UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2337

September Term, 2014

DERWIN L. WALDRON

v.

STATE OF MARYLAND

Hotten,
Berger,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: December 8, 2015

Appellant, Derwin L. Waldron, was convicted after a bench trial in the Circuit Court for Baltimore City of three counts of using a handgun in a crime of violence (Md. Code (Repl. Vol. 2012), § 4-204 of the Criminal Law Article ("Crim. Law")), one count of possessing a handgun (Crim. Law § 4-203), two counts of second degree assault (Crim. Law § 3-203), and one count of first degree assault (Crim. Law § 3-202). Appellant was sentenced to ten years of incarceration (suspend all but five years without parole) and three years of supervised probation for one count of using a handgun in a crime of violence, two concurrent five year sentences without parole for each of the remaining counts of using a handgun in a crime of violence; and concurrent suspended sentences on all remaining counts. Appellant appeals and presents two questions for our review:

> [I.] Was the evidence insufficient to sustain appellant's convictions?
>
> [II.] Did the [circuit] court err in failing to satisfy [Md.] Rule 4-246(b)'s announcement requirement, and in denying appellant's motion for a new trial?

For the reasons that follow, we shall affirm the judgments of the circuit court.

FACTUAL BACKGROUND

On the night of March 31, 2012, a group of Towson University students – Mason Grist ("Mr. Grist"), Marc Israel ("Mr. Israel"), Carly Lambusta ("Ms. Lambusta"), Melissa Lepson ("Ms. Lepson"), and Kelsey Capps ("Ms. Capps") – attended an off-campus party in the Glen Oaks neighborhood of Baltimore City. Shortly after the group arrived, law enforcement ended the party and instructed those in attendance to exit the residence. The

aforementioned group exited through the back of the residence, and into the alley at the 6200 block of Malora Road.

At approximately 11pm that night, appellant had returned to his home on Malora Road after completing his shift as a police officer with the Maryland Transportation Authority ("MTA"). Appellant's wife and daughter were already home, and upon appellant's arrival, the two left in appellant's vehicle so that appellant's wife could seek medical treatment. The two women exited the rear of the dwelling and entered appellant's vehicle, which was parked in a driveway off of the alley behind their home. With appellant's daughter driving, the two pulled out of the driveway and proceeded down the alley.

As the vehicle attempted to pass the group of college students that had recently left the house party, one of the college students, Mr. Grist, sat on the hood of the vehicle. What transpired next was the subject of two contrasting narratives at trial.

a. The State's narrative

The testimony of the five college students, although varying in some detail, was that within seconds of Mr. Grist sitting on the hood, appellant's daughter honked the horn, and Mr. Grist immediately removed himself. According to the students, the vehicle thereafter proceeded down the alley, while the group continued walking down the alley.

According to Ms. Lambusta, Ms. Lepson and Ms. Capps, the three of them were walking behind Mr. Grist and Mr. Israel when they noticed that a man (later identified as

appellant) was walking briskly and approaching the group from behind.[1] Appellant proceeded to walk in between Ms. Lambusta and Ms. Lepson, and towards the back of Mr. Grist. According to Ms. Capps, appellant then pointed a gun in the women's vicinity, and Ms. Capps started to run the opposite direction down the alley. However, she turned around while running to see appellant "bring up the gun and whack [Mr. Grist] over the head." Ms. Lambusta testified that, after appellant created separation by walking in between her and Ms. Lepson, he "raise[d] his arm with an object" towards the back of Mr. Grist. Ms. Lepson testified that she "saw [appellant's] arm raised with a silver object in it, and he rose his hand, and went down towards [Mr. Grist]." All three of the women eventually ran the opposite direction, away from appellant, Mr. Grist, and Mr. Israel.

According to Mr. Israel, he was walking slightly in front of Mr. Grist when he heard a shriek from someone behind him. He then turned around to see appellant attacking Mr. Grist. Mr. Israel then "quickly ran over and kind of tried to push him off him because [he] could tell that someone was hitting him over the head. And as soon [he] pushed him off of [Mr. Grist], [he] was then held at gunpoint." Mr. Israel testified that he had not seen what hit Mr. Grist in the head, "but it was clear afterwards that it had been the gun that was being pointed at [him]." Mr. Israel then put his hands up while Mr. Grist was on the ground bleeding, and appellant told Mr. Israel that he was a police officer.

[1] Each individual's recollection of who was walking with whom in the alley was somewhat different.

While Mr. Grist, Mr. Israel and appellant were still in the alley, the women alerted Baltimore City Police Officer William Jackson ("Officer Jackson"), who was in the area as a result of disturbances from the house party. The women told Officer Jackson that their friend "was in the alley" and "[a] guy had a gun and was going to kill him." Officer Jackson then drove his vehicle down the alley and witnessed an ongoing altercation with "one guy on the ground[,]" and "[a]nother guy was like kind over top of him." As Officer Jackson was approaching in his vehicle, Mr. Grist and Mr. Israel came running towards him, at which time Officer Jackson exited his police cruiser. Officer Jackson then observed appellant walking away from him in the alley with what appeared to be a gun in his hands. Officer Jackson asked appellant to let him see his hands, at which point appellant retrieved his MTA police badge and raised it over the top of his head. Appellant was still facing away from Officer Jackson at this time. When Officer Jackson approached appellant, appellant turned around and Officer Jackson asked appellant to holster his weapon, which he did.

Several additional police officers subsequently arrived on the scene, and Mr. Grist was transported to the hospital where he received several staples to close a wound on his head. Appellant was not arrested, but a supervisor with the Baltimore City Police department reported to the scene and confiscated appellant's handgun. The handgun was entered into evidence at trial, and the defense stipulated that the gun in evidence was the same one confiscated from appellant.

b. Appellant's narrative

As previously mentioned, appellant's take on the events of March 31, 2012, was vastly different from that of the five college students and Officer Jackson. According to appellant, he observed his wife and daughter leave from the rear of his house, and stepped back inside. Appellant testified that he was still wearing the bottom part of his police uniform at this time, which included black pants with a badge and a holstered handgun on his waistband.

According to the testimony of appellant's daughter, she had honked while pulling out of the alley because the group of college students was blocking her exit. At this point, Mr. Grist jumped on the hood of the car. Appellant's daughter testified that, once on the car, Mr. Grist "was calling [her] a douchebag and bitches, and he was using, you know, fuck you guys, and, you know, [saying] let's go for a ride." Appellant's daughter then honked her horn again, but Mr. Grist did not move until her father spoke to him. Once Mr. Grist was off of the hood, appellant's daughter drove away from the alley and did not see what ensued.

According to appellant, when he heard his car's horn, he partially opened his back door to look into the alley. At this time, he observed Mr. Grist jump on the hood of his car, and appellant "started yelling at him to get the hell off my car[,]" but Mr. Grist did not respond. Appellant then proceeded down his steps, and by the time he was halfway down his driveway, Mr. Grist was off the car. Appellant then walked to the alleyway to make sure his wife and daughter were okay, and he observed that the two had driven away.

Appellant then asked Mr. Grist why he was on his car, to which Mr. Grist responded "I wasn't on your fucking car." Appellant alleged that Mr. Grist then began walking towards him, and appellant pulled out his badge with his left hand, and had his right hand on his service weapon, which was still holstered on the side of his leg. Appellant allegedly said "[b]ack up. I'm a police officer," and Mr. Grist responded that he "didn't give a fuck." Mr. Grist then lunged at him, and appellant, with his service revolver in one hand and his badge in the other, "raised his right hand, and [he] came over, grabbed, like, the side of [Mr. Grist's] head or the back of his head, and [he] pushed [Mr. Grist] out of the way as his momentum was coming towards [him,]" and "[Mr. Grist] fell, head first, towards the ground."

While appellant was pushing Mr. Grist to the ground, he allegedly dropped his service weapon from his right hand, at which point he "was in fear for [his] life." However, appellant testified that he never pointed his gun at any of the students, but rather picked his gun up off the ground, and simply told them to "back away. I'm a police officer." Appellant then stood his ground in the alleyway until Officer Jackson came in his police cruiser. According to appellant, he had holstered his weapon and was waiting by the fence in his yard when Officer Jackson approached.

c. The circuit court's findings and sentence

After hearing the conflicting testimony mentioned above, the court made the following findings:

> Mr. Grist, as it would appear, was struck from behind. He has no idea what really happened. And being assaulted in such a manner – I'll use the

assault at this point advisedly – one might be somewhat angry about being struck upon the head.

And why do I believe that he was struck as opposed to merely being pushed, shoved, carried, treated as if he was a toreador? We have the benefit of State's Exhibit 6, which is [appellant's] complaint taken out under oath against Mr. Grist on April 22, three weeks after these events, and after Mr. Grist – I mean, after [appellant] was aware that he was potentially going to face charges as a result of this incident.

And in that, contrary to his testimony in this courtroom, two years later, over two years later, he describes a different event than he described in the courtroom.

He would have me believe that on this evening, he'd return for the shift, gone home. And in my experience, did the unusual thing, left his gun on, left his badge on, left his uniform on, and just relaxed at home.

I've known a number of police officers. I've never seen anybody just come in in uniform and sit down for the evening. It's not to say that it couldn't happen. But in this incident, I don't believe it happened. Because [appellant] describes in his [application for statement of charges] that after the incident in the alley with the car, [he] then ran into [his] house and retrieved [his] Maryland Transportation Authority police badge and departmental issued service weapon.

He was not wearing a full uniform; he was not carrying his weapon; he went and got it; and that's where things went south. Had he left his gun in, even if he wanted to administer some corporal punishment to Mr. Grist, and used only his fist, I don't know that we would be here today. But he didn't.

He went and got his gun. Why did he get his gun? I'm not sure he really intended to use it. But an angry person comes up behind another person that he is mad at, and he cold-cocked him. I believe that's what happened. I believe that's what he did.

* * *

He[] pointed the gun at Mr. Israel and Ms. Capps. He apparently, in pointing the gun at Mr. Israel, who according to [appellant's] statement, had told him to stop hitting his friend.

* * *

I don't believe the gun was dropped. I don't believe [appellant] chased after him. He describes all of that in here. I think that was all made up subsequently, trying to justify what he knew he should not have done and what has made it essentially this whole situation worse by producing such a thing.

We know the gun was out, not holstered, not in the soft holster under his shirt because Officer Jackson, came on the scene and saw him walking up the alley with the gun.

* * *

But Officer Jackson was there almost immediately, goes up the alley, sees a person who he does not then know, standing over Mr. Grist, who he did not know.

And the person who is the Maryland Transportation Authority Police Officer that we learn about later, doesn't stand there and say I'm a police officer. I've been assaulted. This man – nothing. He turns and walks away.

That's not the conduct of a police officer. That's not the conduct of a responsible citizen. That's that conduct of someone who has realized they've overstepped the bounds. And in this case, those bounds, unfortunately, are the criminal laws of the State of Maryland.

For these reasons, I do find beyond a reasonable doubt that [appellant] assaulted Mason Grist in the first degree and used a handgun in a crime of violence, Counts 1 and 4 in the case ending in 043.

As to Mr. Israel and Melissa Capp, I find that he assaulted each of them in the second degree, Counts 2 – count 2 of the cases ending in 044 and 045.

And because he used a gun, it was use of a handgun in a crime of violence, and I find him guilty of that as to each of them, Count 4 of cases ending in 044 and 045.

As to wear, carrying, or transporting a handgun, I'm not exactly – well, I won't go down that road. I find that he did wear, carry, and transport a handgun. Everybody saw him with the gun. He admits he had a gun. It's

> a service weapon. And I find him guilty of that, which is Count 1 of the case ending in 046.

Given the five year mandatory minimum sentence for using a handgun in the commission of a crime of violence, the court sentenced appellant to the shortest feasible term of incarceration (three concurrent sentences of five years without parole). As previously noted, all sentences aside from the mandatory five years for using a handgun were suspended by the circuit court.[2] Appellant noted an appeal in the circuit court on December 8, 2014.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

In reviewing the sufficiency of the evidence, "[w]e do not evaluate conflicting evidence but assume the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court, and, on that basis, simply inquire whether there is any evidence legally sufficient to support those findings." *Mid S. Bldg. Supply of Maryland, Inc. v. Guardian Door & Window, Inc.*, 156 Md. App. 445, 455 (2004).

[2] The court's complete sentence was as follows: assault in the first degree (ten years suspended, to be followed by three years of supervised probation), two counts of assault in the second degree (two years suspended on each, to be followed by three years of supervised probation), possession of a handgun (one year suspended, to be followed by three years of supervised probation), use of a handgun in a crime of violence (ten years, suspend all but the first five without parole, to be followed by three years of supervised probation), two remaining counts of using a handgun in a crime of violence (five years without parole on each). All sentences were concurrent.

DISCUSSION

I. Sufficiency of the Evidence

Appellant alleges that the evidence at his trial was insufficient to sustain his convictions for wearing, carrying, or transporting a handgun, using a firearm in a crime of violence, assault in the first degree, and assault in the second degree.[3] For the reasons that follow, we hold that the evidence in the circuit court was sufficient to convict appellant on each of these counts.

a. Wearing, carrying, or transporting a handgun

"Wear[ing], carry[ing] or transport[ing] a handgun, whether concealed or open" is prohibited by Crim. Law § 4-203(a)(1)(i). However, Crim. Law § 4-203(a)(1)(i) does not apply to:

> (1) the wearing, carrying, or transporting of a handgun by a person who is on active assignment engaged in law enforcement, is authorized at the time and under the circumstances to wear, carry, or transport the handgun as part of the person's official equipment, and is:
>
> > (i) a law enforcement official of the United States, the State, or a county or city of the State[]

Crim. Law § 4-203(b)(1) (amended October 1, 2013). According to appellant, the State failed to establish that he was not authorized to wear, carry or transport his handgun under

[3] Many of appellant's sufficiency arguments were not raised in his motions for judgment of acquittal in the circuit court. We nonetheless address these claims because, "where a defendant has been convicted in a nonjury trial, preserving the issue of evidentiary sufficiency does not depend on a motion for a judgment of acquittal." *Harrison v. State*, 382 Md. 477, 487 n.12 (2004).

this exception, because he "was a 'sworn police officer' in 'good standing[]'" at the time. We disagree for two reasons.

First, the exception under Crim. Law § 4-203(b)(1) is properly characterized as an affirmative defense, which must be raised by the defendant before the State is required to disprove its applicability. *Cf. Brogden v. State*, 384 Md. 631, 643-45 (2005) (noting that neither the State nor the defendant were required prove/disprove the exception for those with a license to carry a handgun, where the defendant did not pursue this affirmative defense at trial). As noted by the State, appellant neglected to raise the exception under Crim. Law § 4-203(b)(1) "in his motion for judgment of acquittal, or his opening or closing statements, or at the hearing on his new trial motion." In light of appellant's failure to raise the affirmative defense under Crim. Law § 4-203(b)(1), the sufficiency of evidence relating to this exception is not properly reviewed by this Court on appeal.

Second, assuming, *arguendo*, that appellant's sufficiency claim was properly before this Court, Crim. Law § 4-203(b)(1) only applies to law enforcement officers "who [are] *on active assignment* engaged in law enforcement, [and] *authorized at the time and under the circumstances* to wear, carry, or transport the handgun as part of the person's official equipment[.]" Crim. Law § 4-203(b)(1) (amended October 1, 2013) (emphasis added). There was sufficient evidence to find that this exception was not applicable, where appellant's shift with the MTA had ended earlier in the night, and appellant conceded that he was not engaged in any authorized law enforcement activity when he confronted Mr. Grist in the alley behind his residence:

> Q. The question was you do not have the right to enforce a motor vehicle law; isn't that correct?
>
> A. I wasn't enforcing no laws.
>
> Q. Okay. According to your agency jurisdiction Directive Manuals, right, from November the 19[th], 2008, Section 3.3, the Criminal Procedures, Title 2, does not authorize police officers to enforce Maryland Vehicle Laws beyond the officer's sworn jurisdiction unless the officer is acting under a mutual aid agreement; correct?
>
> A. Correct, if you say it says that.
>
> Q. So you were not investigating any type of motor vehicle accident; correct?
>
> A. No, I wasn't.

Accordingly, we assign no error to the circuit court's finding that appellant was guilty of wearing, carrying, or transporting a firearm in violation of Crim. Law § 4-203.

b. Use of a firearm in a crime of violence

Crim. Law § 4-204(b) provides that "[a] person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article (Pub. Safety), or any felony, whether the firearm is operable or inoperable at the time of the crime." "[A]ssault in the first or second" degree is among the crimes of violence enumerated in Pub. Safety § 5-101(c), and in the case at bar, the court found appellant guilty of three separate counts of using a handgun in the commission of an assault against Mr. Grist, Mr. Israel, and Ms. Capps. According to appellant, the evidence at his trial was insufficient to support the circuit court's finding of guilt on these three counts, because

"the evidence presented… inherently conflicts with the [l]egislative intent of punishing 'criminals' for possessing handguns." For the reasons that follow, we disagree.

The legislative purpose behind the enactment Md. Code, Article 27 § 36B, the predecessor to Crim. Law § 4-204, "was to reduce the especially high potential for death or serious injury that arises when a handgun, as distinguished from some other weapon, is used in a crime of violence." *See York v. State*, 56 Md. App. 222, 229 (1983). As indicated by the legislative findings enumerated in Crim. Law §4-202, Crim. Law § 4-204 was to serve a similar purpose:

> (1) the number of violent crimes committed in the State has increased alarmingly in recent years;
>
> (2) a high percentage of violent crimes committed in the State involves the use of handguns;
>
> (3) the result is a substantial increase in the number of deaths and injuries largely traceable to the carrying of handguns in public places by criminals;
>
> (4) current law has not been effective in curbing the more frequent use of handguns in committing crime; and
>
> (5) additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public.

Crim. Law § 4-202.

Appellant's argument regarding the legislative intent of Crim. Law § 4-204 (punishing 'criminals' for possessing handguns) is dependent upon his assertion that he was "a 'sworn police officer'" during the time in question, and was also "'authorized to

enforce the general criminal laws of the State.'" (citation omitted). According to appellant, "[r]equiring a judge to impose a mandatory five-year sentence in a case where an officer in good standing after perceiving an emergency in the middle of the night ran out of his house with his badge and service weapon is a denial of fundamental fairness."

Appellant's argument is flawed because the evidence at his trial did not depict a "sworn police officer" either "enforce[ing] the general criminal laws of the state[,]" or responding to an emergency. Instead, the State's evidence revealed that, after appellant's wife and daughter had proceeded past the group of college students, appellant approached the group from behind without speaking a word. Appellant then pointed his handgun at one of the women in the group, then proceeded to strike Mr. Grist in the back of his head with his weapon. Appellant then continued to strike Mr. Grist while he was on the ground, until Mr. Israel attempted to push appellant off of him. At this point, appellant pointed his gun at Mr. Israel, and started yelling for Israel to "[g]et the fuck out of my alley." According to Israel, it was only then that appellant identified himself as a police officer.

The above evidence was credited by the circuit court at the expense of appellant's evidence to the contrary, and we do not disturb the circuit court's decisions regarding credibility of evidence or conflicting testimony when reviewing the sufficiency of the evidence. *See Pryor v. State*, 195 Md. App. 311, 329 (2010) ("Contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact.") (citation omitted). In light of this evidence, any

argument that the legislative intent of the General Assembly is offended by convicting a police officer under Crim. Law § 2-404 is ill-suited to the case at bar. In fact, to accept appellant's positon, we would have to believe that the General Assembly intended to immunize off-duty police officers from punishment for using their service weapons in the commission of violent crimes. We obviously decline to infer such an intent on the behalf of the legislature, and hold that the legislative aim of Crim. Law § 4-204 has not been offended in the case at bar.

Appellant next argues that his convictions for use of a handgun in the commission of a crime of violence must be reversed "because the State failed to establish that appellant 'intended to use the handgun in the commission of the crime he committed.'" (citing *Biggs v. State*, 56 Md. App. 638, 649 (1983)). We disagree, and hold that the evidence at trial was sufficient to support a finding that appellant had the general intent to use the handgun in assaulting Ms. Capps, Mr. Israel and Mr. Grist.

In *Biggs v. State*, 56 Md. App. 638, 648-49 (1983), we discussed the relationship between the use of a handgun and the underlying violent crime:

> It is important to remember that the handgun offense "is separate and distinct from the felony or crime of violence during the commission of which the handgun was used." *Ford v. State,* 274 Md. 546, 551, 337 A.2d 81 (1975). While the underlying crime may indeed be a specific intent crime, as it is here, that fact does not transform the *separate* handgun offense into a specific intent crime. Indeed, it is possible for the underlying crime to be one that does not require a specific intent, *e.g.,* rape or second degree murder. In prosecuting a handgun charge, the State need not prove that the defendant used a handgun with the specific intent that its use be in the commission of a felony or crime of violence. Rather, the State is only required to prove that the defendant intended to use a handgun in what was, in fact and in law, a felony or a crime of violence. In short, the required *mens rea* is merely that

> the defendant intended to do the forbidden act, [*i.e.*], that he intended to use a handgun in the commission of the crime he committed. If that crime turned out to be a felony or a crime of violence, the elements of the handgun violation are fully established. The distinction is between a general intent crime and a specific intent one.

The above excerpt makes clear that a defendant must simply have the general intent to use a handgun in committing the criminal act. *See Harris v. State*, 353 Md. 596, 605 (1999) ("The general intent is the intent to commit the immediate act[.]") (citation omitted).

In the case at bar, the State's evidence was sufficient for the court to find that appellant had the general intent to use his weapon in committing three separate assaults. The State's witnesses testified that appellant pointed his gun at both Ms. Capps and Mr. Israel, and that he also used that gun to strike Mr. Grist. There was no indication that appellant did not intend these actions, and as revealed by *Biggs*, the State was not required to prove that appellant "used a handgun with the specific intent that its use be in the commission of a felony or crime of violence." *Biggs*, 56 Md. App. at 649. Accordingly, the evidence of appellant's intent regarding the use of the handgun was sufficient to sustain his convictions.[4]

[4] In challenging the State's evidence of intent, appellant relies heavily on the circuit court's uncertainty regarding why appellant got his service weapon from his home before leaving his residence: "He went and got his gun. Why did he get his gun? I'm not sure he really intended to use it." Appellant's reliance on this statement is misplaced, because appellant's intent when he entered the alley has no bearing on appellant's general intent to use a handgun in assaulting Mr. Grist, Mr. Israel, and Ms. Capps, once he was in the alley.

Appellant also alleges that the circuit court's finding that "appellant wanted to administer 'some form of corporal punishment' is … legally insufficient to constitute the offense of use of handgun during the commission of a crime of violence…." However, we

(continued . . .)

c. First degree assault

Crim. Law § 3-202 prohibits first degree assault:

> (a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.
>
> (2) A person may not commit an assault with a firearm[]

According to appellant, the evidence at trial was insufficient to support his conviction for first degree assault because "[a]t no point did the trial court find as a fact that appellant intentionally caused or attempted to cause serious physical injury in the commission of an assault[,]" and "the first degree aggravator of use of firearm does not apply under the circumstances presented in this case." We disagree, and hold that the evidence at trial was sufficient to sustain appellant's conviction on either theory of first degree assault.

First, in determining whether the specific intent to cause physical injury required by Crim. Law § 3-202(a)(1) is supported by the facts, "[i]t is permissible to infer that 'one intends the natural and probable consequences of his act.'" *Ford v. State*, 330 Md. 682, 704 (1993) (disapproved of on unrelated grounds in *Henry v. State*, 419 Md. 588 (2011)). At appellant's trial, the evidence established that appellant approached Mr. Grist from behind, and used his handgun to strike Mr. Grist in the back of his head. The court, in its capacity as factfinder, was permitted to infer that appellant intended to cause serious physical injury to Mr. Grist, as serious physical injury is the natural and probable

(. . . continued)
fail to see how the circuit court's finding that appellant intended to administer corporal punishment to Mr. Grist has any bearing on whether the evidence at trial was sufficient for the circuit court to find appellant guilty of using a handgun in the commission of a crime of violence.

consequence of striking a person over the head with a handgun. The evidence also indicated that Mr. Grist suffered a serious physical injury, as he received approximately eight staples to close the wound on his head left by appellant's handgun.

Second, regarding assault under Crim. Law § 3-302(a)(2), the term "assault" retains its common law definition, whereby assault can be committed in one of three ways: "the intent to frighten, an attempted battery, and a battery." *Pryor*, 195 Md. App. at 335 (citing *Christian v. State*, 405 Md. 306, 316-322 (2008)). As it relates to Mr. Grist, the relevant modality of assault is battery, which is a general intent offense involving "the unlawful application of force to the person of another." *Snowden v. State*, 321 Md. 612, 617 (1991). In the case at bar, striking Mr. Grist on the head was sufficient to constitute a battery or "application of unlawful force," and multiple witnesses testified that appellant used a handgun to do so.[5]

Appellant next contends that, because the court found appellant was angry when he struck Mr. Grist, his conviction for first degree assault should have been mitigated to second degree assault under the "hot-blooded response" defense. We do not address this contention because appellant did not raise this defense at trial. The State is not required to prove that the defendant *was not* responding to legally adequate provocation to prove a first degree assault. Instead there must be some evidence "relied on by the defendant which, if believed, would support his claim[,]" before the State is required to disprove the

[5] While the circuit court failed to use the language of Crim. Law § 3-202 in making its findings, we presume that a circuit court judge knows the law and applies it correctly. *State v. Cheney*, 375 Md. 168, 181 (2003).

circumstances of the mitigation defense. *McKay v. State*, 90 Md. App. 204, 214 (1992) (quoting *Dykes v. State*, 319 Md. 206, 217 (1990)). Regardless of whether there was some evidence at trial that would tend to support a "hot-blooded response" defense, appellant never made such a claim in the circuit court. Accordingly, we do not review the applicability of a defense which is entirely absent from the circuit court record.

d. Second degree assault

Appellant next argues that it is "neither just nor reasonable" to hold him criminally liable for second degree assault for pointing his gun at Ms. Capps and Mr. Israel. Appellant again relies on his training as a police officer to allege that he is "trained to act reflexively when encountering a potentially dangerous situation[.]" In making this claim, appellant again ignores the fact that the circuit court clearly credited the State's evidence that appellant was not acting in a law enforcement capacity on the night in question, and that appellant was the one who created a dangerous situation by attacking Mr. Grist. Accordingly, appellant's training as a police officer is entirely irrelevant to the sufficiency of the evidence.

II. The circuit court's compliance with Md. Rule 4-246(b), governing the waiver of the right to be tried by a jury

Appellant's final contention on appeal is that the circuit court erred in accepting appellant's waiver of the right to a trial by jury without announcing that the waiver was knowing and voluntary, as is required by Md. Rule 4-246(b). Appellant acknowledges that he failed to make a contemporaneous objection when the circuit court accepted his waiver,

but seeks review of this claim as plain error. For the reasons that follow, we decline appellant's request, and hold that this allegation of error is not preserved our review.

In *Valonis v. State*, 431 Md. 551, 568 (2013), the Court of Appeals held that, under Md. Rule 4-246(b), "[a]fter the court determines that the waiver is knowing and voluntary, the court is required to announce that determination on the record." The court further held the issue of waiver is preserved for appellate review, "notwithstanding the defendant's failure to object." *Id.* at 569. However, the following year, the Court of Appeals disavowed any portion of its ruling in *Valonis* indicating that a contemporaneous objection was not required to preserve the waiver issue for appeal:

> Going forward, however, the appellate courts will continue to review the issue of a trial judge's compliance with Md. Rule 4–246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review. Accordingly, to the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance with Md. Rule 4–246(b) is reviewable by the appellate courts despite the failure to object at trial, that interpretation is disavowed.

Nalls v. State, 437 Md. 674, 693-94 (2014).

Appellant contends, despite the Court of Appeals' recent holding in *Nalls*, that this Court should review the waiver issue under the plain error doctrine. In *State v. Rich*, 415 Md. 567, 578 (2010), the Court of Appeals explained the high burden that must be satisfied before we will engage in plain error review:

> First, there must be an error or defect-some sort of "[d]eviation from a legal rule"-that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, 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 [D]istrict

> [C]ourt proceedings." Fourth and finally, if the above three prongs are satisfied, the [C]ourt of [A]ppeals has the discretion to remedy the error-discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"

(quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)) (citations omitted).

In the case at bar, we decline to exercise our discretion to review appellant's claim, because the alleged error does not affect the fairness, integrity, or public reputation of judicial proceedings. Prior to appellant's waiver of his right to a jury trial, trial counsel, on the record, explained the distinguishing characteristics of a court trial as opposed to a jury trial, and also confirmed that he had discussed the choice between the two with appellant on several occasions. Furthermore, appellant does not claim that his waiver was in-fact involuntary or made unknowingly, but that the circuit court failed to find the waiver was knowing and voluntary on the record. Under these circumstances, we do not believe that the circuit court's failure to recite the magic words "knowing and voluntary" undermines the fairness and integrity of judicial proceedings.

Appellant also argues that this Court should review the waiver issue because trial counsel was constitutionally ineffective for failing to make a timely objection. However, appellant has not satisfied the high burden of establishing ineffective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must satisfy the two-pronged test derived from the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this test, the defendant must first "prove that counsel's competence failed to meet an objective standard of reasonableness[,]" and second, the defendant must prove "that counsel's performance prejudiced the defense[.]" *Mosley v.*

State, 378 Md. 548, 557 (2003). Objective reasonableness is determined by "considering prevailing professional norms," and trial counsel enjoys a presumption that the challenged conduct was the product of sound trial strategy. *Gross v. State*, 371 Md. 334, 349 (2002) (citation omitted). Regarding prejudice, the defendant must show that "there is a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citation omitted).

Assuming, *arguendo*, that appellant's counsel was ineffective for failing to object when the circuit court accepted appellant's waiver, appellant has failed to explain how trial counsel's allegedly deficient performance affected the outcome of his trial in the circuit court. When trial counsel raised the issue of non-compliance with Md. Rule 4–246(b) in a motion for new trial, the circuit court stated that it had made the required finding that appellant's waiver was knowing and voluntary, but its finding may not have been picked up by the recording system in the courtroom. The circuit court also stated that it "believed that [appellant's] rights with regard to the waiver of a jury trial had been fully protected…." While the circuit court's pronouncement over a month after trial was not sufficient to comply with Md. Rule 4-246(b), the court's response to the motion for new trial indicates that, had trial counsel objected, the court would have likely made the required finding on the record and proceeded to trial. There is therefore little likelihood that, but for counsel's

allegedly deficient performance, the outcome of appellant's trial would have been any different.[6]

Lastly, the circuit court did not abuse its discretion in denying appellant's motion for a new trial, in which appellant raised the un-preserved issue of non-compliance with Md. Rule 246(b). Although the circuit court may, in its discretion, consider both preserved and unpreserved claims in a party's motion for new trial, we have noted that "[t]he non-preservation of [a] claim… could well serve as an unassailable reason for the trial judge, in his discretion, to reject the claim and to deny the motion [for a new trial]." *Isley v. State*, 129 Md. App. 611, 622 (2000). In the case at bar, the circuit court agreed with the State's argument in opposition to appellant's motion for new trial that "a motion for new trial is not an opportunity to raise a belated objection to alleged errors where there's no timely objection[.]" Accordingly, the circuit court did not abuse its discretion in denying

[6] To establish prejudice under *Strickland*, appellant relies on the Court of Appeals decision in *Gross v. State*, were the Court noted that trial counsel is constitutionally ineffective for "failing to preserve or omitting on direct appeal a claim that would have had a substantial possibility of resulting in a reversal of petitioner's conviction." 371 Md. at 636-37. According to appellant, he was prejudiced by trial counsel's omission because, "[h]ad counsel objected to the improper acceptance of the waiver of the right to jury trial, this Court would be compelled to reverse the convictions[.]" In relying on *Gross*, appellant overlooks the fact that *Gross* was decided on appeal from a denial of post conviction relief. This fact is important because, on a direct appeal, this Court can only consider the reliability of the outcome in the court below – whereas appellant would have us consider how we would hypothetically rule in the event that trial counsel had preserved appellant's claim. We refuse to engage in such speculation.

appellant's motion for a new trial because, as we have already held, appellant's allegation of error was not preserved.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.