UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2463

September Term, 2013

RODNEY D. STEPHENSON

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 6, 2015

Following a jury trial in the Circuit Court for Dorchester County, appellant, Rodney Donte Stephenson, was found guilty of first-degree assault, second-degree assault, and reckless endangerment of Randy Jackson and Tyvrin Todd, respectively.[1] In addition, the jury convicted Stephenson of wearing, carrying, or transporting a handgun, possession of a handgun by a disqualified person, use of a handgun in the commission of a felony, and disorderly conduct. He presents five questions for our review, which we quote:

1. Is [a]ppellant entitled to merger of possession of a handgun into use of a handgun, and disorderly conduct into first-degree assault, for sentencing purposes?

2. Did the trial court consider impermissible criteria in imposing maximum consecutive sentences?

3. Was appellant denied the right to be present at a critical stage of the trial?

4. Did the trial court err in admitting hearsay evidence?

5. Did the trial court impose an illegal sentence upon the count of possession of a regulated firearm by a disqualified person?

For the reasons below, we hold that Stephenson's conviction for wearing, carrying, or transporting a handgun must merge with his conviction for use of a handgun in the commission of a felony for sentencing purposes, and otherwise affirm.

[1]Stephenson was acquitted of attempted first-degree murder and attempted second-degree murder of Jackson and Todd.

BACKGROUND

This case results from a shooting that occurred in the parking lot between the Point Break Bar and the Cambridge, Maryland, campus of Chesapeake College. In the early morning hours of April 26, 2013,a man attempted to force himself into the women's restroom in the Point Break Bar, and an altercation occurred. During the course of the fight, at least two women were spat upon and physically assaulted. The bar was then cleared out and the parking lot was filled with people. Randy Jackson and Tyvrin Todd were in the parking lot and were shot. Neither of the victims could identify the person who shot them.

Stephenson does not dispute that he was in the area at the time the shooting occurred. Officer Frank Schmidt of the Cambridge Police Department encountered Stephenson in a back alley shortly after the victims were shot and asked him if he was involved and if he was okay. Stephenson responded that he was okay, that he was not involved, and that the suspects were still back at the scene. Officer Schmidt then spoke with a witness at the scene and, based upon that conversation, sought out Stephenson. When he again found Stephenson, Officer Schmidt was in his patrol vehicle, and Stephenson took off running when he saw Officer Schmidt. As he ran, Stephenson appeared to be holding something in his waist. Stephenson was unarmed when he was apprehended.

A semiautomatic Berra .380 handgun was recovered in the area from which Stephenson fled about ten minutes after his arrest. The handgun was determined to have fired all six of the shell casings, that were recovered from the parking lot following the shooting.

Video surveillance footage from Chesapeake College on the night of the shooting was introduced into evidence. The video shows Stephenson leaving the bar at 1:49 a.m. and displaying a handgun. It does not show the shooter, but it does show the victims being shot.

Following the incident, Felicia Dunnington, a woman who was spat upon during the incident inside the bar, made a written statement to police in which she recounted the events leading up to the shooting.

Stephenson was sentenced as follows: (1) possession of a handgun by a disqualified person, 15 years imprisonment, the first 5 to be served without the possibility of parole; (2) use of a handgun in the commission of a felony, 20 years to be served consecutively; (3) carrying a handgun, 10 years consecutive, first year to be served without the possibility of parole; (4) disorderly conduct, 60 days concurrent; (5) first-degree assault of Tyvrin Todd, 25 years consecutive; and (6) first-degree assault of Randy Jackson, 25 years consecutive. The court merged the reckless endangerment counts for sentencing purposes.

Additional facts will be recounted as they become relevant to our discussion.

DISCUSSION

I. Merger

Stephenson first contends that he is entitled to a merger of two convictions for sentencing purposes. First, he asserts that his conviction for wearing, carrying, or transporting a handgun should merge into his conviction for use of a handgun in the

commission of a felony or crime of violence. Second, he contends that his conviction for disorderly conduct should merge into his conviction for first-degree assault.

A.

We begin with Stephenson's contention that his conviction for wearing, carrying, or transporting a handgun should merge into his conviction for use of a handgun in the commission of a felony or crime of violence for sentencing purposes. Stephenson relies on our opinion in *Holmes v. State*, 209 Md. App. 427, 456 (2013), for the proposition that these two crimes should merge for sentencing purposes. He specifically points to the following in support of his position:

> It is well settled that when convictions for use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun are *based upon the same acts*, separate sentences for those convictions will not stand. *Wilkins v. State*, 343 Md. 444, 446–47 (1996); *Hunt v. State*, 312 Md. 494, 510 (1988).

Id. (emphasis added). The State responds that the two convictions were not based upon the same acts. The State argues that, in its closing argument, it connected the use of a handgun in the commission of a felony charge to three other charges: attempted first-degree murder, attempted second-degree murder, and first-degree assault. The State further contends that it asserted that Stephenson was guilty of wearing, carrying, or transporting a handgun based upon the security camera footage presented at trial.

In closing, the prosecutor stated in pertinent part:

> Now, there is handgun on the person. And that's basically the element as it's just that, that the Defendant had a handgun on his person. And you've seen the video and you can see in the picture the Defendant had a handgun that evening. You heard from the expert it was a handgun, a .380 semiautomatic and it was operable. So I would ask that you find the Defendant guilty of handgun on his person.
>
> * * *
>
> And then we have the final handgun charge using a handgun in the commission of a felony. And there are two elements to that. That the Defendant committed a felony and that the Defendant used a handgun to do that. Now, the felonies in this case are the attempted first degree murder, the attempted second degree murder and the first degree assault. So if you find the Defendant guilty of any of those three then the Defendant is guilty of the handgun and use in the commission of a felony because in this case that's how all of those were carried out with a handgun.

We are persuaded that the State did refer to two separate acts in its closing argument. First, it noted the video of Stephenson carrying a handgun. This video formed an independent basis upon which the jury could convict Stephenson of carrying a handgun. Second, the State asserted that the charges of attempted first-degree murder, attempted second-degree murder, and first-degree assault (of which Stephenson was ultimately convicted) were all based on Stephenson's use of a handgun in the alleged commission of those crimes. Our review, however, does not end here.

In his reply brief, Stephenson cites our recent opinion in *Wallace v. State*, 219 Md. App. 234 (2014), for the proposition that we should examine the charging document and jury instructions to determine whether a verdict was based on a single act or multiple acts. He further contends that any ambiguity should be resolved in his favor.

In *Wallace*, the defendant sought to overturn a robbery conviction on the ground that it was legally inconsistent with the jury's verdict that he was not guilty of second-degree assault. *Id.* at 250. The State opposed this, asserting that the verdicts were not legally inconsistent because evidence produced at trial supported a finding of two distinct instances of assault. *Id.* The central question was "whether the two charges arose from one criminal transaction[.]" *Id.* at 253. Relying on our previous holding in *Morris v. State*, 192 Md. App. 1, 42 (2010), we examined whether the charging document or jury instructions made clear that Wallace was being charged with an assault separate and distinct from that which underlay the robbery charge. *Id.* at 254. Further, we noted that any ambiguity in this analysis must be resolved in Wallace's favor. *Id.* We held that the indictment was ambiguous as to the particular act which gave rise to the second-degree assault charge, and the court provided no instruction clarifying that ambiguity. *Id.* at 257. We held that, because of the ambiguity present in the indictment and jury instructions, Wallace's second-degree assault and robbery charges arose from the same criminal transaction, and therefore the verdicts on each charge were legally inconsistent. *Id.* at 258.

Based on *Wallace*, we examine the charging document and jury instructions presented in this case. The charging document in this case stated in pertinent part:

COUNT ELEVEN

> The State's Attorney for Dorchester County, Maryland informs the Court and charges that Rodney Donte Stephenson, late of Dorchester County, Maryland, on or about the 26th day of April, two thousand thirteen, in

Dorchester County, Maryland, did wear, carry, and transport a handgun upon and about their person, in violation of CR 4-203 of the Annotated Code of Maryland, contrary to the form of the act of the assembly in such case made and provided and against the peace, government, and dignity of the State.

COUNT TWELVE

The State's Attorney for Dorchester County, Maryland informs the Court and charges that Rodney Donte Stephenson, late of Dorchester County, Maryland, on or about the 26th day of April, two thousand thirteen, in Dorchester County, Maryland, did use a firearm in the commission of a felony, in violation of CR 4-204(b) of the Annotated Code of Maryland, contrary to the form of the act of the assembly in such case made and provided and against the peace, government, and dignity of the State.

The court instructed the jury on each of these counts accordingly:

The Defendant is charged with the crime of carrying a handgun. In order to convict the Defendant the State must prove that the Defendant wore, carried or transported a handgun that was within his reach and available for his immediate use.

* * *

The Defendant is charged with the crime of use of a firearm in the commission of a felony. The felonies in this case are attempted first degree murder, attempted second degree murder or first degree assault. In order to convict the Defendant the State must prove that the Defendant committed the felonies or [*sic*] attempted first degree murder, attempted second degree murder or first degree assault and that the Defendant used a firearm in the commission of attempted first degree murder, attempted second degree murder or first degree assault.

We are persuaded that neither the indictment nor the jury instructions clearly indicate whether each charge was supported by a separate act. Any ambiguity must be resolved in Stephenson's favor. *Wallace*, 219 Md. App. at 254 (citation omitted). As we cannot

determine whether a separate act supports each conviction, we hold that Stephenson's conviction for wearing, carrying, or transporting a handgun must merge with his conviction for use of a handgun in the commission of a felony for sentencing purposes.

B.

We return to Stephenson's second contention, namely that his conviction for disorderly conduct must merge into his conviction for first-degree assault. Stephenson cites no law for the proposition that disorderly conduct should merge into first-degree assault for sentencing purposes. This argument is without merit. The elements of the crime of disturbing the peace are set out in Criminal Law Article §10-201(c).[2] There are two modalities of the offense of assault in the first degree: (1) attempting to cause or causing serious physical injury to another; and (2) committing an assault with various types of firearms. *See* Criminal Law Article § 3-303. Without belaboring the point, obstructing the free passage of another

[2]The statute states in relevant part:

> (c)(1) A person may not willfully and without lawful purpose obstruct or hinder the free passage of another in a public place or on a public conveyance.
> (2) A person may not willfully act in a disorderly manner that disturbs the public peace.
> (3) A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.
> (4) A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:
> (i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or
> (ii) act in a disorderly manner.
>
> * * * *

or acting in a disorderly manner (or any of the other modalities of disorderly conduct) are not required elements of assault in the first degree. By the same token, one can be convicted of disorderly conduct even if one has not assaulted another, either with an intent to commit serious bodily injury or by using a firearm. *See Moore v. State*, 198 Md. App. 655, 685 (2011) ("If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts." (Citations, quotation marks and emphasis omitted.)) Stephenson also argues, again without any legal support, that these offenses merge under the rule of lenity. The rule of lenity is inapplicable because there is no ambiguity as to the legislative intent.

II. Sentencing

Moving on, Stephenson claims that the court relied upon impermissible criteria in crafting its sentence. Relying on *Conyers v. State*, 345 Md. 525, 568-69 (1997), he specifically asserts that the court relied upon juvenile charges which did not result in adjudications, but were included in the Pre-Sentence Investigation (PSI). The State responds that this issue is not properly preserved for our review, and in the alternative, that there was no reversible error because this case can be distinguished from *Conyers*.

Beginning with the preservation issue, the State contends that Stephenson's claim is not preserved because he did not object at sentencing. We agree. The following colloquy occurred at sentencing:

> [DEFENSE COUNSEL]: Thank you. And then on page two – Your Honor, let me just say that there are numerous juvenile entries that make no difference in this case because the score on the worksheet is zero. But there are numerous entries on the P.S.I. that are attributed to my client that he disavows entirely.
>
> THE COURT: You're talking about the juvenile record?
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: Well, they show as juvenile contact, some are closed at intake, some are pre-court supervision. But they are part of the P.S.I. as far as I'm concerned fifteen separate contacts. It looks like they started when he was about eleven and ended sometime in when he became an adult.

Stephenson's trial counsel did not object to the court's considering his juvenile record because it was illegal for the judge to do so but rather because the record was inaccurate and misleading.

Looking past preservation, we find Stephenson's substantive argument to be unpersuasive. The sentencing court stated:

> As a juvenile fifteen contacts with the Juvenile Justice System since 1999, starting about when you about eleven years old. Your presence here today is altogether predictable based on your criminal background. You continued your juvenile record through February 6th, 2007, including thefts, assaults, malicious destruction of property. And during this period you were suspended ten times from school totaling twenty-nine days for assault, insubordination, disrespect, and classroom disruption. You're obviously a poster person for bad behavior.

We begin by noting that sentencing courts have virtually boundless discretion in crafting a sentence, and that reviewing courts may only examine the legality of a sentence on three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or

violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (citation, internal quotation marks, and emphasis omitted). A sentencing judge may consider "the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Phillips v. State*, 219 Md. App. 624, 634 (2014) (citation and internal quotation marks omitted).

Stephenson's reliance on *Conyers v. State*, 345 Md. 525, 568-69 (1997), is misplaced.[3] In that case, Conyers contended that the circuit court erred in permitting his juvenile record to be presented to a capital sentencing jury. *Id.* at 563. Eighteen juvenile charges were included in the PSI, only seven of which resulted in a delinquency finding. *Id.* at 565. The Court of Appeals held that it was reversible error "to inform [a] capital sentencing jury of [Conyers's] numerous juvenile charges in which there had been no adjudication resulting in a finding of delinquency[.]" *Id.* at 568.

[3] In his reply brief, Stephenson also complains, without any legal authority, that the court's consideration of his suspensions from school is "fraught with problems." We decline to address this contention, as it is inadequately briefed. *See Diallo v. State*, 413 Md. 678, 693 (2010) (citation and internal quotation omitted) (holding that "arguments not presented in a brief or not presented with particularity will not be considered on appeal").

We are persuaded that the situation here is different from that presented in *Conyers*. The principal difference is that *Conyers* concerned a capital sentencing jury, and no jury is involved in sentencing here. We take special note that *Conyers* specifically included a reference to a capital sentencing jury in its holding, and we are convinced that its holding is thus circumscribed to that narrow class of cases. Further, we are mindful that "[i]t is well settled that a legally trained judge, unlike a lay jury, is capable of compartmentalizing his thinking and of preventing knowledge which might inflame a jury from influencing his own decisions." *Ehrlich v. State*, 42 Md. App. 730, 739-40 (1979) (citing *State v. Hutchinson*, 260 Md. 227 (1970)). Accordingly, we find no error.

III. The Right of Confrontation

During its deliberations, the jury sent a note to the judge asking to view an exhibit containing footage from a security camera on the Chesapeake College campus. The compact disc on which the relevant images were stored, however, also contained material that had not been admitted into evidence. Neither counsel nor the court thought that permitting the jury to have uncontrolled access to the disc, through a laptop, was advisable. Eventually, the court decided that the best procedure would be to bring the jury back into the courtroom and permit the jurors to view the relevant part of the disc on a display screen in the courtroom. Counsel were allowed to be present, in the court's words, only if they "look[ed] wise . . . and [said] nothing, absolutely nothing [.]"

The prosecutor asked that Stephenson be excluded from the courtroom while the jury was present because Stephenson had been staring at the jury throughout the trial in an attempt to intimidate them. The trial court responded, "[w]ell, it was distracting me to watch him watch the jury [during trial]." After further discussion with counsel, the court ordered that Stephenson be removed before the jury was brought into the courtroom.

Stephenson asserts that he was denied the right to be present while the jury reviewed the video footage taken from Chesapeake College's surveillance cameras. Relying on *Midgett v. State*, 216 Md. 26 (1955), Stephenson contends that he had a right to be present during the judge's communication with the jury and the jury's subsequent review of the video. The State responds: (1) that Stephenson had no right to be present because the jury had begun to deliberate; (2) he had waived any suppositional right by his behavior at trial (3) the issue is not properly preserved; and (4) any error was harmless. We agree with the State's first contention.[4]

The Court of Appeals has held:

[4]The factual basis of the State's waiver by misconduct contention is a statement by the prosecutor that Stephenson stared at the jury during the trial in order to intimidate its members. In its brief, the State asserts that the trial court "appeared to agree with the prosecutor's characterization of Stephenson's conduct[.]" We find the State's argument unpersuasive. What the court actually said was that it found Stephenson's conduct to be "distracting." "Distracting" and "intimidating" are very different concepts.

The State's preservation argument is equally unpersuasive. Defense counsel clearly and unmistakably objected on two occasions to the video footage being shown to the jury in Stephenson's absence.

> In this State there is no doubt that an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right. The constitutional guarantee includes the right of the accused to be present . . . (iii) when the court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the court and the jury; **unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury**. Furthermore, the right to be present is personal to the accused and cannot be waived by his counsel.

Midgett v. State, 216 Md. 26, 36-37 (1958) (internal citations omitted) (emphasis added).

Here, Stephenson asserts that the court erred because the court communicated with the jury prior to the playing of the video, and permitted the video to be played during jury deliberations outside of his presence. We begin with the assertion that the court improperly communicated with the jury outside of Stephenson's presence.

The transcript indicates that the court indeed did communicate with the jury after Stephenson left the courtroom, and before the video was replayed. We set out the relevant transcript:

> THE COURT: All right. For the record you object I understand. (The jury entered the Courtroom.)
>
> THE COURT: Just report to your seats.
>
> A JUROR: Excuse me, Your Honor. Is there anyway we can get closer to it?
>
> THE COURT: Yeah, I'm going to tell you that.
>
> A JUROR: Okay.

> THE COURT: I anticipated that. We're trying to make this as easy as possible, ladies and gentlemen, but the way these visual aids are set up they're kind of far away from you and I understand that. We could put them in the jury room on a computer laptop but I don't know if any of you could run it. And we want to make sure you only see what you saw before. There are other things on the CD that are not in evidence. So what we've done is [prosecutor] is going to run the video. [Defense counsel] is going to be present. [Stephenson] is not present. And I'm going to ask you if you'd like to go up and stand by the podium. I'm leaving. I'm out of here.

The substance of this communication concerned the replaying of the video, and the jury's ability to see the video when it was replayed. There is nothing in the above exchange between the court and the jury that indicates that the communication could *in any way* influence the jury or be prejudicial to Stephenson. Consequently, *Midgett* offers Stephenson no relief.

We move to Stephenson's contention that he had the right to be present when the video was played, because the replaying of the video was "a revival of the evidentiary portion of the trial." In advancing this claim, Stephenson cites *Dyson v. State*, 328 Md. 490, 500 (1992), for the proposition that new evidence may be admitted after deliberations have begun. *Dyson* concerns the propriety of a circuit court's refusal to re-open a case after deliberations have begun, and its failure to permit the defendant to cross-examine a recalled witness who testified after the court re-opened the case to receive additional evidence. *Id.* at 500, 504.

In the case before us, the trial court did not permit the introduction of additional evidence. The video footage was admitted as an exhibit and the jury had every right to review

it during its deliberations. Furthermore, we know of no legal principle that permits Stephenson to be present during a jury's review of evidence during deliberations. The only difference here is that the evidence was contained on a disc that also contained information which was not in evidence. Stephenson does not assert that the trial court erred in allowing the prosecutor and defense counsel to be present when the video was replayed and, in any event, the precaution was taken to protect Stephenson. The trial court did not err in ordering Stephenson to be removed from the court room under these circumstances.

IV. A Witness's Prior Statement

One of the witnesses for the prosecution at trial was Felicia Dunnington, one of the women present at the bar before the shootings took place. During the course of her testimony, the State introduced, over Stephenson's objection, a statement written by Ms. Dunnington on the night of the incident. Stephenson contends that the pre-trial statement and her trial testimony do not contradict. He also argues that only the allegedly contradictory portion of the statement should have been admitted, and also that it contained hearsay within hearsay.

The following colloquy occurred during Ms. Dunnington's direct testimony:

Q: Do you remember writing a written statement that evening?

A: This was in April can you see this?

Q: I'm going to show you what's been marked as State's exhibit 10. Do you remember writing that statement at the police station that evening?

A: I mean I was still drunk. I don't remember write -- I remember getting arrested and I remember them asking me questions. Like I remember after

sobering they were asking me all these questions about somebody being shot. And I was like I didn't see anybody get shot.

Q: I understand that. That's not the question. Did you write this statement?

A: Yes, this is my handwriting. Can I read it?

Q: Yes, please. (Thereupon there was a pause in the proceedings.)

A: Yeah. I don't remember writing it, but it says I do not remember a shooter or nobody inside I just heard the shots. The same thing I'm telling you now I don't recall anybody --

THE COURT: There is no question pending.

THE WITNESS: Okay. This is my first time, Your Honor. I'm sorry.

By [PROSECUTOR]:

Q: Do you remember telling the police officer and then writing that the individual that they had at the police station with you the Defendant was there part of this fight that night?

A: No.

Q: So when you - you just read your statement?

A: It says --

THE COURT: Wait a minute, ma'am, there is no question pending.

Q: You just read your statement. Do you remember writing the girl that was spit on told the guy you have locked up to get the other guy?

A: That's --

[DEFENSE COUNSEL]: Objection; hearsay.

THE COURT: Overruled.

A: No. That's not what this says. And you can read it yourself. It says I was -- I didn't see the shooter I just heard the shots. Plain as day. I never said anything like that.

[PROSECUTOR]: Your Honor, at this time the State would move to introduce the written statement of this witness.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. It will be received. (Received into evidence State's Exhibit.)

By [PROSECUTOR]:

Q: Now, you've read a portion of your statement. Can you read the rest of it? When you start from the beginning and read the statement you indicated you wrote this?

A: They were --

[DEFENSE COUNSEL]: Objection. It speaks for itself.

THE COURT: Overruled, sir.

A: I was being arrested for because they said --

Q: There is no question -

THE COURT: The question is read the statement. (Thereupon there was a pause in the proceedings.)

A: I was in plain view and I have a witness --

Q: No. Starting from the beginning?

A: The girl in the blue shirt was spitting on. I was standing there and I got spit on, too. I also was hit that's why I was so upset. But I didn't see the shooter. I just heard the shots. I was in plain view and I have witnesses. I

never kicked anyone. The boy who was shot tried to make peace. The girl was spit on and to get -- the girl was spit on and told -- the guy the guy you have locked up. But I don't -

Q: Continue reading, please?

A: The guy you got locked up to get the other guy. But I don't even know who the people are.

Q: Continue reading your statement.

THE COURT: Read the statement.

A: That's it.

Q: That's not the end of the statement, ma'am.

A: I don't even remember writing this. I don't even remember that night.

THE COURT: Look, you are directed to read the statement that you have identified as yours.

A: It's illegal for you all to put people in other people's stuff. The girl in the blue shirt told the boy who was spit on -

[DEFENSE COUNSEL]: Objection; hearsay.

THE COURT: Overruled.

A: (Continuing) - that he was going to die.

[PROSECUTOR]: You didn't read the whole statement. But I actually don't have any further questions.

The written statement was entered into evidence. It reads in pertinent part:

The girl in the Blue Shirt was spit on I was standing there I got spit on too I was also hit, that's why I was so upset But I didn't see the shooter I just heard the shots I was in plain view and I have witnesses I never kicked anyone the

> boy who was shot tried to make peace the girl who was spit on told the guy you have locked up to get the other guy . . .
> The girl in the Blue Shirt told the Boy who hit/spit on her he was gonna die but the boy who got shot tried to make peace it was his friend

At trial, Stephenson objected to the admission of the statement because it was hearsay. To this Court, he also argues that the trial court erred because there was no inconsistency between Ms. Dunnington's trial testimony and her statement. The latter contention is not preserved. *See Lee v. State*, 193 Md. App. 45, 72 (2010) ("'If counsel provides the trial judge with specific grounds for an objection, the litigant may raise on appeal only those grounds actually presented to the trial judge. All other grounds for the objection . . . are deemed waived.'". (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997))).[5]

Stephenson also contends that Ms. Dunnington's statement contained hearsay within hearsay because "both the testimony and the . . . exhibit relate to statements of the unnamed girl in a blue shirt" and that, as to her, "no conceivable hearsay exception even suggests

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[5]In any event, the trial court did not err in allowing the statement to be introduced. Maryland Rule 5-802.1(a) permits admission of:

> A statement that is inconsistent with the declarant's testimony, if the statement was . . . (2) reduced to writing and was signed by the declarant[.]

Ms. Dunnington's statement was reduced to writing, and was signed by her. It also contradicted her trial testimony. Specifically, she was asked, "Do you remember writing the girl that was spit on told the guy you have locked up to get the other guy?" And she responded "no." Ms. Dunnington's pre-trial written statement explains: "the boy who was shot tried to make peace the girl who was spit on told the guy you have locked up to get the other guy." Accordingly, Ms. Dunnington's statement was properly admitted as an exception under Maryland Rule 5-802.1(a).

itself." The weakness in Stephenson's argument is that neither of the out-of court statements made by the girl in the blue shirt were admitted for the truth of the matter asserted.

First*:* "the girl who was spit on told the guy you have locked up [that is, Stephenson] to get the other guy[.]" Ms. Dunnington related that the girl in the blue shirt urged Stephenson to retaliate. This is an incitement, not a statement of fact.

Second: "The girl in the Blue Shirt told the Boy who hit/spit on her he was going to die[.]" This is a threat, not a statement of fact.

The trial court did not err in admitting Ms. Dunnington's statement into evidence.

V. An Illegal Sentence?

Stephenson's final contention is that the trial court illegally sentenced him to fifteen years imprisonment for possession of a regulated firearm by a disqualified person. He asserts that the maximum sentence he could have received for this offense is five years. Stephenson appears to be under the mistaken impression that he was charged under Public Safety (P.S.) Article § 5-133**(b)**. Count fourteen of the criminal information charged Stephenson under P.S. § 5-133**(c)**, which provides:

> (c)(1) A person may not possess a regulated firearm if the person was previously convicted of:
>
> (i) a crime of violence;
>
> (ii) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, or § 5-614 of the Criminal Law Article; or

> (iii) an offense under the laws of another state or the United States that would constitute one of the crimes listed in item (I) or (ii) of this paragraph if committed in this State.
>
> (2)(I) Subject to paragraph (3) of this subsection, a person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for **not less than 5 years and not exceeding 15 years**.
>
> (ii) The court may not suspend any part of the mandatory minimum sentence of 5 years.
>
> (iii) Except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

(emphasis added).

The above statute expressly permits the sentence of fifteen years for its violation. Furthermore, the State and Stephenson stipulated that Stephenson had been convicted of felony possession of a controlled dangerous substance in 2008, in violation of C.L. § 5-602. This prior conviction makes Stephenson eligible for the enhanced sentence provided by P.S. § 5-133(c). We find no error.

THE JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY ARE AFFIRMED IN PART AND REVERSED IN PART. THIS CASE IS REMANDED TO THAT COURT SO THAT IT MAY MERGE APPELLANT'S CONVICTION FOR WEARING, CARRYING, OR TRANSPORTING A HANDGUN INTO HIS CONVICTION FOR USE OF A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE FOR SENTENCING PURPOSES.

COSTS TO BE PAID 4/5 BY APPELLANT, 1/5 BY DORCHESTER COUNTY.