UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1704

September Term, 2014

WALTER McCOY

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 14, 2015

Appellant, Walter McCoy, was charged with attempted first-degree murder, attempted second-degree murder, use of a firearm during a crime of violence, possession of a firearm by a disqualified person, and violation of a protective order. He was tried before a jury in the Circuit Court for Baltimore City. On June 16, 2014, McCoy moved to suppress evidence seized from a vehicle for which a search warrant was issued, arguing that the supporting affidavit lacked sufficient probable cause. On June 17, 2014, the circuit court denied that motion. On June 24, 2014, a jury found McCoy guilty of attempted second-degree murder; use of a handgun in the commission of a crime of violence; wearing, carrying and transporting a handgun; possession of a firearm as a disqualified person; and violation of a protective order. On August 22, 2014, the court sentenced McCoy to eighteen years of incarceration for the attempted second-degree murder conviction, and to two concurrent eighteen-year terms for use of a handgun and possession of a firearm. McCoy was given a concurrent three-year term for the wearing, carrying and transporting conviction and a concurrent ninety-day sentence for the protective order violation. This timely appeal followed.

Questions Presented

McCoy asks the following questions, which we have reworded for clarity:

1. Did the circuit court err in denying McCoy's motion to suppress evidence?

2. Did the circuit court err in admitting the expert testimony of a ballistics examiner?

3. Did the circuit court err in allowing the victim to testify to McCoy's past incarcerations and bad acts?

4. Did the circuit court err in sustaining the State's objection to McCoy's line of questioning about the victim's mental health?

5. Was the evidence sufficient to sustain McCoy's convictions?

6. Did the circuit court abuse its discretion in sentencing McCoy?

We answer the "no" to the first four questions and "yes" to the last two questions. Accordingly, we affirm the court's judgment in part, vacate in part, and remand the case to the circuit court for the limited purpose of resentencing McCoy.

Facts

On May 26, 2013, Monique Smith was shot twice in the leg; one bullet hit her in the back of her leg and went through her leg with an exit wound on the inner thigh, and the second bullet grazed her right thigh. Smith identified McCoy as the man who shot her. Smith and McCoy had been in a volatile relationship that began in 2005.

At 12:00 a.m. on May 26, 2013, Smith started her shift as a concierge at the Lakewood Apartments located at 1401 North Lakewood Street in Baltimore City, Maryland. The front and back doors were locked. Shortly after 12:00 a.m., Smith heard a noise at the front door. She saw a man, clad in black clothing, pulling on the door handle before he turned and walked away. Smith called the police and was placed on hold when she heard someone pulling on the back door. Smith turned to see a man whom she later identified as McCoy. At that time, the man was wearing a facemask that covered his nose and mouth, leaving his eyes and eyebrows visible. Smith testified that this man told her, "you think it's a game?" and went to reach for something in his

waistband. Smith ran around the wall and shut a door behind her and, when she heard the man following her, she continued to run. As she ran, Smith heard two shots. She fell against the wall and felt something hot on her leg. Smith ran up the stairs and knocked on a couple of apartment doors looking for help. The resident of Apartment 205 let Smith in, and he called 911 at Smith's request. Once on the phone, Smith told the emergency operator that she had been shot twice. Smith identified McCoy as her assailant and related that he drove a 2006 Nissan. After the police arrived, Smith was taken to Johns Hopkins Hospital whereupon she was discharged some six hours later.

Officer Darcy Debrosse, the first officer to respond to the Lakewood Apartments, found blood and shell casings on the first floor hallway and bullet holes in a nearby door, but no weapon. Off. Debrosse followed the blood trail to a second-floor apartment where he spoke to Smith, who told him that her boyfriend, McCoy, had shot her. Responding to the scene, Detective Scott Henry determined that the point of entry was the building's rear door which was broken and "hanging off" the door frame. In the first floor hallway, Det. Henry observed two 10-millimeter shell casings, which indicated to him the use of a semi-automatic handgun, two bullet fragments, and two strike marks, which Det. Henry described as the impression left on a wall from the bullet actually hitting the wall. No weapon was recovered from the scene and no suspect was arrested on the scene in relation to this shooting.

On the morning of May 26, 2013, the police tracked McCoy, through his cell phone, to the 5126 Darien Avenue residence of Tanielle Allen and learned that McCoy

owned a 2006 Nissan registered to him at that address. By 8:00 a.m. on May 26, 2013, police arrested McCoy when he came out of the back door. The search of this home revealed no handgun or black clothing. Some two hours later, McCoy's car, a 2006 Nissan Maxima, was located several blocks away in front of 5112 Groton Road and towed to the Baltimore City Police Department's Eastern District garage. When Det. Henry later interrogated McCoy and asked him where his car was, McCoy responded that it was with his aunt, but when Det. Henry asked him where that was, McCoy paused for about five minutes. When Det. Henry told McCoy that the police had his car and asked him more about the car, McCoy responded, "I'm not at liberty to discuss that."

A search warrant was obtained on May 29, 2013, and a search and seizure warrant was executed on McCoy's automobile on May 30, 2013. During the search of the vehicle, Det. Henry recovered one fired 10-millimeter cartridge casing in or underneath the rear seat. A search warrant was also obtained for McCoy's residence and no evidence of value was recovered from that home or from Tanielle's home.

Firearms examiner Daniel Lamont performed microscopic shell casing comparison of the two cartridge cases found on the scene and the one recovered from McCoy's vehicle. As a result of Lamont's examination of the three casings, he concluded that all were fired from the same firearm. Christopher Favor, a second firearms examiner, conducted an independent comparison of the three cartridge casings and came to the same conclusion that the casings were fired from the same firearm.

Additional facts will be included as they become relevant to our discussion, below.

Discussion

I. Motion to Suppress

McCoy argues that there were no indicia of probable cause to issue the search warrant because the police failed to establish a nexus between the crime and McCoy's vehicle. McCoy asserts that "[t]he alleged criminal activity described in the affidavit contains no facts supporting a reasonable inference, and hence a substantial basis, that a weapon would be found in the car." McCoy avers that, because "[t]he only assertion in the affidavit that arguably establishes a nexus between the alleged shooting and the car is [Det.] Henry's assertion that based on his experience, suspects often choose to hide handguns or other weapons in their cars[,]" the police cannot establish the probable cause. McCoy also argues that the good faith exception to the exclusionary rule does not apply and the evidence should have been suppressed. We disagree.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation[.]" U.S. CONST. amend. IV. The Fourth Amendment is made applicable to the states by the Fourteenth Amendment. *Birchead v. State*, 317 Md. 691, 700 (1989). Probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *Id.* at 246. "[P]robable cause

may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items." *Holmes v. State*, 368 Md. 506, 522 (2002) (citations omitted). Probable cause to search a place is established when there is a nexus between the suspect's criminal actions and the place sufficient to support a reasonable inference that the tools or fruits of the crime probably will be found at that place. *Faulkner v. State*, 190 Md. App. 37, 52 (2010).

In making a probable cause determination, the court issuing the search warrant "is confined to the averments contained in the search warrant application." *Ferguson v. State*, 157 Md. App. 580, 592 (2004) (citation omitted). If a defendant challenges the issuance of a warrant, the reviewing court "do[es] not undertake a *de novo* review, but instead, pay[s] great deference to the magistrate's determination." *Id.* at 592-93 (citation omitted). We accept the issuing judge's "implicit fact-finding, unless clearly erroneous, and, beyond that, we will view the factual recitations in the warrant application in the light most favorable to the State." *Ellis v. State*, 185 Md. App. 522, 535 (2009) (citing *State v. Jenkins*, 178 Md. App. 156, 174 (2008)).

The Court of Appeals has held that when a suspect is arrested and is not carrying the weapon used in the crime, there is a reasonable inference that the suspect's residence is a "probable place for secreting objects such as [the weapon used in the crime]." *Mills v. State*, 278 Md. 262, 280 (1976); *see also Holmes*, 368 Md. at 521; *Ward v. State*, 350 Md. 372, 378-86 (1998). In *Ward*, 350 Md. at 377-78, the Court of Appeals held that

there was a sufficient nexus between a crime and the defendant's car because witnesses identified the defendant as the murderer, the weapon was not on the defendant's person when he was arrested, and the defendant was approached by police less than forty-eight hours after the murder. In *Holmes*, 368 Md. at 517, the Court of Appeals held that there was a connection between a crime and the defendant because the transaction of drugs observed by the search warrant affiant occurred less than a block from defendant's home and the defendant, who had a history of controlled dangerous substance violations, was in and out of his home immediately prior to meeting his customer. The *Holmes* Court concluded that because "a particular kind of weapon was used in the crime; there was evidence linking the defendant to the crime; the weapon was of a kind likely to be kept, and not disposed of, by the defendant; when arrested shortly after the crime, the defendant was not in direct possession of the weapon; *ergo*, it was likely to be found in a place accessible to him - his home or car." *Id.* at 521.

In this case, there was a nexus between McCoy's car and the crime. From the affidavit, we know that a gun was used at the crime scene because Smith, the victim, suffered two gunshot wounds. There was evidence linking McCoy to the crime because Smith immediately identified McCoy as her assailant and identified the vehicle, a blue 2006 Nissan Maxima, which McCoy drove at that time. No gun was found at the crime scene, at McCoy's residence, or on his person. McCoy was arrested within twenty-four hours of the crime and was reluctant to fully discuss his car. In light of the facts and the inferences from these facts, probable cause to search the vehicle existed. Because there

was a substantial basis for probable cause, we need not address whether the good faith exception to the exclusionary rule applies.[1] Therefore, we affirm the circuit court's denial of the motion to suppress evidence.

II. Admissibility of Expert Testimony

Next, McCoy argues that the circuit court should have either excluded or severely restricted the expert testimony of Baltimore City Police Department Firearms Examiner Daniel Lamont. We hold that admitting Lamont's expert testimony was an exercise of sound discretion.

Before trial, the State proposed to proffer expert testimony from Lamont, and McCoy challenged Lamont's certification as an expert. A hearing was held, after which the circuit court ruled that the State had met its burden and certified Lamont as an expert. During trial, Lamont testified that the two bullet casings recovered from the crime scene "matched" the single bullet casing found in McCoy's vehicle. In this case, McCoy does not challenge "the admissibility of traditional comparison microscopic analysis in general," but rather "whether the expert has reliably applied the principles and methodology of toolmark forensics to the facts in this case."

[1] The exclusionary rule is "the appropriate remedy for a violation of the Fourth amendment." *Myers v. State*, 395 Md. 261, 278 (2006). One restraint on the application of the exclusionary rule is the good faith exception, which was established in *Leon,* 468 U.S. 897 (1984). Under the good faith exception, "suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926.

Admissibility of expert testimony is "a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Oken v. State*, 327 Md. 628, 659 (1992) (citations omitted). We only reverse a lower court's decision to admit expert testimony in instances of clear error or serious mistake. *See White v. State*, 100 Md. App. 1, 13 (1994). Accordingly, the *Frye* and *Reed* cases[2] require us to review the lower court's decision regarding admissibility of expert scientific testimony *de novo*. *Clemons v. State*, 392 Md. 339, 359 (2006).

McCoy is not challenging the admissibility of traditional comparison microscope analysis in general. That challenge was raised pre-trial and, appropriately, rejected because Maryland has continued to hold that firearm toolmark analysis is generally accepted within the scientific community and reliable. *Fleming v. State*, 194 Md. App. 76, 107 (2010) (noting in *dicta* that "[a]lthough *Reed* was decided over thirty years ago [and] notwithstanding the current debate on the issue, courts have consistently found [toolmark analysis] to be generally accepted within the scientific community, and to be reliable"). Instead, McCoy challenges "whether the expert has reliably applied the principles and methodology of toolmark forensics to the facts in the case."

The underlying theory behind traditional microscope comparison of cartridges is a belief that "unique characteristics of each firearm are to an appreciable degree copied

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Reed v. State*, 283 Md. 374 (1978).

onto some or all . . . casings firing from that gun." *United States v. Glynn*, 578 F. Supp.2d 567, 573 (S.D.N.Y 2008). In *Fleming*, 194 Md. App. at 102, we described three categories of toolmarks that can be found on spent cartridges: class, subclass, and individual. We described those categories as follows:

> [F]amily resemblances which will be present in all weapons of the same make and model. Examples of class characteristics include the bullet's weight and caliber; number and width of the lands and grooves in the gun's barrel; and the 'twist' (direction of turn, *i.e.* clockwise or counterclockwise, of the rifling in the barrel). Class characteristics that cause toolmarks on spent cartridge casings include the caliber type of breech face, and type of firing pin. A breech face may be parallel, arched, smooth, granular, or circular, and a firing pin can leave an impression that is circular, rectangular, or elliptical.
>
> Subclass characteristics are produced incidental to manufacture and can arise from a source which changes over time, and therefore may be present on a group of guns within a certain make or model, such as those manufactured at a particular time and place. An example would include imperfections on a rifling tool that imparts similar toolmarks on a number of barrels before being modified either through use or refinishing.
>
> Individual characteristics are random imperfections produced during manufacture or caused by accidental damage . . . which are unique to that object and distinguish it from all others. However, non-unique marks may comprise individual characteristics, and wear and tear caused individual characteristics to change over time to some extent.

Id. (internal citations omitted). In sum, "the toolmarks made on a bullet or cartridge casing include marks imposed by all weapons of the make and model that fired the ammunition (class characteristics), marks common only to a subset of that make and model (subset characteristics), and marks unique to the weapon that fired the ammunition (individual characteristics)." *Id.* at 103 (citation omitted).

After our independent review of the record, we conclude that the circuit court did not abuse its discretion by admitting Lamont's expert testimony. McCoy claims that Lamont's examination process was flawed because none of the conclusions presented in his report or his testimony provided any actual evidence that he based his conclusions on any *individual characteristics* or even subclass characteristics. We disagree. On redirect examination, the following exchange occurred between Lamont and the State:

> Q: Now, when you review or rather analyze these casings under a microscope, you have to look at the whole piece of evidence; correct?
>
> A: Correct.
>
> Q: And would you say that it's a more holistic approach?
>
> A: **Uh, yes, I mean I am looking at every marking I can see on the cartridge case to see if it has repeated onto the other, I don't see one line and I'm done, you know.**

(Emphasis added).

This brief, but telling, exchange is evidence that Lamont conducted a sufficient investigation of the cartridge casings before reaching his conclusion that the cartridges found at the scene of the crime matched the cartridges recovered from McCoy's vehicle. That another firearms examiner conducted his own, independent investigation only adds to our confidence in Lamont's conclusion.

In the alternative, McCoy contends that the circuit court should have limited Lamont's expert testimony by requiring him to state that it was "more likely than not" that the cartridges were all fired by the same gun. *See Glynn*, 578 F. Supp.2d at 574-75 (stating that this can be done to satisfy the relevant federal evidentiary rule "without overstating the capacity of the methodology to ascertain matches"). This, however, is not

required in Maryland. Although there is debate amongst various federal jurisdictions about the reliability of toolmark evidence, Maryland has continued to hold that firearm toolmark analysis is generally accepted within the scientific community and is reliable. *Fleming*, 194 Md. App. at 107. Thus, a limiting statement is unnecessary.

Citing, *United States v. Willock*, 696 F. Supp.2d 536, 576 (D.Md. 2010), McCoy also contends that Lamont's three-page report detailing how he reached his conclusion that the cartridges matched is insufficient. Again, although toolmark analysis has come under some scrutiny, it is still generally accepted within the scientific community and considered reliable. The circuit court found that Lamont is an expert in his field, based on the thousands of toolmark analyses he has completed in a professional capacity, in addition to attending numerous trainings both in-house and with outside organizations. Further, another firearms examiner completed an independent investigation and reached the same conclusion as Lamont. That Lamont's report was only three pages is of no importance. Lamont's testimony as an expert witness, therefore, was appropriately admitted.

III. Admissibility of Testimony Regarding McCoy's Past Incarcerations and Other Prior Bad Acts

Next, McCoy argues that the circuit court committed plain error by admitting testimony about McCoy's past incarcerations and prior bad acts. We hold that the court committed no such error, plain or otherwise.

During trial, the State called the victim, Smith, to the witness stand. On cross-examination, defense counsel asked Smith a series of questions implicating

McCoy's previous incarcerations and other bad acts. That exchange took place as follows:

> Q: Ms. Smith, I want to take you back to a period in your relationship with Mr. McCoy in 2009. Did you in fact make a criminal complaint against Mr. McCoy in 2009 that resulted in his arrest?
>
> A: Would you be more detailed, you know, what kind –
>
> Q: Did you accuse Mr. McCoy of assaulting you back in 2009 which resulted in his arrest and incarceration?
>
> A: Yes.
>
> Q: And you would frequently write to Mr. McCoy when he was incarcerated; correct?
>
> A: Did I write, I'm not sure?
>
> Q: Did you ever recall writing letters to Mr. McCoy during the time of his confinement?
>
> A: Which confinement? He's been confined several times.
>
> Q: Well, let's start with the first time that he was arrested in 2009 as a result of a complaint. Do you recall writing any letters to him back in August of 2009?
>
> A: Yes, I think.
>
> * * *
>
> Q: Now, in 2011, did you have occasion in 2011 to allege that Mr. McCoy had assaulted you?
>
> A: Mr. Cole, when you say assault, can you be more specific? I mean, Mr. McCoy has had several incidents with the police being involved and him being arrested. So unfortunately due to the many times I've been assaulted, you have to be specific.
>
> Q: Okay. I will be specific. Specifically on December 29, 2011, did you tell the police that Mr. McCoy had assaulted you?
>
> A: December the 9th?
>
> Q: December 29, 2011.
>
> A: I am not sure.

Q: Okay. Do you recall him being incarcerated around that time frame?

A: I am not sure.

"[E]vidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial." *State v. Faulkner*, 314 Md. 630, 633 (1989) (citations omitted); *accord McKinney v. State*, 82 Md. App. 111, 119 (1990). The reason for this exclusion is that such evidence of prior criminal behavior may predispose jurors to believe that the defendant is guilty or prejudice their minds against him based on his criminal reputation. *See McKinney*, 82 Md. App. at 120-22. However, the Court of Appeals has explained that the "invited error" doctrine precludes an appellant from obtaining a benefit, such as a mistrial or reversal, from an error he or she created. *State v. Rich*, 415 Md. 567, 575 (2010); *Nash v. State*, 191 Md. App. 386, 402-03 (2000).

That McCoy invited the error for which he now complains cannot be ignored. During defense counsel's cross-examination of Smith, she merely attempted to answer the questions that were being asked of her.

Invited error notwithstanding, McCoy argues that the circuit court's admission of this testimony was plain error. Maryland Rule 8-131(a) controls plain error analysis. It states, in pertinent part:

> Ordinarily, 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.

Plain error review, however, is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md.

232, 243 (2011) (citation omitted). Among the factors that we consider are "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald intentions." *Id.* (citation omitted).

Here, there is no plain error. Even McCoy admits that the State did not seek to offer this testimony into evidence. Rather, each answer was in direct response to defense counsel's questions. Finally, and also compelling, the evidence was not used by the State as character evidence to imply that McCoy had a propensity for committing the crimes for which he was accused.

IV. Cross-Examination Regarding the Victim's Mental Health

Next, McCoy argues that the circuit court erred when it denied him the opportunity to cross-examine Smith to question her about her mental health. We reject this contention.

During defense counsel's cross-examination of the victim, Smith, defense counsel attempted to explore the nature of Smith's mental health. That exchange took place as follows:

> Q: At the time of the incident, against referring to the records, were you at that point in time suffering from any mental health issues?
>
> [STATE]: Objection.
>
> The Court: Overruled, if she knows.
>
> A: No, sir.
>
> Q: Depression or anxiety?

[STATE]: Objection. Asked and answered.

The Court: Okay. Sustained.

[DEFENSE]: May we approach, Your Honor, briefly?

The Court: Yes.

(Whereupon, counsel and the defendant approached the bench and the following ensued:)

The Court: Yes?

[DEFENSE]: I do think there might be a history of bipolar disorder that I wanted to ask one more question about, I don't know if you're going to let me go there or not.

The Court: She's already denied it and it may be in the medical records, I don't know if she admitted any medical –

[DEFENSE]: There is nothing – there is a mention of depression but there's not a mention, it's just –

The Court: Okay.

[DEFENSE]: I believe there is a history of bipolar that (inaudible).

The Court: Oh, I am going to sustain it. Okay?

[DEFENSE]: Okay. Thank you.

[STATE]: Thank you, Your Honor.

As an initial matter, the issue McCoy raises here was not properly preserved for our review. "Where the evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 164 (2012) (quoting *Sutton v. State*, 139 Md. App. 412, 452 (2001));

accord Conyers v. State, 354 Md. 132, 164 (1999) (proffer as to substance and importance of the expected answers was required to preserve issue for appeal). There must be a proffer of the anticipated testimony. *Sutton*, 139 Md. App. at 452. Absent such a proffer, any issue arising from the exclusion is not preserved. *See id.*

In this case, at no point did defense counsel make a proffer concerning the substance and importance of the answers he expected to receive from Smith. Therefore, this issue is not preserved for review.

V. Sufficiency of Evidence

McCoy challenges the sufficiency of the evidence to sustain his convictions by arguing that: (1) the jury could not have concluded that he intended to kill Smith because "the thigh is not a vital part of the body" and Smith's injuries were not life threatening; (2) the jury could not have concluded that he was in possession of a regulated firearm because Smith did not see the weapon pulled out by McCoy and no gun was found at the scene; and (3) no rational trier of fact could have found that McCoy was the assailant since Smith was an admitted liar who described how she could create a false allegation of domestic violence and ensure a man's arrest. Specifically, McCoy contends that "the only evidence connecting McCoy to the events at issue was Smith's identification of him 'by his eyes and eyebrows' as the man who came at her otherwise completely covered in black clothing" and "the black clothing worn by Smith's assailant was not found in the search of McCoy's house and car." We disagree with McCoy.

The standard for reviewing the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *see also Allen v. State*, 402 Md. 59, 71 (2007); *Rivers v. State*, 393 Md. 569, 580 (2006); *Moye v. State*, 369 Md. 2, 12 (2002). We give "due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Harrison v. State*, 382 Md. 477, 488 (2004) (citing *McDonald v. State*, 347 Md. 452, 474 (1997) (quoting *State v. Albrecht*, 336 Md. 475, 478 (1994))). In performing its function, the jury is free to accept the evidence it believes and reject that which it does not believe. *Muir v. State*, 64 Md. App. 648, 654 (1985). When reviewing a challenge to the sufficiency of the evidence, we "view the evidence, and all inferences fairly deductible from the evidence, in a light most favorable to the State." *Hackley v. State*, 389 Md. 387, 389 (2005) (citations omitted).

Intent to kill can be inferred from "the use of a deadly weapon directed at a vital part of the human body." *Buck v. State*, 181 Md. App. 585, 642 (2008) (citations omitted). "Since intent is subjective and . . . cannot be directly and objectively proven, its presence must be shown by established facts, which permit a proper inference of its existence." *Earp v. State*, 319 Md. 156, 167 (1996) (citation omitted). In this case, a reasonable jury could have found McCoy's intention to kill Smith. There was a history of violence between McCoy and Smith, and Smith had a protective order against McCoy.

During the shooting incident, when Smith ran away from McCoy, McCoy chased her, used a deadly weapon, and fired at Smith twice. Where bullets hit is not necessarily where they were directed. The fact that Smith's resulting injuries were not life threatening is irrelevant to determining whether McCoy had the intent to kill.

Next, there was sufficient evidence for a jury to conclude a regulated firearm was used. Md. Code (2003, 2011 Repl. Vol.), § 5-133(r)(1) of the Public Safety Article ("PS") provides that a "regulated firearm" includes a handgun. Even though Smith did not see a handgun pulled out from McCoy's waistband, she did see him reach into his waistband and heard shots fired shortly thereafter. In addition, Smith suffered two gun wounds, and an expert testified that the two 10-millimeter casings found at the scene were fired from the same firearm as the casing found in McCoy's vehicle. Moreover, the State presented testimony that a 10-millimeter caliber can be fired from a handgun. Taken together, this was sufficient to support the inference that a handgun was used.

Finally, "[i]n a jury trial, judging the credibility of witnesses is entrusted solely to the jury, the trier of fact; only the jury determines whether to believe any witnesses." *Fields v. State*, 432 Md. 650, 677 (2013) (citation omitted). Although Smith admitted to not being truthful in the past, a rational trier of fact is not precluded from believing that she told the truth on this occasion that McCoy was her assailant. Smith identified McCoy as her assailant and described the car he drove immediately after the incident. The level of familiarity that existed between McCoy and Smith during their seven-year relationship could lead the jury to believe that observing the area around his eyes while hearing what

she perceived as his voice permits Smith to recognize McCoy. Also, admitted as corroborating evidence were bullet holes in the wall, the description of McCoy's vehicle, and a casing of the same caliber used in the crime was found in McCoy's car. This was all consistent with Smith's testimony and made it reasonable for a jury to reject McCoy's allegation that Smith had framed him. Therefore, we conclude that the evidence was sufficient to support McCoy's convictions.

VI. Sentencing

Finally, McCoy argues that: (1) the circuit court erred in imposing a sentence of eighteen years' incarceration for possession of a prohibited firearm in a crime of violence, and (2) the sentence for McCoy's conviction of wearing, carrying and transporting a handgun should be merged with the sentence for the conviction for use of a handgun in a crime of violence. The State agrees with McCoy.

In *Ridenour v. State*, 142 Md. App. 1, 11-12 (2001), we discussed the trial judge's broad power over sentencing and the appellate courts' scope of review, stating:

> Trial judges are vested with broad discretion in sentencing. In exercising this discretion, the sentencing judge should consider "the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." The judge's consideration should be undertaken with the aim of furthering the goals of the criminal justice system: punishment, deterrence, and rehabilitation.

It is equally well-established that there are only three grounds for appellate review of sentences recognized in this state, which the Court of Appeals set forth in *Gary v. State*, 341 Md. 513, 516-17 (1996). They are: "(1) whether the sentences constitute cruel and

unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence was within statutory limits."

The maximum sentence allowed by law for possession of a prohibited firearm in a crime of violence is fifteen years' incarceration. PS § 5-133(c)(2)(i). In *Hunt v. State*, 312 Md. 494, 509-10 (1988), the Court of Appeals stated: "We think it plain that the Legislature did not intend, under circumstances like those now before us, that a separate punishment would be imposed for carrying, wearing, and transporting a handgun consecutive to that imposed for using a handgun during commission of a crime of violence." Merger of the sentences for those convictions is, therefore, appropriate here. But, because McCoy's concurrent eighteen-year sentences for possession of a handgun and use of a handgun are in excess of the statutory limits, we remand the case for resentencing in conformance with the statute. The judgments of the circuit court are otherwise affirmed.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID 5/6 BY APPELLANT AND 1/6 BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.