Circuit Court for Montgomery County
Case No.: 128378

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2077

September Term, 2017

DONTA LABELL POPE

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 4, 2018

A jury sitting in the Circuit Court for Montgomery County convicted Donta Labell Pope, the appellant, of two counts of first-degree assault and two counts of use of a handgun in the commission of a crime of violence (hereinafter "use of a handgun").[1] The appellant makes two claims of error. First, he argues that the circuit court erred by permitting a witness to testify to inadmissible hearsay. Second, he contends that the court erred in sentencing him because it misapprehended the breadth of its discretion under the use of a handgun statute. We shall hold that the admission of the challenged testimony was not erroneous but that the record reflects that the circuit court misperceived its discretion to impose a concurrent sentence for one of the use of a handgun convictions. Accordingly, we affirm the judgments of conviction, but vacate one sentence and remand for resentencing.

BACKGROUND

The charges arise from a shooting that occurred during a family gathering in the backyard of a semi-detached home in Silver Spring. The appellant, who was known to the hosts as "Tay," came to the party with his father, known as "Pops." A physical fight broke out between Pops and Serriow McIntosh ("Mack"), who lived in the house. During the fight, the appellant pulled out a gun and began shooting. One bullet grazed the elbow of Dion Emmanuel and a second bullet hit Rowan Bremmer, Sr., in the side, lodging near his stomach.

[1] The court granted the appellant's motion for judgment of acquittal on one count of attempted first-degree murder. The State entered a *nolle prosequi* as to two additional counts of first-degree assault and two additional counts of use of a handgun in the commission of a crime of violence.

At trial, the State called five witnesses, all of whom knew the appellant, who testified to having observed the appellant reach into his waistband, pull out a small gun, and begin shooting in the direction of Emmanuel. Four of the witnesses also observed the appellant fire several more shots into the backyard, where Bremmer was standing, before running away with Pops. The State also presented testimony from two forensics specialists who identified photographs of the crime scene and a firearm and toolmarks expert, who testified that three bullets were recovered at the scene, all of which were consistent with having been fired from the same .38 caliber handgun.

I.

During the prosecutor's direct examination of an eyewitness, Nicole Rankine, the prosecutor asked her if she overheard Pops say anything while the appellant was shooting. Defense counsel objected and a bench conference ensued. The prosecutor proffered that Rankine would testify that while the appellant was firing the gun, she heard Pops saying, "Yeah, Tay, yeah, Tay, Yeah, Tay[.]" The prosecutor argued that the statement was admissible under the excited utterance exception to the rule against hearsay. *See* Md. Rule 5-803(b)(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible, without regard to the declarant's unavailability). The court overruled defense counsel's objection and permitted Rankine to testify to Pops's remarks. Rankine added that it sounded to her as if Pops was "boosting [the appellant] on," *i.e.*, encouraging him.

We conclude that the court did not err by admitting the testimony because Pops's statement, "Yeah, Tay, yeah, Tay, Yeah, Tay" was not hearsay. Hearsay is "a statement,

other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A "statement" is "(1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." *Id*. at (a) (emphasis added). The words allegedly uttered by Pops were not a "factual proposition" that could be shown to be true (or false), *Stoddard v. State*, 389 Md. 681, 703 (2005). "Yeah Tay" is, "by its very nature, neither true nor untrue." *Holland v. State*, 122 Md. App. 532, 544 (1998). The evidence was not offered for its truth, but rather to show the effect on the appellant, *i.e.*, that he was being encouraged by his father to engage in violent conduct, which was otherwise out of character for him. On this basis alone, we would affirm the admission of the challenged testimony. *See Grant v. State*, 299 Md. 47, 53 n.3 (1984) (this Court may affirm an evidentiary ruling on any ground shown by the record even if not relied upon by the trial court, or even raised by the parties below).

Even if hearsay, the testimony properly was admitted as an excited utterance. Rankine testified that Pops made the statement while his son (the appellant) was shooting in the direction of the man with whom Pops had been fighting, and right before the appellant and Pops fled the crime scene on foot. The State plainly met its burden of showing that the statement was made spontaneously while the exciting event was actively occurring and, as a result, it was not an abuse of discretion to admit it. *See, e.g.*, *Marquardt v. State*, 164 Md. App. 95, 124 (2005) (burden on proponent of evidence "to establish that the statement was spontaneous rather than a result of reflection").

II.

The court sentenced the appellant to a 10-year term for one count of first-degree assault, a concurrent 10-year term for the second count of first degree assault, and two consecutive 5-year terms for the two use of a handgun counts, for a total executed sentence of 20 years. The appellant contends the court erred because it erroneously perceived that it lacked discretion under Md. Code (2002, 2012 Repl. Vol.), section 4-204(c)(2) of the Criminal Law Article to impose a non-consecutive 5-year term for the first use of a handgun count.

As pertinent, section 4-204(c) provides:

> (c)(1)(i) A person who violates this section is guilty of a misdemeanor and, in addition to any other penalty imposed for the crime of violence or felony, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.
>
> ***
>
> (2) ***For each subsequent violation***, *the sentence shall be* ***consecutive to*** *and not concurrent with any other sentence imposed for the crime of violence or felony*.

(Emphasis added.) As the parties agree, the trial court imposed a legal sentence. The Court of Appeals' decision in *Garner v. State*, 442 Md. 226 (2015), establishes that multiple convictions for use of a handgun in the commission of a crime of violence do not merge because the unit of prosecution is the crime of violence and, thus, a court may impose separate sentences for each conviction for use of a handgun. In this case, the appellant was convicted of two contemporaneous counts of use of a handgun. Nothing in the record indicates that he had any prior conviction for use of a handgun. Thus, the court had discretion to make the appellant's 5-year sentence for the first use of a handgun conviction

run concurrent to ***or*** consecutive to the underlying crime of violence conviction for first-degree assault but was mandated to make the 5-year sentence on the second count, which was a "subsequent violation," run consecutive. *Id*. at 253. For the reasons that follow, we agree with the appellant that the record from the sentencing hearing suggests that the court believed that it was required to impose two consecutive sentences under section 4-204(c).

At the December 5, 2017 sentencing hearing, defense counsel argued that the use of a handgun convictions should merge for purposes of sentencing and, to the extent that they did not merge, the court should impose the sentences concurrently.

The prosecutor argued that it was "up for debate" whether under section 4-204(c), the court was obligated to impose consecutive terms for each of the use of a handgun convictions, but that there was "an argument to be made that it could be concurrent." The court interjected that section 4-204(c)(2) "says a sentence [for use of a handgun] shall be consecutive" and questioned the prosecutor's suggestion that the court had "discretion to do it concurrent." The prosecutor replied that the statute was a "little ambiguous" with respect to the issue of consecutive sentences, but, in any event, consecutive sentences were warranted under the facts.

The prosecutor subsequently argued that the court should impose "at least a mandatory 20-year sentence," comprising a mandatory 10-year term for one first-degree assault conviction pursuant to the subsequent offender statute, a concurrent 10-year term for the other first-degree assault conviction, and two consecutive five-year terms for the use of a handgun convictions. The court agreed that that was the legal minimum, stating:

"Because the two fives would *have to be consecutive*." (Emphasis added.) The prosecutor responded, "Right."

On his part, defense counsel requested that the court not impose "two consecutive mandatory sentences for the [use of a handgun convictions]" reiterating his argument that the handgun convictions should merge. He recommended that the court impose a sentence not to exceed 15 years, which would encompass a mandatory 10-year sentence for first degree assault, a concurrent 10-year sentence for first-degree assault, and a consecutive 5-year sentence for the one use of a handgun count.

The court sentenced the appellant as follows:

> Okay. All right, based on the defendant's previous conviction for armed robbery, the Court finds that the defendant is a subsequent offender and therefore the Court is required to impose the mandatory sentence for a conviction of a second crime of violence of not less than 10 years and the mandatory sentence for each conviction for use of a firearm during a felony of not less than five years. I considered all the factors, punishment, deterrents and rehabilitation as the victims indicated they were surprised by this because they considered the defendant to be a brother.
>
> So, it's not clear why he did what he did, but the undisputed facts are that he did shoot and injure his friends. So, there has to be some punishment there has to be some deterrents. The Court is not convinced, however, that the defendant can't be rehabilitated.
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> So, for Count 2, first degree assault against Rowan Bremmer Sr. the sentence is 10 years.
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> Count 3, use of a firearm in the commission of a felony and a crime of violence against Rowan Bremmer Sr. the sentence is five years consecutive to Count 2.
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> Count 4, first degree assault against Dion Emmanuel the sentence is 10 years concurrent to Count 2.
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> And at Count 5, use of a firearm in commission of a felony or crime of violence against Dion Emmanuel the sentence is five years consecutive to Counts 2 and 3.
>
> Defendant has shown he is not a good candidate for probation. He committed the offenses that are the subject of this case while on probation

> for armed robbery. So, therefore the Court is not suspending any of the sentence.

As a threshold matter, we disagree with the State that this issue is not properly before us. The question of whether the terms must run consecutively or may run concurrently was raised by the prosecutor in the discussion of the sentencing options and, as discussed, implicitly was decided by the court. *See* Md. Rule 8-131(a) (appellate court may consider any issue that was "raised in or decided by the trial court"). On the merits, the court's discussions with the prosecutor reflect that it understood the "subsequent violation" language in section 4-204(c)(2) to mandate the imposition of two consecutive 5-year sentences for the use of a handgun convictions. While the prosecutor argued that the statute was ambiguous in that regard, it later argued for a "mandatory" sentence that comprised the two consecutive 5-year terms. In response to that sentencing recommendation, the court reiterated its view that the "two five[-year terms] would *have to be* consecutive." Because the circuit court had the discretion to impose a consecutive *or* concurrent sentence for the appellant's first conviction for use of a handgun in a crime of violence, and it appears from the record that it did not recognize that discretion, we will vacate the appellant's sentence for that offense and remand for resentencing. *See Maus v. State*, 311 Md. 85, 108 (1987) ("When a court must exercise discretion, failure to do so is error, and ordinarily requires reversal."). We emphasize that, on remand, the court retains discretion to impose either a consecutive or a concurrent five-year sentence, based upon its assessment of the relevant sentencing factors.

SENTENCE FOR COUNT 3 (USE OF A HANDGUN IN THE COMMISSION OF A

CRIME OF VIOLENCE) VACATED. REMAND FOR RESENTENCING ON COUNT 3. JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY OTHERWISE AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND MONTGOMERY COUNTY.