UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0121

September Term, 2014

JAMAL JEROME WALKER

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 11, 2016

Following a three-day jury trial in the Circuit Court for Baltimore County, Jamal Walker, appellant, was convicted on two counts each of attempted voluntary manslaughter, and second degree assault, and one count each of using a firearm in the commission of a crime of violence, and wearing, carrying, or transporting a firearm.[1] The court subsequently sentenced Walker to serve two consecutive sentences of nine years each, for the manslaughter convictions; a consecutive twenty years, all but six years suspended, the first five years to be served without the possibility of parole, for the use of a firearm in the commission of a crime of violence; and a consecutive three years for wearing, carrying, or transporting a firearm.[2]

In his timely filed appeal, Walker raises three questions for our consideration:

1. Did the trial court err in limiting the cross examination of a State witness?

2. Did the trial court err in allowing the State to make improper and prejudicial comments at closing argument?

3. Did the trial court err in failing to merge Appellant's conviction for wear, carry, or transport into his conviction for use of a handgun?

Because we agree that the circuit court erred by failing to merge Walker's conviction for wearing, carrying, or transporting a handgun into his conviction for use of a handgun in the commission of a crime of violence for the purposes of sentencing, we shall vacate the separate three-year sentence imposed for wearing, carrying, or transporting a handgun and

[1] The jury found Walker not guilty on counts alleging attempted first and second degree murder and first degree assault.

[2] Appellant's other convictions were merged for the purposes of sentencing.

remand this case to the circuit court for resentencing in a manner not inconsistent with this opinion. Discerning no other reversible error or abuse of discretion, we shall otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

On the night of April 19, 2013, Zxavier[3] Edwards and his girlfriend, Jessica Quiroga, were planning to meet friends at a bar called The Loft in Essex, Baltimore County, Maryland. Sometime after 11:00 p.m., Edwards and Quiroga arrived at The Loft in Quiroga's red Geo Prism. Quiroga parked her car next to a blue Acura CL being driven by Jessica Jones, in which Walker was the front seat passenger.

Edwards and Qioroga heard a gunshot that hit the top of their car, followed by more gunshots that came through the windows and into the passenger compartment. Edwards grabbed a gun he had hidden under the front seat and returned fire, aiming for the muzzle flashes of the gun that was firing at him from the passenger side of the blue car.[4] An uninvolved witness, Lloyd McGuire, who was leaving The Loft just prior to the shooting, observed a man bracing his body against the top and passenger side of the blue car as he fired multiple shots at the red car that was parked on the opposite side of the car.

The whole incident lasted about two to three minutes. Edwards, Quiroga, and Jones all suffered gunshot wounds. Edwards and Quiroga were transported to Franklin Square

[3] Zxavier Edwards's name is misspelled throughout the transcripts as Xavier.

[4] Edwards, an admitted heroin dealer, was legally prohibited from possessing a gun due to a prior conviction for second degree assault. At the time of Walker's trial, Edwards was facing charges for his possession of a firearm and had a violation of parole hearing pending.

Hospital by one of their friends. Jones was transported by ambulance to Bayview Hospital. Walker, who was uninjured, ran from the scene of the shooting. The police recovered multiple cartridge cases from inside and outside of both cars.

Walker was charged in the District Court for Baltimore County on April 19, 2013, and a warrant was issued for his arrest. Walker was apprehended by the police on April 26, 2013. Walker was charged by the State's Attorney by criminal indictment in the Circuit Court for Baltimore County on June 6, 2013.

ANALYSIS

I. Limitations on Cross Examination of State's Witness

Edwards, who fired ten shots at the car in which Walker had been a passenger, was originally charged by the police with attempted first degree murder and related offenses. The charges against Edwards were never reviewed or agreed to by the Office of the State's Attorney, however, and were dismissed soon after they were brought. During cross-examination of Edwards at Walker's trial, defense counsel sought to question Edwards about the charges that were initially filed against him in this case:

> [Defense]: You were originally charged with attempted murder in this case; is that correct?
>
> A. That's correct.
>
> [State]: Objection.
>
> COURT: Sustained.
>
> [Defense]: May we approach?
>
> COURT: Come on up.

(Whereupon, counsel approached the bench).

[Defense]: Your Honor, my point is to show the Defendant was charged with attempted murder and he currently has two things pending in Circuit Court for Baltimore County, a violation of probation on the assault that he talked about and a possession of a weapon. I think I should be able to question him both as to the background of the charge being dropped - -I'm not saying the State has offered him any deal, but he could have his own impression in his head that he would fare better in these cases if he is cooperative with the State.

[State]: [Defense counsel] is able to ask him questions about what are charges against him now. When he was originally charged, the police made that decision, not - -

COURT: It wasn't the State's attorney at that time.

[State]: So I think he can ask about what charges are pending against him now because of the appearance that he might want to garner favor with the State. But I don't believe what he was originally charged with by the State has any bearing on this.

COURT: Agree with that. The original charges - - I sustain the objection on that. But the pending charges I will let you inquire.

(WHEREUPON, proceedings resumed before the Jury.)

[Defense]: Mr. Edwards, you currently have a charge of violation of probation on that second assault that is pending?

A. Yes.

Q. And you currently have a charge of a person, prohibited person in possession of a firearm that is also pending?

A. Yes.

Q. And do you think that by testifying here today you might fare better, that you might get better treatment in those charges if you are cooperative with the State?

A. I couldn't see how because I told the detectives initially and I told the State's attorney that I couldn't see that your client was the person who shot me because I stated multiple times I never [saw] … the [face of the] person who shot me… . So I'm really not helping much.

Q. Even though you do have those charges pending against you at this time?

A. But my testimony here is not helping that case. I'm not saying that I [saw the face of] the person who shot me… . I couldn't see how it helps.

[Defense]: No further questions.

Walker contends that the trial court abused its discretion by sustaining the State's objection to defense counsel's inquiry regarding the charges that were initially filed against Edwards. In his brief, he asserts that the foreclosed line of questioning would have revealed whether Edwards believed he would avoid future prosecution on the dismissed charges if he cooperated with the State by testifying against Walker in this case. As a result of the trial court's limitations on his cross-examination of Edwards, Walker contends, he was denied his right to confront witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution.

The Sixth Amendment provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right to ... to be confronted with the witnesses against him[.]"

U.S. CONST. AMEND. VI. "The right of confrontation includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." *Martinez v. State*, 416 Md. 418, 428 (2010) (citing *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974)). The Sixth Amendment's "Confrontation Clause" is incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."). "This same right is guaranteed to a criminal defendant by Article 21 of the Maryland Declaration of Rights[,]"*Marshall v. State*, 346 Md. 186, 192 (1997),[5] and is embodied in Maryland Rule 5-616(a)(4), which specifically provides that a party may attack the credibility of a witness through questions, "including questions that are directed at: … [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely[.]"

"To comply with the Confrontation Clause, a trial court must allow a defendant a 'threshold level of inquiry' that 'expose[s] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses.'" *Peterson v. State*, 444 Md. 105, 122 (2015) (quoting *Martinez*, 416 Md. at 428) (alteration in original). So long as this constitutional threshold is satisfied, a trial court may, thereafter, impose limitations on a witness's testimony "when

[5] Walker has not made any argument that the scope of Article 21 is broader than that of the Sixth Amendment. Therefore, we shall assume, for purposes of this Opinion, an identical reach.

necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Martinez*, 416 Md. at 428; *see also* Md. Rule 5-611(a) (allowing the court to exercise "reasonable control" over the interrogation of witnesses "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."); *Leeks v. State*, 110 Md. App. 543, 557 (1996) ("When the trier of fact is a jury, questions [regarding bias] should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion."). Where such limitations are imposed by a trial court and subsequently challenged in an appeal, "[t]he question is 'whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial.'" *Parker v. State,* 185 Md. App. 399, 426 (2009).

Maryland courts have recognized that evidence of a witness's belief that he or she might benefit from cooperating with the State is relevant to impeach the credibility of the witness. *See e.g. Calloway v. State*, 414 Md. 616, 633 (2010) ("Circumstantial evidence of a witness's self interest is admissible because . . . 'even an untruthful [person] will not usually lie without a motive.'" (citation omitted)). Any expectation of leniency on the part of the witness is relevant even though there is no indication that there is any formal deal or *quid pro quo* agreement between the witness and the State. *Calloway*, 414 Md. at 637 ("[T]he issue is whether [the witness] had a hope that he [or she] would benefit from volunteering to testify against Petitioner, it is of no consequence that the State had not

offered to make 'any deal or bargain with [the witness] regarding his [or her] charges and his [or her] testimony in [Petitioner's] case.'"); *Leeks*, 110 Md. App. at 557 ("[T]he issue of bias is often generated by circumstantial evidence and does not disappear merely because the witness denies any reason to be biased."). Maryland courts have held that the exclusion of such impeachment evidence usurps the role of the jury to judge the credibility of witnesses and therefore, constitutes reversible error. *Calloway*, 414 Md. at 639 (reversing petitioner's conviction and remanding for a new trial where the Circuit Court granted the State's motion *in limine* based on its own assessment of the witness's credibility); *Leeks*, 110 Md. App. at 557 (noting that "[i]f such circumstantial evidence [of bias] exists, the trier of fact is entitled to observe the witness's demeanor as he or she responds to questions.").

In this case, the police initially charged Edwards with attempted murder, presumably believing that it was equally likely that Edwards, rather than Walker, was the initial aggressor in the shooting in the parking lot at The Loft. The charges against Edwards were never reviewed or accepted by the State's Attorney's Office, and were later dismissed. Of course, the State retained the option of refiling the charges against Edwards, at its discretion. *See e.g. State v. Ferguson*, 218 Md. App. 670, 680-81 (2014) ("Decisions about whether to dismiss charges and whether to re-file charges are uniquely within the State's broad prosecutorial authority."); *Brown v. State*, 74 Md. App. 414, 420-21 (1988) (recognizing that charges that were *nolle prossed* prior to witness's testimony could be refiled if the witness refused to repeat her inculpatory statements at trial).

We agree with Walker that the fact, that (1) Edwards was initially charged with attempted murder, that (2) the charges against him were later dismissed but could be refiled, and that (3) he was subsequently an important witness for the State at appellant's trial, constitute circumstantial evidence for Edwards to believe that he would benefit from his cooperation with the State in its prosecution of Walker. Arguably, had defense counsel been permitted to continue with his line of questioning, the jury could have believed that Edwards was motivated to implicate Walker in the hope that the State would choose not to pursue the previously dismissed charges against him. We are persuaded, therefore, that defense counsel's attempt to question Edwards regarding this potential area of bias was not improper and that the circuit court erred by sustaining the State's objection to defense counsel's query.

"Because the right to cross-examine a witness on matters and facts that are likely to affect his or her credibility is a fundamental concept in our system of jurisprudence, we employ the harmless error analysis when reviewing its violation." *Dionas v. State*, 436 Md. 97, 107-08 (2013) (citing *Smallwood v. State*, 320 Md. 300, 308 (1990)). "Once error is established, the burden is on the State to show that it was harmless beyond a reasonable doubt." *Denicolis v. State*, 378 Md. 646, 658-59 (2003). Where a court has improperly limited cross-examination, reversal is mandated "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dionas*, 436 Md. at 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

During Walker's trial, both the State and the defense presented information about Edwards that reflected negatively on his character and credibility. The State elicited that Edwards was a drug dealer and that, on the night of the shooting, he was in possession of eleven "pills" of heroin that he intended to sell. The State further established during its direct examination of Edwards that he had previously been convicted of second degree assault and was, therefore, legally disqualified from possessing a firearm. Edwards also admitted that he regularly illegally carried a handgun and that he was in possession of the gun on the night of the shooting. The testimonial and forensic evidence clearly indicated that, on that night, Edwards fired his handgun ten times in the direction of the blue car in which Walker had been a passenger. Finally, defense counsel was permitted to question Edwards regarding the felon in possession and violation of parole charges that were pending against him, and to specifically question whether Edwards expected any leniency in those cases as a result of his testimony against Walker.

Walker now challenges the circuit court's ruling, which prevented him from soliciting additional impeachment evidence that Edwards was initially charged with attempted murder. We are persuaded that this evidence was qualitatively different from the other impeachment evidence that was admitted and that its probative value was so comparatively infinitesimal that its exclusion was harmless.

First we note that, generally, parties are limited as to the extent to which they may use evidence of a witness's prior convictions for impeachment purposes. *See e.g. Peterson*, 444 Md. at 134 (discussing limitations imposed by statute and rule). Even more limited, is a party's ability to introduce evidence of charges that are currently pending against a

witness. *See id*. at 134-36 (explaining how the fact that there are charges pending against a witness is admissible only to provide context for questions regarding the witness's expectation that benefits will accrue as a result of his or her testimony). As the Court of Appels has explained, "the existence of pending charges alone is not a sufficient predicate for such a question . . . There must be some evidence . . . that the witness has an expectation of benefitting from the testimony with respect to the pending charges." *Id*. at 135-36 (internal citation and footnotes omitted).

In this case, the charges in question were filed and then dismissed. The dismissed charges were not convictions. Indeed, having been dismissed, they were not even actively pending charges. Moreover, during the discussion at the bench regarding the dismissed charges the State proffered that the charges were initially brought by the police, not the State's Attorney's Office, suggesting that the charges against Edwards were dismissed based on a lack of evidence instead of any desire on the part of the State to encourage or compel Edwards to cooperate in the State's prosecution of Walker.

At no time during Walker's trial was defense counsel limited in his attempts to elicit testimony regarding either Edwards's prior conviction for second degree assault or the charges then pending against him for felon in possession of a handgun or violation of parole. In response to defense counsel's questions regarding whether he expected to receive any benefit in his pending cases, Edwards expressly denied that he had any expectation of leniency. As Edwards explained, he did not feel that his testimony against Walker was very helpful for the State, because he was not able to identify Walker as the man who shot him. Because he could not implicate Walker, Edwards apparently did not

expect any assistance from the State in return for his testimony. It is unlikely that Edwards would have responded differently had defense counsel been permitted to question him regarding any expectation of benefit in relation to the dismissed charges. Additional questions regarding Edwards expectation of a benefit in relation to the dismissed charges would have been repetitive and any response by Edwards, cumulative. *See Peterson*, 444 Md. at 136 ("When assessing the possibility of prejudice or confusion, 'the trial court is entitled to consider whether the witness's self interest can be established by other items of evidence.'" (quoting *Martinez*, 416 Md. at 430).

In light of all of the evidence that was presented at Walker's trial from which the jurors could have concluded that Edwards was not trustworthy and that his account of the events was not credible, we are persuaded that the introduction of additional impeachment evidence regarding the dismissed charges would not have influenced any juror to disbelieve Edwards's testimony, if they were not already inclined to do so. As the Court of Appeals recently reiterated:

> [I]f it is obvious that a witness has a motive to testify in a certain way, it would be permissible to exclude a reference to a benefit from pending charges when 'it is impossible to hypothesize a juror who would have (1) believed [the witness's] testimony in the absence of evidence that there were unrelated criminal charges pending against him at the time, but (2) rejected his testimony upon learning about those charges.'"

Peterson, 444 Md. at 136 (quoting *Calloway v. State*, 414 Md. at 639). This is just such a case.

In sum, the excluded evidence could have potentially convinced the jurors that Edwards was motivated to cooperate with the State out of a desire to avoid the refiling of

the previously dismissed charges against him, which is distinct from any motivation he had to cooperate in the hope that the State would go easy on him with regard to the charges that were still pending against him. We agree that by limiting defense counsel's cross-examination of Edwards on this issue, the circuit court impeded Walker's ability to illustrate this area of Edwards's potential bias for the jury. For the reasons stated above, however, we are ultimately persuaded that under the specific circumstances presented in this case, the error was harmless beyond a reasonable doubt. We, therefore, decline to overturn Walker's convictions on this basis.

II. Improper Comment's During Closing Argument

During the State's closing argument, the prosecutor made several comments that Walker now contends were improper. Walker contends that the prosecutor improperly made claims about the ballistic evidence without any supporting expert testimony. Walker also contends that the prosecutor denigrated defense counsel by saying he was "doing his best." Walker asserts that the trial court erred by failing to act *sua sponte* to curtail the prosecutor's improper and prejudicial statements.

It is clear from the record, and Walker concedes, that defense counsel did not interpose any objections to the prosecutor's comments when they were made, nor after the prosecutor finished her argument. Because defense counsel raised no objection to the allegedly improper statements there is no ruling of the circuit court before this Court to review. We must, therefore, conclude that Walker's current arguments were not properly preserved. *See* Md. Rule 8-131(a) ("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");

Jones-Harris v. State, 179 Md. App. 72, 102 (2008) (holding that complaints regarding improper remarks in closing arguments are waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed").

Walker, nonetheless, urges this Court to exercise its discretion and undertake plain error review of the allegedly improper comments in the prosecutor's closing argument. Plain error review is an extraordinary remedy, to be undertaken only in instances of "truly outraged innocence[.]" *Herring v. State*, 198 Md. App. 60, 87 (2011) (quoting *Jeffries v. State*, 113 Md. App. 322, 325–26 (1997)); *see also Smith v. State*, 64 Md. App. 625, 632 (1985) (holding that gratuitous exercises of discretion is reserved for cases where the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial."). In this case, where the allegedly improper comments if erroneous at all, were not so egregious as to rouse defense counsel to object at the time they were made, we are not persuaded that they are sufficiently compelling to justify plain error review. We, therefore, decline to discuss this unpreserved issue any further.

III. Merger of Convictions for the Purposes of Sentencing

Walker finally contends that the circuit court erred by failing to merge two of his convictions at sentencing. Walker was sentenced to twenty years imprisonment, all but six years suspended, for his conviction of use of a handgun in the commission of a crime of violence. Walker was also sentenced to a consecutive three years for his conviction for wearing, carrying, or transporting a handgun.

It is well-settled that when convictions for use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun are based upon the same acts, separate sentences for those convictions will not stand. *Wilkins v. State*, 343 Md. 444, 446–47 (1996); *Hunt v. State*, 312 Md. 494, 510 (1988). Accordingly, the State concedes that Walker's conviction for these offenses must be merged for the purposes of sentencing. *Hunt*, 312 Md. at 510.

Applying the relevant merger principles to this case, we shall remand this case to the circuit court for resentencing, with orders to vacate the separate three-year sentence imposed by the court for wearing, carrying, or transporting a handgun. *See, e.g., Abeokuto v. State*, 391 Md. 289, 356 (2006) ("Where there is a merger under the rule of lenity, the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty." (internal citations and quotations omitted)). Remanding this case for resentencing is necessary because the circuit court imposed the two sentences to run consecutively.

SENTENCE FOR WEARING, CARRYING OR TRANSPORTING A FIREARM VACATED; JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR RESENTENCING. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE–THIRD BY BALTIMORE COUNTY.