Circuit Court for Baltimore County
Case No. 3-K-19-000218

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 856

September Term, 2020

BRANDON TROY HIGGS

v.

STATE OF MARYLAND

Graeff,
Arthur,
Wells,

JJ.

Opinion by Graeff, J.

Filed: July 26, 2021

On December 20, 2018, appellant, Brandon Troy Higgs, got into a physical altercation with the victims, Elvis Smith and Robert Peete, which resulted in appellant shooting Mr. Smith in the leg. Appellant subsequently was tried in the Circuit Court for Baltimore County on multiple counts, and a jury convicted him of two counts of attempted voluntary manslaughter, two counts of first-degree assault, four counts of violating Maryland's hate crime statute, Md. Code Ann., Crim. Law ("CR") § 10-304 (2018 Supp.), as well as firearm related offenses. The court sentenced appellant to 45 years' incarceration, all but 25 years suspended.

On appeal, appellant presents the following questions for this Court's review, which we have combined, renumbered, and rephrased slightly as follows:

1. Did the circuit court err in refusing to instruct the jury on perfect self-defense?

2. Did the circuit court err by imposing an unlawful sentence?

3. Did the circuit court err when it considered *ex parte* information at sentencing related to appellant's beliefs?

4. Was the evidence insufficient to support appellant's convictions with respect to a violation of CR § 10-304 and for any action against Robert Peete?

5. Does CR § 10-304 violate the First Amendment to the United States Constitution as applied in this action?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2018, Wendell Jones, Mr. Smith, and Mr. Peete were finishing concrete work at a home in Reisterstown, Maryland. On the last day of their job, when

they were close to finishing the concrete that had been poured earlier that morning, a dog ran through the concrete, leaving pawprints behind it.

Appellant, the dog's owner, approached the worksite and a verbal altercation between him, Mr. Smith, and Mr. Peete ensued. As explained in more detail, *infra*, the altercation escalated and ended with appellant shooting Mr. Smith in the leg.

On January 27, 2020, a three-day trial began. Mr. Jones testified that he arrived at the worksite at approximately 8:30 a.m. He had been hired to complete concrete work at a home, and he and Mr. Peete had spent the last several days framing and preparing the worksite for the concrete, which was poured the morning of the shooting. Mr. Smith joined them on the day of the shooting to help them finish their work. Approximately two hours before they would have finished the work, a Pit Bull ran through the "middle part of the concrete." The dog "messed the concrete up" and "left prints in the concrete," which Mr. Smith and Mr. Jones then needed to correct. Appellant and Mr. Smith "had some words." Mr. Jones could not "recollect everything that [appellant] said at that particular point." Appellant was not wearing a shirt or shoes during this first encounter.

Appellant went up the street to retrieve his dog, but he returned once more and "some words was said again." Appellant was still shirtless, and Mr. Jones estimated that only two to four minutes had elapsed between the two encounters. Mr. Jones could not remember the substance of the words exchanged, but he stated that there was a "strong dislike" between Mr. Smith and appellant. Mr. Jones testified that, after appellant left a

second time, he and Mr. Smith went back to work trying to repair the pawprints in the concrete.

Approximately five to seven minutes later, appellant appeared again, this time wearing a hoodie and shoes, and he entered the worksite. Appellant called Mr. Smith some names, and Mr. Smith told appellant to "get off the property." A fight broke out, and Mr. Jones went across the street to his van and called the police. While he was calling the police, Mr. Jones heard Mr. Smith yell that appellant had a gun. At this point, appellant and Mr. Smith were fighting down the street, and Mr. Peete joined the fight in an attempt to take the gun. As soon as Mr. Smith yelled that appellant had a gun, the firearm discharged. Both appellant and Mr. Smith were touching the gun.

Mr. Peete also testified to his recollection of the events. He arrived at the worksite at approximately 6:30 a.m. When they were close to finishing their work, he went to Mr. Jones' van to retrieve some rags so he could clean up some concrete that had spilled on the front door of the home. He heard a yell, turned around, and saw a dog, at which point he also saw appellant, shirtless, coming up the street. Mr. Smith yelled, "man, get your dog . . . you shouldn't let your dog out. He need to be -- he supposed to be on the leash." Appellant responded, "if the dog, um, bite you, just kick him," to which Mr. Smith replied, "if that dog bite me, I'm going to kill him." Appellant asked if Mr. Smith thought he was tough, and he then left to retrieve the dog.

Following this exchange, Mr. Peete began wiping the concrete off the door, but appellant returned with his dog. He gave Mr. Smith his address, noting that, if Mr. Smith

had anything to say to him, he knew where to find him. Mr. Smith replied: "[M]an, go ahead and get your dog and keep him in the house."

Several minutes later, appellant returned to the sidewalk adjacent to the worksite, wearing shoes and a hoodie. He "just started yelling like, you know, y'all need to leave. Y'all don't even belong here." Appellant kept his hand in his pockets, and Mr. Peete was staring at appellant because he "wanted to know what [appellant's] intention was." As appellant turned to walk away, he told the group that they needed to "go back to Africa," and he told Mr. Smith to tell his "boy," i.e., Mr. Peete, to "stop staring." When Mr. Smith replied that Mr. Peete was a grown man, and if appellant had something to say to Mr. Peete, he should say it directly to him, appellant approached Mr. Smith, told him "you can't tell me anything," and shoved him with both hands.

In response to being pushed, Mr. Smith "mushed" appellant, i.e., he "[t]ook his hand and pushed [appellant's] face." Appellant then pushed Mr. Smith again, and Mr. Smith pushed back. At that point, appellant "went to reach into his pocket." Mr. Peete was trying to figure out "what was going on," stating that it did not "feel right." Mr. Smith then took a Come Along and, using the handle as a bat, struck appellant in the head.[1] Mr. Peete's initial reaction was to laugh, "[b]ecause every time [Mr. Smith] was hitting [appellant] in the head with the Come Along it sounded like, uh, softball bat hitting a softball. . . . it was funny." Appellant then started running, but Mr. Smith pursued him and kept swinging the

[1] Mr. Peete testified that a Come Along "is a tool used in concrete. It's basically like a rake without the teeth."

Come Along. After Mr. Smith struck appellant's head several times, Mr. Peete started to walk toward them to stop Mr. Smith "before he kill this boy with the Come Along."

As Mr. Peete walked toward Mr. Smith and appellant, Mr. Smith and appellant "crashed into a car," which was parked in a driveway two houses down. At that point, Mr. Peete noticed something in appellant's hand. He could not see what was in appellant's hand, but Mr. Smith yelled out that appellant had a gun, and Mr. Peete "took off running." When he reached Mr. Smith and appellant, they were already on the ground. Mr. Smith had a hold of appellant's right sleeve, and Mr. Peete pressed his knee down on appellant's right arm. As Mr. Peete looked down, he saw the barrel of the gun pointing directly at his face, and, although appellant's hand was not on the handle of the gun, Mr. Peete observed appellant's finger "pop up like he was about to go to the trigger." Mr. Peete grabbed the barrel of the gun and pressed it to the ground, following which he "gave [appellant] everything that [he] had," punching appellant in the face. Mr. Peete told appellant to "just let the gun go," but appellant refused, saying "oh, no, y'all going to kill me."

Appellant was able to push himself off the ground and pull the gun back toward his chest, but Mr. Peete was able to pin appellant back to the ground. Approximately two minutes later, however, appellant once more pushed himself off the ground, and Mr. Peete's "whole body went forward." Appellant got up on one knee, and he pointed the gun at Mr. Smith. Mr. Peete grabbed appellant's hand "a little bit further up than [appellant's] wrist," but the gun went off, and Mr. Smith was struck in his leg.

The struggle for the gun continued after the shooting. Mr. Peete struck appellant in the temple, and Mr. Smith was able to gain control of the gun. Mr. Smith handed the gun to Mr. Peete, who struck appellant's head with the gun. Shortly thereafter, the police arrived and arrested appellant.[2]

Mr. Smith also testified regarding his recollection of the events. He testified that, when appellant returned for the final time, appellant told him, "n****r this is my hood. You black mother fucker, you need to go back to Africa, you monkey mother fucker." Mr. Smith responded: "[M]y man, you invading my space." After appellant pushed him in his chest, Mr. Smith took the Come Along and struck appellant in the head a single time. He did not know that appellant was armed with a handgun at the time he struck appellant with the Come Along, but he did notice that appellant kept his hands inside his hoodie.

After Mr. Smith struck appellant with the Come Along, appellant backed up and pulled out the handgun concealed in the pocket of his hoodie. Mr. Smith yelled "gun," and he and Mr. Peete fought appellant for control of the weapon. Approximately three or four minutes elapsed between the time the initial fight broke out and when Mr. Peete came to his aid. He and Mr. Peete each punched appellant twice during the fight.

Detective Daniel O'Shea of the Baltimore County Police Department investigated the shooting. He arrived at the scene of the shooting after Mr. Smith had been transported to Sinai Hospital. He discovered a "CZ P-07 nine millimeter semiautomatic handgun."

[2] The police also handcuffed Mr. Peete and placed him in the back of a police car because he "wouldn't stop yelling at them." Mr. Jones stayed behind to finish the concrete work.

At the conclusion of Detective O'Shea's testimony, the State rested its case. Following a brief recess, the court reconvened, and heard argument on appellant's motion for judgment of acquittal. As relevant to this appeal, appellant's counsel asked the court to dismiss the two counts of attempted first degree murder "based upon a couple of theories."

> The first is that I believe that [appellant] has generated, uh, or at least through cross-examination there's been evidence generated to show that [appellant] could have and did act in either self-defense or either imperfect self-defense, and if the Court determines that that's the case, then I would be asking the Court in this situation to strike or dismiss the attempted first degree murder and basically reduce it to manslaughter, which is -- would be proper if, in fact, the Court determines that Mr. Higgs did in fact generate any evidence.
>
> And just very briefly as to that evidence. I think that the State will probably argue that, well, [appellant] was the initial aggressor here. . . .
>
> * * *
>
> So the question becomes, is there enough evidence for the Court to allow the jury to hear the attempted first degree -- first degree murder. And I would argue to the Court that, at least the Court should reduce that to the manslaughter, but I also will argue that the Court should dismiss it outright based upon the -- the arguments of self-defense and also imperfect self-defense.

With respect to the other counts, counsel for appellant stated:

> As to the other counts, and I'll jump, if I could, your Honor, to Count 4, the race, religious belief count, against Mr. Elvis Smith. And the fifth count as to the race, religious count, and also Count 9 regarding Mr. Robert Peete, the race, religious count, and assuming Count 10, the race, religious belief.
>
> I would also ask the Court to dismiss both -- both those counts. I don't think there's been a scintilla of evidence raised to demonstrate that Mr. Higgs committed a crime based upon any thought process, as far as race or religion.

* * *

> Now, it's obvious here, I think the facts have shown that the fight began or the -- the contention began because of the dog. What escalated it and what didn't escalate it, um, is for the jury to determine.
>
> But I think the Court can discern based upon the facts that there's no evidence whatsoever that [appellant] targeted these people, that he committed any crime, whatever crime could be delineated, because of the race, et cetera.

* * *

> I think the Court would probably be able to say and the jury – I'm sorry, the jury would probably be able to discern that if that dog incident never occurred, this never would have happened.
>
> So I'm going to ask the Court to -- to strike that, even at this stage of the game.
>
> And I'm also going to ask the Court to dismiss the counts, as far as attempted first degree murder, and I'll submit on the other counts, your Honor, until after the Defense rests.

The State asked the court to deny the motion. It argued that, although the dog's act of running through the concrete was the origin of the incident, there was sufficient evidence to support convictions under the hate crime statute based on the evidence that appellant approached the victims while armed with a concealed handgun with the intent of provoking a fight through the use of racial slurs. The State asserted that appellant was not entitled to the defense of either perfect or imperfect self-defense because he was the initial aggressor. With respect to the attempted first-degree murder charge of Mr. Peete, the State argued that appellant attempted to commit first-degree murder of Mr. Peete by placing his finger on the trigger of the gun while the gun was pointed at Mr. Peete.

The court took a brief recess to consider appellant's motion. In ultimately denying appellant's motion, the court noted that appellant "made a Motion for Judgment of Acquittal on Counts 1, 4, 5, 6, 9 and 10," and "a technical motion for judgment of acquittal on other counts, but [was] submitting until the end of the case in terms of argument."

Appellant elected not to testify, and the defense did not offer any other witnesses. Defense counsel then renewed his motion for judgment of acquittal, incorporating his previous argument. Counsel requested that the court instruct the jury on perfect and imperfect self-defense, "realizing that we're probably going to fall back on the latter." He argued that, although appellant was the initial aggressor, Mr. Smith "raised the -- the level of the -- of the fight by hitting him on the head with the Come Along."

The State argued that neither an imperfect self-defense nor a perfect self-defense instruction was warranted based on the evidence. It asserted that one who is the aggressor can never claim perfect or imperfect self-defense.

Defense counsel responded that, although an initial aggressor cannot claim self-defense, "when it changes to deadly force, based upon other person's actions the roles reverse and switch." He asserted that appellant subjectively believed his life was in danger, and therefore, he was entitled to an imperfect self-defense instruction based on Mr. Smith's escalation of the fight. Counsel submitted on his argument for perfect self-defense.

The court denied appellant's renewed motion for judgment of acquittal. It then determined that there was sufficient evidence to support a jury instruction on imperfect

self-defense, but the evidence did not warrant a jury instruction on perfect self-defense. The court instructed the jury on imperfect self-defense as follows:

> You have heard evidence that the defendant attempted to kill Elvis Smith and/or Robert Peete in partial self-defense, you must decide whether this is a partial defense or no defense in this case.
>
> In order to convict the defendant of attempted murder the State must prove that the defendant did not act in partial self-defense. If the defendant did act in partial self-defense the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.
>
> Imperfect self-defense is a partial defense and you are required to find the defendant guilty of attempted voluntary manslaughter and not guilty of attempted murder, if all of the following four factors are present.
>
> Although the defendant was the initial aggressor he did not raise the fight to a deadly force level.
>
> The defendant actually, though unreasonably, believed that he was in immediate or imminent danger of death or serious bodily harm.
>
> If the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual though unreasonable belief is a partial self-defense, and the verdict should be guilty of attempted voluntarily manslaughter rather than attempted murder.
>
> And the defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual force.
>
> In order to convict the defendant of attempted murder the State must prove that the defendant did not act in partial self-defense. If the defendant did act in partial self-defense the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.

After the court issued jury instructions, it asked if there were "[a]ny objections that anybody want[ed] to put on the record regarding jury instructions." Appellant's counsel replied: "No objection, your Honor." Counsel then proceeded to deliver closing arguments.

The jury began deliberations at 4:32 p.m., and at 8:32 p.m., the jury returned with a verdict. The jury found appellant not guilty of attempted first-degree or second-degree murder of Mr. Smith and Mr. Peete, but it convicted appellant of the following: attempted voluntary manslaughter of Mr. Smith and Mr. Peete; attempted voluntary manslaughter of Mr. Smith and Mr. Peete because of their race or color; use of a firearm in the commission of a crime of violence, i.e., the attempted voluntary manslaughter of Mr. Smith and Mr. Peete; first-degree assault of Mr. Smith and Mr. Peete; first-degree assault of Mr. Smith and Mr. Peete because of their race or color; use of a firearm in the commission of a crime of violence, i.e., the first-degree assault of Mr. Smith and Mr. Peete; and wear, carry and transport handgun.

On September 23, 2020, appellant appeared for sentencing. At the outset, appellant's counsel noted that he and the State disagreed with respect to which counts merged. The State argued that the hate crime convictions relating to the convictions for attempted voluntary manslaughter of Mr. Smith and Mr. Peete because of their race or color did not merge with the underlying attempted voluntary manslaughter convictions because "the legislature specifically indicated that the sentence for that conviction . . . may be separate from, consecutive or concurrent with any underlying crime." The State conceded that the second set of hate crime convictions, i.e., the convictions for first-degree assault of Mr. Smith and Mr. Peete based on their race and color, merged with the first set of hate crime convictions.

Appellant argued that the conviction for attempted voluntary manslaughter of Mr. Smith should merge with his conviction for attempted voluntary manslaughter of Mr. Smith because of race or color. Appellant conceded that the legislature intended to create a separate crime, but he argued that "[u]nder the rule of merger or rule of lenity, or even just fundamental fairness," the convictions should merge because punishing appellant for additional years "based upon the same elements, the same crime, the same situation, I think would be fundamentally unfair."

The State filed a sentencing memorandum that detailed, among other things, appellant's membership with a white supremacist group, Vanguard America. Counsel for appellant argued that this information should be stricken because it served no purpose other than to be inflammatory, and it was not "certified in any way." Moreover, counsel argued that appellant "should be punished for what he did based upon the evidence presented at trial," not the beliefs he held.

The court stated that "[t]he goals of sentencing are deterrence, punishment and rehabilitation." With respect to deterrence, the court noted that its sentence needed to deter future behavior by appellant, who attacked Mr. Smith and Mr. Peete "because of their race" and was a racist "[b]y all metrics."

The court sentenced appellant to 45 years' incarceration,[3] with all but 25 years suspended. For Count 1, the attempted voluntary manslaughter against Mr. Smith, the

[3] We note that the court, when pronouncing appellant's sentence, stated that it was "a total sentence of 40 years' incarceration." The sentencing transcript, the hearing sheet,

court sentenced appellant to ten years' incarceration, all but five years suspended, and five years of supervised probation upon release. For Count 3, use of a firearm in a crime of violence against Mr. Smith, the court sentenced appellant to five years' incarceration without the possibility of parole, consecutive to Count 1. For Count 4, attempted voluntary manslaughter against Mr. Smith because of race or color, the court sentenced appellant to ten years' incarceration, all but five years suspended, consecutive to Counts 1 and 3. For Count 6, the attempted voluntary manslaughter against Mr. Peete, the court sentenced appellant to ten years' incarceration, all but five years suspended, consecutive to Counts 1, 3 and 4. For Count 8, use of a firearm in a crime of violence against Mr. Peete, the court sentenced appellant to five years' incarceration without the possibility of parole, concurrent to Counts 1, 3, 4, and 6. For Count 9, attempted voluntary manslaughter against Mr. Peete because of race or color, the court sentenced appellant to ten years' incarceration, all but five years suspended, consecutive to Counts 1, 3, 4, and 6. The remaining Counts (Counts 2, 5, 7, 10, and 11) were merged.

This appeal followed.

and the Commitment Record, however, reflect that the court actually sentenced appellant to 45 years' incarceration, with all but 25 years suspended.

DISCUSSION

I.

Jury Instructions

Appellant contends that the circuit court erred by refusing to instruct the jury on perfect self-defense. He argues that a perfect self-defense instruction was supported by the facts of the case because "[t]here was enough ambiguity in the testimony of the three witnesses, that a reasonable finder of fact could have found that [he] was justifiably defending himself from an unwarranted escalation of the altercation." Appellant concedes that he was the initial aggressor, but he asserts that an instruction on perfect self-defense was warranted because Mr. Smith, by attacking him with the Come Along, elevated the altercation with deadly force.

There are two forms of self-defense – perfect self-defense and imperfect self-defense. *State v. Smullen*, 380 Md. 233, 251 (2004). "Perfect self-defense is a complete defense and results in the acquittal of the defendant." *Roach v. State*, 358 Md. 418, 429 (2000). Imperfect self-defense mitigates murder to manslaughter. *Faulkner v. State*, 301 Md. 482, 488 (1984).

To generate a claim of perfect self-defense, the defendant must generate evidence to show each of the following four elements:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself in this danger;

> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Marr, 362 Md. 467, 473 (2001) (quoting *Faulkner*, 301 Md. at 485–86). Imperfect self-defense includes the same elements, with the exception that, with respect to the first element, the accused need only have a subjective belief that he or she is in imminent danger of death or serious bodily harm, even if the belief is not objectively reasonable. *Marr*, 362 Md. at 473.

The State contends that the circuit court properly declined to give a jury instruction on perfect self-defense because it was not generated by the evidence. It asserts that appellant received more than that to which he was entitled by getting an instruction on imperfect self-defense without generating evidence to support that instruction. The State argues that appellant could not claim perfect (or imperfect) self-defense because he was the initial aggressor, and there was no evidence that appellant attempted to retreat from the conflict before resorting to deadly force.

A trial court is required to a give jury instruction requested by a party when "(1) the instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instructions actually given." *Wright v. State*, __ Md. __, No. 40, Sept. Term 2020, slip op. at 14 (filed July 13, 2021) (quoting *Thompson v. State*, 393 Md. 291, 302 (2006)). *Accord Holt v. State*, 236 Md. App. 604, 620 (2018). The trial court's

"decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston*, 444 Md. 67, 82 (2015) (quoting *Gunning v. State*, 347 Md. 332, 348 (1997)).

Before addressing the merits of appellant's claim, we address whether the contention is preserved for this Court's review. Md. Rule 4-325(f) provides: "No party may assign as error the giving or the failure to give an instruction *unless the party objects on the record promptly after the court instructs the jury*, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added.) The purpose behind this Rule "is to give the trial court an opportunity to correct an inadequate instruction." *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)).

Here, although appellant initially asked for an instruction on perfect self-defense, he did not object on the record at the conclusion of the instructions. Indeed, when the court asked if there were "[a]ny objections that anybody wants to put on the record regarding jury instructions," counsel for appellant replied: "No objection, your Honor."

The Court of Appeals has held that there are circumstances where an objection may survive appellate review, despite the failure to strictly comply with the Rule, i.e., in the circumstance where there is substantial compliance with the Rule. *Watts v. State*, 457 Md. 419, 427 (2018). The Court explained in *Sims v. State*, 319 Md. 540, 549 (1990):

> We have said that under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the

> Rule. *Gore v. State*, 309 Md. 203, 208–09, 522 A.2d 1338 (1987); *Bennett v. State*, 230 Md. 562, 188 A.2d 142 (1963). We make clear, however, that these occasions represent the rare exceptions, and that the requirements of the Rule should be followed closely. Many issues and possible instructions are discussed in the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.

In *Johnson v. State*, 310 Md. 681 (1987), the defendant requested a particular jury instruction, the trial judge denied defendant's request, and at the conclusion of the instructions, the defendant stated that he had no exceptions to the jury instructions given. *Id.* at 684–85. The Court of Appeals held that, under these circumstances, the appellate challenge to the jury instructions was not preserved for appellate review. *Id.* at 685. The Court noted that "[t]he language of the [R]ule plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused." *Id.* at 686. Moreover, it concluded that defendant's remark that he had no exceptions to the jury instructions after they were given was akin to "express acquiescence in the instructions as given," and therefore, the issue was unpreserved. *Id.*, at 689.

Here, we are not persuaded this case is one of the rare occasions to excuse the absence of strict compliance with the Rule. The State argued that appellant was not entitled to any self-defense instruction, perfect or imperfect, and counsel may have been persuaded that it was better to accept the court's decision to give an instruction on imperfect self-defense than to revisit the issue. Indeed, counsel's discussion of the instructions reflects a

less than vigorous argument in support of a perfect self-defense instruction. Although counsel requested an instruction on both perfect and imperfect self-defense, he stated that "we're probably going to fall back on the latter." Subsequently, counsel again asked for an instruction on imperfect self-defense and "submitted" on perfect self-defense.

Under these circumstances, and given that, when asked if there were any objections, counsel stated: "No objection, Your Honor," appellant failed to preserve the contention that the circuit court erred by declining to instruct the jury regarding perfect self-defense. Accordingly, we will not address this issue.

II.

Unlawful Sentence

Appellant contends that the court imposed an unlawful sentence for several reasons. Initially, he asserts that the court erred by "allowing the jury to enter a verdict on first degree assault." He then argues that, because it was unclear as to what charges the conviction for use of a firearm in the commission of a crime of violence were based on, the sentence imposed constituted an illegal sentence in violation of Maryland Rule 4-345(a). Finally, appellant argues that the court erred in sentencing him on both the violation of CR § 10-304, a hate crime, and the underlying criminal offense. He argues that, under the required evidence test, the rule of lenity, and notions of fairness, the sentence for the violations of CR § 10-304 merged into the convictions for the underlying crimes. We will respond to each of these contentions in turn.

A.

Assault Charges

The verdict sheet given to the jury stated that, if the jury found appellant guilty of voluntary manslaughter, the jury should not enter verdicts on the charges of first-degree assault or use of a firearm in a crime of violence (first-degree assault). When the jury first came back with its verdict, it indicated that it had rendered a verdict on the charges of first-degree assault, first-degree assault because of race or color, and use of a firearm in the commission of a crime of violence, with respect to each victim, but the court, consistent with the verdict sheet, initially did not take the verdicts on these counts with respect to Mr. Smith. After the jury stated its verdict, counsel approached the bench. The State argued that, by finding appellant guilty of assault of Mr. Peete, it was implied that the jury returned a verdict on those counts regarding Mr. Smith. The court construed that statement as a request to ask the jury about those counts. Counsel for appellant objected because the jury was not following the instructions on the verdict sheet. The court asked the clerk to take the verdict on the assault charges relating to Mr. Smith, stating that "there's no harm in announcing the verdict if they're going to merge."

On appeal, appellant argues that the court erred in allowing the jury to enter a verdict on first-degree assault when it was evident that the jury did not follow the instructions on the verdict sheet. The State does not respond to this contention, other than noting that the assault convictions "were merged."

We conclude that no reversible error was committed when the court accepted verdicts on the assault convictions, even though reaching a verdict on those counts was inconsistent with the instructions on the verdict sheet. "The verdict sheet is merely a tool used to aid the jury in reaching its verdict; it therefore does not bind the jury or the court to its contents." *Ogundipe v. State*, 424 Md. 58, 72–73 (2011), *cert. denied*, 566 U.S. 966 (2012). As appellant notes, the Court of Appeals stated in *State v. Frye*, 283 Md. 709, 723–24 (1978), that, "where a defendant is charged both with a greater crime and with a lesser included offense, and where a guilty verdict with regard to the greater crime will result in a merger, the proper method of instructing the jurors is to advise them that if the verdict on the count charging the greater crime is guilty, then they should not consider the count charging the lesser crime." The Court went on to acknowledge, however, that it is appropriate to tell the jury to render a verdict on both the greater and lesser offense in a case, and if the jury does so, the court can merge the lesser included offense. *Id.* at 724.

We perceive no reversible error in the court's decision to accept the verdict relating to assault and then merging those convictions for purposes of sentencing.

B.

Use of a Firearm in the Commission of a Crime of Violence

Appellant next contends that it is unclear on what charges the sentences for the use of a firearm were based. In support, he asserts that the court-imposed sentences for "use of a firearm in the commission of a crime of violence" without specifying the crime of

violence. He then asserts, without analysis or legal authority, that the sentences therefore constituted an illegal sentence pursuant to Md. Rule 4-345.

Appellant did not object to the sentence below, but, recognizing a potential preservation problem, appellant cites to Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time." This Rule, however, applies only "to correct sentences that are 'inherently illegal', not just 'merely the product of procedural error.'" *Bailey v. State*, 464 Md. 685, 696 (2019). A sentence is inherently illegal when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Bratt v. State*, 468 Md. 481, 496 (2020) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

Here, appellant's sentences were not inherently illegal. A review of the sentencing proceeding indicates that the judge imposed, with respect to each victim, a concurrent five-year sentence for using a firearm in the commission of a crime of violence, and the crime of violence involved was the conviction previously mentioned, attempted voluntary manslaughter. Appellant did not receive an illegal sentence in this regard.

C.

Double Jeopardy

Appellant next contends that his sentence for both the hate crimes and the underlying crimes violated principles of double jeopardy. The State contends that "the court lawfully imposed separate sentences for the hate crime convictions and the

underlying crimes." It argues that appellant's sentences for the hate crimes and the underlying offenses do not violate the Double Jeopardy Clause because the legislature clearly intended for the hate crime to be charged and punished separately from the underlying crime.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, "provides that no individual shall be tried or punished more than once for the same offense." *State v. Frazier*, 469 Md. 627, 640 (2020); U.S. Const., amend. V. A state, however "may impose cumulative punishment if it is clearly the intent of the legislature to do so," *Frazier*, 469 Md. at 641 (quoting *Jones v. State*, 357 Md. 141, 163 (1999)), and "the protection against multiple punishments derived from the Double Jeopardy Clause 'does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *Id.* (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)).

Hate crimes in Maryland are governed by Title 10, Subtitle 3 of the Criminal Law Article. CR § 10-307 provides that "[a] sentence imposed under this subtitle may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this subtitle." This statute makes clear the intention of the General Assembly to impose cumulative punishment for both the hate crime and the underlying offense. Appellant's separate sentences here did not violate principles of double jeopardy.

III.

Ex Parte Information

Appellant contends that the court erred in failing to strike evidence submitted by the State at sentencing that showed appellant was affiliated with white supremacist groups. He argues that this evidence was unauthenticated and had no purpose "other than to be inflammatory."[4]

The State contends that the court "soundly exercised its discretion during sentencing by considering evidence of affiliation with white supremacist hate groups." It argues that appellant's authentication challenge is not preserved for review, and it is without merit. The State further argues that "[r]eliable evidence of his affiliation with white supremacist hate groups was germane to the sentencing court's holistic determination of an appropriate sentence."

A.

Preservation

Initially, we agree with the State that appellant's contention that the circuit court should not have considered the evidence because it was not properly authenticated is not preserved for this Court's review. Md. Rule 8-131(a) provides, in pertinent part, that "the

[4] In his reply brief, appellant argues that the use of this evidence violated his First Amendment right of association and free speech. We will not address this argument that was not raised in the opening brief and was raised for the first time in the reply brief. *See Gupta v. State*, 227 Md. App. 718, 740 (2016) (We need not "consider an issue raised for the first time in a party's reply brief."), *aff'd*, 452 Md. 103, *cert. denied,* 138 S.Ct. 201 (2017).

appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Here, although appellant noted that the evidence had not "been certified" and "we could have a whole hearing on it," he then stated that "it really doesn't matter" and moved on to another topic. The court was not asked to rule on, and it did not address, whether the evidence was sufficiently authenticated. Accordingly, the issue of authentication was not preserved, and we will not address it.

B.

Sentencing Considerations

We turn next to appellant's claim that the court improperly considered the evidence because it was not relevant, and it was "unduly prejudicial." It is well established in Maryland "that the 'sentencing judge is vested with virtually boundless discretion'" in imposing a sentence. *Cruz-Quintanilla v. State*, 455 Md. 35, 40 (2017) (quoting *Smith v.* State, 308 Md. 162, 166 (1986)). The "judge is afforded such discretion to best accomplish the objectives of sentencing—punishment, deterrence, and rehabilitation." *Id.* (quoting *Smith*, 308 Md. at 166). "To achieve those objectives, the sentencing judge is not constrained simply to 'the narrow issue of guilt.'" *Id.* The sentencing judge "may take into account the defendant's 'reputation, prior offenses, health, habits, mental and moral propensities, and social background," *id.* (quoting *Jackson v. State*, 364 Md. 192, 199 (2001)), and it may consider "reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried," *Logan v. State*, 289 Md. 460, 481 (1981).

Appellant, citing *Dawson v. Delaware*, 503 U.S. 159, 165–67 (1992), argues that evidence of his beliefs and associations was irrelevant, and therefore, inadmissible, as "racial animus was not relevant" to his conviction for attempted voluntary manslaughter. To be sure, in *Dawson*, 503 U.S. at 166, the Court said that Dawson's affiliation with the Aryan Brotherhood "had no relevance to the sentencing proceeding in that case, where "elements of racial hatred were . . . not involved in the killing."

Here, by contrast, appellant was convicted of violating Maryland's hate crimes statute by committing racially motivated crimes against the victims. We cannot comprehend how "racial animus" was not relevant to appellant's hate crime convictions.

In *Cruz-Quintanilla*, 455 Md. at 45 (quoting *Dawson*, 503 U.S. at 166), the Court recognized that, in some cases, "associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." We perceive no abuse of discretion or consideration of impermissible considerations in the imposition of sentence here.

IV.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support several of his convictions. Initially, he contends that the evidence was insufficient to sustain his conviction for violating CR § 10-304, the hate crime statute, arguing that "there was no actual evidence of motive for the racially motivated crime found to have been committed." He acknowledges that there was evidence of "racial slurs," but he argues that there was

"nothing . . . connecting the racial slurs to [the] assault or attempted manslaughter." Moreover, he argues that, "because motive is an element of [CR] § 10-304, it is unclear how attempted manslaughter can support a conviction under [CR] § 10-304," asserting that the "mitigating effect of self-defense is to negate malice," and without malice, there "can be no racial animus."

Appellant also contends that the evidence was insufficient to support any of his convictions relating to Mr. Peete. He argues that there was no evidence that he "ever did anything towards" Mr. Peete, and there was no evidence of a racial motive regarding Mr. Peete.

The State contends that "[t]he only sufficiency challenge properly before this Court relates to the convictions for violating the hate crime statute," CR § 10-304, because appellant did not move for judgment of acquittal with respect to the other charges. In any event, it argues that the evidence was sufficient to support all the convictions. With respect to Mr. Peete, the State points to testimony that appellant pointed the gun directly at Mr. Peete, which it asserts allowed a rational juror to reasonably infer that appellant intentionally tried to kill Mr. Peete. With respect to the hate crimes, the State argues that "[a] rational juror could infer," based on appellant's comments and his "decision to arm himself with a loaded firearm before returning to the worksite to provoke a conflict," that his actions were "[m]otivated either in whole or in substantial part by the victims' race."

A.

Standard of Review

When the sufficiency of the evidence is challenged, we review the evidence "in the light most favorable to the prosecution." *State v. Morrison*, 470 Md. 86, 105 (2020). The critical inquiry is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Smith v. State*, 415 Md. 174, 184 (2010)).

B.

Preservation.

We address first the State's contention that appellant has waived appellate review of the sufficiency of the evidence of all convictions other than the convictions for violating the hate crimes statute. Md. Rule 4-324(a) provides that, when making a motion for judgment of acquittal, the defendant "shall state with particularity all reasons why the motion should be granted." "A defendant 'is not entitled to appellate review of reasons stated for the first time on appeal.'" *Stanley v. State*, 248 Md. App. 539, 562–63 (2020) (quoting *Starr v. State*, 405 Md. 293, 302 (2008)). As this Court has explained, "review of a claim of insufficiency is available only for the reasons given by appellant in [the] motion for judgment of acquittal." *Albertson v. State*, 212 Md. App. 531, 569–70 (2013), *cert. denied*, 435 Md. 267 (2013).

Here, appellant moved for a judgment of acquittal at the end of the State's case, arguing that the charges of attempted first-degree murder of Mr. Smith and Mr. Peete

should be dismissed based on self-defense. He also moved for judgment of acquittal with respect to the hate crime charges on the ground that there was no evidence that he committed any crime "because of" the victims' race. With respect to the other charges, defense counsel stated that he would "submit on the other counts . . . until after the Defense rests." After appellant elected not to testify, appellant's counsel stated that he was "going to renew" his motion, incorporating the arguments made previously.

In making his argument below, appellant never raised the contention, as he does on appeal, that the evidence was insufficient to support the convictions regarding Mr. Peete because "[t]here was no evidence that [he] ever did anything towards Robert Peete." Accordingly, appellant has failed to preserve this issue for appellate review.[5]

C.

Hate Crimes

Turning to the sufficiency of the evidence regarding the hate crimes, we note, as indicated, that evidence is legally sufficient to support a conviction "if any rational jury could find 'the essential elements of the crime beyond a reasonable doubt,'" *Morrison*, 470 Md. at 108 (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). Accordingly, we begin with our analysis with the elements of CR § 10-304.

[5] Even if the issue was preserved, we would find the contention to be without merit. Mr. Peete testified that, when he knelt down on appellant's arm to prevent him from aiming the gun at Mr. Smith, appellant "turned the gun over," which resulted in Mr. Peete "look[ing] down the barrel of the gun." Thus, contrary to appellant's contention, there was evidence that he did something toward Mr. Peete, and his insufficiency claim fails.

At the time of the offense, CR § 10-304 provided, in pertinent part, as follows:

> Because of another person's or group's race, color, religious beliefs, sexual orientation, gender, disability, or national origin, or because another person or group is homeless, a person may not:
>
> > (1)(i) commit a crime or attempt to commit a crime against that person or group[.]

Appellant contends that the evidence was insufficient to show a racial motivation for the underlying crimes of attempted voluntary manslaughter and first-degree assault. We disagree.

Motive can be inferred from words, acts, or conduct. *Kinser v. State*, 88 Md. App. 17, 20 (1991). Here, there was evidence to show that appellant attacked Mr. Smith and Mr. Peete because they are, in fact, African American. Appellant made the following comments to the victims: (1) "y'all need to leave. Y'all don't even belong here."; (2) "you n*****s, this is my hood,"; and (3) "you need to go back to Africa, you monkey motherfucker." Based on these comments, and his actions in returning to the victims' worksite with a gun, and then assaulting Mr. Smith after his verbal provocations, there was sufficient evidence for a rational trier of fact to conclude that appellant committed the underlying crimes of attempted voluntary manslaughter and first-degree assault "[b]ecause of" the victims' "race, [or] color." Appellant's claim to the contrary is without merit.

V.

First Amendment

Appellant contends that CR § 10-304 "violates the First Amendment to the United States Constitution as applied in this action." This contention will not detain us long.

As appellant concedes, this Court recently explained that hate crimes statutes that regulate conduct, as opposed to speech, do not violate the First Amendment. *Lipp v. State*, 246 Md. App. 105, 121 (2020). Here, appellant's *conduct*, in committing the crime of attempted voluntary manslaughter and first-degree assault "because of" the victims' race or color, was not protected by the First Amendment.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.