, the police made a decision mid-pursuit to end the chase. Sergeant Duffey, however, who was in an unmarked vehicle with its lights and sirens off, continued to follow the Acura covertly. He followed the Acura to the south side of town, near Summit Avenue. Appellant and Cashwell were then arrested after they parked the Acura and began to walk

away. Appellant was searched incident to arrest and a vehicle inspection report relating to the Acura was found inside a pocket of the blue leather jacket he had been wearing during the entire encounter. No gun was recovered in this case.

Returning to Detective Dietz's testimony, he was asked on cross-examination to explain what led him to believe probable cause existed to arrest Appellant. He replied:

> Well, Tyrell Anderson was an occupant of the vehicle. We, we were determining that we were stopping the vehicle at that point to conduct a stop on it in reference to the shooting.
>
> It was the actions after the fact, during the, the chase, the fleeing, the eluding, that caused us to have to take the, the actions that we did with the occupants of that vehicle.
>
> We're investigating two shootings - one during broad daylight hours, a busy rush hour downtown. …

He continued:

> So what I was saying was - we made a determination to stop the vehicle at that point as two persons were approaching the vehicle, one being Hope Cashwell, who was clearly seen driving the vehicle during the first -- or the second shooting on the 27th. We knew that Ms. Cashwell had immediate ties to the second shooting. It was believed that she was prosecuted -- possibly the driver for the first shooting also.
>
> We make the determination at that point to stop her as they get into the vehicle. Detective Duffey, Detective Brashears, and, and I believe Detective Patterson were all conducting surveillance there in the area of the Otterbein parking lot as they observe a black male walking with Hope Cashwell.
>
> We knew based on surveillance images from the 27th that a black - what we believed to be a black male of stocky build was the front seat passenger of that vehicle.
>
> We also knew that that male that was in the front seat of that vehicle on the 27th was wearing a blue coat that did appear to be a, a blue leather jacket at that point. We weren't positive of that, but it did look like that based on the surveillance images.

> As Mr. Anderson and Ms. Cashwell were approaching the vehicle, Mr. Anderson's wearing a blue jacket that was very similar to the jacket that was being worn on the 27th of the male occupant that was seated in the front seat holding what we believed to be a handgun.
>
> Ms. Cashwell - we had no -- we had, we had absolute certainty in our minds that Ms. Cashwell was operating the vehicle on, on the 27th for the second shooting.
>
> So as both of these persons are approaching the vehicle that we have a tracker on at this point, that we believe the vehicle could be used in commission of two shootings - one downtown during broad daylight hours with numerous persons around.
>
> Yes, the determination was made to stop that vehicle. We were going to stop that vehicle to further investigate the shooting.
>
> The actions that they took after the fact showed their propensity to get away. For violence. They, they struck a vehicle while they were fleeing the police.

Detective Dietz maintained that "[t]hey were both acting in chorus at that point as they were fleeing." Further, "[w]hat I believed in the moment that they were both acting together. That they were persons that had committed shootings." The detective continued, on redirect examination, "[t]hey didn't just flee from us - they fled from us and caused a very immediate danger to many citizens of the community. They struck a vehicle while they were fleeing from the police. When they did finally stop, they got out of the vehicle and began leaving the scene from the vehicle." He concluded, "there was nothing that was going to happen in that time that was going to lead to us not detaining them after that fact. They were being detained."

After hearing from the State, Appellant's counsel argued there was no probable cause to support the warrantless arrest because: (1) there was inadequate proof of identity

of the person shooting out of the sunroof of the vehicle on January 25th; and (2) there was inadequate proof of an actual shooting on January 27th. In addition, counsel argued there was no evidence that Appellant conspired with Cashwell during the high speed chase on January 28th, nor that he was identified wearing or carrying a handgun. The court denied the motion to suppress:

> Reviewing the totality of the circumstances in this case, I do find that the officers did have probable cause to make the arrest at the time of the arrest of Mr. Anderson.
>
> The -- I think -- and I think there is a connection -- I mean, the case builds upon itself on the various dates. On January 25th we've got a general description of a vehicle - and I don't know if [the Prosecutor] has a [witness] who will be able to testify about what particular vehicle it is - but the general description of the vehicle is someone believes it's an Acura. There's an individual standing through the sunroof firing a gun, pointing a gun, and firing a gun. And, and there's evidence of that at the scene - shell casings and, and I guess impacts of that.
>
> Then on the 27th we have two witnesses hearing gunshots. So that is some evidence of another shots fired incident. We have a -- the same, I believe, Detective Dietz said the same vehicle, but certainly a very similar vehicle. At that point, they are able to identify the driver and get a general description of the passenger including this more specific description of a blue jacket or blue jacket with a sheen on it, potentially a leather jacket, and a silver handgun which have been -- ties it back into the incident from January 25th as well as the similarity of the vehicle.
>
> And then on the 28th we see the -- and on the 27th we do identify the driver. The 28th we identify the driver once again. Same vehicle from the incident on the 27th. And a male matching the same general description and a blue leather jacket. So based upon that alone, I do believe there was probable cause to make the arrest.
>
> And I agree with [the Prosecutor] as well - based on that car chase, that fleeing and eluding incident that we heard about, I think it was completely appropriate to -- that the officers had probable cause to arrest anybody in that vehicle once the vehicle was finally stopped.

> So the motion to suppress, I guess, the jacket and the contents of the jacket are denied.[6]

B.

"In reviewing a trial court's ruling concerning the admissibility of evidence allegedly seized in violation of the Fourth Amendment, we accept the trial court's findings of fact unless they are clearly erroneous." *In re D.D.*, 479 Md. 206, 222 (2022) (citing *Grant v. State*, 449 Md. 1, 31 (2016)). "We independently appraise the ultimate question of constitutionality by applying the relevant law to the facts *de novo*." *Id.* Further, "[w]here 'there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Id.* at 222-23 (quoting *Givens v. State*, 459 Md. 694, 705 (2018)). And, we review "'the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress.'" *Id.* at 223 (quoting *Robinson v. State*, 451 Md. 94, 108 (2017)).

[6] The court then considered Appellant's motion to sever. We shall discuss that in Part II of this opinion. We note also that, although the issue of Appellant's standing to challenge evidence seized from the car, as opposed to his person, was decided against him in the motions court, that issue is not raised by either party on appeal. *Compare Brendlin v. California*, 551 U.S. 249, 255-57 (2007) (holding that a passenger in an automobile is seized during a traffic stop), *with Rakas v. Illinois*, 439 U.S. 128, 130, 148-49 (1978) (passengers did not have a legitimate privacy interest in a box of rifle shells found inside a locked glove compartment or a sawed-off rifle found underneath the front passenger seat). *Cf. Maryland v. Pringle*, 540 U.S. 366 (2003) (although standing was not at issue, Court held there was probable cause to arrest the front seat passenger of a car for possession of cocaine either solely or jointly with the other occupants of the car found behind the back seat armrest). We note that, during this trial, evidence from Appellant's person, *i.e.*, his jacket, the vehicle inspection report, a ski mask, sweatshirt, and shell casings from the passenger side floor, were admitted into evidence.

"Under the Fourth Amendment, 'subject only to a few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable.'" *Id*. (quoting *Grant*, 449 Md. at 16-17). Indeed, "'[t]he default rule requires that a seizure of a person by a law enforcement officer must be supported by probable cause, and, absent a showing of probable cause, the seizure violates the Fourth Amendment.'" *Id*. (quoting *Crosby v. State*, 408 Md. 490, 505 (2009)). The Supreme Court explains the doctrine of probable cause as follows:

> The long-prevailing standard of probable cause protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). On many occasions, we have reiterated that the probable-cause standard is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, *supra*, at 175-176); see, *e.g.*, *Ornelas v. United States*, 517 U.S. 690, 695 (1996); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989). "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S., at 232.
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *See ibid*.; *Brinegar*, 338 U.S., at 175. We have stated, however, that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," *ibid*. (internal quotation marks and citations omitted), and that the belief of guilt must be particularized with respect to the person to be searched or seized, *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

Pringle, 540 U.S. at 370-71.

C.

Looking to the evidence elicited during the suppression hearing, in the light most

favorable to the prevailing party on the motion, on the evening of 25 January 2020, surveillance video from a residential camera security system depicted a hooded man standing up through the sunroof of a silver Acura with a different color hood, firing a handgun toward a residence on North Locust Street in Hagerstown. Two days later, on 27 January 2020, after reports of shots fired, city surveillance cameras captured an image of a similar vehicle in the area. Further review of images obtained from this day led police to conclude that Hope Cashwell was the driver of the Acura. An African-American male, wearing a blue jacket and holding apparently a handgun, was the front seat passenger. The next day, 28 January 2020, these same two individuals, similarly attired, were seen entering the Acura and then leading police on a high speed chase along the streets of Hagerstown. Not only was there probable cause to believe that Appellant was involved in the traffic violations, *see* Md. Code (1977, 2020 Repl. Vol.) § 26-101 of the Transportation Article (listing parties to an offense, including accomplices), there was ample probable cause under the totality of the circumstances to believe the persons stopped were involved in the prior shootings. The circuit court denied properly the motion to suppress.

II.

A.

Appellant next avers that the court erred in not severing the offenses because the evidence regarding the charges was not mutually admissible. The State responds that, to the extent preserved, the evidence from both shootings was specially relevant and mutually admissible to prove identity and modus operandi. In reply, Appellant maintains that the

evidence was used, impermissibly, to show criminal propensity. Accordingly, Appellant asks that we vacate his convictions and remand for retrial.

Here, prior to trial, Appellant filed a written motion moving to sever the counts charging violations occurring on separate dates, namely January 25th, January 27th, and January 28th, 2020, on the grounds that the evidence was not mutually admissible nor was it relevant substantially to prove motive, intent, absence of mistake or accident, a common scheme or identity. At the pretrial motions hearing, defense counsel argued in pertinent part:

> The issue I would have with that is being that there is such different evidence that the State plans on introducing on three different dates, it's not like there's an audio -- excuse me, it's not like there's a video of the incident on the 27th, like there is on the 25th. I think it puts Mr. Anderson in a very difficult position and can prejudice him severely in that it's limiting his potential defenses if you will that he may put forth. For instance, he may have a defense for one of those incidents but a different defense for another one of those incidents.

The court interjected: "how is the Court going to permit the State to prove the identification aspect of the January 25th incident if evidence from the January 27th and ultimately the January 28th incident aren't admissible?" After counsel replied "Frankly, I don't care about the State being able to prove anything[,]" counsel argued that Appellant's Fifth Amendment right against self-incrimination was implicated because he might decide to testify as to one, but not the other.[7] Defense counsel suggested that the State could prove identity in other ways, including via anticipated testimony from the driver of the vehicle, Ms. Cashwell.

[7] This argument is not maintained on appeal.

The State responded that the events were mutually admissible to prove identity, motive and common scheme. Additionally, by way of background, the State proffered that Cashwell would testify that the Appellant shot at the specific residence in question in apparent retaliation for offenses connected to a prior traffic incident on 12 January 2020. More specifically, the State argued:

> So therefore, to prove the 25th, in addition to Ms. Cashwell's testimony, which while, yes, that is another avenue to prove identity, corroboration of accomplice testimony is critically important, the corroboration of her testimony will be the evidence from the 27th and the 28th. To prove the 27th would be using the video on the 25th because we don't have a shooting on the 27th. Ms. Cashwell's going to testify that it happened in substantially the same manner as the shooting on the 25th. The video surveillance from the 27th showing them leaving the area corroborates Ms. Cashwell's testimony.
>
> Identity obviously is critically important. And as far as the, the fleeing and eluding, the motive for the fleeing and eluding were the incidents on the 25th and the 27th. She wasn't fleeing because she thought her taillight was out. She was fleeing because she thought -- or they thought they were being arrested for the incidents that had occurred on the 25th and the 27th. Therefore, that's motive for the fleeing and eluding, they're admissible on that.
>
> Common scheme, identity, and motive – they're admissible, mutually admissible on all three. And I would ask Your Honor to deny the motion for severance.

After hearing further argument, the court denied the motion to sever. The court found:

> All right. This one, we knew this was filed and had, had looked at this previously. And after hearing the facts this morning with regard to the other motions, I do believe that the evidence from all three of these incidents is so closely related and intertwined on the issues of motive, common scheme, but I think more importantly on the issue of identity that it, it makes it difficult for the Court to grant the motion. And of course I have to weigh any possible prejudice to the Defendant against a goal to promoting judicial economy.

> But I just, I just feel like the, the evidence of all three - this was an investigation that built on itself - and arguable the -- a scheme based upon, you know, a very similar incident on the 25th and the 27th. So I think it's not appropriate to sever the charges in this case. So I'm going to deny the motion to sever.[8]

B.

Initially, we disagree with the State's suggestion that this issue is unpreserved. Appellant asked for a severance, in writing and, by way of argument during the hearing, articulated the basis for the motion. *See* Md. Rule 4-323(c) ("For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court."). The trial court also decided the issue raised on appeal. *See Bradley v. Bradley*, 208 Md. App. 249, 257-58 (2012) (concluding an issue was preserved where it was "decided by" the trial court (citing Md. Rule 8-131(a))). The issue is properly presented.

C.

Turning to the merits, Maryland Rule 4-253 provides that, "[i]f a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges." Md. Rule 4-253(b). The Rule further provides that, "[i]f it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the

[8] As the State notes, the issue presented concerned only January 25th and 27th. And, whereas the State has limited its appellate argument to the identity exception, we shall do likewise. *See Emory v. State*, 101 Md. App. 585, 610-11 (1994) (recognizing that *modus operandi* is not really a separate exception unto itself, but a subset of the identity exception), *cert. denied*, 337 Md. 90 (1995).

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(c).

"The purpose of joining offenses ... in a single trial is to save time and money by avoiding additional trials." *Conyers v. State*, 345 Md. 525, 552 (1997). "[W]here[, however,] the evidence is not mutually admissible, the value of resources saved by consolidating the cases for trial is questionable." *Garcia-Perlera v. State*, 197 Md. App. 534, 546-47 (2011) (discussing *McKnight v. State*, 280 Md. 604, 609 (1977)). That is due, in part, to the fact that, "[i]n the context of joinder/severance ... the subject matter of the charges against a separate defendant or of separate charges against the same defendant is, by definition, 'other crimes.'" *Solomon v. State*, 101 Md. App. 331, 341-42 (1994), *cert. denied*, 337 Md. 90 (1995). And, evidence of other crimes "would generally be inadmissible unless circumstances of special relevance, other than proving a mere propensity to commit crime, are present." *Galloway v. State*, 371 Md. 379, 396 (2002). As explained by the Court of Appeals in *McKnight*, *supra*, the concern of improper joinder is threefold. First, joinder can cause the defendant to "become embarrassed, or confounded in presenting separate defenses." *McKnight*, 280 Md. at 609. Second, "the jury may cumulate the evidence of the various crimes charged and find guilt when, if the offenses were considered separately, it would not do so." *Id.* And third, "the jury may use the evidence of one of the crimes charged, or a connected group of them, to infer a criminal

disposition on the part of the defendant from which he may also be found guilty of other crimes charged." *Id.*[9]

Thus, in deciding whether to join or sever charges, a court must first determine "whether evidence as to each of the accused's individual offenses would be 'mutually admissible' at separate trials concerning the offenses[.]" *Cortez v. State*, 220 Md. App. 688, 694 (2014), *cert. denied*, 442 Md. 516 (2015). In other words, "the court must determine whether the evidence from the 'other crimes' would be admissible if the trials occurred separately[.]" *Garcia-Perlera*, 197 Md. App. at 548. In that situation, although evidence of "other crimes" is generally inadmissible, it may be admitted "if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989); *see also Cortez*, 220 Md. App. at 694 (noting that, to resolve the issue of mutually admissibility, "the trial court is to apply the 'other

[9] The State relies on language in *McKnight* to suggest that it was Appellant's burden to establish that the evidence would not be mutually admissible at separate trials. The *McKnight* Court stated that "a defendant charged with similar but unrelated offenses is *entitled* to a severance where *he establishes* that the evidence as to each individual offense would not be mutually admissible at separate trials." *McKnight*, 280 Md. at 612 (emphasis added). Although this issue was not raised in the circuit court and ultimately, because of our holding, does not affect the outcome in this case, we note our disagreement with the State's reading. Notably, severance and joinder analysis depends heavily on settled principles of "other crimes" law. In that context, the Court of Appeals has made clear that the party offering the evidence, in this case, the State, has the burden of demonstrating relevance and overcoming unfair prejudice. *See Harris v. State*, 324 Md. 490, 500-01 (1991) ("The exclusionary form of the rule clearly serves to remind the bench and bar that, unlike most other evidence, this evidence carries with it heavy baggage that must be closely scrutinized before admissibility is warranted."); *see also Solomon*, 101 Md. App. at 348 (referring to the "initial hurdle of mutual admissibility").

crimes' analysis announced in [*Faulkner*]"). "[T]here are numerous exceptions to the general rule that other crimes evidence must be suppressed[,]" including, but not limited to, "if it tends to establish motive, intent, absence of mistake, a common scheme or plan, identity, opportunity, preparation, knowledge, absence of mistake or accident." *Faulkner*, 314 Md. at 634; *see also Oesby v. State*, 142 Md. App. 144, 160 (noting that the "classic" list of recognized exceptions is "ever-growing"), *cert. denied*, 369 Md. 181 (2002). A court's determination of mutual admissibility is a legal conclusion to which we give no deference. *Cortez*, 220 Md. App. at 694.

If the evidence of "other crimes" is deemed mutually admissible, the court may still order a severance if it appears that "the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance." *State v. Hines*, 450 Md. 352, 369 (2016). This determination requires a balancing of interests in which the court "weighs the likely prejudice against the accused in trying the charges together against considerations of judicial economy and efficiency, including the time and resources of both the court and the witnesses." *Cortez*, 220 Md. App. at 694. On that scale, "judicial economy is a heavy counterweight[.]" *Solomon*, 101 Md. App. at 346. Moreover, "Maryland Courts have repeatedly held that prejudice within the meaning of Rule 4-253 is a term of art and refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Hines*, 450 Md. at 369 (cleaned up).

In short, "if the evidence is deemed mutually admissible, then 'any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors

weigh against joinder.'" *Garcia-Perlera*, 197 Md. App. at 548 (quoting *Conyers*, 345 Md. at 554-56). This balancing of interests invokes the court's discretionary power, "and we will only reverse if the trial judge's decision 'was a clear abuse of discretion.'" *Cortez*, 220 Md. App. at 694 (quoting *Conyers*, 345 Md. at 556). *See also Hemming v. State*, 469 Md. 219, 240 (2020) ("[A] trial court's decision to sever or join the trials of multiple criminal defendants or multiple counts is ordinarily committed to the sound discretion of the trial judge and is reviewed for abuse of discretion."); *accord Hines*, 450 Md. at 366. In sum, a circuit court abuses its discretion by ordering joinder (or not) when "(1) non-mutually admissible evidence will be introduced; (2) the admission of the evidence causes unfair prejudice; and (3) such prejudice cannot be cured by other relief." *State v. Zadeh*, 468 Md. 124, 145 (2020) (citing *Hines*, 450 Md. at 369-70).[10]

The parties dispute whether joinder was necessary to prove identity and whether the evidence from the two pertinent dates was mutually admissible or more prejudicial than probative. The Court of Appeals recognizes that evidence may have special relevance to prove identity when it shows "the defendant's presence at the scene or in the locality of the crime on trial" or "that a peculiar *modus operandi* used by the defendant on another occasion was used by the perpetrator of the crime on trial[.]" *Faulkner*, 314 Md. at 637-38; *accord Emory*, 101 Md. App. at 610-11. In the joinder context, proximity in time and distance also may be particularly pertinent to establish identity when the "defendant's

[10] In light of the requirements of Maryland Rule 4-252(a) and (g) that a motion for severance or joinder be determined before trial, and considering that our review concerns whether the court's decision was an abuse of discretion, we shall limit our review to the facts adduced prior to that decision at the end of the motions hearing.

multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances[.]" *Carter v. State*, 374 Md. 693, 705 (2003).

Identity may be established also through *modus operandi*, based on a showing that the offenses were "so nearly identical in method as to earmark them as the handiwork of the accused." *Faulkner*, 314 Md. at 638 (quotation marks and citation omitted). Incidents taking place in temporal and geographic proximity to each other can demonstrate identity. *See Garcia-Perlera*, 197 Md. App. at 548 (determining that evidence of multiple crimes taking place in houses within walking distances of each other, among other evidence, could prove defendant's identity). Similarly, possession of an object, such as a gun, on multiple occasions can be specially relevant. *See Govostis v. State*, 74 Md. App. 457, 466 ("Evidence of possession of an object before and after an event with which that object is associated creates, in turn, a reasonable inference of possession of the object during the event." (emphasis omitted)), *cert. denied*, 313 Md. 7 (1988). Close connection between the crimes can be also specially relevant. *See Hamwright v. State*, 142 Md. App. 17, 35 (2001) ("Proof that [the defendant] and his cohorts robbed the two Royal Farms stores was probative as to the identity of the persons who robbed and carjacked [one victim] and robbed, sexually violated, and kidnapped [another]."), *cert. denied*, 369 Md. 180 (2002).

Here, the key evidence from January 25th was that the surveillance video from a private citizen showed a male passenger standing up through the sunroof of a silver Acura with an off-color hood, firing a handgun in the direction of 126 North Locust Street. This

was complemented by ballistic evidence, namely, .22 caliber shell casings found in the street and impact marks found on the side of the residence.

The key evidence from the events on January 27th included that, after receiving reports of shots fired near the same location, city owned surveillance cameras showed what appeared to be the same vehicle, *i.e.*, a silver vehicle with an off-color hood, driving in the vicinity. Hope Cashwell was identified as the driver and the passenger was believed to be an African-American male wearing a blue leather jacket and holding a handgun.

Had these events been tried separately, we are persuaded that, shortly after reports of shots fired on January 27th, the same car involved in the prior shooting was seen in the vicinity, as well as the fact that a male passenger fitting the description of the person involved, was seen in the car carrying a handgun, would have been admissible, in order to prove identity, at a separate trial on the events of January 25th. Likewise, the surveillance recording/photographs from January 25th showing a male passenger standing up through the same vehicle's sunroof and firing a handgun at the residence in question would have been admissible at a separate trial as to the events of January 27th, again, to prove identity. The evidence was mutually admissible.

Turning to the question of whether any unfair prejudice from joinder outweighed this probative value, "Maryland Courts have repeatedly held that [p]rejudice within the meaning of Rule 4-253 is a term of art, and refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Hines*, 450 Md. at 369 (quotation marks, citations and emphasis omitted). We conclude there was no such evidence in this case. Moreover,

any prejudice by admission of evidence from both dates was not so "unfair" as to hinder Appellant's ability to have a fair trial. *See generally, Odum v. State*, 412 Md. 593, 615 (2010) ("Evidence may be unfairly prejudicial 'if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged.' The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." (internal citation omitted)). We discern no such prejudice in this case. Accordingly, the court denied properly the motion to sever.

III.

Finally, Appellant argues the court erred in imposing separate consecutive sentences for possessing the same handgun two days apart. The State agrees and suggests we remand this case for resentencing. Whereas the issue concerns the legality of Appellant's sentence, and considering that we are not bound by concessions of law, we shall consider the arguments raised. *See Greenstreet v. State*, 392 Md. 652, 667 (2006) ("[A] party may not concede a point of law to the exclusion of appellate review, as necessary and proper to decide the case.").

Prior to imposing sentence, the court noted Appellant's "significant criminal history[,]" which included apparent traits of recidivism. The court was concerned also about the underlying events, as they were a "very serious" and "very dangerous situation." The court explained:

> I reviewed the Pre-Sentence Investigation and having reviewed my notes from the trial and recalling all of the evidence at the trial I am struck by how much danger Mr. Anderson put the citizens of the City of Hagerstown in over those three days. I think we're all very, very fortunate that one of the bullets did not strike anyone. And we are all very, very fortunate that the

> high speed chase eluding the police did not result in an accident that caused harm to anyone else. There were a lot of citizens just going about their evenings and going about their days that had nothing to do with this but they were all put in danger. And that's not okay.

Pertinent to our analysis, the trial court sentenced Appellant as follows with respect to the 25 January 2020 events: 15 years, 5 years mandatory, for possessing a regulated firearm after being convicted of a crime of violence in violation of Section 5-133(c) of the Public Safety Article (Count 1); a concurrent 1-year sentence for the possession of ammunition in violation of Section 5-133.1 of the Public Safety Article (Count 3); a concurrent 5-year sentence for reckless endangerment in violation of Section 3-204(a)(2) of the Criminal Law Article (Count 4); and, a concurrent 3-year sentence for wearing, carrying, or transporting a handgun in a vehicle in violation of Section 4-203(a)(1)(v) of the Criminal Law Article (Count 5). The court merged the sentence for possessing a firearm after being convicted of a disqualifying crime, Count 2, with Count 1.[11]

With respect to the 27 January 2020 events, the court sentenced Appellant to: a consecutive 15-year sentence, 5 years minimum and all but 6 years suspended, for possessing a regulated firearm after being convicted of a crime of violence (Count 6); a concurrent 1-year sentence for possessing ammunition (Count 8); and, a concurrent 3-year sentence for wearing, carrying, or transporting a handgun in a vehicle (Count 10). The sentence for possessing a firearm after being convicted of a disqualifying crime, Count 7,

[11] *See* Md. Code (2003, 2018 Repl. Vol.), §§ 5-133, 5-133.1 of the Public Safety ("Pub. Safety") Article; Md. Code (2002, 2021 Repl. Vol.) §§ 3-204, 4-203 of the Criminal Law ("Crim. Law") Article.

merged with Count 6.[12] The aggregate sentence was thirty (30) years' incarceration, with all but twenty-one (21) suspended, and to include a mandatory minimum of ten (10) years without the possibility of parole.[13]

Appellant asks us to vacate the sentences on Count 2, 6 and 7 because these possession offenses are continuing in nature and the record shows that he possessed the same handgun on both January 25th and 27th.[14] The State concedes on this point. Both parties direct our attention to *Webb v. State*, 311 Md. 610 (1988).

B.

We begin with the principles at issue. Whether the offenses in this case merge for purposes of sentencing "is premised in part on the Double Jeopardy Clause of the Fifth Amendment" to the United States Constitution. *Abeokuto v. State*, 391 Md. 289, 352 (2006) (citing *Dixon v. State*, 364 Md. 209, 236 (2001)). The Double Jeopardy Clause,

[12] It appears the court imposed the maximum sentences, albeit concurrent, on the multiple convictions for possession of ammunition in violation of Pub. Safety § 5-133.1, reckless endangerment in violation of Crim. Law § 3-204(a)(2), and, wearing, carrying, transporting a handgun in violation of Crim. Law § 4-203(a)(1). The court also imposed concurrent sentences on the convictions for fleeing and eluding and failure to stop at a scene of an accident, concerning the events of 28 January 2020.

[13] The commitment record, unlike the sentencing transcript and the probation/supervision order, does not show the additional five year mandatory minimum imposed on Count 6. These documents do not show also that the court imposed a fine, all waived, with respect to the reckless endangerment conviction related to the 28 January 2020 events (Count 14).

[14] We shall consider this a claim that appellant was illegally sentenced, and that claim may be raised at any time. *See* Md. Rule 4-345(a); *State v. Bustillo*, __ Md. __, No. 56, Sept. Term, 2021, slip op. at 12-13 (filed 24 Aug. 2022) (observing that the standard of review of an illegal sentence claim is *de novo* (citing *Bailey v. State*, 464 Md. 685, 696 (2019))).

made applicable to the States through the Fourteenth Amendment, *Brown v. Ohio*, 432 U.S. 161, 164 (1977), forbids the imposition of multiple punishments for the same offense. *Purnell v. State*, 375 Md. 678, 691 (2003). An appellate court utilizes the following approach in evaluating whether merger of convictions is required:

> "To evaluate the legality of the imposition of separate sentences for the same act, we look first to whether the charges 'arose out of the same act or transaction,' then to whether 'the crimes charged are the same offense,' and then, if the offenses are separate, to whether 'the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes[.]"'

Alexis v. State, 437 Md. 457, 485-86 (2014) (internal citation omitted) (quoting *Morris v. State*, 192 Md. App. 1, 39 (2010)); *see also Brown v. State*, 311 Md. 426, 434 (1988) ("The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."); *Manigault v. State*, 61 Md. App. 271, 279 (1985) (holding that, in a case where the defendant was convicted of two separate gun possession charges based on one criminal episode involving assaults on two separate victims with the same gun, that the unit of prosecution was the gun). The *Alexis* Court explained:

> The "same act or transaction" inquiry often turns on whether the defendant's conduct was "one single and continuous course of conduct," without a "break in conduct" or "time between the acts." The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant.

Alexis, 437 Md. at 486 (quotation marks and citation omitted).

As indicated, both parties cite *Webb, supra*. There, defendant Webb was convicted in two successive trials, in the District Court of Maryland, sitting in Baltimore City, and the second in the Circuit Court for Baltimore City, for the unlawful wearing, carrying, and transporting of a handgun related to two incidents that occurred three hours apart. *Webb*, 311 Md. at 612-13. In reversing Webb's conviction in the circuit court case, the Court of Appeals explained, first, a wearing and carrying offense is a possession offense, and, therefore, continuous in nature. *Id*. at 615 ('"When mere possession of a prohibited article is a crime, the offense is a continuing one because the crime is committed each day the article remains in possession, as there is a continuing course of conduct.'" (quoting *Duncan v. State*, 282 Md. 385, 389 (1978))). Second, it explained further that multiple convictions for wearing and carrying offenses would be warranted if the State, for example, had proved either: that Webb's unlawful possession was interrupted by some lawful use, for example, by "wearing, carrying, or transporting [the gun] 'within the confines of real estate . . . upon which he resides'"; that Webb had removed the weapon from his actual or constructive possession; or, that the handgun used in the first incident was different from that used in the second incident. *Id*. at 618 (citation omitted). Based on the record before it, the *Webb* Court determined the State could not establish more than one handgun was used in the two incidents or that his carrying of the weapon was intermittent. Therefore, Webb had uninterrupted unlawful possession of a handgun warranting only one conviction. *Id*. at 618-19.

As Appellant acknowledges, *Webb* was explained further in *Anderson v. State*, 385 Md. 123 (2005). There, the Court of Appeals considered a double jeopardy claim

concerning charges of possession with intent to distribute heroin alleged to have occurred at about the same time and place. *Anderson*, 385 Md. at 128-29. On 1 October 2002, at 1500 Myrtle Avenue, Anderson sold heroin to a Detective Barnes. *Id.* at 126. Five minutes later, at the same location, Anderson sold heroin to a Detective Butler. *Id.* Approximately one half-hour later, Anderson was approached by a third detective, Detective Clasing, who, after seeing Anderson discard suspected heroin, charged him under a District Court Statement of Charges with possession of heroin. *Id.* Anderson was found guilty in the District Court of the offense involving Detective Clasing, namely, possession of heroin on 1 October 2002, at 1500 Myrtle Avenue. *Id.* Four weeks later, the State filed two separate indictments in the circuit court, charging Anderson with distribution of heroin to Detectives Barnes and Butler. *Id.* at 127-28. Similar to *Webb, supra*, the Court of Appeals found a double jeopardy violation, in that the District Court possession charges encompassed all the heroin Anderson was alleged to have distributed to Detectives Barnes and Butler; thus, the two indictments charged violations of the same offense and should have been dismissed. *Id.* at 141.

In considering the meaning of the "same offense," the Court explained that "absent a clear statutory direction to the contrary, the uninterrupted possession of an item of contraband is ordinarily regarded as one continuing offense under Maryland law." *Id*. at 134. The *Anderson* Court noted, however, that where there is an interruption in possession, that might support separate offenses. The Court explained:

> *[W]hen the possession that underlies the first incident ends before the second incident - when the possession is interrupted in some way and is not continuous - multiple offenses, separately punishable, may arise*. That is one

> aspect of the problem, and happens to be the one now before us. Another, which may coexist with the first, is where the defendant possesses two or more quantities of a contraband drug that are kept in different places. Although that aspect is not before us, the underlying question is the same in both situations - whether the possession that underlies one offense is the same possession that underlies the other - and much of the discussion of the double jeopardy issue has been in that second context. The fact patterns vary, and it is not easy to compartmentalize the decisions. The common thread, if there is one, is to consider if there is a commonality of time, location, and purpose: was the contraband that formed the basis of the two offenses possessed at the same time, in the same location, and for essentially the same purpose? If so, courts have found the two offenses to be the same.
>
> The easier cases are where the defendant simultaneously possesses small amounts of contraband in nearby places for personal use. In that situation, where there is a commonality of time, location, *and* purpose, courts have concluded that there is but one possession and therefore but one offense.
>
> * * *
>
> The courts have reached different results where there is not a commonality in all three respects.

Id. at 135-36 (emphasis added).

We conclude that the language emphasized above, *i.e.*, "when the possession that underlies the first incident ends before the second incident - when the possession is interrupted in some way and is not continuous - multiple offenses, separately punishable, may arise" is highly instructive. We consider this test in light of the State's burden. *See Alexis*, 437 Md. at 486 ("The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State." (quotation marks and citation omitted)); *Webb*, 311 Md. at 618-19 (observing that it was the State's burden of proving distinct acts of possession, stating "[t]he State did not establish that more than one handgun was

involved or that the carrying of the weapon between 1:30 a.m. and 4:30 a.m. was intermittent").

Here, pertinent to our discussion, Appellant was charged with illegally possessing a handgun on two separate dates. The State presented evidence, through Cashwell, that the gun used on *both* those dates was Appellant's .22 caliber handgun. There was *no* evidence that the handgun ever left Appellant's possession in the interim. It was clear that the State's theory was that Appellant possessed the same handgun on both dates and neither the court's instructions to the jury, nor the State's closing argument, presented any other theory. Absent any evidence showing that the gun left Appellant's possession, we are persuaded that the record in this case does not support separate sentences for Count 1 and Count 6.

With respect to the remedy, Maryland Rule 8-604(d)(2) states that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." In *Twigg v. State*, 447 Md. 1 (2016), the Court of Appeals approved the propriety of remanding a case for resentencing on a greater offense after the merger of a lesser-included offense. Recognizing that sentencing in a case involving multiple counts is akin to sentencing on a "package" that "takes into account each of the individual crimes of which the defendant was found guilty[,]" *id*. at 26-27, the Court concluded that a remand for resentencing was a preferred remedy because "'the sentencing judge, herself, is in the best position to assess the effect of the withdrawal [of the assault conviction from the sentencing package] and to redefine the package's size and shape (if, indeed, redefinition seems appropriate).'" *Id.* at 28 (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989)).

In this case, like *Twigg*, we are concerned ultimately with the imposition of an illegal sentence, *see, e.g.*, *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (observing that the "failure to merge a sentence is considered to be an illegal sentence" (quotation marks and citation omitted)). Therefore, we shall remand this case to the circuit court for resentencing. We note that, upon remand, the court may not impose ordinarily a sentence greater than the sentence that it imposed originally. *Twigg*, 447 Md. at 30 n.14 ("The only caveat, aside from the exception set forth in [Md. Code (1988, 2013 Repl. Vol.),] § 12-702(b)(1)-(3) [of the Courts and Judicial Proceedings Article], is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally.").[15]

SENTENCES VACATED AND REMANDED FOR RESENTENCING. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY WASHINGTON COUNTY.

[15] Additionally, we concur with the State's further observation that, although no sentences were ever imposed on Counts 2 and 7 for illegal possession of a regulated firearm after being convicted of a disqualifying crime on the respective dates at issue, Appellant may not be sentenced for multiple counts of unlawfully possessing the same handgun. *See Melton v. State*, 379 Md. 471, 502-03 (2004) (observing that the statutes were meant to punish each act of possession and not each prior conviction).