Circuit Court for Prince George's County
Case No. CT170781X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1934

September Term, 2017

NATHANIEL LANIER

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: April 9, 2019

*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.

A jury in the Circuit Court for Prince George's County convicted appellant Nathaniel Lanier of three counts based on his illegal possession of a regulated firearm and one count of possession of ammunition.[1] He was sentenced to fifteen years' imprisonment, with all but seven years suspended, and five years' probation on one of the three counts of possession of a regulated firearm, and a concurrent one year term of imprisonment for possession of ammunition. The other two convictions for illegal possession of a firearm were merged for sentencing.

Appellant presents three questions for our review:

1. Did the trial court commit plain error in allowing the prosecutor to comment on [appellant's] flight during closing argument where the court and counsel, but not the jury, knew of an alternative, equally reasonable explanation for the flight and the court refused to give a flight instruction for that reason?

2. Where [appellant] was found to be in possession of a single loaded firearm, did the trial court err in imposing separate sentences for both possession of a regulated firearm after having been convicted of a crime of violence and possession of ammunition by a person who is prohibited from possessing a regulated firearm?

3. Must two of the three convictions for possession of a firearm be vacated where [appellant] was found to have possessed only one firearm?

[1] Count 1: PS § 5-133(c)(1) – possession of a regulated firearm after having been convicted of a crime of violence, as defined in Criminal Law § 14-101.
Count 2: PS § 5-133(c)(1) – possession of a regulated firearm after having been convicted of a crime of violence, as defined in PS § 5-101(c).
Count 3: PS § 5-133(b)(1) – possession of a regulated firearm after having been convicted of a disqualifying crime (second degree burglary).
Count 4: PS § 5-133.1 – possession of ammunition after being prohibited from possessing a regulated firearm.

For the reasons that follow, we answer "no" to the first two questions and "yes" to the third. Accordingly, we will vacate the convictions on counts 2 and 3, but otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 9:00 p.m. on the evening of March 27, 2017, Officers Kyle Cook, Anthony Brooke, and Michael Rushlow were on patrol in marked police cruisers in a "known high drug trafficking area" near the 2600 block of Pinebrook Avenue in Landover. Officer Cook was driving alone, and Officers Brooke and Rushlow were together behind him in Officer Rushlow's cruiser.

Officer Cook turned off Hawthorne Street into a driveway leading into the parking lot of an apartment complex. As he drove, Officer Cook "used [his] spotlight to see if anyone is hanging out, loitering or any of that behind the complex." He observed a Chevy Trailblazer with its driver's side door open, parked next to a trailer. A man, later identified as appellant, was standing behind the driver's door of the Trailblazer about ten or fifteen feet from Officer Cook. That man "[c]rouched down, his head went down as if to be reaching into the vehicle, the door, the floorboard of it," to the point that his "head was almost out of sight." He then "reappeared," and "turned around and ran [] behind the trailer and behind the cars."

Officers Cook and Brooke gave chase because, according to Officer Cook, "unprovoked flight," "given the time of night," was "suspicious." Both officers gave verbal commands, "stop, police," two or three times, but the man kept running. Officer

Brooke apprehended the runner and, by the time Officer Cook caught up, Officer Brooke had placed him in handcuffs. Officer Cook walked appellant back to his cruiser and put him inside. According to Officer Brooke, the chase lasted about ten to 15 seconds because appellant slipped and fell.

In the meantime, Officer Rushlow had stayed with the Trailblazer. He testified that the driver's side door was wide open when appellant ran off, and that no one was in it. Within 30 to 45 seconds, he heard Officer Cook yell that they had someone in custody. Officer Cook returned to the Trailblazer and searched the driver's side floorboard of the car where he had observed appellant reaching. He recovered a .45 caliber Taurus revolver loaded with two rounds of ammunition from under the driver's seat.

The Trailblazer was not registered, and Officer Cook did not recall if it had tags on it. Officer Cook testified that he did not see anyone else that night near the Trailblazer. The officers did not submit the revolver for fingerprint analysis or DNA testing, or make any effort to obtain a swab from appellant because, as Officer Cook explained, "I believed that he reached in the vehicle, put the gun there, and took off running," and therefore "it would be a waste of resources to do [testing]."

Appellant testified to the incident differently. After getting off work, he walked to the apartment complex to try to get a ride home from a friend named Darrell. He did not see Darrell, but he saw a couple of other men in the parking lot, one of whom he asked if he had seen Darrell. As they were talking, police cars drove into the parking lot. Both

appellant and the person to whom he was talking started running. He ran because he was "nervous" and "scared," but after running for about 20 or 30 seconds, he decided to stop because he did not want to get in trouble.

After appellant was handcuffed, the officer walked him back to where he had been talking to the other man and ordered him to sit on the ground. The officer "shined his lights around," and "found some keys on the ground." He "picked the keys up and . . . pushed the unlocked button," which "unlocked the vehicle." Once "inside the vehicle," the officer "claimed he found a gun in it." Accordingly to appellant: the officer never showed him the gun; he never saw the gun; and the gun wasn't his. He acknowledged standing in the parking lot near the Trailblazer, but stated that the car wasn't his, and he didn't know whose it was.

Appellant was charged by indictment with six offenses. In addition to the firearm possession counts and the ammunition possession count, he was also charged with possession of PCP and possession of oxycodone. On the morning of trial, the State nolle prossed the two drug charges, and the trial court granted defense counsel's motion in limine to exclude any reference at trial to the drugs. And, the parties stipulated that "prior to March 27, 2017, [appellant] was prohibited by law from possessing a firearm and ammunition."

The jury verdict sheet had two questions:

> Do you find the defendant not guilty or guilty of illegal possession of a regulated firearm?

> Do you find the defendant not guilty or guilty of illegal possession of ammunition?

Guilty verdicts were rendered on both questions. Pursuant to the parties' stipulation concerning the disqualifying conviction, the court "direct[ed] the clerk to enter verdicts of guilty as to counts one, two, three, and four."

This appeal followed. Additional details will be included in our discussion.

DISCUSSION

I.

Appellant asks us to review for plain error the prosecutor's comments during closing argument related to appellant running from the police. Those comments, in relevant part, were:

> In a few minutes you will hear from defense counsel []. I'm sure he will argue that there were no fingerprints found on the gun, no DNA found on the gun. Officer Cook admitted, yes, I didn't test this for fingerprints . . .
>
> Officer Cook and Officer Rushlow indicated we didn't do it in this case. This isn't CSI. This isn't a case you saw on the news. It was a case of simple handgun possession. We saw him. **We saw him hide the handgun and then run off.**
>
> No. There is not DNA, fingerprints, but the law in this case doesn't require forensic evidence. This is a case of circumstantial evidence that the defendant was in possession of this handgun.
>
> No, the officers did not see him with it waving it around, but they know that he was in possession of it because they saw him stash it. **Why else would he run away? Who would leave their car, abandon it like that if they didn't know that they were about to be caught with it?** Had Officer Cook continued to drive down past where the defendant's car was parked he would have seen him standing there with the handgun in his hand.

(Emphasis added.)

Appellant did not object to the prosecutor's remarks, but now contends that it was plain error for the trial court to allow the prosecutor's comments about him running away because, under the circumstances of this case, no inference could be drawn that his doing so showed a consciousness of guilt related to the illegal possession of a firearm. He argues that the court and the prosecutor knew—but the jury did not—that appellant was apprehended with illegal drugs in his possession because these charges were nolle prossed. Because there was no physical evidence linking appellant to the gun and it was a "circumstantial case," the prosecutor was "ask[ing] the jury to infer a consciousness of guilt from [appellant's] flight" related to the possession of a firearm. That, however, was improper because it was equally likely that he ran because he possessed illegal drugs.

Appellant cites *Thomas v. State*, 372 Md. 342, 352 (2002), in which the Court of Appeals adopted the four-prong test in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), to determine when flight is admissible to show consciousness of guilt for the crime for which the defendant is charged:

> [T]he probative value of the evidence "depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

In *Myers*, the defendant was apprehended for an armed bank robbery, which occurred in Florida in June 1974, by California law enforcement officers, one of whom claimed that Myers had attempted to flee. 550 F.2d at 1038-39. Prior to the Florida trial, Myers was tried and convicted in February 1975 for a July 1974 armed bank robbery in

Pennsylvania. *Id.* at 1039 n.2. On appeal of the Florida conviction, Myers argued that a jury instruction concerning flight from the California police as consciousness of guilt for the Florida robbery should not have been given. The United States Court of Appeals for the Fifth Circuit agreed, stating that "[e]ven assuming that Myers did attempt to flee, giving a flight instruction would still be improper because the third inference upon which the probative value of flight as circumstantial evidence of guilt depends, *from consciousness of guilt to consciousness of guilt concerning the crime charged*, cannot be drawn." *Id.* at 1050 (emphasis added). In other words, because it was known that Myers had committed an armed bank robbery in Pennsylvania between the Florida robbery and the California arrest, "the hypothesis that he fled solely because he felt guilty about the Pennsylvania robbery [could not] be ruled out." *Id.* at 1050.

Appellant also cites *Thompson v. State*, 393 Md. 291 (2006), which cites *Myers* and has similar facts to this case. In *Thompson*, the defendant, when approached by police investigating an armed robbery and shooting, fled on a bicycle. He was apprehended with 86 vials of cocaine on his person. He was later charged with both attempted murder and drug possession, but the trial court dismissed the drug charges prior to trial. The first trial resulted in a mistrial and the State elected to prosecute again the attempted murder charge and a related handgun charge. The trial court gave a flight instruction to the jury over objection, and Thompson was convicted. The Court of Appeals reversed Thompson's conviction, holding that giving the jury instruction was an abuse of discretion because "the jury was not presented with evidence of what may have

been an alternative and at least a cogent motive for Mr. Thompson's flight, specifically that drugs were found on his person." *Id.* at 313-15. The *Thompson* Court emphasized the "importance of connecting a defendant's consciousness of guilt to a consciousness of guilt for the specific crime alleged." *Id.* at 313 (quoting *Thomas*, 372 Md. at 354-55). The jury instruction placed Thompson "in a difficult situation where he must either not object to the highly prejudicial evidence concerning his possession of a significant amount of cocaine being introduced to the jury to explain his flight (or perhaps forced to make a Hobson's choice to introduce such evidence himself), or decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight." *Id.* at 314.

Appellant argues that the rationale in *Myers* and *Thompson* applies in this case because the prosecutor was essentially asking the jury to infer that appellant ran because of the gun, when there could have been two different, possible motivations—the gun and the drugs—that were equally reasonable, but the jury was not aware of the drugs.

The State responds that appellant's argument, which was not preserved for appellate review, does not merit plain error review. In addition, it contends that there was no error because the prosecutor's comments were meant to explain why the officers gave chase to appellant when he took off running and why they did not obtain DNA or fingerprint evidence. In the State's view, the prosecutor was not asking the jury to infer consciousness of guilt from appellant's flight. Officer Cook had testified that his "unprovoked flight" upon seeing the police was "suspicious." Appellant, in his

testimony, had advanced an alternative, non-prejudicial reason for him to flee. He had explained that when the police cars approached, he was asking people in the parking lot if they knew the whereabouts of his friend Darrell. When the man to whom he was talking ran off, he also ran because he was "nervous" and "scared." Therefore, it was proper for the prosecutor to respond during closing arguments that he ran for a different reason.

And, even if a jury flight instruction would have been improper, the State contends that it was not error to argue that appellant's "flight was probative of whether he possessed the handgun found in the car" during closing argument. To support the latter argument, the State cites "numerous cases in which appellate and trial courts have approved a missing witness argument while declining to endorse a missing witness instruction." *See, e.g.*, *Harris v. State*, 458 Md. 370, 412 (2008); *Lowry v. State*, 363 Md. 357 (2001); *Patterson v. State*, 356 Md. 677 (1999). According to the State, the difference between what a court is allowed to instruct a jury and what a prosecutor is allowed to argue stems from the "weight" of a judge's words over counsel's words, noting that juries are instructed that closing arguments do not constitute evidence. *See Harris*, 458 Md. at 402.

Plain error review is a "rare, rare phenomenon," *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)), and is reserved only for unpreserved errors that are "compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial." *Cook v. State*, 118 Md. App. 404, 412 (1997) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)).

The Court of Appeals has explained plain error review as follows:

> First, there must be an error or defect[—]some sort of deviation from a legal rule[—]that has not been intentionally relinquished or abandoned . . . by the [defendant]. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the [defendant]'s substantial rights, which . . . means [that the defendant] must demonstrate that [the error] affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error[—]discretion [that] ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

Givens v. State, 449 Md. 433, 469 (2016) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

In deciding whether to exercise our discretion, we consider "the egregiousness of the error, the impact on the defendant, the degree of lawyerly diligence or dereliction, and whether the case could serve as a vehicle to illuminate the law." *Cook*, 118 Md. App. at 412.

In closing argument, "counsel are free to discuss the evidence and all reasonable and legitimate inferences that may be drawn from the evidence." *Clarke v. State*, 97 Md. App. 425, 431 (1993) (citing *Wilhelm v. State*, 272 Md. 404, 412 (1974)). And, we do not disturb the trial court's ruling on the propriety of closing arguments "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995).

We decline to exercise our discretion to review for plain error in this case. Even were we to assume error, it is not "plain," i.e., "clear or obvious, rather than subject to

reasonable dispute" in the context of this case. *Givens*, 449 Md. at 469. If a "theory requires the extension of precedent, any potential error could not have been 'plain.'" *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455 (5th Cir. 2005) (internal citations and quotations omitted).

Appellant's argument rests on extending case law regarding the propriety of a jury flight instruction to the prosecutor's closing argument concerning appellant's motivation to run from the police. Success on appellate review would depend on the extension of the *Myers* and *Thompson* rationale to an unobjected to comment during closing argument that presented an alternative to appellant's explanation during the trial of why he ran from the police. That would appear to be a fair comment on the evidence and a reasonable inference that could be drawn from it.

Here, the State had requested a jury flight instruction, which the court denied:

> The jury doesn't know it, but you have told me that apparently that there was some drugs . . . It could be that he was fleeing to avoid because of his consciousness of possessing controlled substances. I can't make the finding necessary in order to give the instruction.

When the court added, "There is evidence of flight, you can certainly argue it to the jury," appellant did not object. In short, we are not persuaded that the prosecutor's comments presented an instance that is so "compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial," as to warrant plain error review.

II.

Appellant contends that the trial court erred in imposing separate sentences for both illegal possession of a regulated firearm and illegal possession of the ammunition in that firearm.

In *Potts v. State*, 231 Md. App. 398, 411-12 (2016), we held that a defendant's "separate sentences for possession of a firearm after having been convicted of a crime of violence and possession of ammunition after having been prohibited from possessing a regulated firearm" did not merge under a unit-of-prosecution analysis. We explained:

> The specific statutes at issue in the case *sub judice* are not predicated upon possession of the same loaded firearm, but upon possession of a firearm under [Public Safety Article ("PS")] § 5-133(c)(1) and possession of ammunition under PS § 5-133.1. The enactment of PS § 5-133.1 as a separate statutory provision and the plain meaning of the statutory language reveal an intent on the part of the Legislature to punish possession of ammunition separately from a conviction for possession of a firearm under PS § 5-133(c)(1). This is also supported by the legislative history. PS § 5-133.1 was enacted . . . as part of the Maryland Firearm Safety Act of 2013, for the purpose of "significantly modif[ying] and expand[ing] the regulation of firearms, firearms dealers, and ammunition in the State[.]" S.B. 281 (2013 Sess.), Fiscal & Policy Note at p. 1. That statute provides for a separate sentence under PS § 5-133.1(c).

231 Md. App. at 412-13.[2]

Appellant argues that *Potts* was wrongly decided and should be reconsidered by this Court. He further submits that *Dickerson v. State*, 324 Md. 163 (1991), provides the correct test. In *Dickerson*, the Court of Appeals held that possession of a vial of cocaine did not give rise to two separate convictions for possession of cocaine and possession of

[2] The *Potts* Court further determined that merger was not required under the required evidence test, the rule of lenity, or the principles of fundamental fairness. *Id.* at 413.

paraphernalia. *Id.* at 174. The *Dickerson* Court considered whether the General Assembly "intended that two convictions result whenever a container is used to contain, store or conceal a controlled dangerous substance." *Id.* at 170. It reasoned that "the use of the vial had no purpose other than to contain the cocaine," and that "the possession of cocaine necessarily involved the use of drug paraphernalia." Therefore, it did not "believe the Legislature intended separate punishment for possession of the vial, which contained the cocaine." *Id.* at 173. It concluded that "when there is no other drug paraphernalia, a defendant may only be convicted of possessing cocaine with the intent to distribute, even though the cocaine possessed is in a vial, which is thereby being used as drug paraphernalia." *Id.* at 174.

We are not persuaded to revisit *Potts*. Here, as in *Potts*, the unit of prosecution under PS § 5-133(c)(1) was the firearm and under PS § 5-133.1, the ammunition. The vial in *Dickerson* was essential to the possession of the cocaine. But, ammunition is not essential to the possession of a gun or a gun to possession of ammunition. Nor does a vial holding cocaine materially affect the use or the character of the substance, but pairing ammunition with a firearm transforms a gun into a more lethal weapon.

III.

Appellant and the State agree that two of appellant's three convictions for illegal possession of a regulated firearm should be vacated because all three convictions were based on possession of the same firearm.

In this case, the jury found appellant guilty of illegal possession of a regulated firearm, and, pursuant to the parties' stipulation of disqualification, the court entered guilty verdicts on two counts under PS § 5-133(c)(1), governing possession after having been convicted of a crime of violence, and one count under PS § 5-133(b)(1), governing possession after having been convicted of a disqualifying crime. Appellant was sentenced on only one of the counts under PS § 5-133(c)(1); the other two convictions were merged for sentencing purposes.

As noted earlier, the unit of prosecution under PS § 5-133 was the firearm. Therefore, appellant's possession of a single regulated firearm constituted a single violation of PS § 5-133. *See Melton v. State*, 379 Md. 471, 474 (2004) ("[T]he Legislature did not intend for a court to render separate multiple verdicts of convictions on an individual for illegal possession of a regulated firearm . . . where that individual fits within several categories of prior qualifying convictions, but only possessed a single regulated firearm on a single occasion."); *see also Wimbish v. State*, 201 Md. App. 239, 272 (2011) (holding that only one of the convictions under PS § 5-133 can stand, where the defendant "possessed a single regulated firearm, which was illegal under § 5-133 for two reasons (his age and his prior conviction for a crime of violence)," and affirming the conviction for the offense with the greater penalty).

In sum, only the conviction for count 1 under PS § 5-133(c)(1) can stand.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ON COUNTS 2 AND 3 VACATED. ALL OTHER JUDGMENTS AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY PRINCE GEORGE'S COUNTY.