Circuit Court for Baltimore City
Case No. 116039026

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 726

September Term, 2017

LONNIE NIXON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 19, 2018

In the Circuit Court for Baltimore City, Lonnie Nixon, the appellant, was indicted on two counts of illegal possession of a regulated firearm by a prohibited person; wearing, carrying, or transporting a handgun; and illegal possession of ammunition by a prohibited person. Prior to trial, the appellant discharged his attorney and waived his right to counsel. His motion to suppress tangible evidence was denied.

Following a five-day jury trial, the appellant was convicted of one count of illegal possession of a regulated firearm by a prohibited person,[1] and acquitted of illegal possession of ammunition and wearing, carrying, or transporting a handgun. The court imposed a sentence of ten years' incarceration.

The appellant presents seven questions, which we have rephrased:

I. Did the motions court err by not *sua sponte* ordering that the appellant be evaluated for competency to stand trial?

II. Did the motions court err by denying the motion to suppress evidence?

III. Did the trial court plainly err by admitting evidence of prior bad acts by the appellant?

IV. Did the trial court plainly err by failing to declare a mistrial after it came to light that a police officer had viewed CCTV footage of the incident giving rise to the charges, but that that footage had not been turned over to the appellant, despite his request?

V. Did the trial court plainly err by permitting the State to call a witness to testify about the appellant's prior conviction, as opposed to entering into a stipulation?

[1] As we shall discuss, *infra*, only one of the illegal possession of a firearm counts was sent to the jury.

VI. Did the trial court plainly err by instructing the jury that the appellant's prior conviction was admissible to impeach his credibility?

VII. Did the trial court impose an illegal sentence by sentencing him under the wrong subsection of the illegal possession of a regulated firearm statute?

For the following reasons, we answer the first six questions in the negative and the seventh question in the affirmative. Accordingly, we shall affirm the appellant's conviction but shall vacate his sentence and remand for resentencing for the lesser offense of illegal possession of a firearm by a prohibited person.

FACTS AND PROCEEDINGS

The charges in this case stem from an incident that took place on January 13, 2016, at a bus stop at the corner of North Avenue and Pennsylvania Avenue. On that date, the appellant was assaulted by several unidentified men. While officers from the Baltimore City Police Department ("BPD") were assisting the appellant, they observed a fully loaded, .38 caliber Derringer handgun fall out of his coat pocket.[2] The appellant was placed under arrest. A search incident to that arrest yielded six rounds of .38 caliber ammunition from the appellant's pants pocket.

The appellant had a prior felony conviction from 2013 for distribution of narcotics and, thus, was prohibited from possessing a firearm pursuant to Md. Code (2003, 2011

[2] As we shall discuss, the appellant disputes that the gun ever was in his pocket.

Repl. Vol.), section 5-133 of the Public Safety Article ("PS"). He was indicted on two counts of illegal possession of a handgun – one premised upon his having been convicted of a "disqualifying crime" under PS section 5-133(b), which includes any felony conviction, and one premised upon his having been convicted of distribution of narcotics, an enumerated drug crime under PS section 5-133(c); one count of wearing, carrying, or transporting a firearm; and one count of illegal possession of ammunition.

The jury trial went forward over five days beginning November 15, 2016. The State called six witnesses, including the three BPD officers involved in the appellant's arrest. In his case, the appellant testified and called two witnesses: Martin Cohen, Esq., the appellant's assigned attorney from the Office of the Public Defender, whom he discharged prior to trial; and Deborah Levi, Esq., also an attorney with the Office of the Public Defender.

The evidence adduced at trial showed the following. On January 13, 2016, Detective Al Marcus with the Homicide Division of the BPD was working an overtime assignment at a clinic operated by the Baltimore City Health Department,[3] located at 1515 North Avenue. Around 3 p.m., he was advised by a clinic employee that a man was being assaulted across the street at a bus stop.

Detective Marcus went outside, where he observed a man, later identified as the appellant, lying on the sidewalk on the opposite side of North Avenue. Another man was

[3] By the time of the trial, Detective Marcus had retired and was working as an investigator for the Baltimore City State's Attorney's Office.

sitting on top of him. The appellant was wearing a full-length fur coat. While Detective Marcus waited to cross the street, two men jumped out of a Black Nissan Maxima, approached the appellant, and kicked him several times before jumping back into the car and driving away. Detective Marcus was unable to get the license tag number for the vehicle.

Detective Marcus crossed the street and grabbed the man sitting on top of the appellant, ordering him to "[g]et off." The man responded, "He shot my sister. He shot my sister."

Meanwhile, Sergeant Christopher Warren, also with the BPD, was on patrol in an unmarked vehicle when he heard a call go out over the radio for an "assault in progress" at the corner of North Avenue and Pennsylvania Avenue. He was two blocks away and responded to the scene, arriving shortly after Detective Marcus crossed the street. He observed a crowd surrounding the appellant, who was lying on the sidewalk. The appellant had several "different wounds to his face." Sergeant Warren called for a medic.

Detective Marcus and Sergeant Warren helped the appellant to his feet. As they did so, both officers observed a leather holster lying on the ground next to the appellant. According to Detective Marcus, as he helped the appellant stand up, a handgun fell out of the appellant's right coat pocket. Sergeant Warren initially testified that upon seeing the holster, he searched the appellant's right coat pocket and recovered the handgun. After requesting to refresh his recollection by reading the statement of charges, however,

Sergeant Warren "correct[ed]" his testimony, stating that the handgun fell out of the appellant's coat pocket as he was standing up.

Officer Brenden Provow, a BPD patrol officer in the Western District, also heard the call over the radio that there was a "fight at the Penn/North bus stop[.]" He was six blocks away and subsequently arrived on the scene. He saw Detective Marcus and Sergeant Warren helping the appellant stand up and, immediately thereafter, observed Sergeant Warren "pick up a handgun that had fallen on the ground out of [the appellant]'s pocket."

Detective Marcus placed the appellant under arrest, and Officer Provow searched the appellant incident to his arrest. He found six .38 caliber bullets in the appellant's right front pants pocket.

Officer Provow, along with other officers, conducted an area sweep to search for witnesses to the assault on the appellant. As we shall discuss in greater detail, *infra*, he also viewed the CCTV footage from a camera located near the incident.

Bonita Eads, an "inmate phone monitor" for the Department of Public Safety and Correctional Services, testified that she had downloaded to a DVD recordings of phone calls the appellant made while he was in pre-trial detention. That DVD was admitted into evidence and played for the jury. In one of those recordings, the appellant said that on January 13, 2016, he had gone to North Avenue to buy a gun and "they tried to take it from [him]."

Christopher Faber, a forensic scientist and firearms examiner for the BPD, was accepted as an expert in those fields. He testified that the Derringer handgun was operable.

Regina Kerlin, the fingerprint section manager for the BPD, was accepted as an expert in fingerprint identification. She testified that she had confirmed that the appellant was the same person who had been convicted in 2013 of distribution of narcotics based upon a comparison of his fingerprints with fingerprints taken at the time of the earlier arrest. A certified copy of the docket entries for the prior conviction was admitted into evidence.

At the close of the State's case, the appellant's motion for judgment of acquittal was denied.

The appellant testified that on January 13, 2016, he had arranged to meet a man known as "QT" to purchase a gun for $250. The meeting was supposed to occur at the intersection of Pennsylvania Avenue and North Avenue, between 2:30 p.m. and 3 p.m. When the appellant arrived at the meeting spot, he took the $250 out of the pocket of his sweatpants. QT lifted his shirt to reveal "a silver gun inside of a holster hook[ed] on his . . . jean belt." QT removed the gun from the holster and then attempted to rob the appellant. The appellant and QT began physically fighting over the gun. Two other men joined in the fight. One man jumped on the appellant's back and choked him, and the other man picked up the appellant's cane and beat him in the face with it.

According to the appellant, the fight lasted at least 30 minutes. He briefly lost consciousness. As the police arrived, QT "dropped th[e] gun near [his] left foot." One of the men beating him shoved bullets into his pants pocket.

On cross-examination, the prosecutor asked the appellant if he knew that he had "been convicted of a crime which prohibits [him] from possessing a gun." He replied, "Yes, ma'am." He further acknowledged that on January 13, 2016, he went to North Avenue to purchase a gun; that during the fight with QT, he "held the gun [for] dear life"; and that on the jail phone call, he said that he went to North Avenue to buy a gun and that "they tried to take it from [him]."[4]

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Competency

On July 26, 2016, the appellant appeared with Mr. Cohen in reception court. Trial was scheduled to begin that day in the instant case and in a second criminal case involving the appellant. The appellant moved to discharge Mr. Cohen and to represent himself. The court granted his motion. The appellant heard the State's plea offer and

[4] As mentioned, the appellant also called two attorneys from the Office of the Public Defender as witnesses. We shall discuss their testimony, *infra.*

rejected it. The appellant stated that he wished to go to trial that day and was sent to another courtroom for jury selection.

Before that judge, the appellant explained that he was representing himself. The motions court conducted a Rule 4-215 inquiry,[5] asking the appellant questions about his age, level of education, and whether he was "under the influence of any drugs, alcohol, medication or anything that may cloud your thinking today." This exchange followed:

[APPELLANT]: I take psych meds.

THE COURT: You're on psychiatric medication?

[APPELLANT]: Yeah, I take psych meds. Yes, ma'am.

THE COURT: What type of meds are you taking?

[APPELLANT]: Zoloft and a sleeping pill, but I don't know what –

THE COURT: How much Zoloft do you take per day?

[APPELLANT]: I take it in the morning and at night.

THE COURT: Have you taken it today?

[APPELLANT]: Yeah, before I came.

THE COURT: And what kind of sleeping pill do you take?

[APPELLANT]: I think it's Advil or something. I don't know.

[5] Under Rule 4-215(b), before a defendant way waive his or her right to counsel, the court (or the prosecutor) must conduct "an examination of the defendant on the record" and the court must be satisfied that "the defendant is knowingly and voluntarily waiving the right to counsel." No such inquiry had been conducted by the reception court judge, although the court did engage in a long discussion with the appellant about his decision to waive his right to counsel.

THE COURT: And how often do you take that?

[APPELLANT]: Every day.

THE COURT: What time?

[APPELLANT]: I don't know. Around like, like 10:00 or 11:00, whenever they come.

THE COURT: At night?

[APPELLANT]: In the morning and at night.

THE COURT: You take a sleeping pill in the morning and night?

[APPELLANT]: Yes.

THE COURT: You don't know the name of it?

[APPELLANT]: No, ma'am.

THE COURT: Is the Zoloft or the sleeping pill clouding your mind today?

[APPELLANT]: I feel a little sluggish.

THE COURT: A little sluggish. Do you understand what's going on?

[APPELLANT]: Yes, ma'am.

THE COURT: Do you understand where you are?

[APPELLANT]: Yes, ma'am.

THE COURT: Where are you?

[APPELLANT]: In a courthouse.

THE COURT: What courthouse are you in?

[APPELLANT]: Downtown courthouse.

THE COURT: Okay. And do you know why you're here?

[APPELLANT]: For the charges I got locked up on.

THE COURT: What charge is that?

[APPELLANT]: The handgun, attempt murder and stuff like that.[6]

THE COURT: Okay. And on the handgun charge, what was the date of that offense? Do you know what date they're saying that happened? Sometime in January, was it?

[APPELLANT]: I got locked up the 12th, I think.

THE COURT: Was it some time –

[APPELLANT]: I was in the hospital January the 12th –

THE COURT: Okay.

[APPELLANT]: [indiscernible] January 12th. I was in the hospital.

THE COURT: Okay. So your mind is clear and you know what's going on here today?

[APPELLANT]: Yes, ma'am.

The appellant contends this exchange put his competency to stand trial at issue, triggering the court's duty to *sua sponte* order a competency evaluation. The State responds that this exchange was insufficient to put the appellant's competency to stand trial at issue. Further, the appellant's conduct at the

[6] The appellant also was indicted on charges of attempted murder. Both cases were scheduled for trial that day. The State determined to go forward with the gun charges first, and the trial in the second case was postponed.

suppression hearing (and the trial) affirmatively showed that the appellant was competent.

"'It is well established that the Due Process Clause of the Fourteenth Amendment [to the United States Constitution] prohibits the criminal prosecution of a defendant who is not competent to stand trial.'" *Roberts v. State*, 361 Md. 346, 359 (2000) (quoting *Medina v. California*, 505 U.S. 437, 439 (1992)) (alteration in *Roberts*). A defendant is incompetent to stand trial if he or she is "not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Md. Code (2001, 2008 Repl. Vol.), § 3-101(f) of the Criminal Procedure Article ("CP"). Although a defendant is presumed competent, *Wood v. State*, 436 Md. 276, 285 (2013), the court has an affirmative duty to inquire into, and make a determination of, the defendant's competency if and when it is put at issue. *Peaks v. State*, 419 Md. 239, 251 (2011).

The court's affirmative duty to determine a defendant's competency to stand trial is codified at CP section 3-104(a), which provides:

> If, before or during a trial, the defendant in a criminal case or a violation of probation proceeding appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.

In *Thanos v. State*, 330 Md. 77 (1993), the Court of Appeals clarified that the mandate of CP section 3-104(a) may be "triggered in one of three ways: (1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Id*. at 85 (citing

Johnson v. State, 67 Md. App. 347 (1986)). In the case at bar, only the third circumstance is at issue.

The appellant's statement that he was prescribed psychiatric medications, and his inability to recall the names and doses of some of those medications, was patently insufficient to trigger the court's duty to *sua sponte* order a competency evaluation. *See Gregg v. State*, 377 Md. 515, 544–46 (2003) (court did not have a duty to order a competency evaluation for a defendant who had spent 66 days in a mental institution during a competency evaluation in District Court and displayed some erratic behavior in pre-trial proceedings); *Wood*, 436 Md. at 292 (no duty to order competency evaluation despite defense counsel's request, the defendant's history of psychiatric admissions, and the defendant's refusal to cooperate in a competency evaluation); *Johnson*, 67 Md. App. at 358-60 (no *sua sponte* duty triggered where defendant repeatedly interrupted proceedings and where he had previously been evaluated for competency). The appellant responded appropriately to all the questions asked of him. His behavior was not irrational or erratic in any way. His answers made clear that he understood where he was and the nature of the proceedings against him. Despite lacking legal training, he ably represented himself at the suppression hearing (and at trial). We perceive no error by the court in not ordering him evaluated for competency.

II.

Denial of Motion to Suppress

The appellant contends the circuit court erred by denying his motion to suppress tangible evidence. He asserts that the police exceeded the scope of the "community-caretaking" exception to the warrant requirement by initiating a search of his person while ostensibly coming to his aid.

The State responds that there is no need for this Court to "even consider the [community-caretaking] warrant exception" because the testimony at the suppression hearing established that the police officers saw the handgun "in plain view." Having observed the gun, the police officers had probable cause to arrest the appellant and to search him incident to that arrest. We agree.

Our review of a circuit court's decision to deny a motion to suppress evidence "is limited to information contained in the record of the suppression hearing." *Cartnail v. State*, 359 Md. 272, 282 (2000). We "extend[] great deference to the factual findings of the suppression judge with respect to determinations regarding witness credibility." *McCain v. State*, 194 Md. App. 252, 267 (2010). We will not "disturb [the suppression court's] determinations [on first-level facts] or the weight given to them, unless they are shown to be clearly erroneous." *Longshore v. State*, 399 Md. 486, 498 (2007). "We will review the legal questions *de novo* and based upon the evidence presented at the suppression hearing and the applicable law, we then make our own constitutional appraisal." *Wilkes v. State*, 364 Md. 554, 569 (2001).

The suppression hearing went forward on July 26–27, 2016. The State called three witnesses: Sergeant Warren, Detective Marcus, and Officer Provow. Sergeant Warren testified that when he arrived on the scene, people at the bus stop were yelling that the appellant "had a gun." Sergeant Warren recognized the appellant "from a Wanted poster that had went up two days prior[.]" As the appellant rolled over to stand up, the handgun fell out of his pocket and Sergeant Warren picked it up off the sidewalk.

Detective Marcus testified consistent with his earlier described trial testimony. He further testified that other officers on the scene told him that "they were all looking for [the appellant] because . . . he had warrants out on him."

As discussed, after Sergeant Warren seized the handgun, the appellant was placed under arrest. Officer Provow conducted a search incident to arrest and seized the ammunition from the appellant's front right pants pocket.

The court denied the motion to suppress the handgun seized prior to the appellant's arrest and the ammunition seized during the search incident to that arrest.

"The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton v. New York*, 445 U.S. 573, 587 (1980). The plain view doctrine is subject to a three-part test: 1) was the police officer lawfully in a position from which he or she could view the object; 2) was the "incriminating character of the evidence" "'immediately apparent'"; and 3) did the officer have a "lawful right of access

to the object itself." *Wengert v. State*, 364 Md. 76, 88-89 (2001) (citation omitted). Here that test was satisfied.

When Sergeant Warren and Detective Marcus observed the handgun fall out of the appellant's pocket, they were assisting him to stand up on a public sidewalk. Thus, they clearly "did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136 (1990). Likewise, they had a lawful right of access to the handgun, which fell onto the sidewalk.

The incriminating nature of the handgun also was "immediately apparent" under the circumstances. Sergeant Warren recognized the appellant from the "Wanted poster" and the man sitting on top of the appellant told Detective Marcus that the appellant had "shot his sister." Those statements clearly established "probable cause to associate the [handgun] with criminal activity." *Wengert*, 364 Md. at 89.

The same probable cause supporting the seizure of the handgun under the plain view doctrine gave rise to probable cause to arrest the appellant.[7] *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony . . . is consistent with the Fourth Amendment if the arrest is supported by probable cause."). The resulting search incident to arrest also was reasonable under the Fourth Amendment. *See Paulino v. State*, 399 Md. 341, 350 (2007) ("Police are

[7] As the State points out, the appellant also had an outstanding warrant for his arrest. Thus, his arrest (and the resulting search incident to that arrest) were justified even if the police did not have probable cause based upon the plain view seizure of the handgun.

allowed to conduct a search incident to an arrest in order 'to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape . . . [or] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'") (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). For all these reasons, the court did not err by denying the motion to suppress.

III.

Prior Bad Acts Evidence

The appellant contends the circuit court erred by permitting Detective Marcus to testify on more than five occasions that the man who was holding the appellant down when Detective Marcus and Sergeant Warren arrived at the scene was shouting that the appellant had "shot his sister." While he concedes he did not object to or move to strike any of this testimony, he maintains that we should exercise our discretion to review for plain error the admission of this "textbook inadmissible prior bad act evidence."

The State responds that the admission of the testimony was not error, much less plain error. It emphasizes that the testimony was relevant to prove that the gun seized near the appellant was his gun. In any event, the State maintains that the appellant was not prejudiced by the admission of the evidence because he admitted to possessing a gun, which was the basis for the only crime for which he was convicted—illegal possession of a regulated firearm.

"[P]lain error review is a 'rare, rare phenomenon,' undertaken only when the un-objected-to error is extraordinary." *Perry v. State*, 229 Md. App. 687, 710 (2016)

(quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)). There are four prongs to plain error review:

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

Givens v. State, 449 Md. 433, 469 (2016) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)). *See also White v. State*, 223 Md. App. 353, 403 n.38 (2015) (plain error review is appropriate when the error is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,'" and "'review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon'" (internal citations and quotations omitted)). Further, plain error review is suitable only in cases of "'blockbuster errors.'" *Olson v. State*, 208 Md. App. 309, 363 (2012) (quoting *Martin v. State*, 165 Md. App. 189, 196 (2005)). A defendant "is entitled to a fair trial, but not necessarily a perfect one." *Gutierrez v. State*, 423 Md. 476, 499 (2011) (citing *Hook v. State*, 315 Md. 25, 36 (1989)).

Rule 5-404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." It permits the admission of such evidence, however, "for other

purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.* Therefore, before admitting evidence under Rule 5-404(b), a court must determine "whether the testimony is admissible for some purpose other than to prove bad character, propensity, or the like, and whether the probative value substantially outweighs the risk of unfair prejudice." *Whittlesey v. State*, 340 Md. 30, 61 (1995).

In the case at bar, there is no dispute that Detective Marcus's testimony that the man sitting on top of the appellant said that the appellant had shot his sister was bad acts evidence. However, that testimony was relevant to show that the appellant had possessed a firearm in the past. *See, e.g., Ware v. State*, 360 Md. 650, 676 (2000) (evidence that the defendant possessed a firearm in the past was relevant to prove that he was in possession of a gun on the day of a shooting). The major issue in dispute at trial was whether the appellant had been in possession of the handgun, but it fell out of his pocket as he stood up, or whether, as the appellant claimed, "Q.T" had placed the handgun next to his foot following an attempted robbery. Evidence that the appellant had "shot" someone in the past was relevant to show that he was in the habit of carrying a gun and ammunition. Because the testimony was arguably admissible under the exception to Rule 5-404(b), we have no difficulty in concluding that plain error review is not warranted. Plain error review also is not appropriate here given that some of challenged testimony was elicited on cross-examination of Detective Warren by the appellant. *See Allen v. State*, 89 Md.

App. 25, 43 (1991) ("a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error").

The appellant also has not shown how any error in the admission of the testimony affected the outcome of the trial. He was convicted of just one of the charges: possession of a regulated handgun by a prohibited person. The evidence supporting that charge was largely undisputed: the appellant admitted that he had a prior disqualifying conviction; and he testified that he was attempting to purchase a firearm on the date of his arrest and that he was at one point fighting for control of the gun. Evidence that the appellant had shot someone in the past was not likely to improperly infect the jury's consideration of the only issue in dispute: whether the appellant ever was in possession of the handgun on January 13, 2016.

IV.

CCTV Footage

On the first day of the trial, during a discussion of the State's proposed demonstrative aids and exhibits to be used during trial, the appellant explained to the court that "[t]he reason [he] fired [Mr. Cohen] in the first place was because [the appellant] wanted th[e] CCTV [footage from] . . . North and Pennsylvania[,]" but Mr. Cohen failed to request it. He elaborated that there was a camera located "right next to the subway." He initially had requested that Ms. Levi get the footage and, after Mr. Cohen was assigned to his case, asked him to get it as well.

The court inquired as to whether the footage ever had been requested in discovery. The appellant replied that he did not know how to do that. The court asked the prosecutor whether she "ha[d] in [her] possession . . . any footage from any CCTV at North and Pennsylvania Avenue?" The prosecutor replied that she did not have the footage and that she never had requested it.

The court explained to the appellant that the CCTV footage only would have been preserved if it had been subpoenaed by the State or by him and, in light of the passage of ten months since his arrest, that footage would no longer be available. It elaborated: "The camera may have filmed what happened to you, but the State didn't get it, you didn't ask for it, nobody preserved it, it doesn't exist. At this trial, it [will] not be present."

At the end of the day, the court revisited the issue of the CCTV footage after the appellant asked if he could subpoena the footage. The court asked the prosecutor to "ask [her] detective . . . to check with the CCTV camera folks to determine whether there are any films from any of the CCTV cameras at Pennsylvania and North Avenue." The prosecutor responded that she would make that inquiry, but that she knew from experience that the CCTV footage was recorded over after 45 days if it had not been requested.

On the third day of trial, the prosecutor reported to the court that BPD made a request to City Watch for the CCTV footage on November 16, 2016, the first day of trial.

City Watch responded that the footage no longer existed because it was not requested previously. The court thanked the prosecutor for looking into that issue.

Later that same day, however, Officer Provow testified on cross-examination that he had in fact reviewed the CCTV footage in the days after the incident. The court immediately called counsel up to the bench.

The court asked the prosecutor why she had reported to the court that no request for the CCTV footage had been made when Officer Provow apparently had requested it. The prosecutor responded that she was learning for the first time that Officer Provow had viewed the footage, but that that was not the same as requesting that the footage be preserved. The court indicated that the appellant would be given "wide latitude" to question Officer Provow about the footage.

The appellant asked Officer Provow to describe the CCTV footage he reviewed. Officer Provow explained that there were "trees blocking the view of the camera" of the assault and the arrest.

At the end of that day, the appellant requested that Ms. Levi and Mr. Cohen be subpoenaed to testify about the CCTV footage. The court arranged for them to be present.

Ms. Levi testified that she represented the appellant at his bail review hearing. During discussions with him, Ms. Levi had explained that there was a CCTV camera located near the location of the appellant's arrest. As a result of that discussion, Ms. Levi

made a note in the appellant's file with "a big box around it" that said "Get CCTV footage. There should be a camera at Pennsylvania and North."

Mr. Cohen testified that he entered his appearance in the appellant's case on February 12, 2016. He explained that he had not made a specific request for the CCTV footage because he understood it to be covered by a request for discovery made in an omnibus discovery motion he filed.[8]

The appellant contends the court "implicitly recognized that the State committed a discovery violation" and sanctioned it by granting the appellant "wide latitude," as well as by permitting him to call Ms. Levi and Mr. Cohen in his case to testify about the requests for the CCTV footage that were made. The appellant maintains that this sanction was "inadequate, as would be any sanction short of the granting of a mistrial." While acknowledging that he did not request any sanction, much less move for a mistrial, he urges us to review for plain error the trial court's failure to declare a mistrial.

The State responds that the court's decision not to declare a mistrial was not an abuse of its broad discretion to fashion an appropriate sanction for a discovery violation and, thus, was not error, much less plain error. We agree.

"The remedy for a violation of the discovery rules 'is, in the first instance, within the sound discretion of the trial judge.'" *Raynor v. State*, 201 Md. App. 209, 227–28

[8] The omnibus motion filed by defense counsel on February 12, 2016, included a request for "[a]ll relevant material or information regarding . . . electronic surveillance . . . ."

(2011) (quoting *Williams v. State*, 364 Md. 160, 178 (2001)). Rule 4-263(n) provides that upon a finding that a party has failed to comply with its discovery obligations,

> the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

The Court of Appeals has enunciated four factors a court should consider in assessing the appropriate sanction for a discovery violation: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570–71 (2007) (footnote omitted). "[I]f the discovery violation irreparably prejudices the defendant, a mistrial may be required even for an unintentional violation." *Raynor*, 201 Md. App. at 228. The declaration of a mistrial, however, is "an extreme sanction" that is called for only "when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Burks v. State*, 96 Md. App. 173, 187 (1993).

The appellant argues that a mistrial was the only adequate sanction for the State's failure to produce the CCTV footage during discovery. Assuming, without deciding, that the State was so obligated where, as here, the footage was reviewed by an officer, found to include no relevant information, and thus, not preserved for use at trial, we perceive no error, plain or otherwise, in the court's failure to *sua sponte* declare a mistrial. The CCTV footage was no longer in existence by the time of trial and was not used as part of

the State's case. The prosecutor was surprised by Officer Provow's testimony that he had reviewed the CCTV footage, but as he explained, he did not make a request for the footage to be preserved because the scene of the appellant's assault and subsequent arrest was obscured by tree branches. The court clearly credited Officer Provow's testimony to this effect. In light of that testimony, the court reasonably concluded that the appellant suffered no prejudice as a result of the inadvertent failure to preserve and disclose the CCTV footage; and that there was no prejudice that could be cured by a continuance. Further, by granting the appellant wide latitude to question Officer Provow and to call his own witnesses to testify about the "missing" footage, the court enabled the appellant to argue to the jurors that the officer was lying about the content of the footage.

V.

Evidence of the Appellant's Prior Conviction

The appellant contends the court plainly erred by permitting the State to prove that the appellant had a prior conviction disqualifying him from possessing a gun by introducing into evidence the certified docket entries from his prior criminal case, rather than by stipulation. He relies upon *Carter v. State*, 374 Md. 693 (2003).

In *Carter*, the defendant was charged with illegal possession of a regulated firearm by one previously convicted of a crime of violence and related charges. At trial, the defendant offered to stipulate that he had a prior conviction for a crime of violence that prohibited him from owning a firearm. The State argued that it should be permitted to introduce evidence at trial that the defendant previously had been convicted of robbery

with a deadly weapon. The court agreed, and at trial the State was permitted to introduce into evidence redacted docket entries from the prior case.

The case reached the Court of Appeals, which reversed, holding that "*when requested by the defendant* in a criminal-in-possession case . . ., the trial court must accept a stipulation or admission that the defendant was convicted of a crime that qualifies under the criminal-in-possession statute." *Id*. at 720 (emphasis added) (footnote omitted). The Court held, moreover, that under those circumstances, the jury should not be told the nature of the crime for which the defendant was previously convicted.

In the instant case, unlike in *Carter*, the appellant did not seek a stipulation about his prior conviction. In the absence of a stipulation, the State was obligated to prove the existence of the prior conviction, which was a necessary element of the three illegal possession counts. It did so by introducing into evidence the certified docket entries showing that the appellant was convicted in 2013 of distribution of narcotics (after establishing through its fingerprint expert that the appellant was the person convicted of that crime). We perceive no error in the admission of these records.

VI.

Jury Instruction

On the fourth day of trial, after the State rested, the court advised the appellant about his right to testify in his own defense. As pertinent, it explained that if the appellant elected to testify, the State could "ask [him] any questions about any impeachables that [he] might have." The court clarified with the prosecutor that the only

prior conviction that could be used to impeach the appellant was his felony conviction for distribution of narcotics.

During the appellant's testimony, he was asked about his prior conviction and he acknowledged that he knew that it prohibited him from owning a firearm. He was not otherwise questioned about his prior conviction.

The court instructed the jurors that the appellant's prior conviction could be considered by them in "two ways":

> ***First, you may use that prior conviction to help you assess whether or not the defendant is telling the truth in this case.*** *You may consider it in weighing his credibility and whether or not he is telling you the truth, for a person who has been convicted of a prior offense may have their credibility challenged by the use of a prior conviction.* You may also use that prior conviction as the State is required to prove that the defendant was a prohibited person.

(Emphasis added.) The appellant did not except to that jury instruction.

The appellant contends the trial court committed plain error by instructing the jury that they could consider his prior conviction for distribution of narcotics to assess his credibility. He maintains that this instruction was not generated by the evidence because the State did not use the prior conviction for impeachment purposes when it cross-examined him.

The State responds that because the appellant was advised before he testified that his prior conviction could be used to impeach him the court acted properly in giving the instruction. In any event, the State argues, even if the court erred by so instructing the

jury, any error was harmless because the verdict makes clear that the jurors credited the appellant's testimony at trial.

The instruction as given was superfluous because the State did not impeach the appellant's credibility based upon his prior conviction for distribution of narcotics. Nevertheless, giving the instruction does not rise to the level of plain error. As the State points out, the verdict reflects that the jurors credited the appellant's testimony that he did not arrive at the bus stop in possession of the gun (*i.e.*, that he did not wear, carry, or transport the gun); and that the ammunition was planted in his pocket by one of the men who assaulted him (*i.e.*, that he never knowingly possessed the ammunition). The appellant's own testimony that he was attempting to purchase the gun when he was assaulted and that he was fighting for control of the gun supported the jury's verdict that he was, however briefly, knowingly in possession of the gun. Thus, any error in the giving of the instruction was not shown to have impacted the outcome of the trial. *See Givens*, 449 Md. at 469 (2016) (quoting *Rich*, 415 Md. at 578) (plain error review warranted only if error "affected the [defendant]'s substantial rights, which . . . means [that the defendant] must demonstrate that [the error] affected the outcome of the [trial] court proceedings").

VII.

Sentence

Finally, the appellant contends the court imposed an illegal sentence because it sentenced him for violating PS section 5-133(**c**), when he was convicted of violating PS

section 5-133(**b**). For the reasons we shall explain, we agree that the appellant's sentence is illegal and must be vacated.

Count I of the indictment charged the appellant with violating PS section 5-133(c) and Count II charged him with violating PS section 5-133(b). Both subsections prohibit a person with certain prior convictions from possessing a regulated firearm. As pertinent, subsection (b) prohibits a person who has been convicted of a "disqualifying crime," which includes *any* felony, from possessing a regulated firearm. *See* PS § 5-101(g) (defining the term "disqualifying crime"). And, as pertinent, subsection (c) prohibits a person who has been convicted of certain specifically enumerated drug crimes, including distribution of narcotics, from possessing a regulated firearm. The penalty for a violation of subsection (b) is a maximum of 5 years, *see* PS § 5-144(b), whereas the penalty for a violation of subsection (c) is a mandatory minimum of 5 years and a maximum of 15 years. *See* PS § 5-133(c)(2)(i).

At trial, the State proved that the appellant had a prior conviction for distribution of narcotics. That conviction was a felony and therefore was a "disqualifying crime" under PS section 5-133(b). It also was for an enumerated drug crime under PS section 5-133(c). At the conclusion of the evidentiary portion of the trial, the court explained that the State could not send "duplicate charges" to the jury. It stated that it would send three counts to the jury: (1) "the wear, carry, transport [count]"; (2) "the prohibited person in possession of a firearm, illegal possession of a firearm [count]," and (3) "the illegal

possession of ammunition [count]." The court did not specify which of the two illegal possession of a firearm counts would go to the jury, however.[9]

During the jury instructions conference, the court advised that it planned to give a modified version of Maryland Pattern Jury Instruction – Criminal 4:35.6 regarding the illegal possession of a firearm count and the illegal possession of ammunition count.[10] As modified, the court instructed the jury:

> The defendant is charged, in question 2 and 3, with possession of a regulated firearm and possession of ammunition by a prohibited person.
>
> A prohibited person is an individual that the State has determined may not possess a firearm. Specifically, having been convicted of a crime that disqualifies him from possessing a regulated firearm. In order to convict the defendant of these two charges, the State must prove:
>
> One, that the defendant knowingly possessed a regulated firearm; or . . . knowingly possessed ammunition . . . .
>
> *The defendant was previously convicted of a* ***disqualifying offense*** *that prohibits him from possessing a regulated firearm.*

[9] Just before the court discussed which counts would be sent to the jury, there was a problem with the audio recording of the proceedings that resulted in a nearly 10-minute gap in the transcript. Neither the State nor the appellant represents to this Court that the specific nature of the illegal possession count was discussed during that gap, but the court does reference in its remarks a prior discussion about the "wear, carry, transport" count.

[10] As pertinent, the pattern instruction provides:

> The defendant is charged with possessing a regulated firearm after having been convicted of a crime that disqualified [him] [her] from possessing a regulated firearm. In order to convict the defendant, the State must prove:
>
> (1) that the defendant knowingly possessed a regulated firearm; and
>
> (2) that the defendant was previously convicted of a crime that disqualified [him] [her] from possessing a regulated firearm.

> *In this case, be advised as a matter of law that the crime of distribution of narcotics is a* ***felony****.*

(Emphasis added.) The court went on to define a regulated firearm, indirect possession, and direct possession.

The case was sent to the jury on a special verdict form with three questions. Question two named the offense charged as "Illegal possession of a Regulated Firearm by a Prohibited Person" and asked: "As to the charge of illegal possession of a regulated firearm by a prohibited person on January 13, 2016, how do you find the defendant, Lonnie Nixon?" The jury found the appellant guilty of the illegal possession of a firearm count. It acquitted him of the other two counts.

The parties appeared for a sentencing hearing on March 17, 2017. The court asked whether the appellant or the State had any additions, corrections, or modifications to the presentence investigation report ("PSI"). The prosecutor asserted that the sentencing guidelines attached to the PSI incorrectly stated that the appellant had been convicted of illegal possession under PS § 5-133(b), when, in fact, he had been convicted under subsection (c).

The court made the suggested "correction" to the sentencing guidelines. The appellant did not note an objection to that change.

Disposition was postponed until April 18, 2017, due to a death in the appellant's immediate family. On that date, the prosecutor argued for a sentence of 10 years. The appellant interjected that the maximum sentence listed on the guidelines sheet he had received was 5 years. The court reminded the appellant that that had been

> corrected when we were in the court last . . . [b]ecause the error was made on the worksheet, it was changed and corrected to reflect that the code of the Annotated Code that you were charged with was Subsection (c) and not Subsection (b). The maximum for Subsection (b) is five years. But because of your record, the maximum for Subsection (c) is 15 years, a minimum of five years without parole.
>
> The court sentenced the appellant to a term of ten years' incarceration.

In its brief in this Court, the State acknowledges that the "court was unclear" as to which of the charged illegal possession of a regulated firearm counts was being sent to the jury, and that the jury instructions and verdict sheet do not clear up that ambiguity. It argues, however, that the jury "necessarily found that the State had proved all of the elements of *both* subsections because the only prior conviction offered by the State was for drug distribution, which is a 'disqualifying crime' under subsection (b) (because it is a felony) and one of the enumerated drug crimes in subsection (c)." (Emphasis in original.) It urges that the jury's verdict in this case "necessarily encompassed both offenses" and that the appellant properly was sentenced for "the crime with the greater penalty."[11] We disagree.

[11] The State cites to cases in which defendants were convicted *and* sentenced on multiple counts of illegal possession of a firearm under different PS section 5-133 subsections. In those cases, this Court held that because the "unit of prosecution" was illegal possession of a regulated firearm a defendant only could be convicted and sentenced for one of the counts under the rule of lenity and vacated the convictions for the lesser count. *See Wimbish v. State*, 201 Md. App. 239, 272 (2011); *Clark v. State*, 218 Md. App. 230, 253 (2014). These cases are not pertinent because, in the case at bar, the jury deliberated on and the appellant was convicted of just one count of illegal possession of a regulated firearm. Principles of merger and lenity are not implicated.

It is beyond cavil that a sentence imposed for a crime for which a defendant was not convicted is an illegal sentence. *See, e.g., Carlini v. State*, 215 Md. App. 415, 426 (2013) (sentences imposed for crimes for which a defendant was not convicted are illegal). Here, the appellant was charged with two counts of illegal possession of a regulated firearm, both predicated on the same underlying conviction for distribution of narcotics. At the trial court's direction, however, only one count was sent to the jury. The jurors were instructed that they could find the appellant guilty of illegal possession of a regulated firearm count if they found that he knowingly possessed a firearm *and* that "he was previously convicted of a *disqualifying offense* that prohibits him from possessing a regulated firearm," which the court explained included the appellant's prior felony conviction. The jury instructions both were tailored to the subsection (b) count, which prohibits a person who has been convicted of a "disqualifying crime," defined to include any felony conviction, from possessing a regulated firearm. *See* PS § 5-101(g) (defining the term "disqualifying crime"). Significantly, the jurors were not instructed that distribution of narcotics was one of the enumerated drug crimes under PS section 5-133(c). The jury instructions make clear that the only count that was before the jury for decision was for a violation of PS section 5-133(b). Thus, we shall vacate the appellant's sentence under PS section 5-133(c) and remand for resentencing for a violation of PS section 5-133(b).[12]

[12] Even if we were to agree with the State that the record is ambiguous as to which

(Continued…)

CONVICTION FOR VIOLATION OF PUBLIC SAFETY ARTICLE SECTION 5-133(b) AFFIRMED. SENTENCE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR RESENTENCING. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE.

(…continued)
of the two charges was sent to the jury, which we do not, any ambiguity must be resolved in favor of the appellant.