Circuit Court for Baltimore County
Case No.: C-03-CR-20-002103

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1628

September Term, 2022

TYREIK BROWN

v.

STATE OF MARYLAND

Reed,
Ripken,
Kenney, James A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 26, 2024

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

Appellant, Tyreik Brown, was tried by a jury in the Circuit Court for Baltimore County on charges of attempted first-degree murder of his former girlfriend, Raquell Smith, and related assault and handgun offenses, as well as violating a protective order. At the close of evidence in the trial, the State nol prossed several counts, including violating a protective order. Of the counts that went to the jury, he was convicted of attempted first-degree murder, use of a firearm in the commission of a crime of violence, and two counts of wearing, carrying, and transporting a handgun. He was sentenced to life plus a consecutive twenty-six years of incarceration. In this timely appeal, appellant asks the following questions:

> 1. Did the trial court err in failing to strike evidence about a protective order where the State ultimately nol prossed charges of violating that protective order because it admittedly could not prove the required elements?
>
> 2. Did the trial court err in admitting hearsay evidence?
>
> 3. Did the trial court err in failing to merge [a]ppellant's firearms convictions and sentences[?]

For the following reasons, we shall vacate two of the sentences imposed on his handgun-related convictions but otherwise affirm.

BACKGROUND

On August 4, 2020, Raquell Smith was working as a dental assistant at Towson Smile Care, located at 8501 Lasalle Road in Towson, Baltimore County, Maryland. She testified that appellant had been her former boyfriend, and explained that their relationship ended approximately two weeks to one month prior to August 4, 2020, the date of the shooting.

According to Smith, she had tried to end the relationship earlier, but appellant "just wouldn't let it go." He kept "stalking" her at her home and at work. He was "sending a million messages a day[,]" and "calling [her] job." She needed to have her grandmother drive her to work because "he was following [her] car everywhere." His persistence "just was antagonizing, antagonizing[,] antagonizing, no matter what." Smith obtained a temporary protective order against appellant (the "protective order"), which was admitted, without objection, during trial.[1]

The incident at issue occurred near the end of Smith's work day on August 4, 2020. Smith was using a restroom located in the hallway outside the dental office where she worked, when she heard a knock at the restroom door. The knock was soft at first but became more "aggressive." When she opened the door, appellant was standing in front of her, holding a handgun. She recounted what happened as follows:

> He, uh, he pushed me down and he just, uh, he, um, had a gun. And, um, I was just trying to, um, say no, like beg, like don't, don't do this.
>
> And he, uh, he had it pointed to my head and, um, he started -- he started to just popping it back and it jammed, and I was thinking in my head like, thank the Lord it's not working.

[1] Pertinent to appellant's first issue, the protective order alleged that appellant was stalking Smith and states that: "RESPONDENT KEEPS FOLLOWING PETITIONER AND POPPING UP AT HER GRANDMOTHER'S HOUSE AND AT WORK. REQUEST TO LEAVE HER ALONE. ALSO RESPONDENT KEEPS TEXTING DESPITE REQUESTING TO STOP[.]" (Capitalization in original.) The order further provides that appellant shall not: abuse or threaten to abuse Smith; contact or harass her; or, enter her residence. It also provides that he was to stay away from her place of employment and surrender all firearms for the duration of the order. A final protective order hearing was scheduled for August 13, 2020, notably nine days after the August 4th incident at issue in this case.

> And it just started working (crying). It started working. He just kept shooting. He shoot me, shoot me, it was like -- it was like four times (crying).[2]

According to Smith, the gun was "brown and like black" and a "cowboy Indian type of gun," and that it was so close to her she could have touched it. Appellant was wearing a white shirt with "some stuff on the front[,]" some gloves, and was carrying a bookbag.[3] She knew it was appellant when she opened the restroom door.

Appellant left and Smith called 911 to report the shooting, stating that "he shot me[.]" The audio recording of that call was played for the jury. In addition, Smith confirmed that a still photograph obtained from a hallway surveillance camera in the building where she worked that day depicted appellant and what he was wearing. Again, Smith confirmed that appellant was the man who shot her.

Marc Reibman is an employee with USB Payment Processing, a company located in the same building and on the same floor as the shooting. He testified that he heard a woman screaming "No. No. Please don't do it," followed by gunfire. Reibman also reported the shooting to 911 and, while he was on the phone, he saw a person run out of the building and across the parking lot, towards Calvert Hall High School. According to Reibman, that person was wearing a white shirt and black pants, and was carrying a black bookbag.

[2] Smith testified she was shot in the hands, arms, and wrist.

[3] What she stated was a "bookbag" is also referred to as a "backpack." We will refer to this item of evidence as a "bookbag" for consistency.

Shortly thereafter, Andrew Ciofalo, who lived not far from the site of the shooting, was taking the trash out. He testified that he saw a man wearing a white tank top put a black bookbag into a trashcan in the alley. That man then put an item of clothing in another trashcan before he ran from the scene. Ciofalo relayed this information to two police officers moments later. Police recovered a white t-shirt and the bookbag.[4] Baltimore County Police Detective Bryan Trussell testified that the recovered t-shirt was similar to the one appellant was wearing in a still photograph obtained from the office building surveillance video.

Detective Kyle Feeley of the Baltimore County Police Department also reviewed surveillance footage from cameras located on the first floor of the office building and found an image of the suspect identified as being involved in the shooting. Without objection, Detective Feeley identified photographs of appellant near two different stairwells inside the office building shortly before the shooting, as well as a photograph showing him leaving the building afterward. Detective Trussell also identified appellant as the person depicted in these photographs, without objection. No gun was found in connection with this case.

Additional details will be included in the following discussion.

[4] As will be discussed in more detail later, mail with appellant's name on it was found inside the front pocket of the bookbag and admitted over defense objection.

DISCUSSION

I.

Appellant contends the court erred in not striking evidence from the protective order after the State nol prossed the indictment count to which it related because it was no longer relevant. He argues that such evidence was then inadmissible prior bad acts evidence and unfairly prejudicial. The State responds that appellant waived this issue by not objecting when the protective order was admitted or when Smith testified to the order's factual contents. On the merits, the State argues that the evidence from the protective order was still relevant to prove appellant's identity, motive, and intent in this case, was supported by clear and convincing evidence, and its probative value outweighed the danger of unfair prejudice. But even if its admission was error, it was cumulative of evidence properly admitted and therefore harmless beyond a reasonable doubt. We concur with the State and add that none of the grounds raised by appellant on appeal on this issue were expressly advanced in the trial court.

During the trial, Smith testified without objection that she obtained a temporary protective order against appellant on July 30, 2020, in Baltimore City, but acknowledged not knowing if he had been served with the protective order. As previously indicated, the protective order was admitted without objection.

At the end of the State's case-in-chief, the State nol prossed the count of violating a protective order because appellant had not been served. *See* Md. Code (1984, 2019 Repl. Vol.) § 4-505(b) of the Family Law Article. Thereafter, just before jury instructions, the following ensued:

> [DEFENSE COUNSEL]: Your Honor, Mr. Brown wishes me to address the Court about possibly strike -- asking the Jury to strike any testimony related to the protective orders, uh, since those charges were nol prossed yesterday. He believes the Jury should be instructed not to hear or disregard any evidence related to the protective orders.
>
> THE COURT: All right. [Prosecutor], do you wish to address the request.
>
> [PROSECUTOR]: Your Honor, I -- I believe that the State, um, can establish that a -- a protective order was granted as -- per in the evidence.
>
> The State decided to abandon the violation ex parte because the defendant had not been served with the order, that does not negate that a temporary protective order was granted.
>
> And as your Honor is aware, in order to prove the element of violating a protective order I must prove service. So therefore, the State does not believe it met the elements to, um, to, uh, proceed with that charge, but the State does believe that the evidence did show that a protective order was at least granted and can at least be discussed.
>
> THE COURT: All right. The motion is denied.

Maryland Rule 8-131(a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Additionally, Maryland Rule 4-323(a) provides, in part:

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.

"In other words, if a party fails to raise a particular issue in the trial court, or fails to make a contemporaneous objection, the general rule is that he or she waives that issue on appeal." *Nalls v. State*, 437 Md. 674, 691 (2014). The Supreme Court of Maryland, in *Yates v. State*, 429 Md. 112 (2012), has also stated: "Where competent evidence of a matter is

received, no prejudice is sustained where other objected to evidence of the same matter is also received." *Id.* at 120 (quotation marks and citation omitted); *see also Benton v. State*, 224 Md. App. 612, 627 (2015) ("Moreover, objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." (cleaned up)).

Generally, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified" (cleaned up)). In addition, "'[a] party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are.'" *In re Roberto d.B.*, 399 Md. 267, 311 (2007) (Harrell, J., dissenting) (quoting *Harmony v. State*, 88 Md. App. 306, 317 (1991)). In other words, "[t]he trial court needs sufficient information to allow it to make a thoughtful judgment." *Id*. at 311-12 (quotation marks and citation omitted).

Here, the protective order came in without objection, as did Smith's testimony about the underlying facts supporting that order. The description of harm in the protective order, namely that appellant kept following Smith, appearing at her grandmother's house and her work, and texting Smith, despite her requests for him to stop, was substantially similar to the testimony that appellant sought to strike. Not only was appellant's claim untimely raised, admission of the protective order itself without objection waived any objection to

the testimony on the same subject matter. Moreover, the grounds raised on appeal, namely relevance, prejudice, and prior bad acts, were never raised in the trial court in support of the motion to strike. Maryland Courts have consistently stated that the purpose of the preservation rule "is to 'prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court[.]'" *Peterson v. State*, 444 Md. 105, 126 (2015) (quoting *Grandison v. State*, 425 Md. 34, 69 (2012)). Discerning no reason to deviate from the purpose of the rule, we hold that this issue is not preserved for appellate review.

But had we concluded otherwise, appellant's argument would fail on the merits. We explain.

Initially, "[a] nolle prosequi, or nol pros, is an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v. Huntley*, 411 Md. 288, 291 n.4 (2009). "[T]he entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent." *Id*. (quotation marks and citation omitted).

> [W]hile a nolle prosequi discharges the defendant on the charging document or count which was nolle prossed, and while it is a bar to any further prosecution under *that* charging document or count, a nolle prosequi is *not* an acquittal or pardon of the underlying offense and does not preclude a prosecution for the same offense under a different charging document or different count.

Id. (emphasis in original; quotation marks and citation omitted). We have not found, nor have the parties directed us to, any Maryland case indicating that a jury may not consider evidence admitted during trial for the primary purpose of supporting a charge that was later

nol prossed. *Cf. Boyce v. Commonwealth*, 691 S.E.2d 782, 785 (Va. 2010) (concluding the trial court did not abuse its discretion in failing to strike an expert's opinion that was based, in part, on a dismissed charge in a prior case).[5]

Generally, "all relevant evidence is admissible." Md. Rule 5-402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Maryland Courts have consistently noted that "[h]aving 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (quoting *State v. Simms*, 420 Md. 705, 725 (2011)).

But evidence that fails to clear this hurdle is inadmissible, and trial judges have no discretion to decide otherwise. *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."). When the trial court's ruling does not involve a legal question and concerns a weighing of the evidence's relevance in relation to other factors, we will apply the more deferential abuse of discretion standard. *J.L. Matthews, Inc. v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 368 Md. 71, 92 (2002).

On appeal, appellant advances an argument not raised in the trial court – that the protective order involved inadmissible prior bad acts. The admission of such evidence requires a three-step analysis by the trial court. First, it must determine that the evidence is

[5] We note that, when the jury was instructed, the charging document was not evidence. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 3:00 (2d ed. 2022); *see also Darby v. State*, 3 Md. App. 407, 411-12 (1968) (holding that it was not prejudicial error to give the indictment to the jury despite the fact that one charge was stricken), *cert. denied*, 251 Md. 748 (1968), *cert. denied*, 393 U.S. 1105 (1969).

for one of the permissible purposes specified in Rule 5-404(b).[6] *State v. Faulkner*, 314 Md. 630, 634 (1989). Second, the court must then determine "whether the accused's involvement in the other crimes [or acts] is established by clear and convincing evidence." *Id*. Third, the court must balance the probative value of the evidence against any undue prejudice that would result from its admission. *Id*. at 635.

We review the first step of the analysis *de novo* because it "is a legal determination and does not involve any exercise of discretion." *Id.* at 634. *Accord Vigna v. State*, 241 Md. App. 704, 727 (2019), *aff'd on other grounds*, 470 Md. 418 (2020). The second step is reviewed "to determine whether the evidence was sufficient to support the trial judge's finding." *Faulkner*, 314 Md. at 635. And, if the inquiry proceeds to the third step, "the analysis implicates the exercise of the trial court's discretion[,]" which we review for abuse. *Id*.

According to the State, the protective order was specially relevant: to prove appellant's identity; to rebut appellant's theory that Smith may have "instigated the encounter by inviting him to meet her at her place of work"; and, to prove his motive and intent. As to identity, this Court has stated that '"[e]vidence of other offenses may be

[6] Maryland Rule 5-404(b) provides:

> (b) **Other crimes, wrongs, or acts. –** Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

received under the identity exception if it shows any of the following: (a) the defendant's presence at the scene or in the locality of the crime on trial[.]'" *Emory v. State*, 101 Md. App. 585, 610 (1994) (quoting *Faulkner*, 314 Md. at 637), *cert. denied*, 337 Md. 90 (1995). We are persuaded that in the protective order, the allegation that appellant followed Smith to work and was told to leave her alone, was specially relevant to show the identity of Smith's assailant when she was shot at a restroom at her place of employment.

We are also persuaded that the protective order was admissible to show appellant's motive and intent, in addition to rebutting the defense theory that Smith instigated the altercation. As the Maryland Supreme Court has stated:

> Under some circumstances, where intent is legitimately an issue in the case, and where by reason of similarity of conduct or temporal proximity, or both, evidence of other bad acts may possess a probative value that outweighs the potential for unfair prejudice, the evidence may be admissible.

Howard v. State, 324 Md. 505, 514 (1991); *see also State v. Taylor*, 347 Md. 363, 372-73 (1997) (holding joinder of offense of child abuse proper because acts would be admissible if tried separately to rebut defense of lack of intent or malice); *Bryant v. State*, 207 Md. 565, 586 (1955) ("[T]he evidence of the convictions was admissible because it showed appellant's behavior toward the girl whom he killed only a month later, thus tending to show motive and intent.").

Maryland Courts have explained that this rationale also applies in cases of alleged prior domestic violence. *See Snyder v. State,* 361 Md. 580, 605 (2000) (recognizing that "[e]vidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive"); *Vaise v. State*, 246 Md. App. 188, 211-12 (holding

that evidence of defendant's prior assault of victim was relevant to show motive and identity), *cert. denied*, 471 Md. 86 (2020); *Jackson v. State*, 230 Md. App. 450, 461 (2016) (holding that prior incidents of domestic violence had special relevance to show "the exertion of control over the victim through the perpetration of a cycle of violence" that established a motive for murder); *Stevenson v. State*, 222 Md. App. 118, 150 (2015) (holding that evidence of recent "physically abusive acts" against the victim had special relevance in showing motive because such evidence '"was probative of a continuing hostility and animosity"' toward the victim, '"not simply the propensity to commit murder"' (quoting *Snyder*, 361 Md. at 609)).

Appellant's motive and intent were both contested in this case. As we will detail more, the defense theory was that Smith lured appellant to her office and that the shooting occurred as part of an altercation between the two. The protective order included allegations that appellant kept following Smith despite being asked to stop and to leave her alone. And it ordered appellant to not abuse, or threaten to abuse, Smith, and to not contact or attempt to contact her or harass her, both at her home and at her place of employment. It also instructed the surrender of any firearms.

The evidence supporting the protective order was specially relevant to appellant's intent as to the attempted murder and assault charges. As our Supreme Court has explained, '"intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence."' *Spencer v. State*, 450 Md. 530, 568 (2016) (quoting *Davis v. State*, 204 Md. 44, 51 (1954)). *See also In re David P.,* 234 Md. App. 127, 138 (2017)

(observing that intent need not be proven by direct evidence but "'may be inferred as a matter of fact from the actor's conduct and the attendant circumstances'" (quoting *Young v. State*, 303 Md. 298, 306 (1985))).

As to whether the evidence of a prior bad act is clear and convincing, the focus of appellate review is directed "'at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue.'" *Henry v. State*, 184 Md. App. 146, 168-69 (2009) (quoting *Emory*, 101 Md. App. at 622), *aff'd*, 419 Md. 588 (2011). Our Supreme Court has upheld a trial court's finding of clear and convincing evidence based on the direct testimony of a person with knowledge of the other crimes. *See Vogel v. State*, 315 Md. 458, 461, 473 (1989) (admitting other crimes evidence of prior acts of sexual misconduct with a child).[7] Smith's testimony to the allegations at trial satisfied the second step.

The third step of the admissibility analysis involves the trial court's careful weighing of the need for and probative value of the "other crimes" evidence, "against any undue prejudice likely to result from its admission." *Faulkner*, 314 Md. at 635. Prejudice may result from a jury's inclination to convict the defendant, not because it has found the defendant guilty of the charged crime beyond a reasonable doubt, but because of the defendant's unsavory character or criminal disposition as illustrated by the other crimes evidence. *See Taylor*, 347 Md. at 369 ("Underlying this rule is the concern that the jury

[7] The General Assembly codified the underlying holding in *Vogel* when it enacted Section 10-923 of the Courts & Judicial Proceedings Article, concerning evidence of other sexually assaultive behavior. *See Woodlin v. State*, 484 Md. 253, 267 (2023).

will use the other crimes evidence to convict and punish the defendant for having a criminal disposition or to infer that he is more likely to have committed the crime for which he is on trial."); *Terry v. State*, 332 Md. 329, 334 (1993) (stating that such evidence "may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant").

Our review of the protective order persuades us that it had significant probative value in respect to identity, motive, and intent, which were at issue and that its admission was not unduly prejudicial or unfair. As stated in a Maryland treatise on evidence law:

> [E]vidence is never excluded merely because it is "prejudicial." If prejudice were the test, no evidence would ever be admitted. The parties have a right to introduce prejudicial evidence. Probative value is outweighed by the danger of "*unfair*" prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case. The line is not always easy to draw.

Murphy & Murphy, *Maryland Evidence Handbook* § 506[B], at 230 (5th ed. 2020) (emphasis in original).

In considering this issue, appellant directs our attention to *Streater v. State*, 352 Md. 800 (1999). In that case, Mr. Streater was convicted by a jury of stalking, harassment, and telephone misuse of his wife, from whom he was separated. *Id.* at 803. At trial, she testified to numerous phone calls from and contact with Mr. Streater after she had told him to stop contacting her. *Id*. at 803-04. She testified on direct examination that she obtained a protective order that required '"him to stay away from me."' *Id*. at 804. That order was admitted, over defense counsel's objection, "as substantive evidence for the prosecution's case-in-chief against Mr. Streater." *Id.*

The issue on appeal concerned the fact that the protective order contained other crimes evidence beyond what was alleged during Ms. Streater's in-court testimony. *Id.* at 804-05. The other crimes evidence not mentioned during Ms. Streater's testimony involved three factual conclusions made by the District Court judge which apparently constituted the basis upon which Mr. Streater was ordered not to contact Ms. Streater:

> Specifically, the form order includes a box, which the District Court judge had checked, stating, "Act(s) which placed Person Eligible for Relief in fear of serious bodily harm." A handwritten note scrawled on blank lines underneath the above statement stated, "Respond. threatened to harm Pet., he broke into the house and took her money." The District Court judge also checked a box indicating that Mr. Streater had committed a "[b]attery or assault and battery."

Id. at 805 (footnote omitted).

Although "the fact that a protective order had been issued was properly made known to the jury[,]" a divided Court concluded that the trial court erred because "the protective order contained other crimes evidence and there was no threshold inquiry into the admissibility of that evidence." *Id*. The Court held that three factual findings constituted other crimes evidence that should have been separately assessed from the admissibility of the protective order itself under Md. Rule 5-404(b). *Id.* at 811. The Court noted that "[n]either the judge, the defense attorney, nor the prosecutor ever specifically mentioned any of the three bad acts contained in the protective order." *Id*. at 811 n.5. *Cf. Case v. State*, 118 Md. App. 279, 285 (1997). ("[N]o prior crimes, wrongs, or acts are mentioned in that portion of the protective order that was read to the jury." (cited in *Streater*, 352 Md. at 814)).

The *Streater* Court then engaged in an admissibility analysis of the three factual findings contained in the protective order. *Streater*, 352 Md. at 815-822. As to the first step, the Court noted that the threat and assault and battery factual determinations had special relevance to the intent element of the harassment charge. *Id*. at 816-17. But it was less convinced that the finding that he '"broke into the house and took her money'" had any special relevance. *Id*. at 817. As to the second step, the Court indicated that the trial court should have held a hearing outside the presence of the jury to determine whether the allegations in the protective order were supported under the clear and convincing standard or because the respondent had consented to the entry of the protective order into evidence. *Id*. at 818-19. As to the third step, and because the record was devoid of any reasoning or argument, the Court stated that it could not say as a matter of law that the probative value of the threat and assault and battery findings outweighed their prejudicial effect. *Id*. at 819. As a result of the failure to engage in an other crimes analysis regarding the three factual determinations, the Court reversed the convictions and remanded for a new trial.[8]

Unlike in *Streater*, the protective order in this case did not include any other crimes or bad acts beyond the allegations made by Smith in her trial testimony. Furthermore, as for the third prong, although the trial court was not asked to balance probative value versus unfair prejudice, as the State points out in its brief, the court was asked to consider whether the allegation that Smith hit appellant with a crowbar several weeks before the shooting

[8] The *Streater* dissent would have affirmed the trial court's order admitting the protective order because the trial court was never asked to assess the relevancy or the potential prejudice of the contents of the protective order. 352 Md. at 824-25 (Raker, J. dissenting).

was admissible as a "prior bad act." The court ultimately overruled the objection and permitted defense counsel to question Smith about the protective order that appellant filed against her. It was after this discussion of the law of prior bad acts in the context of appellant's protective order against Smith that appellant asked that Smith's protective order against him be struck from evidence.

In considering this issue and this record, we start with the presumption that "the trial judge knows the law and applies it properly." *Thornton v. State*, 397 Md. 704, 736 (2007). In other words, "there is a 'strong presumption' that judges properly perform their duties in weighing the probative value and prejudicial effect of so-called 'other crimes' evidence. . . . [T]rial judges 'are not obliged to spell out in words every thought and step of logic' in weighing the competing considerations." *Ayers v. State*, 335 Md. 602, 635-36 (1994) (quoting *Beales v. State*, 329 Md. 263, 273 (1993)), *cert. denied*, 513 U.S. 1130 (1995). Only with "proof of clear error by the judge, such as misstating or misapplying the law" is the presumption rebuttable. *Mobuary v. State*, 435 Md. 417, 440 (2013). Had the issue been preserved, we would hold that the court in this case neither erred nor abused its discretion for not striking the protective order at the close of all the evidence.[9]

[9] As to appellant's allegation that "the State knew it could not prove the required element of service[,]" and that "the prosecutor revealed that she admitted the order in bad faith when she never could have proven the charge that rendered it relevant." The State responds that "[t]his is a serious and meritless accusation by Brown." This issue was not raised in the trial court and we will not consider it beyond noting that a claim of prosecutorial misconduct not only needs to be preserved, the defendant has the burden of proving actual prejudice. *See Hogan v. State*, 240 Md. App. 470, 511-12 (holding that a claim of misconduct based on the prosecutor's rebuttal argument was not preserved nor was it plain error), *cert. denied*, 464 Md. 596 (2019); *State v. Deleon*, 143 Md. App. 645, (continued)

Finally, we would hold that any error in admitting the protective order was harmless beyond a reasonable doubt. The standard for review for harmless error in Maryland remains "whether the reviewing court is convinced, beyond a reasonable doubt, that the error in no way influenced the jury's verdict." *Gross v. State*, 481 Md. 233, 237 (2022). *Accord Dorsey v. State*, 276 Md. 638, 659 (1976). In our review, we consider "the cumulative nature of an erroneously admitted piece of evidence[.]" *Gross*, 481 Md. at 237. It is the State's burden to prove the error harmless beyond a reasonable doubt. *See Belton v. State*, 483 Md. 523, 543 (2023). "When an appellate court considers the State's argument that an error is harmless, the court conducts 'its own independent review of the record.'" *Gross*, 481 Md. at 252 (quoting *Dorsey*, 276 Md. at 659).

Here, Smith, who survived the shooting, maintained throughout her testimony that appellant was the shooter. He was also identified, without objection, as the individual on the surveillance video recording in the building around the time of the shooting. And, as discussed above, the protective order itself included substantially the same description of harm as the testimony. As has been explained, an error in admitting evidence is harmless "if identical evidence is properly admitted[,]" *Barksdale v. Wilkowsky*, 419 Md. 649, 663 (2011) (cited in *Gillespie v. Gillespie*, 206 Md. App. 146, 169 (2012)), because the error would not affect the outcome of the case. *Id*. at 657. Had the issue been preserved and had

667 (2002) (requiring proof of actual prejudice for a claim of prosecutorial misconduct). We further note that Smith testified to the same information contained in the protective order.

an error occurred in admitting the protective order, we would hold it to be harmless beyond a reasonable doubt.

II.

Appellant next asserts the court erred by admitting hearsay in the form of a letter found in the recovered bookbag with his name on it. The State responds that the item was admissible as non-hearsay.

We agree with the State that the evidence was not hearsay. In doing so, we note that the defense directed questions at the identity of Smith's assailant, but it primarily sought to establish that appellant's conduct was not intentional.

Before trial, appellant filed a Motion in Limine to Exclude Evidence Recovered from Bookbag on the grounds that any evidence recovered from it was hearsay and that any probative value it may have was substantially outweighed by the danger of unfair prejudice.[10] After jury selection, defense counsel directed the court's attention to an item of mail addressed to appellant found inside the bookbag during a canvas of the area after the incident. Defense counsel argued that "the State is attempting to use the letter to establish ownership of the bookbag that was found in a trash can, which is then allegedly seen on the video, surveillance video at the alleged location of the incident."[11]

The State, in part, responded:

[10] On appeal, appellant abandons any argument concerning the court's weighing of probative value against the prejudicial effect of the evidence.

[11] Although not cited by name in the circuit court, it seems clear from the discussion of the facts and law during the hearing that both trial and appellate counsel are referencing *Bernadyn v. State*, 390 Md. 1 (2005).

The State has in this -- Mr. Brown's case, has no intent to use the address to -- in this mail to prove residency, this is merely mail found in a bookbag.

We are not -- it's -- it's not, um, it's not for the purposes of the -- the truth of the matter asserted that Mr. Brown lived at that address that we are presenting.

Um, your Honor, furthermore, this bookbag was found in a trash can, it is literally discarded property.

When the court asked the purpose of admitting the mail, the State continued:

[PROSECUTOR]: The purpose of admitting it, your Honor, is, well, I guess it would be just to show that the -- that that mail was in that bookbag, and presumably it's the defendant's bookbag. That it's -- that the mail in there was, that who else's bookbag could it possibly be.

THE COURT: So --

[PROSECUTOR]: I'm not showing it for an address.

* * *

THE COURT: That it's -- that it's mail, that it's just mail that belongs to him? I mean, just an envelope that belongs to him?

[PROSECUTOR]: It is -- it -- it is a -- it is a piece of mail that has his name on it, that is the purpose of it.

After further discussion, the court agreed that the purpose of the evidence was "to link [appellant] to the bookbag." The court took a moment to review the case law presented, presumably *Bernadyn, supra*, and found it distinguishable. The court denied the motion in limine, but informed counsel that it would revisit the issue if defense counsel renewed the objection if admission was sought.

When, during trial, Detective Trussell was asked about the mail found in the bookbag, he stated that it contained "a piece of mail *addressed* to Tyreik Brown."

(Emphasis added.) An objection to that answer was sustained and the prosecutor asked the detective if appellant's name was on the piece of mail and he replied "Yes." Defense counsel's objection was overruled by the court stating:

> Right. I think -- I think that's different than the case that you brought to the Court's attention. That was offered to prove that the defendant lived at that address. This is more of identification that the item belongs to the Defendant, not that he lives at any particular address. I think it's a little different.

Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). A "declarant" is "a person who makes a statement." Md. Rule 5-801(b). Further, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. "Whether evidence qualifies for a hearsay exception presents a question of law for the circuit court[,]" which we review without deference. *Wise v. State*, 471 Md. 431, 442 (2020) (citing *Bernadyn*, 390 Md. at 7-8). And, "[i]n any hearsay analysis, the first step is to identify what the extrajudicial statement was offered to prove." *Devincentz v. State*, 460 Md. 518, 553 (2018); *accord Bernadyn*, 390 Md. at 10; *see also* Murphy & Murphy, *Maryland Evidence Handbook* § 702, at 330 (5th ed. 2020) ("When an out-of-court statement is offered in evidence, the trial judge must first determine why it is being offered.").

In this case, the State offered evidence of appellant's name on the envelope found on a letter inside a bookbag that was seen at the scene of the crime. Generally, as the State reminds us, a person's name is not hearsay. *Webster v. State*, 221 Md. App. 100, 117-18 (2015) (discussing cases). In *Webster*, Mr. Webster appealed his jury convictions for several possessory drug and firearm charges. *Id.* at 105. The underlying facts established that, after failing to appear in court, police responded to the apartment of Ms. Bedel, the mother of Mr. Webster's child, and discovered Mr. Webster in a bedroom. *Id*. at 106-07. The police recovered a loaded rifle, ammunition, drugs, and drug paraphernalia from the apartment. *Id*. at 106. Two notebooks and a Frederick County Detention Center identification card with Mr. Webster's picture were also found in the bedroom. *Id*. at 107.

At trial, Trooper Stevens testified as to the contents of one of the notebooks and explained that the name "Yeah-O," which appeared in the notebooks, was Mr. Webster's nickname and a Spanish slang term for cocaine. *Id.* at 115-16. On appeal, Mr. Webster argued that Trooper Stevens's testimony about the alleged nickname in the notebook was inadmissible hearsay. *Id*. at 115. Disagreeing, we quoted the following:

> "We do not think that the name is hearsay. In a sense, it is. We can know a person's name only by being told, either by the person or someone else, unless, of course, we happen to have christened the person. But a name, however learned, is not really testimonial. Rather, it is a bit of circumstantial evidence."

Id. at 118 (quoting *United States v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980)). But even assuming the admission was erroneous, we also determined that any error was harmless beyond a reasonable doubt because Mr. Webster's alleged

nickname and its meaning "w[ere] cumulative to other evidence establishing [Mr. Webster]'s relationship to the apartment and its contents." *Id.* at 119.

Trooper Stevens testified that he was familiar with Mr. Webster from speaking to him on prior occasions and that he knew Mr. Webster lived at the apartment with his child and Ms. Bedel. *Id*. at 119-20. Ms. Bedel also testified that Mr. Webster stayed in her apartment, slept in the master bedroom, and kept clothes there. *Id*. at 120. Police found Mr. Webster present in the apartment and a Frederick County Detention Center identification card with his picture was found on the nightstand. *Id*. Additionally, Mr. Webster admitted that he stayed in the apartment on occasion and stored clothes there. *Id*.

We determined that the other evidence "demonstrated a strong connection between [Mr. Webster] and the apartment[,]" and that any error in admitting the notebook was harmless because a rational factfinder could conclude that Mr. Webster jointly and constructively possessed the contraband. *Id*. *See also Moye v. State*, 369 Md. 2, 14 (2002) ("The State did not need to show that [the appellant] exercised sole possession of the drugs and paraphernalia. Rather, a person may have actual or constructive possession of the CDS, and the possession may be either exclusive or joint in nature.").

In the case now before us, the parties and the trial court primarily relied on *Bernadyn, supra*. That Court was asked to decide whether "a medical bill seized by police at 2024 Morgan Street in Edgewood, Maryland, and addressed to 'Michael Bernadyn, 2024 Morgan Street, Edgewood, Maryland 21040,' when [it was] used by the State to establish that Bernadyn lived at that address, constitute[d] inadmissible hearsay." *Bernadyn*, 390 Md. at 3. When the State sought to admit the medical bill, Bernadyn objected, contending

that he did not live at this address and that admission of the bill was prejudicial. *Id.* at 4. The court overruled the objection and the State repeatedly relied on the medical bill during closing argument to prove that Bernadyn lived at the location where drugs were found. *Id.* at 4-8.

Relying on *Stoddard v. State*, 389 Md. 681 (2005), our Supreme Court held that, under these circumstances, the medical bill constituted a "written assertion" and that, "[w]hen used to prove the truth of that assertion, the bill was hearsay under Md. Rule 5-801(c), because it contained 'a statement . . . offered in evidence to prove the truth of the matter asserted.'" *Bernadyn*, 390 Md. at 11. *See* 6A McLain, *Maryland Evidence, State & Federal* ("*Maryland Evidence*") § 801:6 ("What brought the hearsay hammer down was that the *Bernadyn* prosecutor had emphatically argued to the jury that [the medical provider] would have wanted to have been paid and would have been sure to send the bill to the correct address."). As explained by the Court:

> The bill contained two significant items: Bernadyn's name, and his address. The State did not argue simply that an item bearing Bernadyn's name was found in the house and that Bernadyn probably resided at the house. Rather, the State argued that the bill itself was "a piece of evidence that shows who lives there." In particular, the State suggested that Bayview Physicians had Bernadyn's correct address because "any institution is going to make sure they have the right address when they want to get paid."
>
> In order to accept the words "Michael Bernadyn, Jr., 2024 Morgan Street, Edgewood, Maryland 21040" as proof that Bernadyn lived at that address, the jury needed to reach two conclusions. It needed to conclude, first, that Bayview Physicians wrote those words because it believed Bernadyn to live at that address, and second, that Bayview Physicians was accurate in that belief. As used, the probative value of the words depended on Bayview Physicians having communicated the proposition that Michael Bernadyn lived at 2024 Morgan Street. The words therefore constituted a "written assertion"—and hence, under Md. Rule 5-801(a), a "statement" —

> that Michael Bernadyn lived at 2024 Morgan Street. When used to prove the truth of that assertion, the bill was hearsay under Md. Rule 5-801(c), because it contained "a statement . . . offered in evidence to prove the truth of the matter asserted."

Bernadyn, 390 Md. at 11 (footnote omitted).

The *Bernadyn* Court left open the possibility that, under certain circumstances, similar evidence could be admissible. *Id.* at 12. As Professor McLain explained:

> Offering a life-line for future prosecutions, however, the [*Bernadyn*] majority's opinion suggests that it would have found differently, had the State offered the bill for the limited purpose of showing that something bearing the same name as the defendant's was found in the house. . . . This is the procedure that the majority was advising the State to follow in the future.

Maryland Evidence § 801:6.

In contrast to *Bernadyn*, the State in this case was not attempting to show that the unknown declarant who wrote appellant's name on the mail found in the bookbag "believed" appellant possessed that piece of mail or was "accurate in that belief." What it wanted to show, circumstantially, was a connection between the bookbag and the bookbag described by the victim and shown on the surveillance video at the scene of the crime.

This Court has distinguished *Bernadyn* on these grounds in subsequent cases. In *Fields v. State*, 168 Md. App. 22, *aff'd*, 395 Md. 758 (2006), Saturio Grogrieo Fields, also known as "Sat Dogg," was convicted of first-degree murder and two counts of first-degree assault stemming from the shooting of three young men at a bowling alley. *Id.* at 26-27. Upon investigating the scene of the crime, Detective Ismael Canales "observed that there was a television monitor at each bowling lane, and the names and scores of the bowlers at that lane were displayed on the screen." *Id.* at 29. Detective Canales made a handwritten

list of the names appearing on the monitors for each lane, including the names on the screen above lane 22: "Sat Dogg/Bleu/Vino." *Id.*

Fields sought to preclude the State from eliciting testimony from Detective Canales that the name "Sat Dogg" appeared on the lane screens in the bowling alley. *Id.* at 29-30. He argued "that the name 'Sat Dogg' on the screen was an implied assertion, by an unknown declarant, made out of court, that the appellant was present in the bowling alley that night; and the State was offering the implied assertion in evidence to show its truth." *Id.* at 29. The State responded that "this evidence is being offered to show what names were on the screens as observed by Detective Canales when on the scene." *Id.* at 30 (quotation marks omitted).

On reconsideration after summary remand, this Court affirmed the trial court's decision to admit Detective Canales's testimony. Applying *Bernadyn*, *supra*, a majority of this Court held that the content of the screen monitor above lane 22, as relayed to the jury by Detective Canales constituted "an item of circumstantial evidence" of a material proposition – specifically, that Fields was present at the bowling alley – and not a direct or implied assertion of that proposition by an out-of-court declarant. *Fields*, 168 Md. App. at 35, 37.

While we recognized there was some probative value to the evidence at issue, we concluded that "[t]he appellant's name on the television screen in the bowling alley was not an implied assertion of the factual proposition that the appellant was present at the bowling alley, although it was circumstantial evidence that could be probative of that fact."

Id. at 38.[12] But, because the evidence "was not an 'assertion,' under Rule 5-801(a), it was not a 'statement' under that subsection and hence was not hearsay under Rule 5-801(c). It was admissible non-hearsay evidence." *Id.*

Five years after *Fields*, we revisited the *Bernadyn* distinction in *Fair v. Stat*e, 198 Md. App. 1 (2011). There, Detective Mahan of the Baltimore City Police Department arrested Fair for possession of marijuana. *Id*. at 3. While searching a nearby vehicle with marijuana in plain view, Detective Mahan found a firearm and a combined paycheck and stub in Fair's name in the center console. *Id*. Fair was convicted of both possession of marijuana and possession of a firearm. *Id*. at 8.

An issue on appeal was the admissibility of the paycheck. After an extensive review of the law in this area, we upheld the trial court's decision to admit the paycheck. In so doing, we viewed the paycheck as a "verbal act" not offered to prove the truth of any of its implied assertions that the City believed it owed a named employee wages and had the money to cover the checks, none of which was at issue or related to the crime for which Fair was on trial. In short, it was not hearsay and its relevance was "that its presence supported an inference" that Fair, the payee, "had recently accessed" the center console of the vehicle and "was therefore aware of its contents." *Id.* at 37-38.

[12] The Maryland Supreme Court affirmed this decision on harmlessness grounds, expressly declining to consider the merits of this Court's hearsay analysis. *Fields v. State*, 395 Md. 758 (2006). *See also Maryland Evidence* § 801:6.

In sum, we are persuaded that appellant's name on the envelope was non-hearsay and properly admitted as circumstantial evidence to support an inference that appellant had recently possessed the bookbag.

But even if its admission was error, that, in our view, was harmless beyond a reasonable doubt. Considering Smith's testimony and unequivocal identification of appellant as the shooter, coupled with the testimony of other witnesses, identification was not seriously contested. And in light of appellant's alternative defense theory that the shooting happened after a struggle in the restroom with no intent to kill, identity could arguably be conceded. Ultimately, the deciding issue was Smith's credibility. In short, admission of appellant's name on the envelope found in the bookbag did not impact the decision in this case.

III.

Appellant contends that he was illegally sentenced on multiple firearms-related offenses based on the required elements of the offenses, as well as the use of only one firearm in the shooting. He argues that we should merge his sentences for carrying a loaded handgun, and wearing, carrying, or transporting a handgun with his sentence for use of a firearm in the commission of a crime of violence. The State agrees, as do we.[13]

[13] A motion to correct an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it[.]'" *Johnson v. State*, 427 Md. 356, 371 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)); *see also* Md. Rule 4-345(a) ("The court may correct an illegal sentence at any time.").

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014) (citing *Nicolas v. State*, 426 Md. 385, 400 (2012)). It serves to protect defendants from multiple punishments for the same offense. *Id*. "Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693-94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222-23 (1990)). The required evidence test and the rule of lenity apply in this case.

"In applying the required evidence test, we examine the elements of each offense and determine whether each provision requires proof of a fact which the other does not." *Potts v. State*, 231 Md. App. 398, 413 (2016) (cleaned up). If only one of the offenses has a distinct element, the two offenses are deemed to be the same under the required evidence test. *Id*. If so, we then consider whether both offenses were based on the same act or acts. *Nicolas*, 426 Md. at 408 ("Merger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and* when the offenses are based on the same act or acts." (emphasis in original; cleaned up)).

Counts 6 and 7 of the indictment charged appellant with carrying a loaded handgun on his person and with wearing, carrying, or transporting a handgun on his person. *See* Md. Code (2002, 2021 Repl. Vol., 2023 Supp.) § 4-203(a)(1)(i) (wear, carry, or transport), and (v) (loaded handgun) of the Criminal Law Article. The only difference between these two subsections is that the handgun that the perpetrator wears, carries, or transports, be loaded.

Where only subsection (v) contains an additional element from subsection (i), and the evidence was that appellant carried only one revolver at the time of the shooting, we agree Counts 6 and 7 of the indictment should merge under the required evidence test.

With respect to Count 5, use of a firearm, the parties suggest that the rule of lenity applies and that merger is also required. '"[T]he rule of lenity applies where both offenses are statutory in nature or where one offense is statutory and the other is a derivative of common law."' *Koushall v. State*, 479 Md. 124, 161 (2022) (quoting *Khalifa v. State*, 382 Md. 400, 434 (2004)); *see also Clark v. State*, 473 Md. 607, 622 (2021) (stating that the rule of lenity is a "tiebreaker" that favors the defendant).

"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." *Holmes v. State*, 209 Md. App. 427, 456 (2013) (citing *Wilkins v. State*, 343 Md. 444, 446-47 (1996)). *Accord Freeman v. State*, 259 Md. App. 212, 223, *cert. granted*, 486 Md. 228 (2023) (argued April 9, 2024) (No. 24, Sept. Term, 2023). We agree that Counts 6 and 7 merge into Count 5 and that the sentences on these two counts vacated.

SENTENCES FOR CARRYING A LOADED HANDGUN (COUNT 6) AND WEAR, CARRY OR TRANSPORT A HANDGUN (COUNT 7) ARE VACATED. OTHERWISE, THE JUDGMENTS ARE AFFIRMED.
COSTS TO BE ASSESSED TWO-THIRDS TO APPELLANT AND ONE-THIRD TO BALTIMORE COUNTY.