UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1966

September Term, 2014

KENNEZ MOTLEY

v.

STATE OF MARYLAND

Krauser, C.J.,
Leahy,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: July 15, 2016

Kennez Motley, appellant, was convicted by a jury, in the Circuit Court of Prince George's County, of multiple firearm offenses, including: possession of a regulated firearm after having been convicted of a "crime of violence," possession of a regulated firearm after having been convicted of a "disqualifying crime," and possession of a regulated firearm after having been "found involved as a juvenile [in] an act that would have been a disqualifying crime if committed by an adult." In this appeal, he presents two questions for our review. Rephrased to facilitate that review, they are:

I. Did the court err by permitting the State to introduce, into evidence, photographs, retrieved from Motley's cellphone, which showed Motley in possession of two assault rifles?

II. Did the court err by permitting the State to introduce evidence of Motley's prior out-of-state conviction for purposes of proving that Motley was prohibited, by law, from possessing a firearm?

For the reasons that follow, we affirm.

Trial

Testimony presented at trial established that, on the evening of November 16, 2013, "three masked gunmen came barreling" into the home of Debra and Eric Gordon through their back patio door. The intruders were dressed in black "uniform apparel" and were wearing "square-faced masks" that left visible only their eyes, eyebrows, and lips. All three intruders were armed: one of them was carrying an assault rifle, and the other two were wielding handguns.

Upon finding Mrs. Gordon in the house, the intruders pressed their guns against her head and threatened to kill her if she did not "just do what [she was] told to do."

Then, after tying her hands behind her back, they placed a hood over her head and "tased her" repeatedly.

As these events were transpiring, Mr. Gordon pulled his car into the driveway of his home. Upon entering his house, he was met by the masked intruders, who, while pointing their guns at him, repeatedly "smacked" his head with a pistol and demanded to know "where the money [was]." When Mr. Gordon did not respond to that question, they ripped the hood off of Mrs. Gordon's head and forced her upstairs for the purposes of showing them where cash and other valuables were stored.

In the meantime, Mr. Gordon had managed to escape from his home and run to his neighbor's house where he obtained a "pistol" and instructed his neighbor to call the police. He then returned, with his neighbor's gun in-hand, to the front of his house, just as two of the three robbers were leaving his home. As they proceeded down the driveway, Mr. Gordon took aim at the intruders and pulled the trigger of the handgun but, to no avail, as "the pistol wouldn't fire." The robbers then, after briefly giving chase to Mr. Gordon, fled, taking with them $21,000 in cash and a Rolex watch.

Following the robbery, a friend of Mr. Gordon's provided him with photographs of several individuals, who the friend suspected were involved in the robbery. One of the individuals depicted in the photographs was Motley. Mr. Gordon immediately recognized Motley as one of the three men who had invaded his home and the two others, as well. He also identified a watch, pictured in one of those photographs, as the watch that had been stolen from his house during the robbery.

Mr. Gordon thereafter gave the photographs to a detective with the Prince George's County Police Department, stating that the men depicted in them were the three individuals who had broken into his house. Later, when Mr. and Mrs. Gordon were each shown photographic arrays at the police station, they separately identified Motley, from their respective arrays, as one of the three intruders. In performing that identification, Mrs. Gordon stated, "I will never forget [Motley's] eyebrows and his mustache." Also, from those photographic arrays, Mr. Gordon was able to pick out Rashard Washington as one of the two other robbers, and Mrs. Gordon was able to identify Raymond Ford as the third robber. And, according to Motley's wife, Ford and Motley were "[l]ife-long friends."[1]

After he was arrested for his alleged participation in the robbery of the Gordons' home, Motley denied any knowledge of or involvement in the robbery and consented to a search of his cellphone. The ensuing search of that phone brought to light two photographs, each of which showed Motley "holding two rifles." According to the detective who questioned Motley about those photographs, Motley stated that both rifles were his.

Subsequently, Mr. and Mrs. Gordon identified Motley, at trial, as one of the three intruders. Mrs. Gordon testified that she was able to do so because, during the robbery, when the hood was removed from her head, she was standing directly in front of Motley

[1] Although Motley's wife testified that Ford and her husband were "life-long friends," Motley claimed that Ford was only an "acquaintance" but, nonetheless, admitted that he attended a birthday party for Ford's wife, at which he was photographed with Ford and his wife.

and was able to look at him "eye to eye." And, Mr. Gordon stated that, when he returned to his house, with his neighbor's gun in hand, the motion lights that were on his property "lit up" his driveway, allowing him to clearly see Motley's face, as Motley had exited the Gordons' home without his mask on.

Discussion

I.

At trial, the court permitted the State to introduce the two photographs that had been recovered by the police from Motley's phone, showing him holding two assault rifles. Motley's first contention is that trial court erred in admitting those two photographs because they "were not relevant, were more prejudicial than probative, and confused the issues and misled the jury." We find that this issue was not preserved for appellate review because, as the State put it, "Motley objected only to the admission of the photographs themselves, and not to the testimony about" what they showed. Moreover, assuming that Motley's claim was preserved, we believe that the trial court did not err in admitting that evidence, because the photographs were probative, were not unfairly prejudicial, and did not confuse or mislead the jury. Finally, we conclude that, even if the admission of this evidence was error, that legal impropriety amounted to nothing more than "harmless error."

Waiver

"Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection," *DeLeon v. State*, 407 Md. 16, 31 (2008) (internal citation omitted), which is precisely what occurred in the proceedings below. At trial, Motley did object to the admission of the two photographs that had been recovered from his cellphone, but he failed to object to testimony about what was depicted in those photographs, which was presented both before and after those photographs were admitted into evidence.

Before the introduction of the photographs, the State asked the detective, who had questioned Motley at the police station, about those photographs. When the detective was shown the two photographs by the prosecution, he stated that he "definitely recall[ed] seeing the photo depicting [Motley] holding the rifles." Motley did not object to this statement, nor did he object to the detective's ensuing testimony regarding the authenticity of those photographs. In fact, it was not until the State moved to admit the photographs into evidence that the defense objected.

Furthermore, after the photographs were admitted into evidence, the detective testified that Motley "claimed [the weapon in the photographs] as his own." Then, later at trial, when Motley finally took the stand, the State asked whether he offered to give the detective the assault rifle depicted in the photographs, to which Motley replied: "No. I offered to give him my phone and that I had an AR-15 and range and everything." [2] In

[2] An AR-15 assault rifle "is the civilian equivalent of the military M–16 rifle." *Owens v. State*, 352 Md. 663, 699 n.3 (1999).

sum, by repeatedly failing to object to testimony describing the photographs at issue, Motley waived the issued as to the admissibility of those photographs.

Motley nonetheless suggests that his failure to object to the admission of the photographs should not render the issue unpreserved for appellate review. Notably, he contends that the failure to object to the testimony of the detective was, in effect, a strategic decision as that testimony was "exculpatory." But, such a strategic decision does not affect the issue's "unpreserved" status. The Court of Appeals has observed: "It would be unfair to the trial court and opposing counsel if the appellate court were to review on direct appeal an unobjected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent." *Robinson v. State*, 410 Md. 91, 104 (2009) (internal citation omitted). "[I]f the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection," the Court observed, "simply encourages defense gamesmanship." *Robinson*, 410 Md. at 104. In short, Motley's decision not to object, whether strategic or not, does not alter the fact that the issue of the photographs was not preserved for appellate review because Motley failed to object to the testimony describing the contents of the photographs.

Admission of the Photographs

Although not preserved for our review, we shall nonetheless address Motley's contention that the court erred in admitting the photographs at issue into evidence, because such photographs "were not relevant, were more prejudicial than probative, and confused the issues and misled the jury." Motley's contention, that the photographs were

not relevant as to any issue before the trial court because, at trial, "the State's witnesses testified that [Motley] possessed a handgun during the robbery, yet the photographs depicted [Motley] with two rifles," is unpersuasive.

Maryland Rule 5-401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And, as we said in *Hayes v. State*, 3 Md. App. 4, 8-9 (1968), "it is always relevant to show that the defendant before the date of the crime had in his possession the means for its commission" (internal citations omitted). To be more specific, evidence of a defendant's gun possession is relevant to show that the defendant was involved in the alleged crime. *See Hayes*, 3 Md. App. at 4-9 (holding that a trial court did not err in admitting testimony that the defendant possessed, prior to the shooting, a similar type of weapon that the victim had been shot with, because such testimony was "a proper showing of possession of the means of committing the crime"); *Reed v. State*, 68 Md. App. 320, 330 (1986) (holding that a trial court did not err in permitting a witness to testify that she saw the defendant carrying a handgun, two years prior to the murder for which he was on trial, because such evidence "was probative to show that the [defendant] possessed the type of weapon employed in killing [his victim]"); *Grymes v. State*, 202 Md. App. 70, 104 (2011) (holding that the admission, into evidence, of a handgun, along with photographs of where that gun was recovered, was not an abuse of discretion because such evidence was relevant as the prosecution had introduced other evidence that the defendant was previously "seen with a revolver style handgun prior to the crime," and the room in which

the revolver was discovered was located at the bottom of the defendant's building); and Ware *v. State*, 360 Md. 650, 676 (2000) (holding that testimony that the defendant "had a gun and always carried it with him" was relevant to establish both that the defendant possessed a gun and that he had the habit of carrying one, because "the habit of carrying a gun made it more likely that he had a gun on the day of the murders").

First of all, the photographs at issue were evidence of Motley's alleged involvement in the robbery. Although, as Motley points out, both of the Gordons testified that he was carrying a handgun, not a rifle, during the robbery, they both testified that one of the three intruders was armed with a rifle, which, based upon their respective prior military experience and weapons training, they identified as an "assault rifle." That testimony, along with the photographs of Motley holding two assault rifles and the testimony of Motley's wife that he and one of the other alleged robbers were "life long friends," was evidence that Motley not only supplied one of the weapons that was used during robbery, but that he directly participated in that robbery. Or, as the State succinctly put it: the photographs were relevant as "they tended to corroborate the identification testimony of the victims by establishing that Motley owned a gun like that used by one of the robbers."

Although there is no Maryland case directly on point, *Lawrence v. State*, 124 So. 3d 91 (Miss. Ct. App. 2013), a Mississippi appellate decision, not only addresses the very issue before us—that is, the admissibility of photographs showing that the accused was in possession of a firearm similar to the one involved in the robbery—but, in addressing that issue, the Mississippi court applied a Mississippi rule of evidence

identical to its Maryland counterpart, Maryland Rule 5-401. In that case, Lawrence was charged with, and ultimately found guilty of, murder after having shot and killed an individual during the course of a home robbery. *Lawrence*, at 92. At trial, an eyewitness to the killing, testified that Lawrence and another man had entered the victim's home. *Id*. at 93. One had a handgun, and the other was wielding an AK-47 assault rifle. *Id*. The State then introduced, into evidence, a photograph, recovered from Lawrence's cellphone, which depicted an AK-47 assault rifle in Lawrence's bedroom, as well as the actual assault rifle itself. *Id*. at 92-94.

In holding that the photographic evidence was relevant, the Mississippi appellate court, applying a rule of evidence identical to Maryland Rule 5-401,[3] found that "the photograph of the rifle and the actual rifle matched the description" of the rifle used during the commission of the crime, and thus the admission of that evidence "made it more probable that Lawrence committed the crime." *Id*. at 96. As in *Lawrence*, the assault rifles, depicted in the photographs at issue, matched the description of a weapon used during the commission of the crime and "made it more probable" that Motley was involved in the crimes in question.

Moreover, Motley's assertion that "the State made no allegations at trial that [he] supplied the codefendants with a rifle or that the rifles depicted in the photographs [were]

[3] In its analysis of whether the photograph of the assault rifle was relevant, the Mississippi appellate court applied "Mississippi Rule of Evidence 401," which defines "'relevant evidence' as 'evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The language of that Mississippi rule of evidence matches the language of Maryland Rule 5-401.

the same type as that used in the robbery" is of no consequence, as the jury was free to draw reasonable inferences from the evidence presented, regardless of whether those inferences were expressly drawn by either party. *State v. Mayers*, 417 Md. 449, 466 (2010) ("We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence . . . .") (internal citation omitted).

Furthermore, the photographs at issue were evidence that Motley was guilty of the three firearm offenses of which Motley was ultimately convicted, namely: possession of a regulated firearm after having been convicted of a "crime of violence," possession of a regulated firearm after having been convicted of a "disqualifying crime," and possession of a regulated firearm after having been "found involved as a juvenile [in] an act that would have been a disqualifying crime if committed by an adult." At trial, Motley agreed to the fact that he had previously been convicted of a "crime of violence" and a "disqualifying crime" and that he had been "found involved as a juvenile [in] an act that would have been a disqualifying crime if committed by an adult." Thus, in order to prove the commission of the firearm offenses, with which Motley was charged, the State had only to show that Motley was in possession of a "regulated firearm," such as an AR-15,[4] in the State of Maryland.

[4] Section 5-101(r) of the Public Safety Article of the Maryland Code defines a "Regulated firearm," in relevant part, as: "(2) a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon: . . . (xv) Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle. . . ."

The pictures, of course, established that Motley was in possession of a regulated firearm, and the testimony of the detective, who had questioned Motley about the assault rifles depicted in the photographs, indicated that that possession occurred in the State of Maryland. Specifically, the detective testified that Motley had told him that he kept an assault rifle[5] at his father's house, which subsequent testimony established was located in Waldorf, Maryland.[6] Thus, the photographs were relevant and therefore admissible, as evidence, to show both that Motley was involved in the robbery of the Gordon home and that he was in possession of a regulated firearm.

Having determined that the photographs of Motley holding the assault rifles were relevant evidence of the crimes charged, we turn next to Motley's unpreserved contention that the photographs were, in any event, unfairly prejudicial. Maryland Rule 5–403 provides that even relevant evidence "may be excluded if its probative value is

[5] It is unclear as to whether Motley owned one or two assault rifles. The photographs, about which the detective testified, clearly show that Motley was holding two assault rifles. Yet, at times, the detective's testimony refers to a single rifle, and at other times two rifles. Moreover, the detective testified that Motley admitted to owning an assault rifle, which he kept at his father's house in Maryland. And Motley, when he took the stand, testified that he told the detective that he had "an AR-15 and range and everything."

[6] Although the State did not expressly advance this theory at trial, the jury was free to find that Motley, who had admitted to owning an AR-15, was guilty of these illegal possession of a regulated firearm offenses because there was testimony that Motley stored at least one of the assault rifles in Maryland, which meant that he had "dominion or control," and thus possession, of a regulated firearm in Maryland, in violation of Maryland law. *Parker v. State*, 402 Md. 372, 407 (2007) ("In order for the evidence supporting the handgun possession conviction to be sufficient, it must demonstrate either directly or inferentially that [the defendant] exercised some dominion or control over the prohibited item . . . . Possession may be actual or constructive, and may be either exclusive or joint") (internal citations omitted).

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403 (2015). Evidence "is considered unfairly prejudicial when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which the defendant is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (internal citations and brackets omitted). And, in determining "whether a particular piece of evidence is unfairly prejudicial," we balance "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014) (internal citations omitted). But, we caution that evidence that "prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5–403." *Odum v. State*, 412 Md. 593, 615 (2010) (internal citation omitted).

At the outset, we note that there is little case law to support a claim that photographic evidence was unfairly prejudicial, a fact noted by the Court of Appeals in *Mason v. Lynch*, 388 Md. 37 (2005), where it observed: "Among the scores of this Court's opinions involving the admission or exclusion of photographic evidence, it is extremely difficult to find cases in which this Court has held that the trial court's ruling, as to the admission or exclusion of photographs, constituted reversible error." *Mason*, 388 Md. at 52. And "the very few cases finding reversible error are ones," noted the Court, "where the trial courts admitted photographs which this Court held did not accurately represent the person or scene or were otherwise not properly verified." *Id*.

With this in mind, we note the absence of any claim, by Motley, that the photographs at issue were inaccurate or that they were not properly verified. Rather, Motley merely suggests that the probative value of the photographs was substantially outweighed by a danger of unfair prejudice. We disagree. The probative value, or "utility," of this evidence was significant. As noted earlier, the photographs were evidence of Motley's participation in the armed robbery and his unlawful possession of a regulated firearm.

Furthermore, the photographs posed no danger of unfair prejudice. They merely showed Motley holding two assault rifles, a depiction that had already been described, by the testimony of the detective, without objection. In short, by the time that the photographs were introduced, the jury was well aware of what they showed and thus they served only to confirm what had already been testified to. Thus, the probative value of the photographs was not "substantially outweighed by a danger of unfair prejudice."

Finally, we turn to Motley's assertion that the jury must have been confused and misled by the photographs of him holding the assault rifles. He reasons that, because it was the State's position, at trial, his illegal possession of a regulated firearm took place during the robbery, it made no sense for the jury to acquit him of all the charges that related to his alleged participation in the robbery but find him guilty of the possession of a regulated firearm offenses, unless it was confused by the admission of the photographs.

Motley's claim is unpersuasive for three reasons. First, as discussed earlier, the jury could have found Motley guilty of illegal possession of a regulated firearm simply

based on the evidence presented that he owned and stored at least one assault rifle[7] in Maryland. Second, it is irrelevant that the photographs were introduced without testimony as to when they were taken, as the jurors were free to examine the photographs and conclude for themselves approximately when the photographs were taken. Moreover, the defense not only failed to ask the detective, during cross examination, as to when the photographs were taken, but nothing prevented Motley from challenging the nature, timing, or reliability of the pictures.

And, third, Motley's claim, that the jury was confused and misled by the photographs, because it acquitted him of the robbery charges but convicted him of the unlawful possession of a firearm charges, ignores the fact that the jury may have simply rendered a compromise verdict, which, here, was more than a possibility as it appears, from the record, that there was significant disagreement among the jurors during their deliberations. For example, during those deliberations, the court received several notes from the jury, one of which indicated that six of the jurors believed that Motley was guilty of armed robbery, first-degree burglary, and first-degree assault, while the other six jurors believed he was innocent of those charges. In fact, it was not until after the court re-instructed the jury on several points, including the requirement that it could not convict Motley of any crime unless it reached a unanimous verdict of guilt as to that crime, that the jury returned its verdict.[8]

[7] *Supra* note 5.

[8] Motley claims that the verdicts were "inconsistent factually and legally," but he nonetheless concedes that that issue is not preserved for our review. We (continued…)

Harmless Error

Finally, as noted earlier, even if the trial court erred in admitting the two photographs at issue into evidence, that error was harmless beyond a reasonable doubt, as the testimony, from the police detective describing what was depicted in the photographs, was admitted without objection. Thus, the admission of those photographs was, at worst, cumulative, and consequently harmless beyond a reasonable doubt. *See Vandegrift v. State*, 82 Md. App. 617 (1990) ("Even assuming, for the sake of argument, that it was error to have admitted the chemist's report, in light of [the forensic chemist's] testimony, the report was merely cumulative and its admission was harmless beyond a reasonable doubt.").

II.

Motley next contends that the trial court erred in permitting the State to introduce evidence of Motley's prior conviction, in the District of Columbia, for assault on a police officer, to show that Motley was prohibited by law from possessing a regulated firearm in Maryland and therefore was guilty of two of the three illegal possession of a firearm charges of which he was ultimately convicted: possession of a regulated firearm after having been convicted of a "crime of violence," in violation of § 5-133(c)(1) of the

(…continued) therefore decline to address this unpreserved claim, other than to note that even if those verdicts may have been factually inconsistent, they were not legally inconsistent, and therefore not improper. *Travis v. State*, 218 Md. App. 410, 457 (2014) ("jury verdicts which are illogical or factually inconsistent are permitted in criminal trials") (internal citation omitted).

Maryland Code ("P.S. § 5-133(c)"), and possession of a regulated firearm after having been convicted of a "disqualifying crime," in violation of § 5-133(b) of the Maryland Code ("P.S. § 5-133(b)").[9]

The Maryland Code defines a "crime of violence" as, among other things, "an offense under the laws of another state or the United States that would constitute" a crime of violence in Maryland, P.S. § 5-133(c)(iii), and a "disqualifying crime," under the same section of the code, includes a "crime of violence." P.S. § 5-101(g)(1). Therefore, if Motley's prior D.C. conviction was a "crime of violence," under Maryland law, it was also a "disqualifying crime" under Maryland law.

At trial, Motley moved to exclude the evidence of his conviction in the District of Columbia for assault on a police officer, [10] claiming that it was not admissible to establish that he was in unlawful possession of a regulated firearm in Maryland, because that

[9] The third illegal possession of a firearm charge, which Motley was ultimately convicted of, was possession of a regulated firearm after having been "found involved as a juvenile [in] an act that would have been a disqualifying crime if committed by an adult." But the predicate offense, for that charge, involved a different conviction that is not relevant to this issue.

[10] The exact dates of Motley's prior offense and conviction are unclear. Motley, in his appellate brief, states that the prior conviction occurred on December 22, 2006. And then, in his reply brief, he asserts that the date of the prior conviction was November 10, 2008, "for conduct that occurred on April 8, 2007." Unfortunately, the record does not resolve this ambiguity. "Exhibit 3," which is an "Order of Discharge and Certificate Setting Aside Conviction," states that Motley was convicted for "Assault on Police Officer" on December 22, 2006 and that the conviction was "set aside" on April 27, 2010. And, "Exhibit 4," which is a "judgment in a criminal case" from the Superior Court of the District of Columbia, states that, on November 10, 2008, Motley pleaded guilty to one count of "Assault on a Police Officer (misd)," for an offense that occurred on April 8, 2007.

conviction had been "set aside," pursuant to § 24-906(e) of the D.C. Code. The court below denied that motion, finding that since § 24-906(f)(8)[11] of the D.C. Code permits the use of a "set aside" conviction as the predicate offense for a violation of § 22-4503 of the D.C. Code, which governs: "Unlawful possession of firearm[s]," and since § 22-4503 was the "D.C. version of Maryland Public Safety 5-133," it logically followed that that "set aside" conviction could be used, in Motley's case, as the predicate offense for a violation of § 5-133.

The day after the court denied that motion, Motley requested that the court reconsider the issue, asserting that § 24-906(f)(8) of the D.C. Code, the provision that the trial court had said permitted a court to consider a prior "set aside" conviction for unlawful possession of a firearm, did not apply because that provision was, Motley asserted, limited to "set aside" convictions that were "punishable by more than 180 days." The court, however, rejected that argument, concluding that Motley's prior D.C. conviction for assault on a police officer, was a "crime of violence" (and thus a "disqualifying crime" as well) under Maryland law. In drawing this conclusion, the trial court likened the D.C. conviction to the crime of second-degree assault in Maryland, one of the enumerated offenses, under P.S. *See* P.S. § 5-101(c)(3).[12] After this ruling,

[11] That D.C. statutory provision expressly provides: "[a] conviction set aside under this section may be used . . . [in] determining whether a person has been in possession of a firearm in violation of § 22-4503." D.C. § 24-906 (f)(8).

[12] Section 5-101(c)(3) of the Public Safety Article of the Maryland Code states, in relevant part: "Crime of violence means . . . assault in the first or second degree."

Motley agreed to stipulate that he had been convicted of a "crime of violence" and thus a "disqualifying crime" for purposes of the two unlawful possession of a firearm charges at issue but stated that he was doing so without waving his objection to the admission of his D.C. conviction.

On appeal, Motley challenges the court's admission of the evidence of his prior D.C. conviction, claiming, first, that his prior conviction, for assault on a police officer in D.C., was not a "crime of violence" or a "disqualifying crime" under Maryland law, and, second, that the trial court, in any event, should not have admitted that prior conviction as evidence that Motley had previously been convicted of a "crime of violence" and "disqualifying crime" because it had been "set aside" under D.C. law. His first claim was waived.

"It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State,* 355 Md. 528, 541 (1999) (internal citations omitted). At trial, Motley objected to the admission of the D.C. conviction into evidence, on the grounds that the conviction had been "set aside" under D.C. law, but not that the D.C. conviction did not constitute a "crime of violence" or a "disqualifying crime," before stipulating to its admission.[13] Thus, we decline to address

[13] We do note, however, that it appears that Motley, at sentencing, admitted that his conviction for assaulting a police officer rested on an "unlawful touching" of that officer, or, as Motley put it, "a hit from the door." Thus, were we even to consider his unpreserved claim that his prior D.C. offense does not constitute a "crime of violence" in Maryland, Motley would fare no better, as a second-degree assault in Maryland, which qualifies a "crime of violence," "reaches any unlawful touching, whether (continued…)

the merits of Motley's first contention, raised for the first time on appeal, that his prior D.C. conviction for assaulting a police officer was not a "crime of violence" or a "disqualifying crime," and therefore did not constitute a predicate offense for the two illegal possession of a regulated firearm convictions at issue, because this claim was not raised below.

Motley's second contention that the trial court erred in permitting the State to introduce his prior D.C. conviction for assaulting a police officer and was thereby prohibited from possessing a regulated firearm in Maryland, as that conviction had been "set aside," under D.C. law, is without merit. Motley claims that a "set aside," under D.C. law, is "the equivalent of a Maryland expungement," which he maintains, precluded its admission into evidence in the proceeding below. We disagree. A "set aside" conviction is not the equivalent of an "expunged" conviction under Maryland law.

Initially, we note, however, that the trial court did mistakenly rely solely upon the law of the District of Columbia, rather than the law of Maryland, in ruling that Motley's prior conviction was admissible to show that he was prohibited from possessing a regulated firearm in Maryland. [14] *See Jones v. State*, 420 Md. 437, 457-59 (2011) (where

(…continued) violent or nonviolent and no matter how slight." *United States v. Royal*, 731 F.3d 333, 342 (4th Cir. 2013).

[14] As previously noted, the trial court looked to D.C. law in order to determine how and if the prior conviction could be used in Motley's prosecution. The court found that D.C. § 24-906(f)(8) permitted the use of a "set aside" conviction to determine whether someone is in unlawful possession of a firearm, in violation of D.C. § 22-4503. And, because the trial court found that D.C. 22-4503 was equivalent to P.S § 5-133, the trial court permitted the prior "set aside" conviction to be admitted as the predicate offense for the two illegal possession of a firearm charges at issue. Motley (continued…)

the Court held that, in determining whether an out-of-state conviction is a "disqualifying crime" under P.S. § 5-101, Maryland courts should look to Maryland's felony classification system because "[t]he diversity of classification systems [among other states] necessitates the reference to Maryland's own felony classification to ensure uniformity of application of the law."); *see also McCloud v. Dep't of State Police, Handgun Permit Review Bd.*, 426 Md. 473, 485 (2012) ("By looking to the Maryland equivalent to determine whether an out-of-state conviction is a disqualifying crime, we effect Maryland policy and legislative intent more than we would by leaving it up to other states to define which criminal offenses are serious enough to bar obtaining a handgun permit in Maryland.").

But that error is of no consequence, as the circuit court, nonetheless, reached the right result, namely, that Motley's "set aside" conviction, under D.C. law, was admissible as evidence that he had violated Maryland law by possessing a regulated firearm in Maryland. A "set aside" conviction is not the equivalent of an "expunged" conviction. Indeed, not only are the eligibility requirements for those two remedial measures, as well

(…continued) contends that the trial court was not permitted to use his prior conviction as the predicate offense for these charges. Specifically, he claims that the D.C. § 24-906(f)(8)—the provision that permits the use of a "set aside" conviction—only applies where the "set aside" conviction was punishable by a term of imprisonment greater than one year. The parties disagree over whether Motley's assault on a police officer was punishable by a year or more, because each side cites different versions of the D.C. statute. This is a disagreement that we cannot resolve because of conflicting dates of Motley's conviction in the record. *See supra* note 10. Nevertheless, because we look to Maryland law in order to determine whether a Maryland court can use a "set aside" conviction as a predicate offense for a violation of P.S. § 5-133, this dispute is of no consequence.

as the procedures for obtaining the relief they offer, decidedly different, but, most importantly, the consequences and effects, of a "set aside" and expungement, are quite disparate as well.

In Maryland, the relevant statutory provisions governing expungement[15] allow for an individual, who has been charged with the commission of a crime, as well as an individual who has been convicted of a crime, to file a petition seeking the "expungement of a police record, court record, or other record maintained by the State," in accordance with various conditions listed in the code.[16] Then, "based upon statutorily defined entitlement, or the lack of it," the court shall grant or deny the petition. Indeed, as we observed in *State v. Nelson*, 156 Md. App. 558, 568 (2004), "the [expungement] statute seems to lodge no discretion in the court, but to mandate either granting or denying the relief, based upon statutorily defined entitlement, or the lack of it." Citing *Ward v. State*, 37 Md. App. 34, 36 (1977) (referring to the former Md. Ann. Code art. 27, § 737(e), repealed and reenacted by 2001 Md. Laws 10 at Md. Code Ann., Crim. Proc. § 10-105(e) with new language but without substantive change).

An individual, who has been convicted of a crime, is eligible for an expungement of the record of that conviction, under Maryland law, if that person: "is convicted of only one criminal act, and that act is not a crime of violence; and is granted a full and

[15] The statutory provisions governing expungements are found in § 10-101 - § 10-109, of the Criminal Procedure Article of the Maryland Code.

[16] See generally, § 10-102 - § 10-104, of the Criminal Procedure Article of the Maryland Code.

unconditional pardon by the Governor." Md. Code Ann., Crim. Proc. § 10-105(a)(8)(i-ii). Alternatively, an individual is eligible to have the record of a conviction expunged if that conviction was for one of the enumerated offenses in the expungement provisions of the Maryland code, which consist of minor, public nuisance type offenses, such as public urination or panhandling. Md. Code Ann., Crim. Proc. § 10-105 (a)(9).[17]

On the other hand, a "set aside," which is only provided under the D.C. Youth Rehabilitation Act, [18] is of a decidedly different character from an expungement. To begin with, the availability of a "set aside" is limited to "youth offenders," that is, offenders under the age of 22, who have not been convicted of murder.[19] This age limitation reflects one of the "primary objectives" of the D.C. Youth Rehabilitation Act,

[17] The minor offenses, which a person can petition to have expunged, include convictions from, any State, of the following offenses: "(i) urination or defecation in a public place; (ii) panhandling or soliciting money; (iii) drinking an alcoholic beverage in a public place; (iv) obstructing the free passage of another in a public place or a public conveyance; (v) sleeping on or in park structures, such as benches or doorways; (vi) loitering; (vii) vagrancy; (viii) riding a transit vehicle without paying the applicable fare or exhibiting proof of payment; or (ix) except for carrying or possessing an explosive, acid, concealed weapon, or other dangerous article as provided in § 7-705(b)(6) of the Transportation Article, any of the acts specified in § 7-705 of the Transportation Article." Md. Code Ann., Crim. Proc. § 10-105 (a)(9).

[18] The "D.C. Youth Rehabilitation Act," as it is called by the D.C. Court of Appeals, refers to a series of statutory provisions of the D.C. Code, found in the Chapter of the code entitled "Youth Offender Programs," §§ 24–901 - 24–907, which govern the use of sentencing alternatives for young persons convicted in the District of Columbia.

[19] The term "youth offender" is defined as: "a person less than 22 years old convicted of a crime other than murder, first degree murder that constitutes an act of terrorism, and second degree murder that constitutes an act of terrorism." D.C. Code Ann. § 24-901.

namely: to provide court's with "sentencing flexibility in order to address the particular needs of a youth offender," *Brown v. United States*, 579 A.2d 1158, 1158-59 (D.C. 1990), which, of course, is not a "primary objective" of the expungement provisions in Maryland.

Moreover, whether a "youth offender," sentenced under the D.C. Youth Rehabilitation Act, is eligible to have his or her conviction "set aside," unlike obtaining an expungement in Maryland, is a matter committed to the discretion of the sentencing court. *Edwards v. United States*, 721 A.2d 938, 945 (D.C. 1998).[20] In fact, a sentencing court, after an individual has been convicted and sentenced, has been imposed, has the latitude to "suspend the youth offender's prison sentence and order probation," or "require the 'youth offender' to serve the full sentence otherwise required by law" before ordering that the conviction be "set aside." *Dung Phan v. Holder*, 722 F. Supp. 2d 659, 663 (citing D.C. Code § 24–903(a)(1)). And, the court has broad latitude in determining when and if that "set aside" shall take effect. That is, the court may "set aside" a conviction "upon partial or full completion of the probation term." *Dung Phan*, 722 F. Supp. 2d at 663 (citing § 24–906(e)). Thus, to assign a D.C. "set aside" the same status as a Maryland expungement, here, would, in effect, mean that a discretionary

[20] In fact, Motley's conviction was "set aside" pursuant to § 24-906(e) of the D.C. Code, a provision of the D.C. Youth Rehabilitation Act, which states, in pertinent part: "Where a youth offender has been placed on probation by the court, the court may, in its discretion, unconditionally discharge the youth offender from probation before the end of the maximum period of probation previously fixed by the court. The discharge shall automatically set aside the conviction." D.C. Code Ann. § 24-906 (e).

decision of a D.C. trial court may override Maryland's strict statutory requirements for granting such a remedy in Maryland.

Furthermore, not only are the procedures and eligibility requirements different, but the consequences, or effects, of obtaining a "set aside" are quite unlike those that attend an expungement. In Maryland, the result of the expungement process, that is, the consequence of expunging a record, is, according to the relevant statutory provisions, the record's "removal from public inspection," which can be achieved in one of three ways:

> (1) by obliteration;
> (2) by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access; or
> (3) if access to a court record or police record can be obtained only by reference to another court record or police record, by the expungement of it or the part of it that provides access.

Md. Code Ann., Crim. Proc. § 10-101.

But, as the United States Court of Appeals for the Fourth Circuit observed, in discussing a previous version of the Maryland expungement statute: an expungement "involves more than the removal of records from public inspection." *United States v. Bagheri*, 999 F.2d 80, 85 (4th Cir. 1993). "An order expunging records has legal consequences that do not apply where records are merely removed from public inspection. Maryland law makes the disclosure of expunged records unlawful absent a court order." *Bagheri*, 999 F.2d 80, 85 (4th Cir. 1993); *see also* MD, Crim Proc. § 10-108. "Violators are guilty of a misdemeanor and subject to possible imprisonment of one year and a possible fine of $1,000. *Id.*; *see also* § 10-109. "Maryland law also provides criminal penalties for employers or educational institutions that require disclosure of

criminal charges that have been expunged." *Id.*; *see also* § 10-109. Those statutory measures prohibit unsanctioned access and disclosure of expunged records, which, the Fourth Circuit explained, creates a "liberty interest," or heightened expectation, in the protection of expunged records. *Id*. at 84 ("Maryland's expungement statute thus evidences an intent to prevent consideration of expunged records by parties other than the State of Maryland. . . . Maryland law, through expungement, arguably creates a liberty interest intended to extend to federal sentences. . . .").

In contrast, a conviction that has been "set aside," under D.C. law, does not carry these or any similar protections, nor does the D.C. Youth Rehabilitation Act include, as do the expungement provisions, under Maryland law, a prohibition against the use of a "set aside" conviction. In fact, a "set aside," which the District of Columbia Court of Appeals has stated "merely shields [a conviction] from public view and effect," *Solomon v. United States*, 120 A.3d 618, 622 (D.C. 2015) (internal citations omitted), can be used, according to the statutory provisions which govern "set aside" convictions, for a variety of purposes.[21] Therefore, contrary to Motley's claim, a "set aside" conviction, under

[21] According to D.C. Code Ann. § 24-906 (f)(1)-(8), a "set aside" conviction can be used:

> (1) In determining whether a person has committed a second or subsequent offense for purposes of imposing an enhanced sentence under any provision of law;
> (2) In determining whether an offense under § 48-904.01 is a second or subsequent violation under § 24-112;
> (3) In determining an appropriate sentence if the person is subsequently convicted of another crime;
> (4) For impeachment if the person testifies in his own defense at trial pursuant to § 14-305;
> (5) For cross-examining character witnesses; (continued…)

D.C. law, is not equivalent to an expunged conviction, under Maryland law, because not only are the procedures and eligibility requirements for obtaining them different, but so are their effects and consequences.

Finally and, perhaps most devastating to Motley's claim, is the simple fact that Motley's prior D.C. conviction does not qualify for expungement under Maryland law. As indicated previously, an individual, who has been convicted of a crime, is eligible for an expungement of the record of that conviction, if he or she "is convicted of only one criminal act, and that act is not a crime of violence; and is granted a full and unconditional pardon by the Governor," Md. Code Ann., Crim. Proc. § 10-105 (8) (i-ii), or if that individual is convicted of one of the minor, public nuisance offenses enumerated in the expungement statutory provisions. Md. Code Ann., Crim. Proc. § 10-105 (a)(9).[22] Not only has Motley's conviction not been pardoned, but the "set aside" of his conviction cannot be construed as a "pardon," as the D.C. Court of Appeals has said that a "set aside" does not "in any sense forgive" past conduct, nor is it "a pardon." *Solomon*, 120 A.3d at 621. And Motley's prior "set aside" conviction does not fit within any of the minor offenses listed in Maryland's expungement statute. *See* Crim. Proc. § 10-105 (a)(9). Therefore, to conclude that for purposes of establishing a predicate

(…continued)
(6) For sex offender registration and notification;
(7) For gun offender registration pursuant to subchapter VIII of Chapter 25 of Title 7, for convictions on or after January 1, 2011; or
(8) In determining whether a person has been in possession of a firearm in violation of § 22-4503.

[22] *Supra* note 17.

offense to a firearms offense, under § 5-133(c)(1) and § 5-133(b), a "set aside" offense is the equivalent of an expunged offense, under Maryland law, would grant a benefit to those convicted of a D.C. offense that would be denied those convicted of the same offense in Maryland, when neither offense has been pardoned.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.