Circuit Court for Baltimore City
Case No.: 121007030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1646

September Term, 2021

ISAAC SMITH

v.

STATE OF MARYLAND

Graeff,
Tang,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: November 29, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Isaac Smith, was charged with various assault and firearms offenses in relation to an altercation with an unidentified man in downtown Baltimore. Following a bench trial in the Circuit Court for Baltimore City, the court found appellant guilty of the following:

Count 1: first-degree assault;

Count 2: second-degree assault;

Count 3: wearing, carrying, and transporting a handgun;

Count 4: wearing, carrying, and transporting a loaded handgun;

Count 5: use of a firearm in the commission of a crime of violence;

Count 6: possession of a regulated firearm, pursuant to PS § 5-133(c),[1] after being convicted of possession with intent to distribute;

Count 7: possession of a regulated firearm, pursuant to PS § 5-133(b), after being convicted of a disqualifying crime; and

Count 8: possession of a firearm, pursuant to CR § 5-622,[2] after having been convicted of a felony.

The court imposed the following concurrent sentences: Count 1 - twenty-five years' incarceration for first-degree assault, with all but six years suspended in lieu of three years' supervised probation; Count 4 - three years for wearing, carrying, and transporting a loaded handgun; Count 5 - five years' incarceration without possibility of parole for use of a firearm in the commission of a crime of violence; and Count 6 - five years for illegal

[1] "PS" refers to the Public Safety Article of the Maryland Code (2003, 2018 Repl. Vol.).

[2] "CR" refers to the Criminal Law Article of the Maryland Code (2002, 2021 Repl. Vol.).

possession of a regulated firearm after being convicted of a drug offense. The remaining counts merged for purposes of sentencing. On this timely appeal, appellant asks us to address the following questions, which we have rephrased slightly:

1. Is the evidence sufficient to sustain the convictions where the State failed to show that appellant was involved in this incident and failed to show that if he was involved, he did not act in self-defense?

2. Did the trial court err by allowing inadmissible hearsay: an anonymous declarant's statement that someone threw a gun after the shooting, which suggested that a gun found nearby was used in this shooting?

3. Did the trial court err by accepting appellant's jury trial waiver without first informing him of the standard of proof and after misinforming him of the consequences of a hung jury?

4. Must the convictions under PS § 5-133(b) (Count 7) and CR § 5-622 (Count 8) be vacated where appellant was also convicted under PS § 5-133(c) (Count 6) for possession of a single gun?

For the following reasons, we shall vacate appellant's conviction under PS § 5-133(b) (Count 7), and otherwise affirm.

BACKGROUND

At around 11:20 a.m. on Sunday, August 23, 2020, Baltimore City Police Officer Stephen Lepper was on patrol in his marked police vehicle in the 100 block of Howard Street when he heard "a popping sound, the discharging of a firearm." He testified that he heard six to eight gunshots from the direction of Lexington Street. After Officer Lepper turned onto Lexington Street, an MTA officer caught his attention and directed him to a nearby alley. As he proceeded to that location, an anonymous bystander yelled, "He threw a gun. There's a gun in there," indicating a nearby parking garage. Officer Lepper exited

his vehicle and found a black and silver handgun, identified and admitted as a Kel-Tec nine-millimeter semiautomatic handgun, in the parking garage.

Officer Lepper informed police dispatch of his discovery, and several other police units soon arrived in the area, specifically reporting to the original crime scene at a corner convenience store located on West Lexington Street. This was approximately fifty yards or less from the parking garage where the officer found the handgun. At the crime scene, police investigators found eight nine-millimeter shell casings, some projectiles, broken glass, and a bloody face mask outside the store. A police firearms expert opined that certain shell casings recovered from the scene had been fired from this same handgun, which was determined to be operable.

Detective Gary Klado testified that he responded to the scene of the shooting, spoke to the store employee, and obtained a copy of the store's video surveillance footage. Recordings from one interior camera and two exterior cameras were admitted.

The videos showed, in pertinent part, that, at around 11:19 a.m., a man wearing a tracksuit arrived outside the store, walked up to a man wearing a tank top, and hit him in the head with a handgun. At that point, a third man, who had long hair, ostensibly the appellant, backed away and went into the convenience store. The indoor camera showed the man with the long hair watching the other two, who remained outside, through the store front windows. The man in the tracksuit put his handgun into his pocket and pulled out a cell phone, all the while still arguing with the man in the white tank top. After their conversation ended, the man in the tracksuit started walking away, towards the front of the convenience store. Then, the man with the long hair, who was still inside the store, and

the man in the tracksuit, standing outside, looked at each other and exchanged gunfire. The store's front plate glass window shattered, and the man with the long hair fell through it while he continued to fire multiple shots at the man in the tracksuit. The man in the tracksuit returned fire as he fled the scene.[3] The man with the long hair got up, took off his face mask, and approached the store clerk. His face was visible in the indoor video surveillance footage. He then fled the area.

Blood samples found on the interior of the face mask left at the scene and the exterior of the handgun were submitted for DNA analysis. After analysis, appellant was identified as the major male profile present from DNA collected from the interior of the face mask. Appellant was also identified as the single source of DNA collected from the handgun.

After hearing closing arguments, the court found as follows:

> Okay. I've had an opportunity to consider the testimony and the exhibits received. I will agree with [defense counsel] that the two issues before the [c]ourt really are, one, the identity of the person who has committed the offenses and then whether this was a matter of self-defense or not.
>
> So, in looking, first, at the identity issue, the [c]ourt does find that the State has proven beyond a reasonable doubt that the individuals shown in the video and the person who had that weapon and fired that weapon was, in fact, the defendant, [appellant]. I took an opportunity to look closely at the videos; in particular, the video from the interior of the store. First, you can see the person that, to the [c]ourt, very clearly appears to be [appellant] before the incident occurs. Then, at 11:20:18, after the shooting has taken place, [appellant] removes not just – he initially had glasses on, but he has no glasses on. He actually removes the face mask, uncovering his nose and

[3] Officer Lepper testified that he saw the man in the tracksuit run into the Metro station, but he assumed the person was just a bystander. The man in the tracksuit was never identified.

> mouth and exposing his entire face, and says something to the store clerk. There's no audio. I don't what is said, but his face is very clearly shown in its entirety.
>
> Furthermore, there is DNA evidence showing that the person who had the gun and whose blood was on the mask was, in fact, [appellant].
>
> The [c]ourt finds that this is overwhelming evidence of the identification of [appellant] and qualifies as proof beyond a reasonable doubt of his identity.

The court then addressed appellant's claim that he acted in self-defense:

> Turning to the issue of the self-defense claim, again, I went back to the video and essentially watched it frame by frame as it was going, and you can see – well, the different videos. There's an incident with the unidentified person in the black tracksuit who approaches [appellant] and the person he is with, who may be his friend or acquaintance. That person in the black tracksuit takes out a weapon and strikes this other person who was with [appellant]. Now, if at that point [appellant] had sought to defend his friend, perhaps that could be defense of others to that assault, but [appellant] walks away and the person in the black tracksuit puts away his weapon.
>
> He then has, you can very clearly see in his hand, a phone that he is now walking towards the front of this carry-out store, or this convenience store. From the interior video, you can see [appellant] inside the corner store. You can see him watching out the window. You can see him readjusting his property by putting – he had something down, but he then reaches into his waistband, pulls out a weapon. At 11:20, when this is all now happening, you can see the front of the store from the inside. It's a full glass window and a glass door. They are intact. You can then see [appellant] approach the front door to open the door. There's a woman, another person unrelated to the incident, who is about to come in, and you see her react and recoil as he's taking out the weapon and raising it. Now, the glass is still intact. As [defense counsel] pointed out in her closing, there's remnants of a projectile that had come in from the outside, breaking the window, but that hadn't happened yet.
>
> It's very clear and the [c]ourt finds beyond a reasonable doubt that [appellant] was the initial aggressor in that incident by pulling the trigger reaching out the door. The other person then fires in and [appellant] fires additional shots, emptying out the weapon, and then running away, discarding it, but the [c]ourt rejects any claim of self-defense.

The court then found appellant guilty as provided in our earlier statement of the case.

Additional facts will be included in the following discussion as necessary.

DISCUSSION

I.

Appellant contends the evidence was insufficient to prove his identity and, even if identity was established, the evidence established that he acted in self-defense. The State responds that these claims are without merit because there was both video and DNA evidence to prove appellant's identity and because appellant was the initial aggressor at the time of the shooting.

Maryland Rule 8-131(c) provides the standard for appellate review of bench trials:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the [circuit] court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the [circuit] court to judge the credibility of the witnesses.

The Court of Appeals has explained that, pursuant to this rule, the appellate court must "determine '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.'" *Koushall v. State*, 479 Md. 124, 148 (2022) (emphasis and citations omitted); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We do not retry the case or draw "other inferences from the evidence." *Koushall*, 479 Md. at 148 (citations omitted). "[O]ur concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* at 148-49 (quoting *Taylor v. State*,

346 Md. 452, 457 (1997). Moreover, "[b]ecause the circuit court is entrusted with making credibility determinations, resolving conflicting evidence, and drawing inferences from the evidence, the reviewing court gives deference to a trial judge's or a jury's ability to choose among differing inferences that might possibly be made from a factual situation. *Id.* at 149 (citations omitted) (cleaned up).

With respect to identity, the court, as the fact finder, considered the visual evidence and concluded that appellant matched the appearance of the man with the long hair at the scene. The shooter also left behind a bloody face mask and a handgun containing his DNA. Appellant's argument that the State failed to prove he was the one seen in the video or that, even considering the DNA evidence linking him to the face mask and the handgun, he was the actual shooter goes to the weight of the evidence, not its sufficiency. There was more than sufficient evidence of appellant's identity.

Turning to his self-defense claim, we focus on the element requiring that the accuser must not have been the aggressor or provoked the conflict.[4] *See State v. Smullen,* 380 Md. 233, 269 (2004) (explaining that self-defense requires that the accused must not have been the aggressor or provoked the conflict). Based on our review of the videos, we conclude that the court did not err in finding that appellant was the initial aggressor. When he arrived

[4] Application of the self-defense defense requires the following: "(1) [t]he accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant; (2) [t]he accused must have in fact believed himself in this danger; (3) [t]he accused claiming the right of self-defense must have not been the aggressor or provoked the conflict; and (4) [t]he force used must not have been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded." *State v. Faulkner*, 301 Md. 482, 485-86 (1984).

outside of the convenience store, the man in the tracksuit struck the man in the tank top with a handgun. The man with the long hair, identified by the court as appellant, retreated into the interior of the store. Then, after almost a minute went by, and after the man in the tracksuit put away his gun and started to leave the scene, appellant raised his gun, through the opened door, aiming in the direction of the man in the tracksuit. The man in the tracksuit reacted by recoiling, drawing his weapon, and firing. The visual evidence supports the court's finding that appellant "was the initial aggressor in that incident by pulling the trigger reaching out the door." The court's findings are not clearly erroneous, and the evidence was sufficient to sustain appellant's convictions.

II.

Next, appellant asserts that the court erred by overruling his objection to inadmissible hearsay, namely, Officer Lepper's testimony that an anonymous bystander told him that she saw someone throw a handgun into the parking garage. The State responds that the statement was either non-hearsay or an excited utterance and was harmless beyond a reasonable doubt in any event.

Explaining his actions after he heard gunshots, Officer Lepper testified as follows:

> [OFFICER LEPPER]: When I got to the intersection of Eutaw Street, I made a right turn onto Eutaw to go northbound, conducting my area canvass. An MTA officer was running on foot southbound and said to me, "No, it's by the alley," which I took to mean Marion alley, which was behind me southbound. I turned my vehicle around and proceeded south to Marion alley, at which point an anonymous citizen began yelling at me that someone threw a gun –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

> [PROSECUTOR]: You can continue.
>
> [OFFICER LEPPER]: That he, I believe, to my best recollection, she stated, "He threw a gun. There's a gun in there," which prompted me to exit my vehicle and enter the entrance to the parking garage in the 100 block of North Eutaw where I located a black and silver handgun.

Additionally, prior to the State playing his body-worn camera footage, Officer Lepper explained that "[a]s I had pulled up, a woman was yelling at me that he threw a gun." After defense counsel's objection again was overruled, the State played the footage in which Officer Lepper told Detective Klado that the bystander said, "They threw a gun in there."

We need not decide the merits of the hearsay issue because, even were we to conclude that the court erred in admitting the statements, we have no difficulty holding that any error was harmless beyond a reasonable doubt. *See Fields v. State*, 395 Md. 758, 759 (2006) ("Because we shall hold that even if the court erred with respect to the evidentiary issue, the error was harmless beyond a reasonable doubt, we do not reach the [merits of the hearsay] issue."); *Brown v. State*, 364 Md. 37, 38 (2001) (declining to address merits of challenged evidentiary ruling where error was harmless in any event).

"[A]n error is harmless if 'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Fields*, 395 Md. at 764 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Here, the court found that appellant was the person in the video shooting the handgun from inside the convenience store. DNA consistent with appellant's DNA profile was found on the handgun as well as a face mask left at the scene. Where the primary basis

of appellant's argument is that this statement, from the bystander about the whereabouts of the handgun, was used to prove his identity as the shooter, it was cumulative to other stronger evidence of that same fact. *See Potts v. State*, 231 Md. App. 398, 408-10 (2016) (error in admitting inadmissible hearsay was harmless where evidence was cumulative). Any error in its admission was harmless beyond a reasonable doubt.

III.

Appellant next argues his jury trial waiver was not made knowingly because the court gave an inadequate advisement of the standard of proof and the requirement of a unanimous verdict. The State responds that these grounds were never argued in the trial court and are both unpreserved and meritless in any event.

Rule 4-246(b) governs the waiver of the right to a jury trial in circuit court and provides in relevant part:

> Procedure for Acceptance of Waiver. A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the *waiver is made knowingly and voluntarily*.

(Emphasis added); *see Abeokuto v. State*, 391 Md. 289, 317-18 (2006) (although there is no "fixed incantation" which the court must recite, the record must show that the defendant has "some knowledge of the jury trial right before being allowed to waive it") (citations omitted).

On the second day of the bench trial, the court and the parties realized that appellant had not waived his right to a jury trial on the record. The court informed the parties that,

due to that omission, should appellant request a jury trial, the court would grant a motion for new trial. Thereafter, the following colloquy transpired:

> THE COURT: Okay. So, if you had decided you wanted to have a jury trial, what would happen is you would be in a much larger courtroom and they would bring in a big group of people who are here for jury duty. Your attorney and the State have actually given me questions that they wanted me to ask those potential jurors to narrow them down from the big group of, say, 60 down to 12 people who would be your jury. They would sit in the jury box like those red chairs over there. They would hear the same testimony that I've been hearing.
>
> Throughout the jury trial, you're presumed innocent. The burden of proof is on the State. In order for the jury to find you guilty, all 12 of them have to agree. The same as to a not guilty verdict. All 12 have to agree. If there's any disagreement, if 11 people say, "I vote not guilty," and one person votes "guilty," that's 11 to 1. That's considered a hung jury. Eventually, the judge would say, "This is a mistrial," and then what would happen is you would get a new trial date again, a new group of jurors would come in, you would pick a new jury, and the whole process would repeat, and that would happened as many times as it took until you found 12 jurors to agree to either a guilty verdict or a not guilty verdict. Do you understand that?
>
> [APPELLANT]: Yes.
>
> THE COURT: So, from what I understood from our discussion yesterday from what [defense counsel] had said is that you wanted to give up that right and instead have a bench trial; is that correct?
>
> [APPELLANT]: Yes.

After asking appellant whether anyone coerced him into waiving a jury trial and inquiring about his education, mental health, and sobriety, the court found that appellant had knowingly and voluntarily waived his right to a jury trial.

Appellant did not object to this procedure and did not raise the grounds asserted on appeal, namely, that he was not properly advised of the burden of proof or the requirements associated with a unanimous verdict. "[A] claimed failure of the court to adhere strictly

with the requirements of Rule 4-246(b) requires a contemporaneous objection in order to be challenged on appeal." *Spence v. State*, 444 Md. 1, 14-15 (2015) (citing *Nalls v. State*, 437 Md. 674, 684 (2014)). As the Court of Appeals has stated, "by failing to object at the time the court accepted his waiver of his right to a jury trial," appellant "failed to preserve his claim of error" for review.[5] *Id.* at 15. We decline to exercise our discretion to review the issue pursuant to Rule 8-131.

IV.

Finally, appellant argues that two of his three firearms-related convictions, under PS § 5-133(b) (Count 7) and CR § 5-622 (Count 8), must be vacated because the unit of prosecution was the one handgun recovered in this case.

As mentioned, appellant was convicted of the following: Count 6 - possession of a regulated firearm after being convicted of a drug offense, under PS § 5-133(c)(1); Count 7 - possession of a regulated firearm after being convicted of a disqualifying crime, under PS § 5-133(b); and Count 8 - possession of a firearm after having been convicted of a felony, under CR § 5-622. As to these, the court sentenced appellant to five years concurrent on Count 6 and then merged Counts 7 and 8 into Count 6. Appellant's argument is that, although the sentences on Counts 7 and 8 merged, the convictions must be vacated because

[5] Relying on *Curtis v. State*, 284 Md. 132 (1978), appellant claims that his constitutional claim is preserved for review. *Curtis*, while restating the standard that the relinquishment of fundamental constitutional rights requires a knowing affirmative waiver, *id.* at 143-44, was not concerned with the scope of appellate review. *See Hartman v. State*, 452 Md. 279, 300 (2017) ("[O]ur precedents recognize that constitutional issues raised for the first time on appeal, and not raised in the trial court, are not automatically entitled to consideration on the merits under Maryland Rule 8-131(a).") (collecting cases).

there was only one unit of prosecution, namely, the handgun.[6] We address appellant's arguments in turn.

Count 7 - PS § 5-133(b)

Both parties direct our attention to *Wimbish v. State*, 201 Md. App. 239 (2011), *cert. denied*, 424 Md. 293 (2012). Pertinent to this issue, we determined that in cases where an individual is charged with more than one offense under PS § 5-133, the proper question is not whether the offenses merge, but whether separate convictions can stand, each being based upon the individual's possession of a single gun, which forms the "unit of prosecution." *Id.* at 270-72. The defendant in *Wimbish* was separately convicted for violations of PS § 5-133(c)(1), prohibiting possession of a regulated firearm by an individual who had previously been convicted of a crime of violence, and PS § 5-133(d), prohibiting possession of a regulated firearm by an individual under twenty-one years of age. *Id.* at 270. Relying on *Melton v. State*, 379 Md. 471 (2004), we opined that the violation the legislature sought to punish through PS § 5-133 was "the prohibited act of illegal possession of a firearm." *Id.* at 271-72 (quoting *Melton*, 379 Md. at 484-86). Therefore, Wimbish's possession of a single regulated firearm, though it was statutorily proscribed for two different reasons — his age and his previous conviction — constituted

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[6] Merger does not affect the underlying conviction. *Lovelace v. State*, 214 Md. App. 512, 543 (2013); *Moore v. State,* 198 Md. App. 655, 689 (2011) (stating that "where the convictions for two offenses merge under the required evidence test, the doctrine of merger allows only the imposition of a sentence on the greater offense; the *convictions* for both offenses stand inviolate, unaffected by the merger") (internal quotations omitted) (emphasis added).

only a single violation of the statute. *Id.* at 272. Ultimately, this Court determined the proper remedy for the illegal sentence imposed by the circuit court was to affirm the defendant's conviction for the offense carrying the greater potential penalty and to vacate the defendant's conviction for the less serious offense. *See id.* We conclude that *Wimbish* is decisive as to whether appellant here could be convicted of multiple violations of PS § 5-133. Thus, as PS § 5-133(c) (Count 6) imposes a greater sentence, we shall vacate the lesser offense under PS § 5-133(b) (Count 7).[7]

Count 8 - CR § 5-622

With respect to CR § 5-622 (Count 8), we reach a different conclusion. In *Wimbish, supra*, we held that the defendant could receive two separate convictions for illegal possession of a regulated firearm, under PS § 5-133(c), and possession of a short-barreled shotgun, under CR § 5-203:

> [W]ith respect to appellant's contention that his conviction under § 5-133(c) should merge with his conviction under § 5-203, we apply a different analysis and reach a different conclusion. As discussed above, appellant's possession of a regulated firearm, while prohibited under two different subsections of § 5-133 (specifically subsections (c) and (d)), constituted only one violation under that law. Thus, he could receive only *one* conviction, a result with which the doctrine of merger, which involves the combination, for sentencing purposes, of *multiple* convictions, is unconcerned. *In contrast, appellant's possession of a short-barreled shotgun violated two different statutes, namely, §§ 5-133 and 5-203, that is, illegal possession of a regulated firearm and possession of a short-barreled shotgun, respectively. For those two violations, appellant could, and did, receive two convictions.*

[7] A violation of PS § 5-133(b) is subject to sentencing up to five years as provided by PS § 5-144(b), whereas a violation of PS § 5-133(c) is subject to five years mandatory minimum under PS § 5-133(c)(2).

Wimbish, 201 Md. App. at 272 (emphasis added).

Applying the same rationale, the conviction under CR § 5-622 (Count 8) should not be vacated. PS § 5-133(c) and CR § 5-622 are different statutes, and appellant could receive a separate conviction for each violation. The court's decision to merge the conviction for Count 8 into the conviction Count 6 for sentencing purposes adequately addressed any multiple-punishment concerns, because appellant was punished but once for his conduct.

CONVICTION ON COUNT 7 VACATED; JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE ASSESSED 2/3 TO APPELLANT AND 1/3 TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.