Circuit Court for Prince George's County
Case No. CT-21-1253-X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1433

September Term, 2022

RASHAD TERELL FURR

v.

STATE OF MARYLAND

Arthur,
Albright,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 19, 2023

* 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 Maryland Rule 1-104(a)(2)(B).

The Circuit Court for Prince George's County, proceeding on a not guilty plea and an agreed statement of facts, found Rashad Terell Furr, appellant, guilty of wearing, carrying, and transporting a handgun on his person; knowingly transporting a (different) handgun in a vehicle; and unlawfully receiving a detachable magazine with a capacity greater than ten rounds. At the same time, the court acquitted appellant of several related offenses involving the same handguns. The court sentenced appellant to three concurrent one-year sentences, all but 90 days suspended. This timely appeal ensued, in which appellant raises five issues:

> I. Whether the circuit erred in denying appellant's motion to suppress;
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> II. Whether appellant's jury trial waiver was knowing;
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> III. Whether the evidence was sufficient to sustain appellant's conviction for receiving a detachable magazine with capacity greater than ten rounds;
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> IV. Whether the trial court rendered inconsistent verdicts; and
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> V. Whether the court's failure to impose a term of probation resulted in the imposition of three concurrent 90-day sentences.

Because the trial judge rendered inconsistent verdicts, we reverse. We shall not address the remaining issues because it is unnecessary to do so.

BACKGROUND

Early in the morning on December 18, 2020, two New Carrollton Police Department officers responded to a 911 call. The caller, Niya Mickle, told police that Keshawn Furr (appellant's brother and the father of Ms. Mickle's children) was at her residence, despite there being a restraining order prohibiting him from being there.

Upon arriving at the parking lot near Ms. Mickle's home, police officers encountered Keshawn Furr and appellant, sitting "in a Nissan Altima that was not parked[.]" Because Keshawn Furr matched the description Ms. Mickle had provided in her 911 call, police officers approached the vehicle and asked the occupants to step outside. One of the officers observed appellant moving about in a suspicious manner, "consistent with someone concealing a firearm on their person."[1] After appellant notified the officer that he was armed, that officer recovered a Glock 17 semiautomatic handgun with a large-capacity 30-round magazine from appellant's jacket pocket. Subsequently, police officers searched the Nissan, and a Glock 43 semiautomatic handgun with a 6-round magazine was recovered from the glove compartment, directly in front of where appellant had been sitting in the front passenger seat.[2]

A criminal information was filed, charging appellant with (1) knowing possession of a regulated firearm (Glock 43) by a person younger than 30 who previously has been adjudicated delinquent; (2) knowing possession of a regulated firearm (Glock 17) by a person younger than 30 who previously has been adjudicated delinquent; (3) wearing, carrying, and knowingly transporting a loaded handgun (Glock 43) in a vehicle; (4)

[1] The officer observed appellant "moving his hand from an upright position and then moving it to the left side of his body in an appearance to guard it[,]" a maneuver the officer described as "a security check, which he knew through his training, knowledge and experience to be consistent with someone concealing a firearm on their person."

[2] In the Statement of Facts, the prosecutor declared that the search of the car was an inventory search. At the suppression hearing, the court ruled that the vehicle search was justified on the ground that a handgun had been recovered from appellant's person, after he had just been inside the same vehicle.

wearing, carrying, and transporting a handgun (Glock 43) on the person; (5) wearing, carrying, and knowingly transporting a loaded handgun (Glock 17) in a vehicle; (6) wearing, carrying, and transporting a loaded handgun (Glock 17) on the person; (7) wearing, carrying, and transporting a handgun (Glock 17) on the person; (8) unlawfully receiving a detachable magazine with a capacity of more than ten rounds; (9) possession of ammunition by a prohibited person.

Appellant filed a motion to suppress the handguns on the ground that the search violated the Fourth Amendment. A suppression hearing was held, at the conclusion of which the circuit court denied the motion to suppress. The case went forward on an agreed statement of facts so that appellant could appeal the denial of his motion to suppress.

Bench Trial: Agreed Statement of Facts and Announcement of Verdict

At the ensuing proceeding, after appellant waived his right to a jury trial and agreed to proceed on a statement of facts, the prosecutor read the following statement of facts into the record:

> Had the matte[r] proceeded to trial, the State would have proven beyond a reasonable doubt that on December 18th, 2020 at approximately 3:42 in the morning, Corporal Howell and Corporal Washington with the New Carrollton Police Department responded to [complainant's address] in New Carrollton, Prince George's County, Maryland, for a report of a domestic issue.
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> Prior to their arrival, Prince George's County Communications advised that the Defendant, or one of the individuals on scene, Mr. Keshawn Furr, who is Mr. Rashad Furr's brother, was wanted through Montgomery County for a larceny. The 911 caller, who was Niya Mickle, who is Mr. Keshawn Furr's -- the mother of Mr. Keshawn Furr's children, called police indicating that Mr. Keshawn Furr was at her residence, she has an active restraining order against him.

She gave a description to dispatch that he was wearing a black hat, red jacket, about 24 years of age, black male, and that he was banging on the door. When the police arrived on scene, Mr. Keshawn Furr and his brother, the Defendant, Mr. Rashad Furr, who's present at defense counsel table wearing a black shirt, were both in a vehicle, in a Nissan Altima that was not parked, bearing a Virginia registration, in the parking lot at that location.

Mr. Keshawn Furr did match the description provided by dispatch. At that point, the officers approached the vehicle, asked Mr. Keshawn Furr and Mr. Rashad Furr to put their hands up. At this time one of the officers witnessed Mr. Rashad Furr moving his hand from an upright position and then moving it to the left side of his body in an appearance to guard it.

The officer described that as a security check, which he knew through his training, knowledge and experience to be consistent with someone concealing a firearm on their person. At that point the officers advised both Mr. Keshawn Furr and Mr. Rashad Furr to exit the vehicle. As soon as Mr. Rashad Furr exited the vehicle, he advised officers that he had a gun in his coat pocket.

At that point, a Terry frisk was conducted and a Glock 17 with a 30 round magazine -- Glock 17 handgun with a 30 round magazine was removed from Mr. Rashad Furr's left interior jacket pocket. That handgun was test fired and determined to be operable. At that point, Mr. Keshawn Furr was also placed under arrest and the vehicle was impounded and an inventory search was conducted. A second handgun, a Glock 43 with a six round magazine that was fully loaded, was located in the glove[] compartment directly in front of where Mr. Rashad Furr was seated in the car.

Mr. Rashad Furr indicated that he has a North Carolina permit, that both of the handguns did in fact belong to him. He . . . does not [have] a Maryland wear/carry permit. All events occurred in Prince George's County, Maryland.

Defense counsel moved for judgment of acquittal. After hearing argument by the parties,[3] the trial judge announced the verdict, which we quote, along with the responses of counsel:

> THE COURT: So as far as Count I and Count II, the Defendant's Motion for Judgment of Acquittal will be granted as far as those two counts in the indictment.[4] With regard to the additional representations that the State made with regard to the inventory search and the inevitable discovery of the gun within the glove box of the vehicle, the Court's not satisfied necessarily based on the Statement of Facts that have been presented that that second handgun would have been discovered. We don't know whether or not based on the information in the Statement of Facts that that is actually factual.
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> I do concur with the State that because of the totality of the circumstances and the admission of Mr. Furr, that the handgun on his person would have been discovered, obviously, since he admitted to officers that he was in possession of that handgun and that he was transporting that handgun in the vehicle.
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> So as to Counts IV and Counts V, that's wear, carry and transporting a handgun upon a person and a loaded handgun in the vehicle, I will find that the Defendant is guilty as far as those two counts as I believe the requisites have been met with regard to the State's Statement of Facts in this case that have been presented that it's sufficient to make a determination as to those.
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> As to Count -- well, I guess it could be Count III or Count V, but we'll do IV and V with regard to the purposes of today's hearing. So as to Count III, Count VI, Count VII, Count VIII and Count IX -- the extended magazine was in the handgun that he had on his person or in the vehicle, Ms. [Prosecutor]? I'm not sure from the statement.

[3] As appellant observes in his brief, "the prosecutor inexplicably focused almost entirely on whether the recovery of the guns was constitutional[,]" a matter that already had been determined during the suppression hearing. Unfortunately, the trial judge agreed with the State, in the apparent belief that the search of the glove compartment was unconstitutional.

[4] The prosecutor had conceded that the Statement of Facts failed to set forth the disqualifying adjudication, which was an element of those charges.

[PROSECUTOR]: On his person.

THE COURT: Okay. And so Count VIII the Court will find that there was an extended magazine in the vehicle and that the State has provided sufficient proof as to Count VIII. But as to the other counts in the indictment, the Motion for Judgment of Acquittal will be granted with regard to those counts.

[PROSECUTOR]: **Can you repeat them, Your Honor, I'm sorry.**

THE COURT: **Sure, of course. So JOA on I, II, III, VI, VII and IX. Guilty as to IV, V and VIII.**

[PROSECUTOR]: Okay.

[DEFENSE COUNSEL]: **So you're saying guilty verdicts on Counts IV, V and VIII?**

THE COURT: **Correct.**

[DEFENSE COUNSEL]: **All right. Fine.**

(Emphasis added.)

The judge imposed three concurrent sentences of one year, all but 90 days suspended,[5] on Counts 4, 5, and 8. This timely appeal ensued.

[5] The judge did not declare a term of probation when she pronounced the sentence. Likewise, neither the hearing sheet for the trial date nor the commitment record indicates a period of probation. Nonetheless, the "Disposition" in the docket, as well as the commitment record, indicate that one year less thirty days of each concurrent sentence is suspended. Whether the trial judge's failure to declare a term of probation resulted in flat 90-day sentences is one of the issues raised in this appeal, but that issue is mooted by our disposition of this case.

DISCUSSION

Parties' Contentions

Appellant contends that the circuit court rendered inconsistent verdicts. His argument may be summarized, in his own words, as follows:

> The court's verdicts of guilty on Count 4, which charged Mr. Furr with wearing, carrying and transporting the Glock 43 on his person, guilty on Count 5, which charged Mr. Furr with knowingly transporting the loaded Glock 17 in a vehicle, and guilty on Count 8, which charged Mr. Furr with unlawfully receiving a detachable magazine with a capacity of more than 10 rounds, were inconsistent with its acquittals on Count 3, which charged Mr. Furr with knowingly transporting the loaded Glock 43 in a vehicle, its acquittal on Count 6, which charged Mr. Furr with wearing, carrying and transporting the loaded Glock 17 on his person, and its acquittal on Count 7, which charged Mr. Furr with wearing, carrying and transporting the Glock 17 on his person.
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> Under the facts as recited by the prosecutor, there was no apparent basis on which to find that Mr. Furr knowingly transported the loaded Glock 17 in a vehicle but did not wear, carry and transport it on his person. Likewise, there was no apparent basis on which to find that Mr. Furr possessed the extended magazine that was in the Glock 17 that was in Mr. Furr's pocket but did not wear, carry, and transport the Glock 17 on his person. Additionally, there was no apparent basis on which to find that Mr. Furr wore, carried or transported the Glock 43 on his person but did not transport the loaded Glock 43 in a vehicle. Finally, there was no apparent basis on which to find that Mr. Furr knowingly transported the loaded Glock 17 in the vehicle but did not knowingly transport the loaded Glock 43 in the vehicle. Because the court failed to explain the apparent inconsistencies in its verdicts, this Court must hold that they are inconsistent, and, as the [Supreme Court of Maryland] did in *Williams*, it must reverse the guilty verdicts.
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> * * *
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> If the court had convicted Mr. Furr of all the counts related to the Glock 17 and had acquitted him of all the counts related to the Glock 43, the verdicts would have been curious, given the agreed statement of facts that was read into the record, but they may not have been inconsistent because the court's comments about the constitutional validity of the search of the

> glovebox that produced the Glock 43 and the search of Mr. Furr's pocket that produced the Glock 17 may have served as an explanation of sorts. It is apparent that the court did not believe that the search of the glovebox was constitutional. If the court had acquitted Mr. Furr of all the counts related to the Glock 43, therefore, the inference may have been drawn that the court did not believe that Mr. Furr could have possessed a gun that was recovered illegally. That, of course, was not the court's verdict, and its musings about the propriety of the searches in this case does not justify the mixed verdicts it did render.

In support, appellant relies primarily upon *State v. Williams*, 397 Md. 172 (2007).

The full extent of the State's counterargument[6] is as follows:

> Considered in light of the statements about the suppression issues, and the reference to the motion for judgment of acquittal, the trial court's explanation was adequate. Even if the Court finds inconsistency with respect to one of the guilty verdicts, it should find that the others are not inconsistent.

Analysis

Preservation

Initially, we note that, in *Travis v. State*, 218 Md. App. 410 (2014), as an alternative holding, we concluded that the contemporaneous objection rule applied to a claim of inconsistent verdicts, even in a bench trial. *Id.* at 468-72; *see Givens v. State*, 449 Md. 433, 463 (2016) (observing that, in *Travis*, we held "that a defendant waived an issue as to allegedly inconsistent verdicts by failing to timely object after a trial court stated the verdicts at the conclusion of a bench trial").[7] Because defense counsel did not object when

[6] The remainder of the section of the State's brief addressing this issue consists primarily of quotations from the transcript.

[7] Although Md. Rule 8-131(c) provides for appellate review of a claim of insufficient evidence following a bench trial, even in the absence of a motion for judgment of acquittal below, *see*, *e.g.*, *Ennis v. State*, 306 Md. 579, 596 (1986), it does not generally (continued…)

the verdicts were announced, even after the prosecutor sought clarification (which should have prompted a reasonably diligent defense counsel to object), we would be obligated to apply *Travis* and hold that the claim of inconsistent verdicts is not preserved, had the State raised non-preservation in its brief. Moreover, we have discretion to notice the failure of a party to preserve an issue for appeal, even where non-preservation has not been raised by the opposing party. Md. Rule 8-131(a).

Because it was unnecessary to the decision in *Travis*, 218 Md. App. at 468 ("hold[ing] that there was no fatal inconsistency between the convictions and the acquittal"), we did not explore the novel and significant double jeopardy implications of the holding in that case.[8] Therefore, because the State has not raised the issue of non-preservation, we decline, under these circumstances, to raise it *sua sponte*.

override the contemporaneous objection rule as codified in Md. Rule 4-323. *See*, *e.g.*, *Bryant v. State*, 436 Md. 653, 669 (2014) (requiring a contemporaneous objection to preserve for appeal a claim that the prosecution failed to prove that a defendant had committed a predicate offense relied upon in imposing an enhanced sentence); *Rivera v. State*, 248 Md. App. 170, 183 (2020) (requiring a contemporaneous objection to preserve for appeal a claim that the trial court relied upon matters not in evidence in rendering its verdict in a bench trial).

[8] In requiring a contemporaneous objection to preserve a claim of inconsistent verdicts in a bench trial, we necessarily are implying that such an objection would serve a useful purpose, namely, that the trial judge, having been alerted to the problem, would be permitted to change the verdict despite having already pronounced it in open court. There are decisions holding that, under some circumstances, a judge's declaration of an acquittal, after jeopardy has attached, is final and irrevocable, even where the judge recognizes, prior to the conclusion of trial, that the acquittal was based upon a legal error. *See*, *e.g.*, *Smith v. Massachusetts*, 543 U.S. 462 (2005) (holding that, in a jury trial, a judge's midtrial grant of a motion for judgment of acquittal could not be reconsidered where the defense had presented its case prior to the judge's attempt to rescind her previous ruling). *Smith* suggested, in strong dicta, that a state retained the authority, under its common law, to (continued…)

Merits of the Claim

There is a crucial distinction between claims of inconsistent verdicts in bench trials versus jury trials. Whereas in jury trials, "a guilty verdict cannot be legally inconsistent with a not-guilty verdict," but "a guilty verdict may be factually inconsistent with a not-guilty verdict[,]" *Givens*, 449 Md. at 458 (citing *McNeal v. State*, 426 Md. 455, 459

delineate circumstances under which a judge's grant of an acquittal is tentative and subject to modification. *Id.* at 470-71 (recognizing that "some state courts have held, as a matter of common law or in the exercise of their supervisory power, that a court-directed judgment of acquittal is not effective until it is signed and entered in the docket, until a formal order is issued, or until the motion hearing is concluded" (citations omitted)); *id.* at 471 (declaring that "[i]t may suffice for an appellate court to announce the state-law rule that midtrial acquittals are tentative in a case where reconsideration of the acquittal occurred at a stage in the trial where the defendant's justifiable ignorance of the rule could not possibly have caused him prejudice"); *id.* at 474 (noting that "a prosecutor can seek to persuade the court to correct its legal error before it rules, or at least before the proceedings move forward").

The only decision by the Supreme Court of Maryland that has addressed this issue is *Pugh v. State*, 271 Md. 701 (1974). In that case, the Court, interpreting Maryland Rule 742 (the predecessor of the substantially similar current Rule 4-328), held that, except for a "slip of the tongue" in pronouncing a verdict, corrected "immediately thereafter," the general rule is that "[o]nce a trial judge intentionally renders a verdict of 'not guilty' on a criminal charge, the prohibition against double jeopardy does not permit him to change his mind." *Id.* at 707. More recently, in dicta, the Supreme Court of Maryland noted, without analysis, our holding in *Travis*, that a contemporaneous objection is required to preserve for appeal a claim of inconsistent verdicts in a bench trial. *Givens*, 449 Md. at 463.

In sum, the questions raised, were we to apply the preservation rule announced in *Travis*, are momentous and ultimately will have to be addressed by the Supreme Court of Maryland in a suitable case, where the issue has been properly raised. This is not that case.

(2012)),[9] in bench trials, all inconsistent verdicts are abhorrent. In *Travis*, we stated the rule as follows:

> If verdicts of conviction and acquittal are inconsistent (legally or factually) at the hands of a judge, the common law generally and Maryland specifically have always held such inconsistency to be reversible error.

Travis, 218 Md. App. at 462.

In the present case, it is easier to understand the verdicts by putting them in tabular form, grouped by their correspondence with which of the two handguns was at issue:

Glock 17 (recovered from appellant's person) (with 30-round magazine)	Glock 43 (recovered from glove compartment)
Count 5: wearing, carrying, and knowingly transporting a loaded handgun in a vehicle GUILTY	Count 3: wearing, carrying, and knowingly transporting a loaded handgun in a vehicle ACQUITTED
Count 6: wearing, carrying, and transporting a loaded handgun on the person ACQUITTED	Count 4: wearing, carrying, and transporting a handgun on the person GUILTY
Count 7: wearing, carrying, and transporting a handgun on the person ACQUITTED	
Count 8: unlawfully receiving a detachable magazine with a capacity of more than ten rounds GUILTY	

We need not consider Counts 1, 2, or 9 (all acquittals) because those counts required evidence of appellant's prior disqualifying juvenile adjudication, which the prosecutor concededly did not set forth in the Statement of Facts.

[9] In *State v. Stewart*, 464 Md. 296 (2019) (per curiam), a sharply divided Court reconsidered whether Maryland should retain the legal versus factual distinction when addressing claims of inconsistent verdicts in jury trials. Four Judges/Justices reaffirmed the rule adopted in *McNeal* and *Givens*. *Stewart*, 464 Md. at 301-02.

As for the counts related to the Glock 17, which, when seized, had a 30-round magazine attached, we conclude that the guilty verdicts on Counts 5 and 8 are fatally inconsistent with the acquittals on Counts 6 and 7. Under the undisputed facts in this case, it was impossible for appellant to be guilty of wearing, carrying, and knowingly transporting the loaded Glock 17 in a vehicle but, simultaneously, to be not guilty of wearing, carrying, and transporting the same handgun (loaded or not) on the person. Likewise, it was impossible for appellant to be guilty of receiving the detachable large-capacity magazine, which was attached to the Glock 17, but simultaneously, to be not guilty of wearing, carrying, and transporting the Glock 17 (loaded or not) on the person.

As for the counts related to the Glock 43, we are unable to reconcile the finding of guilt on the charge of wearing, carrying, and transporting that handgun on the person (Count 4) with the acquittal on the charge of wearing, carrying, and knowingly transporting the same loaded handgun in the vehicle from which appellant was extracted (Count 3).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO THE PAID BY PRINCE GEORGE'S COUNTY.