Circuit Court for Baltimore City
Case No. 122053010

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1023

September Term, 2023

NATHAN L. PRESBERRY

v.

STATE OF MARYLAND

Friedman,
Kehoe, S.,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: April 14, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

During the early hours of January 15, 2022, in the 1700 block of Thames Street in Baltimore City, four men entered a Toyota RAV4 and lay in wait for the three victims. When the three victims were in sight, shots were fired from the car. After investigation, detectives with the Baltimore Police Department determined that appellant Nathan Presberry was the driver of the RAV4 but was not one of the shooters. Presberry was arrested and charged with crimes related to the incident. Following a jury trial in the Circuit Court for Baltimore City, Presberry was convicted of several counts of attempted first-degree murder, conspiracy, handgun charges, and reckless endangerment.[1]

In this appeal, Presberry challenges that the circuit court erred (1) in admitting video footage without expert testimony, (2) by not finding that the State committed a discovery violation, and (3) by admitting hearsay evidence about the police investigation. Presberry also asks us to (A) vacate one count of conspiracy, (B) merge the handgun sentences, and (C) merge reckless endangerment with attempted first-degree murder. For the reasons that follow, we hold that the circuit court did not err in (1) admitting the video footage, (2) finding that the State did not commit a discovery violation, and (3) admitting the alleged hearsay evidence. We also (A) vacate one count of conspiracy, (B) merge the handgun sentences, but (C) affirm the separate convictions for reckless endangerment and attempted first-degree murder.

[1] The three other men in the RAV4 were tried in separate trials, but only one resulted in conviction.

DISCUSSION

I. SURVEILLANCE VIDEO

Presberry first argues that the circuit court erred in admitting video footage from surrounding businesses without an expert witness. We disagree.

Maryland Rule 5-901(a) requires that evidence be authenticated before it can be admitted into evidence. For purposes of admissibility, a video is subject to the "same general rules … as a photograph." *Washington v. State*, 406 Md. 642, 651 (2008). The photograph or video must either be "authenticated through the testimony of a witness with personal knowledge" of the recorded event or authenticated under the "silent witness theory." *Id.* at 652. The trial court does not need to find "that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson v. State*, 460 Md. 107, 116 (2018) (quoting *U.S. v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) (emphasis in original)). The threshold for admissibility is low, but the parties are free to put on evidence or argue that a photo or video is not what it purports to be. *Id.*

At trial, Detective Mark Keenan testified as to how he obtained the videos of the incident from surrounding businesses and CitiWatch[2] by downloading the footage onto a USB and uploading it to a Baltimore Police Department reporting system. Presberry

[2] Citiwatch is a partnership between the Baltimore Police Department, other public safety agencies, local small business owners and residents that allows for the registry and sharing of private surveillance footage with the goal of enhancing public safety responses and deterring crime. *Citiwatch Community Partnership Overview*, BALTIMORE POLICE DEPARTMENT, https://www.baltimorepolice.org/community/citiwatch-community-partnership-overview; https://perma.cc/L8KE-45UH (last visited April 7, 2025).

objected to this testimony on the grounds that Detective Keenan had not been qualified as an expert but was testifying to technical information that required expert qualification. The circuit court overruled Presberry's objection and allowed the detective to continue his testimony.

Under the silent witness theory referenced above, a lay witness can testify to the "the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Jackson*, 460 Md. at 117 (citation omitted). It is not necessary for the sponsoring witness to be qualified as an expert so long as they present "evidence sufficient to support a finding" that the video is what it purports to be. *Id.* at 115 (citation omitted). Here, because the proffered evidence in question is a video, the silent witness theory applies. Under this theory, Detective Keenan could testify, without being qualified as an expert, on the type of recording system used, the process by which he obtained the footage, and the reliability of the systems. That is precisely the testimony he gave. As a result, we hold that the circuit court did not err in admitting Detective Keenan's testimony to authenticate the videos under the silent witness theory.

II. DISCOVERY VIOLATION

State's Exhibit 16B is a picture taken at the scene of the crime, which allegedly depicts Presberry. The picture was described in the application for statement of charges and produced by the State in discovery. Despite that, however, Presberry argues that the manner in which this photo was disclosed was insufficient. According to Presberry, when the State intends to introduce information of a pretrial identification, it must label the

evidence as such. While the State must disclose if its witness will identify the defendant, the rules of discovery do not require such explicit labeling of the information as Presberry contends. Rather, all that is required is that the defendant be provided with complete and accurate information regarding the extent to which the witness could identify the defendant so the defendant can have adequate time to prepare a defense. *Williams v. State*, 364 Md. 160, 174, 179 (2001).

Although it didn't come up during the State's direct examination, during cross-examination, Detective Moss identified Presberry as the person depicted in State's Exhibit 16B. Presberry objected on the grounds that this amounted to a pretrial identification, which the State did not properly disclose in discovery. The circuit court found this was not a pretrial identification and thus no discovery violation occurred. We agree.

Maryland Rule 4-263 sets out the rules for discovery in criminal trials. The State is required to disclose to the defense "[a]ll relevant material or information regarding … pretrial identification of the defendant by a State's witness." MD. R. 4-263(d)(7)(B). To determine if the State committed a discovery violation, we must first establish if a pretrial identification occurred. *Simons v. State*, 159 Md. App. 562, 570 (2004). A pretrial identification is a pretrial statement that "directly implicates the defendant in the commission of the crime." *Green v. State*, 456 Md. 97, 155 (2017) (quoting *Simons*, 159 Md. App. at 575). A pretrial identification, as the term is used here, is not limited to procedures such as a photograph array or a show up or line up, and includes a law enforcement officer's "surveillance observation, if used by the State for purposes of identification." *Id.* at 152 (quoting *Williams*, 364 Md. at 178). The purpose of requiring the

State to disclose pretrial identifications is to ensure that defendants have all the relevant information they need to "prepar[e] their defense and to protect them from unfair surprise." *Williams*, 364 Md. at 172.

Here, the State first referred to a picture identifying Presberry in the application for statement of charges where it wrote that "[t]he vehicle [was] driven by a male later identified via photo … as Nathan Presberry." As part of discovery, the State provided Presberry with State's Exhibit 16B, a picture, the State alleged, of Presberry driving the RAV4. Later, during trial and prior to Detective Moss's identification, State's Exhibit 16B was entered into evidence without objection. Despite the picture already being in evidence, the State did not attempt to have Detective Moss explicitly identify Presberry as the man driving the RAV4. It was not until cross-examination that Presberry's defense counsel asked Detective Moss for the very identification that Presberry now challenges:

> **Defense Counsel**: … [W]ould it be fair to say that it was through some process of deduction or elimination probably centering around phone calls … that Mr. Presberry went from person of interest to suspect to arrestee…?
>
> * * *
>
> **Det. Moss**: My long-sight would be that it would be a process of elimination combined with a knowledge of associates, a hub, an address, and pictures of Mr. Presberry.
>
> **Defense Counsel**: Okay. From Facebook, right?
>
> **Det. Moss**: No.
>
> **Defense Counsel**: From what?
>
> **Det. Moss**: From driving the vehicle.
>
> * * *

Defense Counsel: … With particular reference to [Exhibit] 16B, it's a picture of the RAV4, correct?

Det. Moss: Correct.

* * *

Defense Counsel: And it is your testimony that in your opinion that would be my client, Nathan Presberry, yes or no?

Det. Moss: Yes.

Just because Detective Moss testified that Presberry was the man depicted in the photo does not automatically mean that he made a pretrial identification or that a pretrial identification occurred. In line with Maryland Rule 4-263, the State disclosed all relevant photos and their purposes to Presberry during discovery. Only after he was asked by Presberry did Detective Moss identify Presberry as the man in State's Exhibit 16B. At the close of discovery, Presberry had all of the relevant material and information he needed—including this picture—to mount his defense. That he was surprised when the detective pointed to an admitted piece of evidence as identifying him does not make it a pretrial identification. Presberry asked the detective a question, and he did not like the answer. This was not a pretrial identification and, therefore, no discovery violation occurred.

III. HEARSAY

Next, Presberry argues that the circuit court erred in allowing Detective Moss to testify that he developed Presberry as a person of interest based on information that he gathered as part of his investigation. Presberry claims that the testimony offered by Detective Moss was inadmissible hearsay. We disagree.

For testimony to be hearsay, there must first be a statement, made outside of court, that is offered by the testifying witness. MD. R. 5-801. If this statement is "offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true[]" it is not hearsay, and therefore admissible for this limited purpose. *Morris v. State*, 418 Md. 194, 226 (2011) (quoting *Graves v. State*, 334 Md. 30, 38 (1994)). It is well-settled that, in the context of testimony by investigating officers, explanation that they took their next steps based "upon information received" is not objectionable as hearsay. *Graves*, 334 Md. at 39 (citation omitted). When the police officer "becomes more specific by repeating definite complaints" of the crime, however, the testimony goes directly to the question of the defendant's guilt or innocence and will typically be excluded as overly prejudicial. *Id.* (citation omitted).

Here, the testimony was that Detective Moss initially developed Presberry as a person of interest after listening to recordings of phone conversations of Joel Duncan, who was independently developed as a person of interest in this investigation. At trial, the State asked Detective Moss: "… [T]hrough your investigation of those calls, did you develop any other persons of interest?" Detective Moss replied that he did and named Presberry as that person of interest. The State did not ask for, nor did Detective Moss testify to, any specifics about the calls. The testimony did not go to the question of Presberry's guilt or innocence; it went only to the steps Detective Moss took in his investigation. As such, the

circuit court did not err in allowing Detective Moss to testify, and the statements were properly admitted.[3]

IV. SENTENCING

Presberry was convicted of three counts of attempted first-degree murder, one count of reckless endangerment, two counts of conspiracy, one count of use of a firearm in the commission of a crime of violence, and one count of wearing, carrying, or transporting a handgun. Presberry argues that he is entitled to reversal of one of his sentences for conspiracy, merger of the two handgun sentences, and merger of the sentence for reckless endangerment with the sentences for first-degree murder. We agree as to the sentences for conspiracy and handgun use. We disagree, however, that reckless endangerment and attempted first-degree murder should merge.

When reviewing a trial court's decision whether to merge sentences "we must examine whether the trial court's conclusions were legally correct," without deference to the findings of the trial court. *Clark v. State*, 246 Md. App. 123, 131 (2020). "'Under Maryland common law principles, the normal standard for determining whether one offense merges into another' is the required evidence test." *Morgan v. State*, 252 Md. App.

[3] We note that even if there had been any error in the admission of this testimony, it would not have required reversal. For an error to be reversible, the appellant must show the error was not harmless. *Bellamy v. State*, 403 Md. 308, 332 (2008). Here, the recordings of the statements that Detective Moss relied on were later admitted into evidence. Therefore, even if hearsay was elicited from Detective Moss, that error became harmless when the sources of the statements were admitted and played for the jury without objection from Presberry. *See Dove v. State*, 415 Md. 727, 743-44 (2010) ("cumulative evidence" which "tends to prove the same point as other evidence presented during the trial" may make harmless otherwise reversible error.).

439, 460 (2021) (citation omitted). The required evidence test begins by first asking if "the two offenses at issue are based on the same act or acts," with any ambiguities being construed in favor of the defendant. *Id.* Second, "if all of the elements of one offense are included in the other offense" the two offenses merge, but "if each [offense] contains an element that the other does not, they do not merge[] even if they arise from the same conduct or incident." *Marlin v. State*, 192 Md. App. 134, 159 (2010) (citations omitted). In addition to the elements of each crime, courts will also look at "the charging document, jury instructions, verdict sheet, and evidence" from trial, and the prosecutor's closing arguments. *Butler v. State*, 255 Md. App. 477, 501-02 (2022) (citations omitted).

A. Conspiracy charges and attempted first-degree murder

Presberry argues that one conspiracy charge should be vacated. Here, the State concedes that the evidence supports that only one agreement was made. We agree and vacate one of Presberry's conspiracy convictions.

B. Handgun charges

Presberry argues that his sentences for wearing, carrying, or transporting a firearm should merge with his sentence for use of a firearm in the commission of a crime of violence. The State concedes error. We agree. Under the rule of lenity, Presberry's sentence for wearing, carrying, or transporting a handgun merges with his sentence for the use of a firearm in the commission of a felony or crime of violence because the sentences arose out of the same act or transaction. *See Clarke v. State*, 218 Md. App. 230, 255-56 (2014) (merging the sentences of wearing, carrying, or transporting a handgun with wearing, carrying, or knowingly transporting a handgun in a vehicle because they arose from the

same act or transaction). Here, the evidence of the *transportation* of the firearm was the same as the evidence for the *use* of the firearm. Accordingly, we merge the two sentences.

C. Reckless endangerment and attempted first-degree murder

Finally, Presberry argues that the sentence for reckless endangerment must necessarily merge into the sentences for attempted first-degree murder. The State counters that, while the two charges stem from the same incident, the two are not aimed at the same conduct, and therefore merger is not required. We agree with the State.

Because Presberry's charges for attempted first-degree murder and reckless endangerment arise from the same incident, we look at the elements of each crime alongside the record to determine if they must merge. For reckless endangerment, the State must prove: "1) that [Presberry] engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that [Presberry] acted recklessly." *See Jones v. State*, 357 Md. 408, 427 (2000). It is "the reckless conduct and not the harm caused by the conduct … which the statute was intended to criminalize." *Id.* at 426 (quoting *Minor v. State*, 326 Md. 436, 441 (1992)). For attempted first-degree murder, the State must prove that Presberry attempted "a deliberate, premeditated, and willful killing." MD. CODE, CRIMINAL LAW §§ 2-201, 2-205.

Here, the charging document identifies the victim of the reckless endangerment charge as the "people in the immediate vicinity," but for attempted first-degree murder names three specific victims. It is clear from the elements of each charge and the record that attempted first-degree murder requires the intent to kill or murder specific individuals,

while the reckless endangerment charge, in this case, does not rise to the same mental state. *Martin v. State*, 218 Md. App. 1, 40 (2014) (stating that the attempted murder in the first degree requires "the intent to commit murder in the first degree." (citation omitted)); *Jones*, 357 Md. at 427 (reaffirming that the test for a defendant's mental state for reckless endangerment is not whether they *intended* that the conduct create substantial risk but rather whether the misconduct, viewed objectively, was a gross departure from what a law-abiding person would observe). Further, in its closing argument, the State emphasized this distinction:

> This was a Saturday night in Fell's Point. You saw through the camera footage that there were quite a few [people] out there. A stray bullet … could have struck anybody. That's creating a substantial risk of death or serious bodily harm to the general public.

While we cannot say that reckless endangerment and attempted first-degree murder may never merge if both the victim of reckless endangerment and the attempted murder are the same, *see, e.g.*, *McClurkin v. State*, 222 Md. App. 461, 489 (2015) (merging reckless endangerment and attempted first-degree murder of the same victim), the facts of this case do not require merger. Here, the record is clear that the charges against Presberry were for two different kinds of conduct. We, therefore, affirm the conviction for reckless endangerment. No resentencing is required. [4]

[4] Though Presberry does not ask us to consider resentencing, we note that, in this case, resentencing would not be required as the sentences are to be served concurrently, and he was not sentenced to probation based on the vacated or merged sentences. *See Johnson v. State*, 248 Md. App. 348, 356 (2020) (holding that the appellate courts have discretion as to whether to remand a merger case for resentencing).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED IN PART AND VACATED IN PART. APPELLANT AND BALTIMORE CITY TO SPLIT COSTS.