Circuit Court for Worcester County
Case No. C-23-CR-17-000150

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2271

September Term, 2017

JOSEPH PATWYNE JOHNSON

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 6, 2019

Appellant, Joseph Patwyne Johnson, was indicted on June 28, 2016 in a 10-count indictment on charges related to a shooting that occurred on June 11, 2016. The indictment identified Kevin Harmon as the victim. The State informed the court that it misidentified the victim in its indictment and, subsequently, nol prossed all 10 charges. Six months later, on April 25, 2017, the State indicted Johnson on the same 10 charges but this time, it identified a different victim, Jamon Byrd. Johnson sought to dismiss the second indictment on the basis of a *Hicks* violation because more than 180 days had passed since his initial indictment,[1] but the court denied his motion. Prior to trial, the State, nol prossed only the charges of disorderly conduct and malicious destruction of property.

The case proceeded to a jury trial on the other eight charges in the Circuit Court for Worcester County on September 7, 2017. The jury found Johnson guilty of first-degree assault; second-degree assault; reckless endangerment; illegal possession of a firearm by a disqualified person; wearing, carrying, or transporting a handgun; and use of a firearm in the commission of a felony or a crime of violence. Seven days after the jury verdict, Johnson filed a motion for a new trial, which the circuit court summarily denied. Johnson then filed a motion to reconsider his motion for a new trial, which the circuit court denied at his sentencing hearing on January 12, 2018. The circuit court sentenced Johnson to a total of 25 years in prison; 10 years for the three handgun convictions and a consecutive 15 years for the assault and reckless endangerment convictions.

[1] *State v. Hicks*, 285 Md. 310, 318 (1979) (holding that "dismissal of the criminal charges is the appropriate sanction where the State fails to bring [a criminal case] to trial within the [180]-day period prescribed by" Maryland Rule and statute).

(continued)

Johnson appeals his convictions and presents four questions,[2] which we have rephrased:

I. Did the trial court abuse its discretion when it denied Johnson's motion to dismiss his case because the State failed to bring him to trial within 180 days?

II. Did the trial court err when it did not submit to the jury the offenses of disorderly conduct and malicious destruction of property?

III. Did the trial court err when it denied Johnson's motion for a new trial?

IV. Did the trial court err when it denied Johnson's motion for judgment of acquittal on the three handgun offenses?

For the reasons explained below, we discern no error in the judgments of the circuit court. Accordingly, we affirm.

BACKGROUND

A. Pretrial Motion to Dismiss Indictment

Initially, Johnson was indicted on June 28, 2016 on the following 10 counts: (1) attempted first-degree murder; (2) attempted second-degree murder; (3) first-degree assault; (4) second-degree assault; (5) reckless endangerment; (6) illegal possession of a regulated firearm as a disqualified person; (7) wearing, carrying or transporting a handgun;

[2] In his brief, Johnson presents the following questions:

1. Was Mr. Johnson denied his right to trial within 180 days?
2. Did the trial court deprive Mr. Johnson of a fair trial by not submitting two lesser[-]included offenses to the jury?
3. Did the trial court err by denying Mr. Johnson's motion for a new trial?
4. Is the evidence legally insufficient to sustain Mr. Johnson's convictions for three handgun offenses?

(8) use of a firearm in the commission of a felony or crime of violence; (9) disorderly conduct; and (10) malicious destruction of property. The indictment identified Kevin Harmon as the victim. Two days later, on June 30, 2016, defense counsel entered her appearance. The matter was set for a jury trial on October 13, 2016.

Defense counsel and Johnson presented at a status conference hearing that was held on August 3, 2016 for purposes of bail review and the entry of nol pros as to some of the charges. At the hearing, the State nol prossed all of the attempted murder and assault charges, as well as the charge for use of a firearm in the commission of a felony or crime of violence. The Assistant State's Attorney explained that he was dropping those charges because he had identified the wrong victim:

> . . . I had always intended on moving forward with this case without the cooperation of the alleged victim in that matter. I didn't need that victim to prove my case. However, that victim, along with [defense counsel], came to our office and essentially said, not only am I not participating, but I'll come to court and say I wasn't the victim. At that point, I found that it was ethically necessary to file the motion for the status conference, knowing now that I can't proceed on those charges.
>
> I mention that because while my elements have changed and what I can prove, the theory of the State's case is still the same. The theory of the State's case as I stand here now is that [] Johnson, being a prohibited person, fired into a vehicle with a person in it. That's why I've left the reckless endangerment charges, along with the possession of handgun charges.

When the matter was called for jury trial on October 13, 2016, the State nol prossed the remaining charges against Johnson.

B. Jury Trial

Roughly six months later, on April 25, 2017, Johnson was indicted by a grand jury for a second time on the same 10 charges for which he was indicted back in June of 2016.

This time, the indictment identified Jamon Byrd as the victim. The case proceeded to trial before a jury on September 7, 2017. At trial, the State called four witnesses: Carisa Beasley, the mother of Johnson's girlfriend at the time of the shooting; Linda Beasley, Carisa's mother; Rufus Beasley, Carisa's father; and Jamon Byrd.[3] The defense did not call any witnesses. The following facts were established at trial.

On June 11, 2016, Carisa hosted a barbecue at her house to celebrate her fiancé's birthday. Linda and Rufus, along with other family and friends, were present at the party, but Carisa's daughter, Kaylah Kellam, did not attend the party. In the late hours of the evening, Johnson arrived at Carisa's house and entered her kitchen, looking "visibly upset." At the time, Kellam and Johnson were dating.[4] Carisa told Johnson that Kellam wasn't home, and Johnson mentioned that Kellam might be with Byrd, who also goes by the nickname "Smiley." Byrd confirmed at trial that he and Kellam had an intimate relationship at the time of the shooting. Carisa knew that Byrd sometimes spent time at Harmon's house, which was two doors down from her house.

At some point, Johnson left Carisa's house and walked outside. Carisa, hearing "a lot of, you know, voices outside[,]" followed Johnson and found him on the street by the mailbox in front of her home. Linda and Rufus also joined Carisa at the front of the house. Johnson was "[u]pset, [and] refused to leave, saying that [they] knew where [Carisa's daughter] was, just mad." Carisa, Linda and Rufus all attempted to calm down Johnson

[3] For purposes of clarity, we shall refer to Carisa, Linda and Rufus Beasley by their first names.

[4] Johnson and Kaylah were married at the time of trial on June 11, 2017.

and, in an effort to get him to leave, the three of them walked with Johnson down the street to get him to his car, which was parked on the street between Carisa's and Harmon's house. Rufus followed Linda as she walked behind Carisa and Johnson.

As the four approached Johnson's car, they observed headlights come on from a car leaving Harmon's driveway. Upon seeing the headlights, Carisa heard Johnson say: "[i]s that that N word right there[?]" and walked towards the car. Linda and Rufus also heard Johnson say something to that effect. At that point, Carisa turned away to walk back to her house because "[s]he was done," but Linda and Rufus stayed outside. "[N]ot even a minute" after turning around to walk towards her home, Carisa heard several gunshots. Carisa never saw Johnson with a handgun. Linda testified at trial that she observed Johnson retrieve something from inside his car and then "started firing" shots from a pistol at the car coming out of Harmon's driveway. Linda testified that she "assumed it was a gun" because, though she "couldn't see the gun directly, [] it was fire, sparks coming from it, . . . every time he shot, sparks would come from it." Rufus also testified to seeing Johnson run toward the car pulling out of Harmon's driveway with gunshot "fire coming from an object in" Johnson's hand. Once Linda and Rufus heard the gunshots, they both ran back toward Carisa's house.

Byrd, an admitted drug dealer, testified that he had been at Harmon's house on the night of the shooting to collect money from Harmon in the shed behind his house. After he was done, he drove his rental car down Harmon's driveway and observed several people in the street arguing, one of whom was Johnson. He observed Johnson walk toward a car

and "reach[] for his gun" before shooting at Byrd's rental car. Several bullets struck the rental car as Byrd drove away.

The police were called, but Johnson had left the area by the time they arrived. Byrd did not personally report the shooting to the police until April 20, 2017, roughly 10 months after the incident.[5]

After the State rested its case, Johnson moved for a judgment of acquittal as to the attempted first-degree murder charge and the "handgun charges." With regard to the handgun charges, Johnson argued that "nobody has actually put a handgun in [Johnson's] hand." The court denied Johnson's motion and the defense rested its case.

The jury found Johnson not guilty of attempted first- and attempted second-degree murder but found him guilty of first-degree assault; reckless endangerment; illegal possession of a registered firearm; wearing, carrying and transporting a handgun; and use of a firearm in the commission of crime of violence.[6] The court entered the jury verdict on September 7, 2017.

The court sentenced Johnson to 10 years' imprisonment, the first five years without the possibility of parole, for the use of firearm offense. For the first-degree assault offense, the court sentenced Johnson to 15 years' imprisonment, to be served consecutively to the

[5] At trial, defense counsel elicited testimony from Byrd that he reported the shooting after the State brought a "drug case" against him. The State agreed to recommend a sentence of 10 years in prison at the pending sentencing hearing in that case in exchange for his truthful testimony at Johnson's trial.

[6] On the day of trial but prior to the commencement of the proceedings, the record reflects that in a chambers meeting the State nol prossed the charges of disorderly conduct and malicious destruction of property.

sentence imposed for use of firearm offense, for a total sentence of 25 years' imprisonment. The court merged the other two handgun offenses with the use of firearm offense for purposes of sentencing. The court merged the counts of second-degree assault and reckless endangerment with first-degree assault for purposes of sentencing.

Johnson noted his timely appeal to this Court on January 28, 2018. We shall furnish additional facts as necessary throughout our discussion of the issues.

DISCUSSION

I.

Motion to Dismiss Indictment

A. Factual Background

On April 27, 2017, two days after Johnson was indicted the second time, he filed a motion to dismiss the charging document and requested a hearing. In his motion, Johnson alleged that: "[t]he charging document [wa]s defective, duplicitous, and operate[d] to deny [Johnson] due process law"; "[t]his prosecution was defectively instituted"; and "[t]his prosecution [wa]s barred because of statute of limitations, immunity, and/or [sic] jeopardy."

The circuit court held a hearing on the motion on August 23, 2017, at which Johnson argued that his *Hicks* date had passed because the court should consider "whatever time was on the first case before the State nol prossed would be added to whatever time has been on this case, which would put him over the *Hicks* date." Johnson argued further that, even though the second indictment identified Byrd as the victim, as evidenced by the charging officer's report, the charging officer "knew that the real victim was [] Byrd" at the time of

the original indictment, but mistakenly identified Harmon as the victim because "[h]e thought [Harmon] was [Byrd]."

In response, the State argued that it was unaware of any authority standing for Johnson's proposition that "the State always has to be right." The State averred that "[t]his is two separate cases"—the first case was dismissed after having discovered from a meeting with defense counsel and Harmon that Harmon was not the victim. The State emphasized that "the potential inconsistencies in [the charging officer's] report, was [in] no way a deciding factor" in dismissing the first case. According to the State, it recharged Johnson in 2017 because it "simply. . . had corroborated a new victim, [] Byrd, who came to the State's Attorney's Office."

After hearing both parties' arguments, the circuit court denied Johnson's motion. The court found that "[t]here would be no advantage to the State" in bringing charges that identified the wrong victim "and then recharging with a different victim if, in fact, they didn't believe they were the facts." Therefore, the court concluded that there was no *Hicks* violation because "[t]here [we]re two separate cases that aren't related to each other, other than the fact that the facts of the case are the same. It's a different victim, different cases."

B. The Parties' Contentions

Before this Court, Johnson argues that the trial court erred in denying his motion to dismiss the indictment on the basis of the State's failure to try him within 180 days of the appearance of his defense counsel. Johnson avers that in dismissing the original indictment against him 75 days before the expiration of the 180-day rule and then refiling the same

charges against him several months later, the State's dismissal had the necessary effect of circumventing the 180-day rule.

The State responds that Johnson's "claim is unsupported by the record, which shows that the State dismissed the original charges because they incorrectly identified the victim, and that the State promptly refiled the charges upon discovering the correct identity of the victim." Therefore, the State continues, "there was no intent to circumvent the 180-day" rule and the trial court properly denied Johnson's motion to dismiss the indictment.

Typically, "[t]he dismissal of an indictment is at the sound discretion of the trial court, and we review for an abuse of discretion." *State v. Lee*, 178 Md. App. 478, 484 (2008) (internal citation omitted).

C. *Hicks* Violations and the *Curley* Exceptions

In general, under Maryland Code (2001, 2008 Repl. Vol.),[7] Criminal Procedure Article ("CP"), § 6-103(a)[8] and Maryland Rule 4-271(a)(1),[9] criminal cases in a circuit

[7] We shall refer to this version of the Criminal Procedure Article in effect at the time of this particular proceeding. The 2008 Replacement Volume has since been replaced by the 2018 Replacement Volume, without any substantive changes to Section 6-103. Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-103(a).

[8] Section 6-103 provides:

(a) *Requirements for setting date*. – (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:

(i) the appearance of counsel; or

(ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.

(2) The trial date may not be later than 180 days after the earlier of those events.

[9] Maryland Rule 4-271 provides:

(continued)

court must be tried no later than 180 days after the earlier of either the first appearance of the defendant or the first appearance of the defendant's counsel. *See also State v. Price*, 385 Md. 261, 277-78 (2005) (discussing the requirements of CP § 6-103 and Rule 4-271). The purpose of the 180-day requirement is to "obtain prompt disposition of criminal charges[,]" for the Maryland General Assembly has "recogni[zed]the detrimental effects to our criminal justice system which result from excessive delay in scheduling criminal cases for trial and in postponing scheduled trials for inadequate reasons." *Hicks*, *supra*, 285 Md. at 316.

The Court of Appeals has held that "when a circuit court criminal case is nol prossed, and the state later has the same charges refiled, the 180-day period for trial prescribed by [law] ordinarily begins to run with the arraignment or first appearance of defense counsel under the *second* prosecution." *Curley v. State*, 299 Md. 449, 462 (1984) (emphasis added); *see also State v. Huntley*, 411 Md. 288, 293 (2009). "If, however, it is shown that the nol pros had the purpose or the effect of circumventing the requirements of [CP § 6-103(a) and Rule 4-271(a)], the 180-day period will commence to run with the arraignment or first appearance of counsel under the first prosecution." *Curley*, 299 Md. at 462. When these exceptions apply, "[i]f trial does not begin then within the 180-days of the first appearance of the defendant or defense counsel in the initial prosecution, the

> (a) **Trial date in circuit court.** (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events.

subsequent indictment must be dismissed under [*State v. Hicks*, 285 Md. 310, 318 (1979)]." *Huntley*, 411 Md. at 293-94. "Without the *Curley* exceptions and the *Hicks* dismissal remedy, the "State could evade the 180-day period, whenever it desired a trial postponement beyond 180 days, by merely nol prossing the case and refiling the same charges, a tactic that would make the requirements of the statute and rule 'meaningless.'" *Huntley*, 411 Md. at 295 (quoting *Curley*, 299 Md. at 461). The exceptions will not apply, however, "where the prosecution acts in good faith or so as to not evade or circumvent the requirements of the" 180-day rule. *Id*. (internal quotation marks omitted).

In *Curley*, the Court of Appeals addressed the application of the statute and rule "where the prosecuting attorney files a nol pros prior to the expiration of the 180-day period and thereafter causes the same charge or charges to be refiled against the defendant." 299 Md. at 452. Curley was charged by information with vehicular homicide and manslaughter, and other related offenses. *Id*. Curley's counsel entered his appearance in the circuit court on September 22, 1980, setting the 180-day time period to expire on March 23, 1981. *Id*. at 453. The State nol prossed all of the charges against Curley on the last day for a trial under the statute and rule, explaining that it entered the nol pros "based on the combined factors of the apparent inadmissibility of the blood alcohol content test performed in this case and upon the request made of the State by the family of the victim." *Id*. About three months later, the State "filed a second criminal information charging Curley with the same offenses as had been charged under the prior information." *Id*. Curley moved to dismiss the charges, arguing that the State had violated the 180-day rule and also violated "his constitutional right to a speedy trial[.]" *Id*. The circuit court denied

the motion to dismiss because there was no evidence of the State's motive to avoid the 180-day rule. *Id*. at 454. The case proceeded to trial, and a jury convicted Curley of many of the charges. *Id.* Curley appealed to this Court, which certified the case to the Court of Appeals. *Id*. at 454-55.

The Court of Appeals reversed the circuit court's denial of the motion to dismiss, explaining that the trial court's application of the exception to the 180-day rule was "too limited." *Id*. at 461, 463. The Court explained that, "[w]here the state's action necessarily circumvents the statute and rule prescribing a deadline for trial, this should be sufficient to continue the time period running with the initial prosecution." *Id.* The State had entered the nol pros on "the final day for trial, [when] it was too late for compliance with" the statute and rule. *Id*. at 462. Thus, it was clear to the Court that, "[r]egardless of the prosecuting attorney's motives, the necessary effect of the nol pros was an attempt to evade the dismissal resulting from the failure to try the case within 180 days." *Id*. at 463.

In a companion case to *Curley*, the Court in *State v. Glenn* reached a different outcome. 299 Md. 464 (1984). In that case, the State indicted several defendants with distribution of obscene matter. *Id*. at 465. Their attorney entered an appearance on July 17, 1981, meaning the 180-day time period for commence trial of all three cases was set to expire on January 13, 1982. *Id*. The court scheduled trial for November 17, 1981. *Id.* Prior to trial, the State discovered that the charging documents were defective because they failed to allege an element of the crime charged, but the defendants' attorney would not agree to an amendment of the charging documents. *Id*. For these reasons, on the day of trial, the State nol prossed the charges. *Id*. at 466. That same day, the State refiled

corrected charging documents alleging the same, but corrected, offense. *Id*. The defendants were arraigned and their attorney's appearance was entered on January 11, 1982, making the *Hicks* expiration date July 10 for the second indictment. *Id*. On February 18, however, the defendants' attorney moved to dismiss the charges, claiming violations of the defendants' constitutional right to a speedy trial and the 180-day requirement prescribed by statute and rule. *Id*. The circuit court granted the motion to dismiss, concluding that the 180-day period for trial under the first indictment (January 13, 1982) continued to run after the nol pros and new charging documents. *Id*. The State appealed, and this Court affirmed. *Id.*

The Court granted certiorari. *Id.* Applying *Curley*, the Court concluded that neither the purpose nor the necessary effect of the nol pros was to circumvent the 180-day requirement:

> In the instant cases the prosecuting attorney's purpose in nol prossing the charges was not to evade [CP § 6-103(a) and Rule 4-271(a)]. The record clearly establishes, with no basis for a contrary inference, that the charges were nol prossed because of a legitimate belief that the charging documents were defective and because the defendants' attorney would not agree to amendment of the charging documents.
>
> Unlike the situation in *Curley*, the necessary effect of the nol pros in these cases was not to circumvent [the statute or rule]. November 17, 1981, which was the assigned trial date and the date of the nol pros, was only 123 days after the arraignment and first appearance of counsel. If the cases had not been nol prossed, trial could have proceeded on November 17th. If the cases had not been nol prossed, and if for some reason trial had not proceeded when the cases were called on November 17th, there remained fifty-seven days before the expiration of the 180-day deadline.

Id. at 467. Accordingly, the Court reversed the circuit court's dismissal of the charges. *Id.* at 468.

The Court of Appeals' decision in *Huntley* is also instructive. 411 Md. 288 (2009). There, the State indicted Huntley on charges of child sex abuse on August 27, 2007. *Id*. at 290. To comply with *Hicks*, trial had to commence by March 4, 2008. *Id*. at 292. On the day of trial, and one day before the expiration of the 180-day period, the State moved to amend the dates of the charged offenses in the indictment.[10] Huntley's counsel objected to the amendment and the trial court denied the motion, prompting the State to nol pros the charges rather than proceed to trial on a defective indictment. *Id*. Three weeks later, the State reindicted Huntley on the same charges, this time providing new dates for the charged offenses. *Id*. at 292-93. Huntley moved to dismiss the second indictment, which the court granted by concluding that the purpose of the State's nol pros of the first indictment was to evade the court's previous denial of the State's motion to amend the indictment. *Id*. at 293. The State appealed to this Court, but the Court of Appeals issued a writ of certiorari on its own initiative. *Id*.

The Court held that under the circumstances of Huntley's case, the dismissal of the indictment was unwarranted. *Id*. at 302-03. The Court explained:

> When the State seeks to try a case beyond the 180-day deadline through the strategic use of a nol pros, its actions [] are subject to the analysis discussed in *Curley*.
>
> Where the State instead is prepared to try the case on the trial date, pending approval of its motion to amend the flawed indictment, that motion is denied, and the State nol prosses the indictment in order to re-indict later on corrected charges, the significant concern of the statute, the rule, *Hicks*, and *Curley* regarding the "prompt disposition of charges" and the elimination

[10] Rule 4-204 permits a trial court to change, without the consent of the defense, the dates of an offense where the amendment would change only the form and not substance of the offense. *Thompson v. State*, 181 Md. App. 74, 99 (2008), *aff'd*, 412 Md. 497 (2010).

> of "excessive scheduling delays" is absent. In such a situation, the State has no obvious or secret motive to delay prosecution of the defendant beyond 180 days and there is no ruling by the trial court regarding its calendar that the State may be said to be circumventing.

Id. at 298–99 (citations omitted). The Court added that, "[t]he State *was not refused a continuance*, and it *did not seek to evade any scheduling orders of the court due to missing evidence*." *Id*. at 300-01 (emphasis added). In sum, "[w]here the State's nol pros [] is used to remedy a genuinely flawed indictment, the concerns of *Curley* are not present." *Id*. at 302. Thus, the Court concluded that the 180-day period for Huntley's trial "beg[an] anew with the second indictment" and vacated the judgment of the circuit court. *Id*. at 301, 302-03.

We return to the relevant procedural facts of this case, which are not in dispute. The State charged Johnson in a 10-count indictment in June 2016. The original indictment alleged that Harmon was the victim. Johnson's counsel entered her appearance on June 30, 2016. Therefore, the 180-day period for trial under CP § 6-103(a) and Rule 4-271(a) was to expire on December 27, 2016. The matter was set for a jury trial on October 13, 2016. Having learned from defense counsel and Harmon that the indictment alleged the wrong victim, on August 3, 2016, the State nol prossed the attempted murder charges, assault charges, and the charge for use of a firearm in the commission of a felony or crime of violence at a status conference hearing. When the matter was called for trial on October 13, 2016, 74 days prior to the *Hicks* deadline, the State nol prossed the remaining charges against Johnson. On April 25, 2017, the State filed a second indictment charging Johnson

with the same offenses as had been charged under the first indictment, but this time alleging Byrd as the victim.

We conclude that neither the purpose nor the necessary effect of nol prossing the charges was to circumvent the 180-day requirement. Like the State's purpose in *Glenn*, the record here establishes that "the charges were nol prossed because of a legitimate belief that the charging document[] w[as] defective"—it alleged the wrong victim. 299 Md. at 467. We recognize that in *Glenn*, the State also nol prossed the charges because it believed that "the amendment was a matter of substance and could not be made over [defense counsel's] objection." 299 Md. at 465. Although the necessary amendment in this case did not require defense counsel's agreement, the record establishes that the State did not know the true victim's identity at the time the case was nol prossed and, therefore, could not have amended the indictment. *Cf. Baker v. State*, 130 Md. App. 281, 299 (2000) (explaining that "[w]e assess the situation as of the day the nol pros is entered" (emphasis omitted)). And, even though the State was originally prepared to move forward without the cooperation of the victim, the State learned, after meeting with Harmon, that he would go to court and testify that he was not the victim.

We agree with the trial court that the necessary effect of nol prossing the charges was not to circumvent the 180-day requirement. Unlike in *Curley*, the State here nol prossed the remaining charges on the assigned trial date, which was 105 days after the first appearance of Johnson's counsel. 299 Md. at 452-53. Thus, if the case had not been nol prossed, trial would have still proceeded on October 13, 2016. And, if the case had not been nol prossed and failed to proceed on October 13, there still remained 75 days before

the expiration of the 180-day period for bringing Johnson to trial. *Cf. Glenn*, 299 Md. at 467; *see also State v. Brown*, 341 Md. 609, 619 (1996) ("The *Glenn* decision makes it clear, therefore, that a nol pros will have the 'necessary effect' of an attempt to evade the requirements of [the statute and rule] *only* when the alternative to the nol pros would have been a dismissal with prejudice for noncompliance with [the statute and rule].").

We likewise reject Johnson's reliance on *Ross v. State*, 117 Md. App. 357 (1997); *Alther v. State*, 157 Md. App. 316 (2004); *Price*, 385 Md. 261; and *Wheeler v. State*, 165 Md. App. 210 (2005), to support his proposition that the purpose of the State's nol pros was to circumvent the 180-day requirement. As the Court of Appeals highlighted in *Huntley*, those cases involved scenarios in which

> the State's proven purpose in nol prossing the charges was to evade the trial court's or administrative judge's denial of the State's motion for a continuance or postponement, or to force rescheduling of a trial date for which it was not ready to proceed. It is distinctly those types of scenarios, *where the nol pros is used as a clear stand-in for a failed continuance request*, that the prophylactic analysis of *Curley* and the sanction of *Hicks* were designed to address.[]

411 Md. at 296-97 & n.12 (emphasis added) (footnote omitted) (explaining that in *Wheeler*, the State's nol pros had the necessary effect of circumventing the *Hicks* rule because it "essentially evaded the trial court's determination that there was *no good cause to postpone* the case and that trial should proceed as scheduled"). In the underlying case, "[t]he State was not refused a continuance, and it did not seek to evade any scheduling orders of the court due to missing evidence." *Id.* at 300-01 (emphasis added).

In sum, we find no abuse of discretion by the trial court in denying Johnson's motion to dismiss the indictment.

II.

Instructions on Lesser-Included Offenses

Johnson argues that the trial court erred when it failed to submit the offenses of disorderly conduct and malicious destruction of property to the jury because they are lesser included offenses of first-degree assault. Johnson acknowledges on appeal that "[d]efense counsel did not note any exceptions to the [jury] instructions given" and that the State nol prossed both offenses. Johnson argues, however, that he did not have an opportunity to object to the nol pros because it was not done in open court or in his presence. He urges this Court to exercise its "discretion to undertake plain error review because the trial [court's] actions directly affected [his] right to a fair trial."

The State responds that plain error review is not warranted in this case because Johnson fails to establish any error. The State argues that Johnson never requested jury instructions on disorderly conduct and malicious destruction of property. Moreover, the State continues, both of these offenses are not lesser included offenses of first-degree assault.

Recently in *Newton v. State*, 455 Md. 341 (2017), the Court of Appeals explained the four-part test that we apply in determining whether to undertake plain error review:

> (1) "*there must be an error or defect*—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the [] court proceedings'"; and (4) the error must "seriously affect[] the fairness, integrity or public reputation or judicial proceedings."

Id. at 364 (citing *State v. Rich*, 415 Md. 567, 578 (2010)) (emphasis added). In the present case, Johnson fails to establish an error that would justify the exercise of our discretion to undertake such review. We explain.

As Johnson points out correctly, a criminal defendant is entitled to have instructions on lesser-included offenses submitted to the jury under certain circumstances. *Hook v. State*, 315 Md. 25, 43-44 (1989). The Court of Appeals has explained this principle as follows:

> When the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection, to nol pros the lesser included offense. . . . In short, it is simply offensive to fundamental fairness, in such circumstances, to deprive the trier of fact, over the defendant's objection, of the third option of convicting the defendant of a lesser included offense. And if the trial is before a jury, the defendant is entitled, *if he so desires*, to have the jury instructed as to the lesser included offense.

Hook, 315 Md. at 43-44 (emphasis added). Years later, this Court set-out the two-step analysis that the trial court must undertake:

> The inquiry in assessing whether a defendant is entitled to a lesser included offense jury instruction is a two-step process. *The first step is to determine whether the offense qualifies as a lesser included offense of the greater offense*. . . . The second step required the Court, based on the particular facts of the case, to determine whether there exists . . . a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.

Malik v. State, 152 Md. App. 305, 332-33 (2003) (internal citations and quotations omitted) (emphasis added).

Ordinarily, "[i]n determining whether one offense is a lesser-included offense of another, we apply the required evidence test." *Middleton v. State*, 238 Md. App. 295, 306 (2018). In applying the "required evidence" test, "courts look at the elements of the two offenses *in the abstract*. All of the elements of the lesser included offense must be included in the greater offense. Therefore, it must be impossible to commit the greater without also having committed the lesser." *Williams v. State*, 200 Md. App. 73, 87 (2011) (quoting *Hagans v. State*, 316 Md. 429, 449 (1989)) (emphasis added). In *Williams v. State*, this Court concluded that the offense of first-degree assault could not merge into the offense of robbery because the offenses failed the required evidence test.[11] 187 Md. App. 470, 478 (2009). We explained that "[n]either the element of an intentional cause or attempt to cause serious physical injury nor the use of a firearm is included in the offense of simple robbery." *Id.*

To convict a defendant of first-degree assault, "the State must prove all of the elements of second degree assault and also must prove that: (1) the defendant used a firearm to commit assault; or (2) the defendant intended to cause serious physical injury in the commission of the assault." Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:01.1; Maryland Code (2002, 2012 Repl. Vol., 2018 Supp.), Criminal Law Article ("CL"),

[11] Although *Williams* addressed whether two convictions could merge for purposes of sentencing, courts apply the same required evidence test for determining lesser-included offenses in the merger context as well. 426 Md. at 408 ("Merger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and* when the offenses are based on the same act or acts.") (citation and brackets omitted).

(continued)

§ 3-202. The crime of second-degree assault consists of three modalities: "(1) intent to frighten, (2) attempted battery, and (3) battery." *Snyder v. State*, 210 Md. App. 370, 382 (2013). Here, based on the court's jury instructions, it appears that the State charged Johnson with the attempted battery variety of second-degree assault.[12] *Cf. Nicolas v. State*, 426 Md. 385, 403 (focusing on the battery variety of assault for which petitioner was convicted in applying the required evidence test). "[T]he elements for an attempted battery variety of assault in the second-degree are that the defendant actually tried to cause physical harm to the victim, the defendant intended to bring about physical harm to the victim, and the victim did not consent to the conduct." *Snyder*, 210 Md. App. at 385.

The crime of disorderly conduct is found in CL § 10-201(c)(2), which provides that a "person may not willfully act in a disorderly manner that disturbs the public peace." The Court has explained that "[t]he gist of the crime of disorderly conduct . . . as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, *a number of people gathered in the same area*." *Drews v. State*, 224 Md. 186, 192 (1961) (emphasis added).

[12] The court instructed as follows:

> The defendant is charged with the crime of second degree assault. Assault is an attempt to cause offensive physical contact. In order to convict the defendant of second degree assault, the State must prove: [1.] that the defendant actually tried to cause immediate offensive physical contact with Jamon Byrd; [2.] that the defendant intended to bring about the offensive physical contact; and, [3.] that the defendant's actions were not consented to by Jamon Byrd, nor legally justified.

Finally, the crime of malicious destruction of property is found in CL § 6-301(a), which provides that a "person may not willfully and maliciously destroy, injure, or deface the real or personal property of another."

We are unable to conclude that every element of the crime of disorderly conduct or malicious destruction of property is also an element of the crime of first-degree assault, such that it is "impossible to commit [first-degree assault] without also having committed [disorderly conduct or malicious destruction of property.]" *Williams*, 200 Md. App. at 87. As discussed, Johnson was charged with the attempted battery variety of second-degree assault, which is an element of first-degree assault. Accordingly, in order to convict Johnson of first-degree assault, the State had to prove, beyond a reasonable doubt, that Johnson: (1) "actually tried to cause physical harm to the victim, the defendant intended to bring about physical harm to the victim, and the victim did not consent to the conduct[;]" and (2) used a firearm to commit the assault or intended to cause serious physical injury in the commission of the assault. Looking at the crime of malicious destruction of property, neither malice nor the destruction of *property* is an element required to establish first-degree assault. Also, willfully acting in a disorderly manner that disturbs the public peace, i.e., that "offends, disturbs, incites, or tends to incite, *a number of people gathered in the same area*," *Drews*, 224 Md. at 186 (1961) (emphasis added), is not an element required to prove first-degree assault. Johnson was not, therefore, entitled to jury instructions on these two offenses and, therefore, he fails to establish an error that would justify the exercise of our discretion to undertake plain error review. *Newton*, 455 Md. at 364; *see*

also Morris v. State, 153 Md. App. 480, 507 n.1 (2003) (explaining that before we review for plain error, there must be error, it must be plain, and it must be material).

Finally, Johnson argues in his reply that this Court should undertake plain error review because "the nol[] pros[] of counts 9 and 10 was not made in open court or in his presence." The hearing sheet indicates that the State nol prossed the charges of disorderly conduct and malicious destruction of property in chambers before the start of trial. Without a transcript of the parties' meeting in chambers, we are unable to ascertain whether Johnson's counsel objected to the nol pros of those charges. Moreover, it is undisputed that Johnson's counsel did not note any exceptions to the jury instructions given at trial. Even assuming, *arguendo*, that Johnson objected to the nol pros of those charges, his argument is without merit because neither "offense qualifies as a lesser included offense of the greater offense."[13] *Malik*, 152 Md. App. at 332.

III.

Motion for New Trial

A. Factual Background

Seven days after the entry of the verdict, Johnson filed a motion for a new trial, asserting that "he was escorted into the courtroom by the [s]heriff in the presence of the jury[,] which is inherently prejudicial and an affront to his appearance as innocent before proven guilty." He complained that this prejudice may have "push[ed] the jury over the

[13] For this reason, we need not get into a discussion as to whether Johnson affirmatively waived his right to plain error review. As we explain, Johnson fails to establish an error that would justify undertaking such a review.

beyond a reasonable doubt standard." Without any explanation as to when during the trial proceedings this took place, Johnson noted in his motion that "[t]he [a]ttorneys were not present and so this was not known until after the fact." The State opposed the motion, asserting that it did not recall such an event and that Johnson should have raised this issue at trial when "the appropriate relief may have been a mistrial." Further, the State argued that although the accused has a right to be tried without being physically restrained, Johnson "does not even allege that he was restrained, only that he was 'escorted' at an unknown time during the proceedings[.]" On September 21, 2017, the circuit court entered an order denying Johnson's motion.

Three weeks after the jury rendered its verdict, on September 28, 2017, Johnson filed a *pro se* motion to reconsider his motion for a new trial, raising the same argument and requesting an evidentiary hearing to allow witness testimony. The court struck this motion for non-compliance with the Maryland Rule requiring an attorney's signature on motions of represented parties. On November 30, 2017, Johnson filed a second *pro se* motion to reconsider his motion for a new trial, asserting the same argument he raised in his original motion, plus two new arguments. First, Johnson argued that the State intentionally failed to call Trooper Sears, the charging officer, as a witness at trial to conceal the fact that Trooper Sears lied on his warrant application and in his testimony before the grand jury. As a result, Johnson asserted that he was unable to impeach Trooper Sears and "expose" the "misconduct." Next, Johnson argued that, prior to trial, he had filed an attorney grievance complaint against the prosecutor in the case, which the commission failed to resolve prior to trial, allowing the prosecutor to proceed to trial

without Trooper Sears and "stop[] the defense from impeaching" him. Johnson contended that, "[b]ecause of [all of] these actions, [he] was denied due process and did not receive a fair trial[.]"

When the parties appeared before the circuit court for sentencing on January 12, 2018, counsel for Johnson requested the court reconsider its prior denial of Johnson's motion for a new trial, reiterating the same three arguments Johnson had raised in his *pro se* motions. With regard to the argument that the State's failure to call Trooper Sears denied Johnson due process, Johnson's counsel added that "[b]ecause [Johnson] was not placed on notice the State was not going to call [the trooper,] [Johnson] did not have the opportunity to call the trooper himself." The State responded that the allegation that "somehow Trooper Sears testified or committed perjury in front of the grand jury is a bald accusation because th[ere] [are] no recordation or transcripts from the grand jury." Furthermore, with regard to Johnson's allegation that the State failed to called Trooper Sears, the State asserted that it "did not believe that calling Trooper Sears was necessary in its case-in-chief" and highlighted that defense counsel "had every obligation and every opportunity to inquire into Trooper Sears and to bring him to court as well" yet failed to do so.

The court denied Johnson's motion for a new trial on all of Johnson's asserted grounds. Addressing only Johnson's argument that he was escorted into the courtroom by the sheriff in the presence of prospective jurors, the court found that a review of the relevant trial transcript showed that the prospective jurors had not yet entered the courtroom when Johnson was escorted into the courtroom by the sheriff.

B. Parties' Contentions

On appeal, Johnson argues that the trial court erred in denying his motion for a new trial for three reasons: (1) the prospective jurors saw Johnson being escorted into the courtroom by the sheriff, which prejudiced his right to a fair trial; (2) the State failed to call the charging officer as a witness at trial in violation of his right to produce witnesses in his defense under the Sixth and Fourteenth Amendment to the United State Constitution, as well as Article 21 of the Maryland Declaration of Rights; and (3) the prosecutor misrepresented the State's reason for dismissing the original indictment and recharging Johnson with the same offenses.

The State retorts that Johnson's arguments are not properly before this Court because Johnson's motion for a new trial raised issues that could have been raised at his trial. In any event, the State avers, Johnson's arguments are meritless because the trial transcript revealed that the prospective jurors were not present when the sheriff escorted Johnson into the courtroom, Johnson "never sought to exercise" his right to produce witnesses in his defense, and the State did not intend to circumvent the *Hicks* rule.

Pursuant to Maryland Rule 4–331(a), "[o]n motion of the defendant filed within [10] days after a verdict, the court, in the interest of justice, may order a new trial." Rule 4-331(b) vests a court with revisory power "to set aside an unjust or improper verdict and grant a new trial . . . in the circuit courts, on motion filed within 90 days after its imposition of sentence." Motions for new trials filed within 90 days of sentencing are concerned only with errors appearing "'on the face of the record' (the pleadings, the form of the verdict) and not with the evidence or the trial proceedings[.]" *Ramirez v. State*, 178 Md. App. 257,

280 (2008) (citing *United States v. Sisson*, 399 U.S. 267, 280-83 (1970)). After 90 days have passed, a court has "revisory power and control over the judgment in case of fraud, mistake, or irregularity." *Id*. at 279. The term "mistake" has been interpreted to refer to "jurisdictional error[s] only" and "'irregularity' typically means irregularity of process or procedure." *Ramirez*, 178 Md. App. at 281 (internal quotations omitted). Rule 4-331(c) provides that "[t]he court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of th[e] Rule," on motion filed within one year after sentencing or the court's receipt of "a mandate issued by the final appellate court to consider a direct appeal," or "on motion filed at any time if the motion is based on DNA identification testing[.]"

C. Preservation

As an initial matter, we must determine whether Johnson's complaints are properly before us. Ordinarily, the 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[.]" Md. Rule 8-131(a). As this Court held in *Ramirez*, an appellant's failure to timely move for a mistrial or a new trial can waive appellate review of a claim of error in the trial court's denial of a new trial. 178 Md. App. at 286.

Johnson's first argument—that he was prejudiced when the sheriff escorted him into the courtroom in the presence of prospective jurors—is properly before us because it was raised in a timely motion for a new trial, which he filed seven days after the jury verdict. Md. Rule 4-331(a).

Johnson's other two arguments, on the other hand, are not properly before us because they were raised for the first time in his motion to reconsider the court's denial of a new trial. As the State points out correctly, this Court in *Isley v. State* noted that "[i]f such alleged errors were not preserved for appellate review by timely objection at trial, raising them in a [m]otion for a [n]ew [t]rial and then appealing the denial of that motion is not a way of outflanking the preservation requirement." 129 Md. App. 611, 619 (2000) (citation omitted), *overruled on other grounds*, *Merritt v. State*, 367 Md. 17 (2001). Here, Johnson filed a motion to reconsider the court's denial of a new trial, raising new grounds that were not raised in his original motion after the time for motions pursuant to Rule 4-331(a) had already expired. Johnson's motion to reconsider cannot be viewed as a separate motion that was prematurely filed under section (b) or (c) of the Rule. *See Ramirez*, 178 Md. App. at 279-82 (concluding that appellant waived claim of error on appeal because "[n]one of the three subsections of th[e] Rule applied to appellant's motion"). Johnson's motion also failed to offer any argument as to how the State's failure to call Trooper Sears or the prosecutor's alleged misrepresentation at the hearing on the motion to dismiss the indictment are errors appearing "on the face of the record." *Id.* at 280; Md. Rule 4-331(b). Similarly, these two arguments do not involve allegations of a jurisdictional defect, fraud, or an "irregularity of process or procedure." *Ramirez*, 178 Md. App. at 281 (citation omitted); Md. Rule 4-331(b). Finally, his motion to reconsider does not allege newly discovered evidence as a basis for a new trial. Md. Rule 4-331(c). As such, we conclude that Johnson's other two grounds for a new trial—that the State's failure to call Trooper Sears and the State's misrepresentations in opposing the pretrial motion to dismiss the

indictment denied Johnson due process and his right to a fair trial—are not properly before this Court.[14]

D. Courtroom Security Measures

Ordinarily, the standard of review of the court's decision to deny a motion for a new trial is an abuse of discretion. *Jackson v. State*, 164 Md. App. 679, 700 (2005). When, however, "an alleged error is committed during the trial, when the losing party or that party's counsel, without fault, does not discover the alleged error during the trial, and when the issue is then raised by a motion for a new trial, we have reviewed the denial of the new trial motion under a standard of whether the denial was erroneous." *Merritt v. State*, 367 Md. 17, 31 (2001). If so, we gauge whether such error was harmless. *Id.* Although Johnson alleged in his motion for a new trial that the *attorneys* were unaware of the fact that the sheriff escorted him into the courtroom in the presence of prospective jurors, presumably Johnson himself would have been aware of this occurrence. Accordingly, we shall review the trial court's decision for an abuse of discretion.

We begin our analysis by recognizing that "[i]t is obvious that some security is necessary or desirable in most, if not all, criminal trials. It is equally obvious that not all security measures will result in prejudice to the defendant." *Bruce v. State*, 318 Md. 706,

[14] Even assuming that these arguments are properly before us, they are without merit. Johnson cites to no legal authority, nor are we aware of any, for the proposition that a defendant is denied constitutional rights when the State does not call a witness the defense desires to cross-examine. Johnson had every opportunity to call Trooper Sears as a witness and failed to do so. Further, Johnson's third argument is an offshoot of the *Hicks* violation issue he raises on appeal. As discussed, *supra*, the State's nol pros did not have the purpose or the necessary effect of circumventing the 180-day requirement.

718 (1990). "Security measures that are not observed or observable by the jury generally do not offend due process rights to a fair trial, and do not require judicial scrutiny." *Id*. at 716. Thus, to challenge security measures as the basis for a due process violation, a "*defendant must first establish that the security measures were observed or observable by jurors or prospective jurors*." *Id*. ("If the jury is not aware of the security measures, it cannot be prejudiced by them.") (emphasis added). If a defendant makes this threshold showing, the defendant must then "establish that 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id*. at 719 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986)). As an appellate court, our task is to:

> look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Id. at 721 (quoting *Holbrook*, 475 U.S. at 572). "Our inquiry is not whether less conspicuous measures might have been feasible, but whether the measures utilized were reasonable and whether, given the need, such security posed an unacceptable risk of prejudice to the defendant." *Id*. (citing *Holbrook*, 475 U.S. at 572).

In the instant case, the trial court denied the motion for a new trial based on the portion of the trial transcript indicating that the prospective jurors had not yet entered the courtroom at the time the sheriff escorted Johnson into the courtroom. The court read aloud the relevant portion of the transcript upon which it relied:

> So at 9:46 the Sheriff says hold on for a minute, let's get him out here first and then at 9—within minutes of each other, Mr. Cabrera, who was the State's Attorney at that time said hold the door because I don't want the

> Defendant coming in from the back in front of the jury. Sheriff, hold that door. They bring the Defendant in, then the Defendant was looking at some papers.
>
> * * *
>
> *The Defendant, so my family's not here either, so they're not letting anybody in yet? And for emphasis, so they're not letting anybody in yet?* Then at 9:49, the Clerk, they're going to let the jury come in and then, yes, the seating is limited. At 9:50 Mr. Fried[, defense counsel,] comes in and has a discussion with the Defendant. 9:56, the p[ro]spective jurors then enter the courtroom.

(Emphasis added). Though the recited portion of the trial transcript is omitted from the transcript in the record before us on appeal, the trial court provides a more than adequate recitation of the transcript and Johnson does not challenge the accuracy of the court's recitation. Accordingly, as discussed, "[a]ny security precautions in the vicinity of the courtroom, or even surrounding a criminal defendant, *which are not observed or observable by the jury panel*, ordinarily do not have a prejudicial effect on the right to a fair trial." *Bruce*, 318 Md. at 718. Thus, we cannot say that the trial court's decision to deny, without a hearing, the motion for a new trial on this basis was an abuse of discretion.[15]

[15] Even assuming that the challenged security measure—the sheriff's escort into the courtroom—was "observed or observable" by the prospective jurors, Johnson's argument would fare no better. The Court of Appeals in *Bruce* held that the presence of uniformed security officers in the courtroom during jury selection and trial was not unreasonable and did not pose an unacceptable risk of prejudice to which the prospective jurors may have been exposed. 318 Md. at 721-22. The Court noted, "we are not confronted with an inherently prejudicial practice like shackling during trial, which can only be justified by compelling state interests in the specific case. We are also not confronted with an extensive security force so close to the defendant that it could 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'" *Id*. at 721 (citations omitted).

As Johnson asserts, he was escorted into the courtroom by a single sheriff. Mindful of the reality that "some security is necessary or desirable in most, if not all, criminal trials[,] *id*. at 718, and that "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance," *Holbrook*, 475 U.S. at 567, we cannot say (continued)

Folk v. State, 142 Md. App. 590, 603-04 (2002) (recognizing that the decision to hold a hearing on a Rule 4-331 motion is within the trial court's discretion, even when the factual record on the issue is undeveloped).

IV.

Sufficiency of the Evidence

Finally, Johnson contends that the trial court erred when it denied his motion for judgment of acquittal on his three handgun convictions because, he asserts, the State failed to prove that he fired a gun that met the statutory definition of "a handgun." Contesting only the handgun element of the crimes, Johnson argues that, although Linda described seeing Johnson with a pistol, none of the witnesses "described the gun in great detail."

The State retorts that the conviction for the use of a firearm in a crime of violence "did not even require proof that the weapon was a handgun." With regard to the other handgun convictions, the State asserts that "one eyewitness testified that the gun was a 'pistol' and another testified that the shots came 'from [Johnson's] hand.'" And, testimony from Rufus about seeing "'fire,' i.e. muzzle flashes come from Johnson's hand supported an inference that the gun had a very short barrel—less than 16 inches in length—and[,]" therefore, met the statutory definition of a handgun.

The standard for appellate review of evidentiary sufficiency is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of

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that it was unreasonable to have a *single* sheriff escort Johnson into the courtroom. Such a conclusion is even stronger in the instant case than in *Bruce*, which involved the presence of six security officers during jury selection and trial.

fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Tracy v. State*, 423 Md. 1, 11 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis added). "[T]he limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted), *aff'd*, 387 Md. 389 (2005). It is axiomatic that, "[i]n its assessment of the credibility of witnesses, [a fact-finder is] entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witnesses, whether that testimony was or was not contradicted or corroborated by any other evidence." *Nicholson v. State*, 239 Md. App. 228, 243 (2018) (citation omitted) (emphasis and second bracket in original).

This Court has held that "evidence to support a conviction for a handgun crime is insufficient unless a jury can find beyond a reasonable doubt that the weapon used met the statutory definition of a 'handgun.'" *Brown v. State*, 182 Md. App. 138, 166 (2008) (citations omitted). Typically, "[a] challenge to whether a weapon meets the statutory definition of a handgun most frequently arises in cases in which the weapon in question is not recovered and thus not produced at trial." *Id*. We have stated that "tangible evidence in the form of the weapon is not necessary[, however,] to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference." *Id*. at 166-67 (citations omitted).

For instance, in *Couplin v. State*, 37 Md. App. 567, 575-76 (1977), *overruled in part on other grounds, State v. Ferrell*, 313 Md. 291 (1988), this Court addressed whether there

was sufficient circumstantial evidence regarding the handgun element of Section 4-204(b) of the Criminal Law Article. There, a witness testified that the "appellant had a gun in his hand, which she testified was a 'handgun,' and which she described to [the o]fficer [] as being a 'small pistol.'" *Id*. at 576. The witness's testimony was supported by the officer's testimony, who also testified that the witness told him that the appellant was "armed with a small pistol." *Id*. This Court, therefore, held that the circumstantial evidence was sufficient to sustain the handgun conviction at issue. *Id*. at 578.

Similarly, in *Washington v. State*, 179 Md. App. 32, 69-71 (2008), *reversed on other grounds*, 406 Md. 642 (2008), this Court addressed whether there was sufficient circumstantial evidence regarding the handgun element of Section 5-133(b) of the Public Safety Article. In that case, the shooting occurred outside of a bar and the victim testified that "once outside, appellant 'whipped out his gun' and shot him." 179 Md. App. at 70. It was also undisputed that the "the gun at issue was concealed on appellant's person when appellant called [the victim] outside." *Id*. We concluded that, "[b]ased on the circumstantial evidence, the jury could reasonably infer that the gun's barrel was less than sixteen inches long." *Id*.

We turn to the three handgun convictions in this case and the relevant statutory definitions of a "handgun" for each handgun crime. First, Johnson was convicted of violating Maryland Code (2003, 2018 Repl. Vol.), Public Safety Article ("PS"), § 5-133(b). Section 5-133(b) provides that "a person may not possess a *regulated firearm* if the person . . . has been convicted of a disqualifying crime[.]" (Emphasis added). The statute defines a "regulated firearm" as, among other things, "a *handgun*," which is "a firearm with a barrel

less than 16 inches in length" and "includes signal, starter, and blank pistols." PS § 5-101(n), (r) (emphasis added).

Johnson was also convicted of violating CL §§ 4-203(a)(1)(i) and 4-204(b). Section 4-203(a)(1)(i) makes it unlawful to "wear, carry, or transport a *handgun*, whether concealed or open, on or about the person[.]" (Emphasis added). Section 4-204(b) makes it unlawful to "use a firearm in the commission a crime of violence . . . or any felony, whether the firearm is operable or inoperable at the time of the crime" and further provides that a "firearm" includes, among other things, a *handgun*. CL § 4-204(a)(2). A "handgun" is defined as "a *pistol*, revolver or other firearm capable of being concealed on the person." CL § 4-201(c)(1) (emphasis added). A handgun "includes a short-barreled shotgun and a short-barreled rifle[,]" but it "does not include a shotgun, rifle, or antique firearm." CL § 4-201(c)(2)-(3).

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient circumstantial evidence to support the handgun elements of Johnson's convictions for the three handgun crimes. Three witnesses testified to hearing gunshots. Linda testified specifically that Johnson was shooting a "pistol." Although Johnson argues that Linda equivocated on cross-examination, the fact-finder was entitled to credit only the testimony she gave on direct examination. *Nicholson*, 239 Md. App. at 243. Additionally, Rufus testified that he saw "shots come from [Johnson's] hand, like gunshots, fire c[a]me out[,]" which could support the reasonable inference that the weapon was small enough to fit into Johnson's hand. *Cf. Manigault v. State*, 61 Md. App. 271, 287 (1985) (holding that testimony that appellant's hand covered most of the gun was sufficient

"to permit a reasonable inference that it was a handgun and not a full-fledged rifle or shotgun"). Finally, Byrd testified to observing Johnson "reach[] for his gun" before firing gunshots at Byrd's car. The witness testimony describing the handgun at issue here is analogous to the witnesses' descriptions of the guns at issue in *Couplin*, 37 Md. App. at 576 ("handgun" and "small pistol")[16] and in *Washington* ("whipped out his gun"), which this Court found to be sufficient evidence supporting the handgun element of the crimes charged, 179 Md. App. at 70. We conclude, therefore, that there was sufficient circumstantial evidence from which the jury could reasonably infer that the alleged handgun in this case was a pistol capable of being concealed and less than 16 inches long, for purposes of establishing the handgun element of all three convictions.[17]

For the foregoing reasons, we affirm the judgments of the circuit court.

[16] We note that in *Couplin*, with regard to handgun charges, this Court addressed whether there was sufficient circumstantial evidence regarding the handgun element of CL § 4-204(b), only. 37 Md. App. at 575-78. Here, Johnson was convicted of violating CL § 4-204(b) *and* 4-203(a)(1)(i). *Couplin* is nevertheless instructive because CL §§ 4-204(b) and 4-203(a) are governed by the same definition for "handgun," CL § 4-201(c). *Id.*

[17] We likewise reject Johnson's reliance on *Brown v. State*, 182 Md. App. 138 (2008). There, Brown argued on appeal that the evidence was insufficient to sustain his convictions for violating CL §§ 4-204 and 4-203. 182 Md. App. at 143, 162-63. As in this case, no weapons were recovered in *Brown*. *Id.* at 154. However, the similarity ends there. Unlike the instant case, the only witness to the crimes in *Brown* "specifically testified that he could not describe the weapons used by his assailant." *Id*. at 168. And, when asked if the witness could at least say whether the weapons were pistols or rifles, the witness responded: "I can say that they found an AK[] 47 shell on the floor." *Id*. Because the witness could not "testify as to the type of weapon used by the assailant, even to say whether it was a handgun," this Court concluded that the witness testimony regarding the handgun was not descriptive. *Id*. at 169. Here, as we've explained by now, Linda described specifically that Johnson was shooting from a pistol.

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