Circuit Court for Cecil County
Case No.: C-07-CR-21-000378

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1645

September Term, 2021

JEREMY BROOKE-THODOS

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: September 1, 2022

When a police officer attempted to arrest Jeremy Brooke-Thodos, appellant, pursuant to an outstanding arrest warrant, appellant dropped a blue sweatshirt he was carrying and ran away. Ultimately, the police caught him and placed him under arrest. Thereafter, the police found a pistol wrapped inside the blue sweatshirt appellant had dropped. The State thereafter charged appellant with numerous offenses stemming from the incident.

Following trial in the Circuit Court for Cecil County, a jury found appellant guilty of the following:

Count 1: unlawful possession of a firearm, pursuant to PS § 5-133(c)[1], by a person with a disqualifying conviction[2];

Count 2: unlawful possession of a firearm pursuant to PS § 5-133(b), by a person previously convicted of a felony;

Count 3: unlawful possession of a firearm, pursuant CL § 5-622(b), by a person with a previous conviction for a felony controlled dangerous substance (CDS) offense;

Count 4: wearing, carrying, or transporting a handgun;

Count 5: wearing, carrying, or transporting a loaded handgun;

Count 6: unlawful possession of ammunition;

Count 8: resisting a lawful arrest; and

[1] "PS" refers to the Public Safety Article of the Maryland Code.

[2] At trial, the parties stipulated that appellant had a prior conviction for violating section 5-602 of the Criminal Law Article of the Maryland Code ("CL"), which disqualified him from possessing a firearm. CL § 5-602 prohibits the distribution, or possession with the intent to distribute, a controlled dangerous substance ("CDS"). A person who violates CL § 5-602 is guilty of a felony.

Count 9: unlawful possession of CDS (fentanyl).[3]

Thereafter, after merging Counts 2 through 6 into Count 1 for sentencing, the court sentenced appellant to ten years' imprisonment for Count 1, three concurrent years' imprisonment for Count 8, and one concurrent year imprisonment for Count 9.

Appellant noted an appeal. In it, he first claims that his convictions on Count 2 and Count 3 should be vacated as redundant in light of his conviction on Count 1. Second, he claims that the trial court's behavior during portions of trial deprived him of a fair trial and constituted a plain error. For the reasons that follow, we, along with the State, agree that his conviction for Count 2 must be vacated. Otherwise, we disagree with appellant and shall affirm.

DISCUSSION

I

As noted above, appellant contends that, while his conviction for Count 1 may stand, his convictions under Counts 2 & 3 must be vacated because all of those convictions stem from the possession of the same firearm made unlawful by the same prior conviction. For the reasons we explain, we agree that his conviction for Count 2 must be vacated, but we do not agree that his conviction for Count 3 must be vacated. In our view, the trial court's merger of the sentence for Count 3 into the sentence for Count 1 adequately addressed appellant's double jeopardy related concerns stemming from his separate convictions for Count 1 and Count 3.

[3] The jury acquitted appellant of Count 7 which charged him with second-degree assault.

Count 1 charged appellant with a violation of PS § 5-133(c), which makes it a felony for a person to possess a regulated firearm after having been convicted of certain enumerated crimes. Pertinent here, PS § 5-133(c)(1)(ii) prohibits a person from possessing a regulated firearm if the person has previously been convicted of unlawfully possessing CDS with intent to distribute it under CL § 5-602.[4]

Count 2 charged appellant with a violation of PS § 5-133(b), which makes it a misdemeanor for a person to possess a regulated firearm for a number of reasons. Pertinent here, PS § 5-133(b)(1) prohibits a person from possessing a regulated firearm if the person was previously convicted of a "disqualifying crime," which is defined by PS § 5-101(g)(2) as including, among other things, any felony.[5]

Count 3 charged appellant with a violation of CL § 5-622, which, in pertinent part, makes it a felony for a person to possess a regulated firearm after having been convicted of a felony drug offense under Title 5 of the Criminal Law Article. CL § 5-622(b)(1).[6]

In short, therefore, the statutes underlying the convictions on counts 1, 2, and 3 overlappingly criminalize the same conduct. PS section 5-133(b) criminalizes the possession of a regulated firearm after being convicted of a disqualifying crime, which includes any felony. PS section 5-133(c) criminalizes the possession of a regulated firearm

[4] With exceptions not here germane, a person convicted of violating PS § 5-133(c) is subject to imprisonment for not less than 5 years but not exceeding 15 years. PS § 5-133(c)(2).

[5] A person convicted of violating PS § 5-133(b) is subject to a maximum sentence of five years' imprisonment or a fine of $10,000, or both. PS § 5-144(b).

[6] A person convicted of violating CL § 5-622 is subject to a maximum sentence of five years' imprisonment or a fine of $10,000, or both. CL § 5-622(c).

after being convicted of possession with intent to distribute CDS, which is a felony. And CL section 5-622 criminalizes the possession of a regulated firearm after being convicted of a violation of any felony under title 5 of the Criminal Law Article, which includes possession with intent to distribute CDS.

The State agrees with appellant that the conviction for Count 2 should be vacated, and so do we. With respect to PS § 5-133's statutory predecessor, the Court of Appeals explained, in *Melton v. State*, 379 Md. 471 (2004), "the unit of prosecution for [the statute] is the prohibited act of illegal possession of a firearm and … the statute does not support multiple convictions … where there is only a single act of possession." *Id*. at 486. Thus, when a person possesses a single regulated firearm that is illegal under two subsections of PS § 5-133 for two separate reasons, the person commits only one violation of the section, and therefore only one conviction – the one with the greater penalty – can stand. *Wimbish v. State*, 201 Md. App. 239, 272 (2011).

The State disagrees that the conviction for Count 3 should be vacated, and so do we. The rationale behind vacating Count 2, which, like Count 1, both charged a violation of PS § 5-133, does not support vacating the conviction for Count 3, which charged a violation of CL § 5-622 – a completely separate statute. We agree with the State that the trial court's decision to merge the sentence for Count 3 into the sentence for Count 1 adequately addressed any double jeopardy-related multiple punishment concerns because appellant was punished but once for his conduct. *See Montgomery v. State*, 206 Md. App. 357 (2012) (noting the difference between convictions that are multiplicative because they are predicated on the same conduct and violate the same statute, and convictions for which the

sentences merge because they are predicated on the same conduct and violate different statutes).

II.

Appellant next claims that the trial court deprived him of his right to a fair trial by making comments during trial "discouraging defense counsel from zealously advocating for" appellant and expressing "impatience with [trial] counsel's questions of potential jurors and the State's witnesses, as well as some of counsel's objections and legal arguments."

Appellant acknowledges that he lodged no contemporaneous objection to the court's allegedly improper conduct and has therefore failed to preserve the issue for appellate review. He asks us to overlook the lack of preservation and review the error under our authority to review unpreserved errors pursuant to Md. Rule 8-131.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (quotation marks and citation omitted). Therefore, plain error review "is reserved for those

errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted).

We conclude that any presumptive error on the trial court's part was not so extraordinary or fundamental that it deprived appellant of his right to a fair trial.[7] Thus, under the circumstances presented, we decline to exercise plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted).

CONVICTION FOR UNLAWFUL POSSESSION OF A REGULATED FIREARM (COUNT 2) VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY

[7] Based upon our independent review of the record of the proceedings below, we conclude that the trial court's actions, whether viewed individually or collectively, did not deprive appellant of his right to a fair trial. Below we briefly summarize the trial court's conduct that appellant claims violated his rights:

During jury selection, after the trial court had twice declined to ask a defense-requested *voir dire* question, the trial court said: "You've made your exception twice. Do you want to make it a third time?"

Also during jury selection, in declining to ask a defense-requested follow-up question of a juror who had already been questioned about being the victim of a crime, the trial court said: "You know, we're going to be here until this time tomorrow if you ask nitpicking questions like that."

Finally, twice during the cross-examination of the trooper who had the initial encounter with appellant, and once during the cross-examination of another police officer, the trial court made, and sustained, its own objection to questions that it believed had been "asked and answered."

OTHERWISE AFFIRMED. COSTS TO BE DIVIDED EQUALLY.