

Circuit Court for Cecil County
Case No. C-07-CR-18-001150

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 43

September Term, 2019

HECTOR R. LLOPIZ

v.

STATE OF MARYLAND

Graeff,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: December 28, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

On January 11, 2019, a jury convicted Hector Llopiz, appellant, in the Circuit Court for Cecil County of possession of a regulated firearm after having been convicted of a crime of violence, possession of a regulated firearm after conviction of a disqualifying crime, driving under the influence, fleeing and eluding a police officer, and numerous other traffic offenses.¹ The court sentenced appellant to a term of 15 years on the conviction for possession of a regulated firearm after conviction of a crime of violence, the first five years to be served without the possibility of parole, and it merged the second conviction for possession of a regulated firearm. It imposed a consecutive one-year sentence, plus a \$500 fine, on the conviction of driving under the influence, a concurrent two-month sentence on the conviction for failure to stop at the scene of an accident, and a concurrent one-year sentence on the conviction for fleeing and eluding. The remaining counts were “suspended generally[.]”

On appeal, appellant raises three questions for this Court’s review, which we have rephrased slightly, as follows:

1. Did the trial court err by restricting defense counsel from cross-examining a police witness about the component parts of the weapon and/or by giving a supplemental instruction to the jury judicially noticing that the weapon was a regulated firearm?

¹ The traffic offenses included: failure to display headlights when required, two counts of failure to drive right of center, reckless driving, negligent driving, failure of vehicle to yield at an intersection, failure to stay at the scene of an accident, failure to control vehicle speed on a highway to avoid collision, driving in excess of reasonable and prudent speed, failure to stop at a stop sign, and failure to obey traffic device instructions.

2. Did the trial court err by giving a supplemental instruction to the jury judicially noticing that appellant’s prior conviction in Pennsylvania for aggravated assault was both a felony and a crime of violence?

3. Did the trial court err by permitting a police witness who was not tendered or accepted as an expert witness to offer an opinion about the weapon?

For the reasons set forth below, we answer question one in the affirmative, and therefore, we shall reverse appellant’s conviction for possession of a regulated firearm and remand for further proceedings.²

FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2018, appellant was involved in a police chase in Elkton. At trial on the ensuing charges, the State called two witnesses: Deputy First Class Jonathan Douglas, a member of the Cecil County Sheriff’s Office, and Corporal Todd Finch, a member of the Elkton Police Department.

At 7:20 p.m., DFC Douglas observed appellant make numerous dangerous and erratic driving maneuvers. He attempted to effectuate a traffic stop on Route 40 and pursued appellant into a residential neighborhood. Appellant hit a vehicle stopped at a red light, continued to drive, and ultimately “spun out” while making a turn. Appellant

² The issues raised by appellant involve only the firearm convictions. The remaining convictions are not implicated on appeal. Nevertheless, we shall vacate the sentences on the remaining convictions and remand to allow the court to fashion an appropriate sentence in light of the decision on appeal. *See Twigg v. State*, 447 Md. 1, 30 n.14 (2016).

then exited his vehicle and ran away on foot. DFC Douglas pursued appellant on foot and apprehended him when appellant fell.

Upon returning to appellant's vehicle, DFC Douglas observed a "chrome-in-color firearm on the ground in the dirt" directly beside the driver's side door of the vehicle. Photographs of the weapon were admitted in evidence as State's Exhibit 1, and the actual weapon was admitted as State's Exhibit 3.

Corporal Finch arrived at the scene at 7:25 p.m. As he approached the vehicle, he observed "what appeared to be a semiautomatic firearm" on the ground next to the driver's side door. Appellant, who was handcuffed at the scene, called out to Corporal Finch and said he wanted to speak to him. Corporal Finch, who was wearing a body camera, advised appellant of his *Miranda* rights. After appellant stated that he understood his rights, Corporal Finch "asked about the firearm." Initially, appellant denied that it belonged to him and said that he "found it in the vehicle," which he told Corporal Finch belonged to his sister. Appellant then stated to the contrary and then "kept going back and forth" between saying that Exhibit 3 belonged to him and that it did not belong to him. An excerpt of Corporal Finch's bodycam footage was played for the jury.

The State introduced into evidence, as Exhibit 5A, a redacted, certified record from the Court of Common Pleas of Lancaster, Pennsylvania, showing that appellant pleaded guilty to two counts of aggravated assault in 2011. An unredacted copy of the criminal record was marked as Exhibit 5, but it was not admitted in evidence.

Further facts will be added as necessary in the discussion that follows.

DISCUSSION

Appellant’s contentions of error pertain solely to his convictions for possession of a regulated firearm after having been convicted of a violent crime (Count 1) and possession of a regulated firearm after a prior conviction of a disqualifying crime (Count 2). Before discussing the specific contentions on appeal, we will set forth the elements of these crimes.

Pursuant to Md. Code Ann., Pub. Safety (“PS”) § 5-133(b)(1) (2017 Supp.), “[a] person may not possess a regulated firearm if the person . . . has been convicted of a disqualifying crime.” PS § 5-133(c)(1) prohibits possession of a “regulated firearm” by a person who was “previously convicted of . . . (i) a crime of violence . . . or (iii) an offense under the laws of another state or the United States that would constitute [a crime of violence] if committed in this State.” To secure a conviction under either PS § 5-133(b)(1) or PS § 5-133(c)(1), “the State must establish that the handgun involved was a regulated firearm, that the defendant possessed this firearm, and that he was precluded from doing so because of a disqualifying status.” *Smith v. State*, 225 Md. App. 516, 520 (2015), *cert. denied*, 447 Md. 300 (2016).

A “regulated firearm” is defined by reference to three subsections of PS § 5-101. First, PS § 5-101(r) defines “Regulated firearm” as: “(1) a handgun; or (2) [certain specified assault weapons].” Here, there was no contention that Exhibit 3 was an assault weapon, and therefore, the pertinent provision at trial was whether it was a “handgun.” A

“‘[h]andgun’ means a firearm with a barrel less than 16 inches in length.” PS § 5-101(n).

PS § 5-101(h) defines “firearm” as follows:

(1) “Firearm” means:

(i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or

(ii) the frame or receiver of such a weapon.

(2) “Firearm” includes a starter gun.

As indicated, the convictions here required a showing that appellant possessed a regulated firearm after conviction of a disqualifying crime. A “disqualifying crime” includes “a violation classified as a felony in the State,” PS § 5-101(g)(2), including a conviction for a crime in another state that would be classified as a felony if it had been committed in Maryland. *Jones v. State*, 420 Md. 437, 456–57 (2011).

A “crime of violence” includes multiple listed crimes, including “assault in the first or second degree.” PS § 5-101(c)(3). A person commits the felony of assault in the first degree if he or she intentionally causes or attempts to cause “serious physical injury to another” or commits an assault with a firearm. Md. Code Ann., Criminal Law (“CR”) § 3-202 (2012 Repl. Vol.). Assault in the second-degree includes simple assault, which is a misdemeanor, and an assault on certain classes of people, including law enforcement officers and correctional officers, which is a felony. CR § 3-203. Additionally, as indicated, it includes crimes committed in other states that would constitute a crime of violence in Maryland. PS § 5-133(c)(1)(iii). With that background in mind, we address appellant’s contentions of error.

Appellant contends that the trial court erred in granting the State’s motion *in limine* and restricting defense counsel from eliciting testimony regarding, or arguing that, the weapon found did not satisfy the definition of a “firearm” under PS § 5-101(h)(1). He notes that it was the State’s burden to show that the weapon was a regulated firearm, i.e., a weapon (or the frame or receiver of such a weapon) that is designed to expel or may readily be “converted to a weapon that can expel a projectile by the action of an explosive.” He asserts that, by limiting his cross-examination of DFC Douglas, the court erroneously “took a critical issue of fact away from the jury.” He further contends that the trial court erred by giving a supplemental jury instruction taking “judicial notice” that Exhibit 3 was a regulated firearm.

The State acknowledges that the trial court “arguably improperly limited” the defense by ruling that defense counsel could not “attack the character of the gun as a firearm.” It further acknowledges that “whether a weapon is a regulated firearm is not a question that falls within the classic definition of ‘judicial notice.’”

The State argues, however, that reversal of appellant’s firearm convictions is not warranted for several reasons. First, it asserts that appellant failed to preserve his contention of error with respect to the motion *in limine* because he did not object to the numerous instances when DFC Douglas and Corporal Finch referred to Exhibit 3 as a “firearm” or a “weapon.” Second, the State contends that any error by the court in its pretrial ruling and its supplemental instruction taking judicial notice that Exhibit 3 was a

regulated firearm was harmless, asserting that the “evidence made it patently clear that the gun fell within the definition of a regulated firearm.”

I.

Proceedings Below

A.

Motion in Limine

On the first day of trial, after the jury was empaneled, the State moved *in limine* to preclude “the defense . . . from discussing anything about operability” of Exhibit 3 because it was not an element of the charges for possession of a regulated firearm. Defense counsel stated that he was “not going to discuss the operability aspect,” but he would “discuss aspects of [the] definition” of a “firearm” under PS § 5-101(h). The State explained that, in its view, PS § 5-101(h) only required proof that the weapon was the “frame or receiver” of a handgun, and because that could not be disputed, defense counsel should not be permitted “to try to confuse the jury by arguing something that really isn’t in the statute.” Defense counsel reiterated that “[t]he word operability [would] not come out of [his] mouth.” The trial court granted the motion *in limine*, stating “[n]o operability discussion or reference.”

After the court ruled, defense counsel reiterated that he intended to discuss the definition of a firearm that appeared in PS § 5-101(h). The State argued that defense counsel should not be able argue that the weapon “does not fall under that definition and confuse the jury.” Defense counsel explained that he wanted to be able to argue, and

question witnesses regarding, whether Exhibit 3 was a weapon that “expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive[.]” PS § 5-101(h)(1)(i). The trial court stated that, as long as Exhibit 3 was “designed to expel . . . a projectile by the action of an explosive[.]” the State did not need to prove that it could expel or be readily converted to expel a projectile. It ruled: “The Court will not permit any discussion of whether or not this is a weapon, and the motion *in limine* is granted.”

B.

Trial Testimony

At trial, DFC Douglas identified two photographs of the “weapon,” which were admitted into evidence as State’s Exhibit 1. He characterized the weapon as a “Bryco Arms .380 auto[.]” which was the name depicted on the side of Exhibit 3. When asked to identify certain parts of a handgun based upon his experience carrying a weapon, DFC Douglas explained that the “frame” referred to the “handle part with the trigger assembly,” the “slide” was the “top portion” of a firearm where you “chamber a round,” and the “magazine” “holds your ammunition and goes into the weapon.” He confirmed that Exhibit 3 was a semiautomatic weapon, and it had a barrel, a grip, a trigger, and a place for a magazine.

On cross-examination, DFC Douglas stated that there was not a magazine attached to Exhibit 3, nor any bullets in it, when it was recovered. When defense counsel asked DFC Douglas if he had “examined” Exhibit 3, the prosecutor objected, stating her

concern that defense counsel was about to “go down that path of the operability[.]”

Defense counsel responded:

All I’m trying to do is bring out that he wrote a report that says it’s not operable. He wrote a report that says it has no barrel. There is no pin in it. I can ask him, [“]Is this in the same condition?[]”] Because it didn’t have a pin in it. It didn’t have a barrel. You said it didn’t have a barrel in it.

The trial court ruled: “I already granted the motion [*in limine*]. You cannot bring that up. You cannot have any issues that have to do with operability, that has to do with bullets, the barrel, or anything else. It’s a gun or it isn’t a gun. It’s a gun.”

Defense counsel noted that the court had permitted the prosecutor to question DFC Douglas about the components of Exhibit 3, and he asked if the court was precluding him from doing the same. After further discussion, the court reiterated its earlier ruling, stating: “Based upon my reading of the statute I said you cannot ask any questions about the operability of the gun. And that’s what you’re trying to do.” Defense counsel responded:

I understand that I can’t ask this officer whether or not that weapon has a barrel in it. I can’t ask the officer whether or not that weapon has a firing pin on it. I already asked him whether or not there was a clip on it. But if I can’t ask those questions and they are part of the statute, if that’s what you’re telling me, I’ll just go sit down.

At the end of the State’s case and at the close of all the evidence, defense counsel moved for judgment of acquittal. He argued, in relevant part, that the State failed to establish that Exhibit 3 was a “regulated firearm.” The State argued, referring to the ruling on the motion *in limine*, that the court had found that Exhibit 3 was a firearm.

Prior to denying the motion, the court stated: “I saw that it’s a gun. I heard that it’s a gun.”

C.

Jury Instructions

The court then instructed the jury. As pertinent to this appeal, it instructed that appellant was charged “with possessing a regulated firearm after having been convicted of a crime of violence that disqualified him from possessing a regulated firearm” and “possessing a regulated firearm after having been convicted of a crime that disqualified him from possessing a regulated firearm.” It instructed that the State was required to prove that appellant “knowingly possessed a regulated firearm.” It then instructed:

Firearm means a weapon that expels, is designed to expel or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of such a weapon. A regulated firearm means a handgun which is a firearm with a barrel less than 16 inches in length and includes a signal pistol, a starter pistol or a blank pistol.

In closing argument, defense counsel argued that the State had not established that Exhibit 3 could expel, was designed to expel, or was readily converted to be able to expel a projectile. At the conclusion of the defense closing argument, the State then requested that the court give a supplemental instruction advising the jurors that it had found that Exhibit 3 was “a regulated firearm.” Defense counsel objected, arguing that the court could not take judicial notice of facts that the State was required to prove. The court agreed to give a supplemental instruction, but it permitted defense counsel to supplement his closing argument.

Defense counsel then argued that the jury was “the final arbiters of what the facts are and the law in the case.” He advised them that the court was about to instruct them that it had found that Exhibit 3 was “a regulated firearm,” but that did not “take the issue away from” the jurors, and they still needed to find that Exhibit 3 was a weapon that expelled, was designed to expel, or could be readily converted to expel a projectile in order to convict appellant of the firearm charges.

Immediately thereafter, the court gave the following supplemental instruction:

Ladies and gentleman, this Court took judicial notice that the gun is a [regulated] firearm, This instruction is not part of your packet, but I’m going to read it to you twice. The jury may but is not required to accept as conclusive any judicially noticed fact adverse to the accused.

II.

Analysis

There is no dispute that, to prove appellant’s guilt of the two charges of possession of a regulated firearm, the State was required to prove that Exhibit 3 was a regulated firearm. *See Smith*, 225 Md. App. at 520 (Pursuant to PS §§ 5-133(b)(1) and (c)(1)(i), “the State must establish that the handgun involved was a regulated firearm.”) We agree with the circuit court’s determination that operability was not critical to this issue. *See Moore v. State*, 424 Md. 118, 130–31 (2011) (“The design and construction of a weapon, rather than the state of its operability at the time of the crime, determines whether a weapon is or is not a ‘firearm’ for the purposes of [PS] § 5-101 and 5-133[.]”) (quoting *Neal v. State*, 191 Md. App. 297, 308 (2010)).

The statute, however, has specific requirements that must be shown for the State to meet its burden to show a weapon is a firearm. PS § 5-101(h)(1) defines firearm as: “(i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or (ii) the frame or receiver of such a weapon.” The State argued below that the gun recovered here fell “under 5-101(h)(1), Subsection (ii) at the very least,” stating that a frame or receiver of such a weapon constitutes a firearm.

As this Court explained in *Walker v. State*, 192 Md. App. 678, 688 (2010):

The second disjunctive clause of the first paragraph of subsection (h) uses the phrase “such a weapon.” The term “such a weapon” means, obviously the type of weapon referred to in PS [§] 5-101(h)(1)(i), i.e., “a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive.”

Thus, in *Walker*, we accepted the argument that a starter pistol could be considered a “firearm” only if it “expels, or is designed to expel, or may readily be converted to expel projectiles.” *Id.* at 690–91.

Here, appellant’s defense on the firearm charges was that the State failed to meet its burden to show that the handgun recovered was a firearm. The trial court, however, improperly interfered with the presentation of that defense. We agree with appellant that the court erred by restricting defense counsel from cross-examining DFC Douglas about the characteristics of the weapon as it related to the issue of whether it was a regulated firearm. Defense counsel proffered at the bench that DFC Douglas wrote a report stating that Exhibit 3 had “no barrel” and “no pin,” and it was not operable. If, as defense counsel proffered, DFC Douglas wrote in his report that Exhibit 3 did not have a “barrel,”

defense counsel should have been allowed to ask him to explain the discrepancy between his report and his testimony on direct examination that Exhibit 3 had a barrel. And he should have been permitted to inquire about the design and functionality of Exhibit 3 to attempt to show that it did not satisfy the requirements of PS § 5-101(h)(1).³

We also agree with appellant that the trial court erred in instructing the jury that it took “judicial notice that the gun is a [regulated] firearm.” Whether the gun in this case was a regulated handgun was not a fact of which the court properly could take judicial notice. *See* Rule 5-201(b) (A court may take judicial notice only of a fact “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

Moreover, “it is generally improper for a trial judge to show his or her opinion of those matters upon which the jury will eventually pass.” *Gore v. State*, 309 Md. 203, 214 (1987). The court’s supplemental instruction advising the jurors that it took judicial notice of the fact that Exhibit 3 was a regulated firearm improperly invaded the province of the jury.

Finally, because the issue of whether the weapon was a regulated firearm was a critical issue in the case, we cannot say, beyond a reasonable doubt, that these errors did

³ Although defense counsel did not object each time a witness or counsel referred to Exhibit 3 as a firearm or a handgun, we are not persuaded that this constituted a failure to preserve the issue on appeal. Defense counsel’s argument was that, even if Exhibit 3 looked like a firearm, it did not necessarily satisfy the statutory definition of a firearm.

not influence the verdict. *See State v. Heath*, 464 Md. 445, 466 (2019) (An error cannot be deemed harmless unless “a reviewing court can say, after an independent review of the record, that beyond a reasonable doubt, the error in no way influenced the verdict.”). Accordingly, we reverse the convictions for possession of a regulated firearm.⁴

**JUDGMENTS OF THE CIRCUIT COURT
FOR CECIL COUNTY ON COUNTS I AND
II REVERSED. SENTENCES ON THE
REMAINING COUNTS VACATED AND
REMANDED FOR RESENTENCING.
COSTS TO BE PAID BY CECIL COUNTY.**

⁴ Because the remaining two issues presented relate only to the convictions being reversed and may not arise on retrial, we decline to address them.