Circuit Court for Baltimore City
Case No. 117107003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 241

September Term, 2018

TRAVIS MANNING

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Kehoe, J.

Filed: August 27, 2019

After a jury trial in the Circuit Court for Baltimore City, Travis Manning was convicted of attempted murder in the first degree, reckless endangerment, use of a handgun in the commission of a felony or crime of violence, possession of a regulated firearm by a disqualified person, and carrying a handgun concealed or openly about his person. Manning was sentenced to a term of life imprisonment on the conviction of attempted murder; a concurrent five year term on the conviction of reckless endangerment; a consecutive twenty year term on the conviction of use of a handgun in the commission of a felony or crime of violence; and a consecutive term of fifteen years on the conviction of possession of a handgun by a disqualified person. The conviction of carrying a handgun was merged for sentencing purposes. In this appeal, Manning presents four questions, which we have rephrased:

1. Did the sentencing court err in imposing separate sentences on Manning's convictions of attempted murder, reckless endangerment, use of a handgun in the commission of a felony or crime of violence, and possession of a handgun by a disqualified person?

2. Did the trial court err in permitting the State, during rebuttal closing arguments, to present a theory of the case that Manning maintains was not supported by the evidence?

3. Did the trial court's admission of certain extrajudicial statements violate the rule against hearsay and the Confrontation Clause?

4. Did the trial court err in giving a flight instruction to the jury?

For reasons to follow, we hold that Manning's conviction of reckless endangerment should have merged for sentencing purposes into his conviction of attempted murder.

Accordingly, we vacate that sentence. Otherwise, we affirm the judgments of the circuit court.

Background

Manning was arrested and charged in connection with the shooting of Garcia Johnson, inside of K&T Wireless, a cellular telephone store, on Belair Road in Baltimore. A few hours after the shooting, Mr. Johnson was shown a photographic array by the police. Mr. Johnson identified Manning's photograph and wrote, "He shot me," on the picture.

At trial, Baltimore City Police Officer Michael Curtin testified that at approximately 7:00 p.m. on March 16, 2017, he received a call for "a reported discharging" at K&T Wireless. Officer Curtin testified that, after arriving at the scene, he encountered the victim, Garcia Johnson, who had "one bullet hole in the back of his neck." Officer Curtin's arrival on the scene and his initial interaction with the victim, was recorded by the officer's body camera, and the recording was admitted into evidence without objection and shown to the jury. At one point in the video, another officer on the scene can be heard reporting that an unidentified person had said that "the possible suspect's name is Travis." On cross-examination, Officer Curtin testified that, during his interaction with Mr. Johnson immediately after the shooting, Mr. Johnson reported that he had "a large sum of – some money on him" and that "he had gotten locked up in that block before" and had "just [come] home."

Baltimore City Police Sergeant Chris Schmidt testified that, around the time of the shooting, he was in the Northeast District Police Station monitoring real-time footage from

the "CitiWatch" cameras that were mounted on poles throughout Baltimore. At the time, Sergeant Schmidt was monitoring the area near K&T Wireless, which, according to the officer, was known to contain "a high level of narcotics activity." Sergeant Schmidt explained that, as he was monitoring the camera's footage, he received a call about the shooting, which included a description of the suspect. The State then asked the officer whether he received any other information:

[STATE]: And was there also, at some point, information given out as to a suspect's name?

[WITNESS]: Yes.

[STATE]: And what was the name that you were – for your understanding of the suspect's name?

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: The name that I was given was the first name of Travis.

[STATE]: Okay. And what, if anything, did you do with that information in terms of attempting to ascertain a possible suspect to the shooting?

[WITNESS]: I –

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: I used their departmental databases. It's Detective 101. If you're looking for someone named Travis, you look in that general area for people named Travis. So utilizing our departmental databases, I located an

individual with the name of Travis who had utilized an address on Clifton Park Terrace.

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: And what was the Travis that you were able to identify as a possible suspect to the shooting.

[WITNESS]: Travis Manning. This gentleman seated here.

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: Okay. And to be clear, you're identifying the Defendant for the record?

[WITNESS]: Yes, sir.

Sergeant Schmidt further testified that, upon identifying the suspect as Travis Manning, he notified Baltimore City Police Detective Durel Hairston and forwarded the information to him.

Baltimore City Police Detective Earl Thompson testified that, a few days after the shooting, he was tasked with serving an arrest warrant on Manning. Detective Thompson explained that, pursuant to the warrant, he went to 3103 McElderry Street in Baltimore, where he waited for Manning to arrive. A few hours later, Detective Thompson observed Manning exit that address, walk down the street, and enter a vehicle, at which point the officer arrested Manning.

Detective Thompson also testified that he was wearing a body camera at the time and that the camera captured Manning's arrest. When the State attempted to introduce that footage into evidence, defense counsel objected, arguing that the footage contained "statements made by another witness," Shamieka Toulson. According to defense counsel, Ms. Toulson can be heard making statements that connected Manning to a residential address, 3216 Belair Road, near where the shooting occurred. The trial court overruled the objection, and the footage was played for the jury.

Following Detective Thompson's testimony, Ms. Toulson was called to the stand. She testified that she and Manning were friends and that, on the day of Manning's arrest, she picked him up from an address on McElderry Street. She also testified that Manning "sometimes" stayed at 3216 Belair Road.

Garcia Johnson testified that, on the day of the shooting, he travelled to K&T Wireless to have his phone fixed. Mr. Johnson stated that, after he entered the store and walked up to the counter, he "heard the bell ring" and turned around to see "a man with a mask on, gloves on, and a black coat." When the man "turned around to lock the door," Mr. Johnson "charged him" in an attempt to "get out that store." At some point, Mr. Johnson was shot. After being shot, Mr. Johnson observed the assailant exit the store and run "through the alley."

When the State asked Mr. Johnson about his pretrial identification of Manning, Mr. Johnson recanted and insisted that Manning was not the person who shot him. The State then played for the jury a recording of an interview that Mr. Johnson gave to the police

following the shooting. In that recording, Mr. Johnson told the police that he was "positive" Manning was the person who shot him. Mr. Johnson also provided a description of the clothes that Manning was wearing at the time. The video also showed Mr. Johnson telling the police that Manning "sold weed" on Belair Road and that, a few weeks prior to the shooting, Manning had threatened him after the two "had words" about Manning's treatment of some Muslim women in the area. On cross-examination, Mr. Johnson testified that, at the time of the shooting, he had a pending drug charge.

Baltimore City Police Detective Durel Hairston testified regarding his investigation into the shooting. During that testimony, the State asked Detective Hairston about his contact with the victim and his actions leading up to the arrest of Manning:

> [STATE]: And now before you met with Mr. Johnson, what, if any, suspect had you developed as part of your investigation?
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> [DEFENSE]: Objection.
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> THE COURT: Overruled.
>
> [WITNESS]: I had been told by the lieutenant that was there at the scene that Travis Manning was told to her that he had shot the victim.

Detective Hairston went on to state that he got the first name "Travis" from the lieutenant on the scene and that the last name "Manning" came from Sergeant Schmidt. Using that information, Detective Hairston obtained a search warrant for 3103 McElderry Street and 3216 Belair Road, which were two addresses associated with Manning. Upon execution of the search warrant, the police recovered clothing that was similar to the

clothing that Mr. Johnson had said the suspect was wearing around the time of the shooting. On cross-examination, Detective Hairston testified that Mr. Johnson had approximately $500 on his person when he was shot.

At the close of all evidence, the State asked the trial court to issue a flight instruction to the jury. The court agreed and, over objection, instructed the jury as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough, by itself, to establish guilt, but it is a fact that may be considered by you as evidence of guilt.
>
> Flight, under these circumstances, may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide that there is evidence of flight, you then must decide whether this flight shows consciousness of guilt.

Later, during closing argument, defense counsel discussed Mr. Johnson's statements to police regarding an alleged argument that Johnson and Manning had prior to the shooting:

> And that Garcia Johnson also tells the detective that this is all over some uncorroborated, unverified argument that occurred three weeks prior to the shooting with some unknown, he calls them Muslim sisters and he gives two names unverifiable by the detective and these sisters apparently own some non-existent store in the block.

During rebuttal argument, the State responded:

> Now, lastly, [defense counsel] says – she talks about these, the, as she puts them, as he puts them, the "Muslim sisters." Well, again, I think it's important to talk about a motive in this case, right? So you heard from Mr. Johnson. He had been in jail. He comes home from jail and he gets back out there on the block and everybody is looking up to [Manning] on that block.
>
> As Mr. Johnson says, it's because [Manning] sells weed on that block and one day Mr. Johnson sees [Manning] being disrespectful and he goes down

> the street and maybe he's had a drink down at that barber shop and he publicly humiliates [Manning] and does it in a way that, as he said, makes him feel lesser than a man or hurts his pride and you even heard [from] Mr. Johnson that [Manning] actually specifically issued threats.
>
> Now, it's also quite possible that there's a secondary motive here, right? You've heard Mr. Johnson had quite a lot of money in his pocket and he also, as he said, had a pending drug charge. Well, he just came home from jail. Perhaps he also was trying to move back into that block which is this man's territory and [Manning] was not about to let that man move in on that block and start selling there –
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> [DEFENSE]: Objection.
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> THE COURT: Overruled.
>
> -- and publicly humiliate him. So he is going to do what he just did which is he sees that man, he sees Mr. Johnson coming up the street and he decides, you know what, I'm going to take – this is going to be the time right now when I'm going to take care of this problem who is now in my block and I'm going to take care of it.

Manning was ultimately convicted and, as noted, sentenced to a term of life imprisonment on the conviction of attempted murder; a concurrent term of five years' imprisonment on the conviction of reckless endangerment; a consecutive term of 20 years' imprisonment on the conviction of use of a handgun in the commission of a felony or crime of violence; and a consecutive term of 15 years' imprisonment on the conviction of possession of a handgun by a disqualified person. This timely appeal followed.

Analysis

1.

Manning first argues that the sentencing court erred in imposing separate sentences on his convictions of attempted murder and reckless endangerment. Manning maintains that, because both crimes were predicated upon the same transaction, *i.e.*, the shooting of Mr. Johnson, his conviction of reckless endangerment should have merged for sentencing purposes into his conviction of attempted murder. Manning also argues that the court erred in imposing separate sentences on his convictions of use of a firearm in a felony or crime of violence and possession of a firearm by a disqualified person. Citing *Carpenter v. State*, 196 Md. App. 212 (2010), Manning maintains that, "as a general rule, possession of a handgun merges into use of that same weapon for sentencing purposes." Manning avers that the same should be true for the two offenses at issue here and that, as a result, the "rule of lenity" requires merger. Manning also asserts that, under the principle of "fundamental fairness," his convictions should have merged because this Court, in *Clark v. State*, 218 Md. App. 230 (2014), held "that where a person is prohibited from possession of a firearm for three different reasons, but possesses only one weapon, three separate sentences could not be sustained."

The State agrees that Manning's conviction of reckless endangerment should have merged for sentencing purposes into his conviction of attempted murder. The State does not, however, agree that Manning's other two convictions should have merged. The State notes that, in *Frazier v. State*, 318 Md. 597 (1990) and *Pye v. State*, 397 Md. 626 (2007),

the Court of Appeals held that a conviction of wearing, carrying, or transporting a handgun did not merge for sentencing purposes into a conviction of possession of that same weapon by a disqualified individual. The State maintains that, even though the Court's holdings in those cases involved the statute proscribing wearing, carrying, or transporting a handgun, which is not at issue here, the rationale espoused by the Court is nevertheless applicable to the instant case. The State also maintains that the sentencing court properly imposed separate sentences because the offenses are set forth in separate statutes and target different aggravating conduct.

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* "[T]he general rule for determining whether two criminal violations…should be deemed the same…is the so-called 'same evidence' or 'required evidence' test[.]" *Whack v. State*, 288 Md. 137, 141 (1980). "In applying the required evidence test, we examine the elements of each offense and determine whether each provision requires proof of a fact which the other does not." *Potts v. State*, 231 Md. App. 398, 413 (2016) (cleaned up). If one of the offenses contains all of the elements of the other offense, that is, if only one of the offenses has a distinct element, the two offenses are deemed to be the same under the required evidence test. *Id.* If so, we must then consider whether those offenses were based on the same act or acts. *Nicolas v. State*, 426 Md. 385, 408 (2012) ("Merger occurs as a matter of course when two

offenses are deemed to be the same under the required evidence test *and* 'when [the] offenses are based on the same act or acts[.]'") (emphasis in original) (citations omitted).

We agree with Manning that his conviction of reckless endangerment should have merged for sentencing purposes into his conviction of attempted murder. Attempted murder and reckless endangerment have the same elements, with attempted murder having the additional element of the specific intent to kill, and both crimes were based on the same act (the shooting of Mr. Johnson). *McClurkin v. State*, 222 Md. App. 461, 489 (2015). Accordingly, the sentencing court erred in failing to merge those convictions for sentencing purposes.

We now turn to Manning's second claim: that the sentencing court erred in imposing separate sentences on his convictions of use of a firearm in a felony or crime of violence and possession of a firearm by a disqualified person. The two statutes at issue are § 4-204 of the Criminal Law Article and § 5-133 of the Public Safety Article of the Maryland Code. The first statute states, in pertinent part, that "[a] person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." Md. Code, Crim. Law § 4-204(b). The statute also states that "[a] person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years." Md. Code, Crim. Law § 4-204(c)(1)(i). Section 5-133 of the Public Safety Article states, in pertinent part, that a person may not possess a regulated

firearm if that person had previously been convicted of certain enumerated crimes.[1] Md. Code, Public Safety § 5-133(c)(1). The statute also provides that "a person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for not less than 5 years and not exceeding 15 years." Md. Code, Public Safety § 5-133(c)(2)(i).

We hold that the two offenses do not merge under the required evidence test. To be guilty of violating § 4-204(b) of the Criminal Law Article, a person must use a firearm in the commission of a felony or crime of violence. To be guilty of violating § 5-133(c) of the Public Safety Article, a person must possess a firearm and have been convicted of a disqualifying crime. Because the two offenses have distinct elements, they are not "the same" under the required evidence test.

The required evidence test is not, however, "the exclusive standard under Maryland law for determining questions of merger, and even 'where two offenses are separate under the required evidence test, there still may be a merger for sentencing purposes based on considerations such as the rule of lenity[.]'" *McGrath v. State*, 356 Md. 20, 24-25 (1999) (citations omitted). "The rule of lenity, applicable only where a defendant is convicted of at least one statutory offense, requires merger when there is no indication that the legislature intended multiple punishments for the same act." *Potts*, 231 Md. App. at 413-14. "The rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants." *Alexis v. State*, 437 Md. 457, 484 (2014).

[1] Manning stipulated at trial that he had previously been convicted of a crime that disqualified him from possessing a regulated firearm.

"In deciding whether to apply the rule of lenity, we look to whether the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes[.]" *Clark*, 218 Md. App. at 255 (cleaned up; citing *Alexis*, 437 Md. at 485–86). With that said, "the rule of lenity serves only as an aid for resolving an ambiguity; it is not used to beget one." *Wimbish v. State*, 201 Md. App. 239, 274 (2011) (cleaned up; citing *Dillsworth v. State*, 308 Md. 354, 365 (1987)).

"As early as 1941, the Maryland Code included a proscription against the possession of a 'pistol or revolver' by a person who had previously been convicted of a crime of violence." *Wimbish*, 201 Md. App. at 275. In 1957, the Legislature enacted Article 27, § 445(c), which made it "unlawful for any person who [had] been convicted of a crime of violence … to possess a pistol or revolver." *Frazier v. State*, 318 Md. 597, 598 (1990). That prohibition was later amended to include individuals convicted of certain enumerated crimes. *Melton v. State*, 379 Md. 471, 479-80 (2004). In 1996 and 2000, the Legislature passed the Maryland Gun Violence Act and the Responsible Gun Safety Act, respectively, both of which enhanced the penalties for those convicted under the statute. *Id.* at 480-81, 484-85. In 2003, the entire statutory scheme was recodified without substantive change as § 5-133 of the Public Safety Article. 2003 Md. Laws, Ch. 5.

Meanwhile, "[i]n 1972, the Legislature, more and more concerned with the increasing use of handguns in the commission of crimes, enacted a comprehensive handgun control statute." *Frazier*, 318 Md. at 599-600. Included in that legislation was Article 27 § 36B, the predecessor to Criminal Law § 4-204. *Ali v. Department of Public Safety &*

Correctional Services, 230 Md. App. 682, 697 (2016) (citations omitted). The purpose of the statute was "to reduce the especially high potential for death or serious injury that arises when a handgun, as distinguished from some other weapon, is used in a crime of violence." *Id.* (cleaned up). The statute made it illegal for a person to wear, carry, or transport any handgun; the statute also made it illegal for a person to use a handgun in the commission of a felony or crime of violence. *Wynn v. State*, 313 Md. 533, 536-37 (1988). "In enacting § 36B, the legislature made clear its purpose to restrict the carrying of handguns as a measure to control the use of such weapons in the commission of crimes of violence." *Hunt v. State*, 312 Md. 494, 510 (1988).

Moreover, "[w]hen it enacted the handgun control statute, Ch. 13 of the Acts of 1972, Art. 27, §§ 36B-36F, the Legislature specifically addressed the matter of other statutes encompassing handguns, and it indicated its intent as to which of those other statutes should no longer cover the use of handguns." *Frazier*, 318 Md. at 597 (quoting *Whack*, 288 Md. at 145). Prior to that time, although Art. 27, § 36 proscribed the carrying of weapons, there also existed local legislation that regulated and penalized certain uses of handguns. *Id.* at 613-14. "In the handgun control act of 1972, the Legislature dealt with the above-described statutory provisions, so as to prohibit the pyramiding of penalties under both the existing law and the new law for the unlawful use of a handgun." *Id.* at 614 (quoting *Whack*, 288 Md. at 145-46). In short, the Legislature, in enacting the handgun control statute, was concerned, at least in part, with the matter of duplicative legislation; "[w]here it desired no duplication, it specifically amended or superseded those other statutes." *Id.* That intent by

the Legislature is significant because the Legislature did not amend Art. 27, § 445(c), the predecessor to § 5-133 of the Public Safety Article. *Id.*

The Court of Appeals discussed this issue in *Frazier*. 318 Md. at 613-15. In that case, the Court held that the defendant's conviction under Art. 27, § 36B (wearing, carrying, or transporting a handgun) and his conviction under Art. § 445(c) (possession of a handgun by a disqualified person) did not merge for sentencing purposes despite the fact that the two convictions were based on the same act. *Id.* at 615. The Court reasoned that, had the Legislature intended to prohibit separate penalties for violation of the two statutes, it would have amended § 445(c) when it enacted Art. § 36B. *Id.* The Court further reasoned that "[t]he Legislature's concern about the possession of a handgun, and its additional concern about the aggravating circumstance of the handgun being possessed by a person who has been convicted of a crime of violence, [was] not unreasonable." *Id.*

The Court of Appeals returned to this issue in *Pye v. State*, 397 Md. 626 (2007). In that case, the Court, citing its holding in *Frazier*, again held that the defendant's conviction of wearing, carrying, or transporting a handgun and his conviction of possession of a firearm by a disqualified person did not merge for sentencing purposes. *Id.* at 637. The Court explained that, despite the passing of the Maryland Gun Violence Act and the Responsible Gun Safety Act, *Frazier* remained good law:

> There is no indication in the Acts that the General Assembly intended to modify the holding in *Frazier* when it enacted the 1996 and 2000 Acts relating to the use of weapons. The contrary would appear to be more likely. … In neither of the codifications at issue here was reference specifically made to avoidance of duplication. In neither of the two statutory

> modifications, has the General Assembly indicated that duplicative sentences under separate statutory offenses, arising out of one incident involving handguns, are to be avoided.
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> * * *
>
> The General Assembly is presumed to have had full knowledge of our holding in *Frazier* when it enacted the legislation on which [Petitioner] relies. Therefore, had the General Assembly wanted to avoid duplication with respect to handgun sentences arising out of a single incident, it certainly could have, and we believe would have, included in that legislation a provision prohibiting such sentences. It did not do so.
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> * * *
>
> Moreover, and perhaps as important, it is most unlikely that the General Assembly would promulgate, on the one hand, a statutory scheme designed, in part, to increase sentences, while, on the other hand, and at the same time, intending that the doctrine of merger would apply and, thereby, reduce the total sentences.

Id. at 635-37.

Against this backdrop, we hold that Manning's convictions of use of a firearm in a felony or crime of violence and possession of a firearm by a disqualified person should not merge for sentencing purposes. Although the Court of Appeals' decisions in *Frazier* and *Pye* involved a different crime, *i.e.*, wearing, carrying, or transporting a firearm, the Court's analysis and conclusions are nevertheless applicable here. As noted, the crime of which Manning was convicted—using a firearm in the commission of a felony or crime of violence—was enacted at the same time and as part of the same legislative scheme as the statute prohibiting wearing, carrying, or transporting a firearm. Both statutes have virtually the same legislative history, and both were enacted to achieve the same purpose: "to protect

the public from an unjustified risk of harm by deterring the unlawful possession and use of handguns under all circumstances." *Wynn*, 313 Md. at 543-44. As with the statute prohibiting the wearing, carrying, or transporting of firearms, the Legislature could have included a provision in § 5-133 of the Public Safety Article to prohibit duplicate sentences for convictions of § 4-204 of the Criminal Law Article but chose not to. Thus, for the same reasons given by the Court in *Frazier* and *Pye*, the legislative intent is clear, and, because the statute is clear, the rule of lenity "does not apply when there is no ambiguity to resolve." *Wimbish*, 201 Md. App. at 274 (citations omitted).

Furthermore, Manning's reliance on *Carpenter* is misplaced. In that case, we held that the defendant's conviction for wearing, carrying, or transporting a handgun should have merged for sentencing purposes into his conviction for use of a handgun in the commission of a crime of violence because the convictions were based on the same act and because the Legislature, in enacting those statutes, did not intend for there to be separate sentences under those circumstances. *Carpenter*, 196 Md. App. at 232-33. In contrast, the present case involves a different crime (possession of a firearm by a disqualified person) governed by a different statutory scheme (§ 5-133 of the Public Safety Article), and the Legislature, as previously discussed, intended to impose separate sentences, even when the convictions are based on the same act.

Manning's reliance on *Clark* is also misplaced. In that case, we held that a defendant who was found in possession of a firearm could not be *convicted* of multiple violations of § 5-133 simply because he met several of the statutorily-defined characteristics of a

"disqualified" person. *Clark*, 218 Md. App. at 251-53. We also held that the defendant's convictions for wearing, carrying, or transporting a handgun on his person and for wearing, carrying, or transporting a handgun in a vehicle should have merged for sentencing purposes because they were based on the same act and because we "[could not] say that the Legislature intended that more than one sentence be imposed." *Id.* at 255-56.

Again, the statutes at issue in the present case were enacted with the clear intention of permitting multiple sentences. Moreover, we are not dealing with whether Manning could be subject to multiple *convictions* under § 5-133 but rather whether Manning could be subject to multiple *sentences* after having been convicted of violating § 5-133 and § 4-204 of the Criminal Law Article. On that point, our discussion of the issues in *Wimbish* is instructive:

> We first note that appellant's contention with respect to his two convictions under § 5-133 (for possessing a firearm, while under the age of twenty-one, and possessing a firearm, after having been previously convicted of a crime of violence) requires a different legal analysis than does his contention with respect to the merger of his convictions under that section with his conviction under § 5-203 [of the Public Safety Article] (for possessing a short-barreled shotgun).
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> * * *
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> Applying [the Court of Appeals' holding in *Melton v. State*, 379 Md. 471 (2004)] to the instant case, we conclude…that when appellant 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), he committed only one violation of that section. As a result, only one of appellant's convictions under § 5-133 can stand.
>
> * * *

> But, with 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 convictions, appellant could, and did, receive two convictions.

Wimbish, 201 Md. App. at 270-72 (emphasis in original).

Finally, Manning's "fundamental fairness" argument also fails. To begin with, Manning did not object at the time his sentence was pronounced. Consequently, that argument is not preserved for our review. *Potts*, 231 Md. App. at 414 (noting that "the fundamental fairness test does not enjoy the same procedural dispensation of Md. Rule 4-345(a) that permits correction of an illegal sentence without a contemporaneous objection.") (citations and quotations omitted).

Even so, merger under the principle of fundamental fairness would be inappropriate. As discussed, the Legislature intended to permit multiple sentences for convictions under the two statutes. *Id.* (noting that the imposition of separate sentences was not fundamentally unfair where "[i]t was clearly the Legislature's intent to permit multiple sentences for the crimes at issue[.]"). Moreover, the two statutes are contained in different Articles and are aimed at punishing different behaviors. *See Carroll v. State*, 428 Md. 679,

697 (2012) ("One of the principal reasons for rejecting a claim that fundamental fairness requires merger in a given case is that the crimes punish separate wrongdoing.").

In sum, we hold that Manning's conviction of possession of a firearm by a disqualified person should not have been merged for sentencing purposes into his conviction of use of a firearm in the commission of a felony or crime of violence. We also hold that Manning's conviction of reckless endangerment should have been merged for sentencing purposes into his conviction of attempted murder. Accordingly, Manning's sentence pursuant to his conviction of reckless endangerment shall be vacated.

2.

Manning next contends that the trial court erred when, during closing argument, it permitted the State to argue that Manning might have had a "secondary motive" in shooting Mr. Johnson, namely, that he "was not about to let [Mr. Johnson] move in on the block and start selling [drugs] there and publicly humiliate him." Manning asserts that the State's argument was improper because it was not supported by the evidence.

The State responds that the evidence showed that Manning sold marijuana in the area near the scene of the shooting, that drug dealing in that area was commonplace, and that Mr. Johnson "also was a drug dealer." The State maintains, therefore, that it was reasonable for the prosecutor to infer that Manning may have shot Mr. Johnson because he "was trying to move in on Manning's territory." The State also maintains that, even if the remark was improper, any prejudice was cured by the trial court's instructions to the jury that closing arguments were not evidence.

"Closing arguments are an important aspect of trial, as they give counsel 'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose deficiencies in his or her opponent's argument.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (citation omitted). Closing arguments provide counsel with an opportunity "to 'sharpen and clarify the issues for resolution by the trier of fact in a criminal case' and 'present their respective versions of the case as a whole.'" *Whack v. State*, 433 Md. 728, 742 (2013) (citation omitted). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* (citations and quotations omitted).

Generally speaking, "arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel[.]" *Lawson v. State*, 389 Md. 570, 591 (2005) (citations and quotations omitted). Nevertheless, our appellate courts have long held that counsel are permitted a degree of rhetorical liberty during closing argument:

> There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 412 (1974)[2] (quoted in *Anderson v. State*, 227 Md. App. 584, 589 (2016)).

For that reason, "we grant attorneys, including prosecutors, a great deal of leeway in making closing arguments." *Whack*, 433 Md. at 742. And, we generally defer to the judgment of the trial court, as it "is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Id.* "As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party." *Id.* (citations and quotation marks omitted). And, "we do not consider that discretion to be abused unless the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Brewer v. State*, 220 Md. App. 89, 111 (2014) (citations and quotation marks omitted).

Moreover, if counsel does exceed the bounds of permissible argument, reversal is required "only 'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Pickett v. State*, 222 Md. App. 322, 330 (2015) (quoting *Spain v. State*, 386 Md. 145, 158 (2005)). "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the

[2]Abrogated on other grounds as recognized by *Simpson v. State*, 442 Md. 446, 458 n. 5 (2015).

weight of the evidence against the accused." *State v. Newton*, 230 Md. App. 241, 255 (2016) (quoting *Spain*, 386 Md. at 159), *aff'd*, 455 Md. 341 (2017).

We hold that the trial court did not abuse its discretion in overruling the objection to the State's remarks. Evidence was presented establishing that both Manning and Mr. Johnson had been involved in drug trafficking in an area near where the shooting occurred and that Mr. Johnson had recently been released from prison. Evidence was also presented establishing that Manning and Mr. Johnson "had words" several weeks prior to the shooting and that Manning had threatened Mr. Johnson. Accordingly, it was reasonable for the State to infer that Manning shot Mr. Johnson because Manning did not want Mr. Johnson to "move in on the block and start selling there and publicly humiliate him." *See Winston v. State*, 235 Md. App. 540, 572-74 (2018) (holding that the court did not err in permitting the State to argue that the defendant, during an encounter with a witness, may have threatened to kill the witness's son, where the evidence showed that, following the encounter, the witness looked scared and held his son close to his body).

Nevertheless, even if the State's remarks were improper, we cannot say that the jury was likely to have been misled to the prejudice of Manning. Not only was the remark made in isolation, but the court had previously instructed the jury that arguments by counsel were not to be considered as evidence. *See Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions[.]").

3.

Manning next argues that the trial court, on three separate occasions, admitted "extrajudicial statements in violation of the hearsay rule and Confrontation Clause." The first instance occurred when Detective Hairston testified that he "had been told by the lieutenant that was there at the scene that Travis Manning was told to her that he had shot the victim." The second instance occurred when Sergeant Schmidt testified that, following the shooting, he "was given … the first name of Travis" and that he used the "departmental databases" to locate "an individual with the name of Travis who had utilized an address on Clifton Park Terrace." The third instance occurred during the testimony of Detective Thompson, when the State played a portion of a video that showed a witness, Ms. Toulson, stating that she was "picking up Mr. Manning at 3216 Belair Road."

The State responds that Manning's claims are without merit because the statements referenced during the officers' testimony were not inadmissible hearsay and, as a result, not subject to the Confrontation Clause. Finally, the State maintains that, even if the trial court erred, Manning is not entitled to reversal because the essential contents of the objectionable evidence was admitted without objection at other points in the trial.[3]

[3] The State also asserts that Manning's claims regarding Detective Hairston's and Sergeant Schmidt's testimony are unpreserved because Manning did not lodge a timely objection to either testimony. We disagree with the State. As for Detective Hairston's testimony, the prosecutor asked the officer "what, if any, suspect [he had] developed as part of [his] investigation." Immediately thereafter, defense counsel objected, and the trial court overruled the objection. Immediately following that, Detective Hairston gave the testimony that Manning now claims was improper. This is sufficient to preserve Manning's argument as to Detective Hairston's testimony. *See* Md. Rule 4-323(a) ("An objection to the

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Such out-of-court statements are generally inadmissible. Md. Rule 5-802. "An out-of-court statement is admissible, however, 'if it is not being offered for the truth of the matter asserted or if it falls within one of the recognized exceptions to the hearsay rule.'" *In re Matthew S.*, 199 Md. App. 436, 463 (2011) (quoting *Conyers v. State*, 354 Md. 132, 158 (1999)). "Generally, an out-of-court statement is admissible as non-hearsay if it is offered for the purpose of showing that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true." *Morales v. State*, 219 Md. App. 1, 11 (2014). "[A]ppellate review of whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible, is *de novo*." *Hallowell v. State*, 235 Md. App. 484, 522 (2018).

We hold that the testimony of Detective Hairston and Sergeant Schmidt was not inadmissible hearsay. Each of the statements at issue was offered to explain the respective officer's conduct in investigating the shooting, not to show that Manning was in fact the shooter. Accordingly, the trial court did not err in admitting that testimony. *See Holland v. State*, 122 Md. App. 532, 542 (1998) (holding that statement made to officer was not hearsay where the statement "simply provided some narrative background as to why [the

admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent."). Much the same occurred during Detective Schmidt's testimony.

officer] drove around the block and arrested the appellant when he did."); *See also Morales*, 219 Md. App. at 11 ("In the context of an officer explaining why he or she arrived at a particular location, the officer 'should not be put in a false position of seeming to have just happened upon the scene; he should be allowed some explanation of his presence and conduct.'") (citations omitted). For the same reasons, the statements did not implicate the Confrontation Clause. *See Derr v. State*, 434 Md. 88, 107 (2013) ("[T]he Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted.").

Nevertheless, the trial court's admission of the evidence in question, including the recorded statements made by Ms. Toulson regarding Manning's connection to 3216 Belair Road, did not constitute reversible error, because the essential contents of that evidence were admitted without objection at other points in the trial. The Court of Appeals "has long approved the proposition that [it] will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (citations omitted). Here, the recording from Officer Curtin's body camera, which was admitted into evidence and shown to the jury without objection, depicted an officer at the scene of the shooting reporting that someone had said that "the possible suspect's name is Travis." And, regarding Manning's connection to 3216 Belair Road, Ms. Toulson testified, without

objection, that Manning sometimes stayed at that address. Thus, even if the court erred in admitting any of the evidence noted by Manning, that error was harmless.

4.

Manning's final contention is that the trial court erred in giving a flight instruction to the jury. Maryland Rule 4-325(a) provides that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "Rule 4-325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008).

Manning concedes that the flight instruction propounded by the trial court was a correct statement of the law and that there was evidence of flight. Relying almost exclusively on *Thompson v. State*, 393 Md. 291 (2006), Manning nevertheless asserts that the court erred in giving the instruction because, "even where there is evidence of flight, if there is some ambiguity in the evidence giving rise to a possible flight instruction and the instruction resolves the ambiguity in the State's favor, the instruction should not be propounded." Manning maintains that, although it was uncontested that someone had fled the scene following the shooting, it was "hotly contested whether that person was Manning." According to Manning, the "ambiguity" as to his identity as the shooter rendered a flight

instruction inappropriate because "as in *Thompson*, the jury could easily have inferred that the court intended its flight instruction to apply to Manning, as the only person on trial."

Manning is mistaken. *Thompson* is concerned about a problem that is entirely absent from this appeal. In that case, three individuals were walking near the 1300 block of East Pratt Street in Baltimore when two men on bicycles, one of whom was armed with a gun, approached the individuals and attempted to rob them. *Thompson*, 393 Md. at 294. The three individuals fled, and one of the would-be robbers opened fire, wounding one of them. *Id.* A short time later, a police officer arrived at the location of the shooting and observed an individual, later identified as Thompson, who matched the description of the shooter and was riding a bicycle. *Id.* When the officer approached Thompson and asked him to stop, he fled. *Id.* Thompson was quickly apprehended, and the police recovered a significant quantity of cocaine on Thompson's person. *Id.* Following his arrest, Thompson told the police that he ran because he had drugs in his possession. *Id.* at 311. Thompson was charged with various crimes, including attempted murder, assault, and drug possession. *Id.* at 294-95. Prior to trial, the circuit court suppressed various evidence, including Thompson's statement to the police about the drugs. *Id.* at 295-96. The court then dismissed the drug charges, and the State proceeded to trial on the remaining charges related to the shooting. *Id*. At trial, the court, over objection, gave a flight instruction, and Thompson was ultimately convicted. *Id.* at 299-300. After Thompson noted an appeal, this Court affirmed, holding that the evidence supported the court's flight instruction. *Id.* at 300.

The Court of Appeals ultimately granted Thompson's petition for a writ of *certiorari* and reversed. *Id.* at 301. In so doing, the Court noted that, in order for a flight instruction to be warranted, four factors must be evident: "that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime." *Id.* at 312. Citing the third factor, the Court held that the flight instruction in Thompson's case was misleading 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 (footnote omitted). The Court explained that this fact, "which was known to all parties involved although not revealed to the jury, undermin[ed] the confidence by which the inference could be drawn that Mr. Thompson's flight was motivated by a consciousness of guilt with respect to the crimes for which he was on trial in the present case[.]" *Id.* at 314. The Court further explained that Thompson "was placed 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.* The Court held, therefore, that it was error "for the trial judge to give such an instruction in a case like the case *sub judice* where the

defendant would be prejudiced by the revelation of the 'guilty' explanation for his flight." *Id.* at 315.

Here, by contrast, Manning offered no "alternative explanation," either prior to or during trial, that undermined the validity of any of *Thompson's* four inferences. In fact, Manning does not dispute that the "flight" in the present case was directly related to the crime charged, nor does he argue that the person who fled had a motive to do so that was not relevant to the shooting. Instead, Manning asserts that, because his identity as the perpetrator was disputed, there existed an "ambiguity" that the court resolved in the State's favor by giving the flight instruction. Such a position is not supported by *Thompson* and is inconsistent with the principle that the evidentiary threshold for a jury instruction is "some [evidence], as that word is understood in common, everyday usage." *Bazzle v. State*, 426 Md. 541, 551 (2012) (citing *Dykes v. State*, 319 Md. 206, 216–17 (1990)). In this case, there was eyewitness evidence, in the form of Johnson's pre-trial statement that was admitted as substantive evidence, identifying Manning as the shooter and that Manning fled the scene after the shooting. Manning has cited no authority for the proposition that the flight instruction should not be given simply because the identity of the suspect is disputed. We are aware of no case in which either this Court or the Court of Appeals reached such a conclusion.

In the end, we cannot say that the trial court's instruction was erroneous or, as Manning contends, "an endorsement of the State's case."[4] When issuing the instruction, the court did not use Manning's name or suggest that flight was to be considered as evidence of guilt. Instead, the court stated that "a person's" flight "may" be considered as evidence of guilt. The court also stated that flight may be motivated by factors "which are fully consistent with innocence." The court then informed the jury that it needed to decide "whether there is evidence of flight" and, if so, "whether this flight shows consciousness of guilt." Nothing in the court's instruction can be construed as advocating the State's position or suggesting that Manning was the person who fled following the shooting. Thus, we hold that the trial court did not abuse its discretion in propounding the flight instruction, as the instruction was a correct statement of law, supported by the evidence, and not covered by other instructions. *See Thompson*, 393 Md. at 311 ("We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.").

APPELLANT'S SENTENCE FOR HIS CONVICTION OF RECKLESS ENDANGERMENT IS VACATED; THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE OTHERWISE AFFIRMED. COSTS TO BE ALLOCATED AS FOLLOWS: 75% TO BE PAID BY APPELLANT; 25% TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[4] In *Thompson*, the Court noted that the jury "instruction does not impermissibly emphasize the importance of evidence of flight; rather, it attempts to insure that the jury does not imbue evidence of flight with more weight than it deserves." 393 Md. at 307.