Circuit Court for Howard County
Case No. 13-K-17-057485

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 521

September Term, 2018

DERRICK CHARLES JOHNSON

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: March 18, 2020

In a sixteen-count murder trial, a jury in Howard County returned verdicts against appellant Derrick Charles Johnson ("Johnson") that included: (1) guilty of first-degree premeditated murder; (2) guilty of first-degree felony murder; but (3) not guilty of either armed robbery or robbery, when the State had specifically premised the felony murder charge on the predicate felonies of armed robbery and robbery.[1] After the verdicts were announced and hearkened, the trial judge sent the jury back to resolve the legal inconsistency between the felony murder conviction and the robbery acquittals, but subsequently decided to accept all the verdicts as previously announced, without re-hearkening the jury. On appeal, Johnson contends that the judge's actions require us to vacate all of his convictions and remand for a new trial, including the conviction for first-degree premeditated murder. Based on the particular circumstances of this case, we do not agree that the premeditated murder conviction must be vacated. However, the State agrees with Johnson that his felony murder conviction should be vacated in light of the legally inconsistent verdicts that were not resolved.

BACKGROUND

Nothing that occurred prior to the taking of the jury's verdicts is challenged on appeal. Accordingly, our description of the underlying criminal event and the earlier phases of the four-day trial is brief.

[1] The jury also convicted Johnson of first-degree assault and use of a firearm in a crime of violence.

On December 18, 2016, Davon Jones ("Jones") arranged to meet cousins Kaiyon Stanfield and Khalil Stanfield ("Kaiyon" and "Khalil") in Laurel, purportedly to buy a quarter pound of marijuana from the two men. Johnson, then 19 years old, accompanied Jones to the meetup.[2] Johnson and Jones got into the backseat of a Dodge Neon driven by Khalil; Johnson sat on the rear passenger side directly behind Kaiyon, who was sitting in the front passenger seat. It is not disputed that during the encounter Kaiyon fatally suffered three gunshot wounds: one to the back left side of his head, one to the right side of his neck, and one to the right side of his back.[3] Nor is it contested that after shooting Khalil (fortunately, Khalil was able to run out of the car and survive the encounter; he

[2] Johnson did not know either Kaiyon or Khalil Stanfield at that time. The State's theory was that Jones was the "mastermind" behind the event, but that Johnson still shot Kaiyon twice during the course of the "execution."

[3] The State argued at trial that the trajectory of the two bullets that entered Kaiyon's right side (and which exited or stopped on the left side of his body) meant that those shots would not have been fired by Davon Jones, who was situated to Kaiyon's left at all relevant times. The State added that the video footage of the incident (captured by a neighborhood security camera) showed that Khalil was running away and Jones was out of the car when Kaiyon was shot in the neck and back, leaving Johnson as the only person still in the car able to shoot him.

Johnson's counsel contested that the evidence did not irrefutably prove that point. During closing argument, Johnson's counsel stated: "Now, it's clear that – obvious that two persons were shot and one w[as] killed. But with respect to who did what, [the prosecutor] has created this narrative where she's decided that my client was responsible for two of the shots that occurred on Mr. Kaiyon Stanfield. But I submit to you that that's not based on the evidence that has been presented." Later during closing argument, Johnson's counsel stated: "if you're going to make any assumptions, assume that for whatever reasons, Mr. Jones decided he didn't want to pay for the marijuana perhaps. And decided in an act of—that we—no one can understand, decided to shoot both Kaiyon and Khalil Stanfield . . . If you even believe that there are two guns there, which there likely were, what evidence do you have that the guns weren't fired by one—that both weren't fired by one person versus each person firing each gun."

testified at trial), Jones reached into the car and took the marijuana from the driver's side of the vehicle. The State argued that Jones's taking of the marijuana constituted an (armed) robbery that could support a felony murder conviction against Johnson.[4]

Sixteen counts were submitted to the jury. The relevant counts for the purposes of appeal concerned first-degree premeditated murder, first-degree felony murder, robbery, and armed robbery. When the jury returned its verdicts,[5] the forewoman orally announced that the jury's verdicts were (1) guilty of first-degree premeditated murder, (2) guilty of first-degree felony murder, but (3) not guilty of either armed robbery or robbery. Johnson's defense counsel declined having the jury polled immediately after the verdicts were announced. Defense counsel then tried to raise an objection before the verdicts were hearkened, but the trial judge told the counsel to wait. After the jury was hearkened, confirming all the verdicts as announced by the forewoman, defense counsel approached the bench and argued that the felony murder conviction was legally inconsistent with the

[4] Johnson's counsel acknowledged during closing argument that "[w]e know Mr. Jones took the marijuana from the scene." As such, defense counsel argued to the jury that Johnson "knew nothing about" the robbery and "didn't participate in it," given that it was Jones who took the marijuana. The State effectively argued that Johnson was guilty of robbery as an accomplice. At sentencing, the State speculated that the jury's inconsistent verdicts (convicting for felony murder but acquitting of robbery) resulted from the jury overlooking accomplice liability on the robbery and armed robbery counts.

[5] We use the plural term verdicts "because a 'verdict' is a single finding by a trier of fact; in a criminal case in which there are multiple charges, the trier of fact may issue multiple verdicts, which are either guilty verdicts or not-guilty verdicts." *Givens v. State*, 449 Md. 433, 437 n. 2 (2016). *See also Selvester v. United States*, 170 U.S. 262, 268 (1898) ("[A]lthough distinct offenses [may be] charged in separate counts in one indictment, they nevertheless retain[] their separate character to such an extent that error or failure as to one ha[s] no essential influence upon the other.").

robbery acquittals, given that the State had explicitly premised the felony murder charge on robbery and armed robbery.[6] The State agreed at the bench conference that the felony murder conviction was inconsistent with the robbery counts.

We highlight two key exchanges from this bench conference with respect to the apparent inconsistency:

First, after pointing out the inconsistency between the felony murder count and the robbery counts, defense counsel's stated request was that "the Court send the jury back to deliberate *that particular count*" (*i.e.*, the felony murder count) (Emphasis added).

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[6] Other felonies had been submitted to the jury: as the instruction for the charge of using a handgun in the commission of a felony put it, "[t]he felonies in this case are: First Degree Murder, Second Degree Murder, Attempted First Degree Murder, Attempted Second Degree Murder, First Degree Assault, Armed Robbery, and Robbery." However, the felony murder instruction was explicitly predicated on armed robbery or robbery. The felony murder instruction stated:

> In order to convict the defendant of First Degree Felony Murder, the State must prove:
>
> (1) That the defendant or another participating in the crime with the defendant committed Armed Robbery or Robbery;
> (2) that the defendant or another participating in the crime killed Kaiyon Stanfield; and
> (3) that the act resulting in the death of Kaiyon Stanfield occurred during the commission or attempted commission of the Armed Robbery or Robbery.
>
> Felony Murder does not require the State to prove that the defendant intended to kill Kaiyon Stanfield.

Moreover, we note, for example, that first-degree assault cannot, as a matter of law, serve as the underlying felony to a felony murder conviction. *State v. Jones*, 451 Md. 680, 708 (2017) ("The assaultive act merges into the resultant homicide, and may not be deemed a separate and independent offense that could support a conviction for felony murder.").

Second, after the State agreed that there was an inconsistency, the following colloquy occurred:

> The Court: Alright so then I will send them back to resolve *that apparent[] inconsistency*.
>
> [Prosecutor 1]: Okay.
>
> [Prosecutor 2]: *But only to count two* [the felony murder count] right?
>
> The Court: Pardon me?
>
> [Prosecutor 2]: Only to count two correct?
>
> The Court: That's as to count two and count –
>
> [Prosecutor 1]: That's it, just count two.
>
> [Prosecutor 2]: That's it.
>
> [Defense Counsel]: That's the count that is implicated – that's not consistent with the rest of the verdict sheet, yes.
>
> The Court: Okay. Alright, alright. And in particular with, it's not consistent with which ones?
>
> * * *
>
> [Defense Counsel]: . . . I would ask that they be sent back to consider count two all the way to twelve.[7]
>
> The Court: Say that last part again?
>
> [Defense Counsel]: *To count two only*.
>
> The Court: Right.
>
> [Defense Counsel]: For them to reconsider, and that's fair right?
>
> [Prosecutor 1]: Yes Your Honor.
>
> The Court: Okay.

[7] First-degree premeditated murder was count *one*.

After the bench conference ended at that point, the judge immediately made the following statement to the jurors before sending them to re-deliberate:

> Ladies and Gentlemen there appears to be a – a logical inconsistency in the verdict sheet. In that the – the felonies that were the basis – that were argued to be the basis for Felony Murder, count two, were Robbery and Armed Robbery. The jury has acquitted with respects to the counts dealing with Robbery and Armed Robbery and Conspiracy to commit those offenses. So I'm going to have to ask the jury to return to the deliberation room *to resolve that inconsistency with respect to count two, Felony Murder, okay*. You can't – and that's all I'm going to say, alright? Thank you.
>
> (Emphasis added).

At that point, the jury returned to the jury room to resume deliberations.

About a half hour after the jury was sent to re-deliberate,[8] the circuit court announced, just prior to calling the jury back into the courtroom, that after consulting with Counsel in chambers,[9] he had decided "to bring the jury back out and accept their verdict and to deal with the inconsistency at sentencing." The jury was brought back into the courtroom, at which point the trial judge announced that he had decided "to accept your verdict as you have given it." The judge made that announcement to the jury during

[8] The jury was sent back to re-deliberate at 5:32 p.m. (on a Friday). The proceedings re-commenced at 6:06 p.m., at which point the judge announced that he would be accepting the verdicts.

[9] The judge stated that "there was [not] a unanimous agreement about how best to proceed at this point and time" but did not elaborate as to which party may not have been on board, or any proposed alternative courses of action. After the judge announced this decision, however, defense counsel stated that "just for the record we are objecting to the interruption of the jury's deliberation, just want to make the record clear with all due respect."

the following colloquy with the jury forewoman, in which the judge also asked whether the jury had made any modifications to its verdicts:

> The Court: Thank you. Ladies and Gentlemen, I've decided to accept your verdict as you have given it. I have given you back the verdict sheet, there are no modifications to it at this point and time is that correct? Madam Jury lady?
>
> Jury Foreperson: We weren't finished when we got called, we were still discussing.
>
> The Court: Right, but it's at this point and time that there have been no modifications?
>
> Jury Foreperson: No.
>
> The Court: Okay, so Ladies and Gentlemen the verdict has been hearkened, you have agreed that this was your verdict when asked by the Clerk is that correct?
>
> Jury Foreperson: Yes.
>
> The Court: And – so I'm going to accept your verdict and excuse you . . . .
>
> The jury was then discharged.

At sentencing, the State reiterated that the felony murder conviction was inconsistent with the robbery acquittals, and asked the circuit court to "only consider the premeditated murder for sentencing purposes because the felony murder was an inconsistent verdict with the remainder of the charges against Mr. Johnson."[10] Just before announcing Johnson's sentence, the judge stated: "with respect to the inconsistent verdict, I will not consider the . . . felony murder conviction because of the jury's election

[10] Though acknowledging that Johnson had no prior record (either as a juvenile or adult), the State sought life without parole. Johnson's defense counsel did not make a specific sentence recommendation, but requested that the circuit court not impose life without parole.

not to render guilty verdicts on the underlying felonies that would have supported the particular conviction." The judge then added, "I will only sentence the Defendant on premeditated first degree murder and use of a firearm in a crime of violence." Describing the fatal shooting of Kaiyon Stanfield as a cold-blooded, calculated "execution," the court imposed life without parole for the premeditated first-degree murder, and a consecutive eight year sentence (the first five years without parole) for the handgun offense.

Johnson's appeal followed.

DISCUSSION

"In Maryland, for a verdict in a criminal case tried by jury to be final, the jury must intentionally render a unanimous verdict." *Caldwell v. State,* 164 Md. App. 612, 631 (2005). Such unanimity, implemented through Rule 4-327(a), is required to ensure the right to an impartial jury that is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Jones v. State,* 384 Md. 669, 683 (2005). Whether a verdict is unanimous "is a mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Caldwell,* 164 Md. App. at 643. Decisions such as whether to give supplemental instructions or re-poll a juror are reviewed for an abuse of discretion. *Sidbury v. State,* 414 Md. 180, 186 (2010); *Smith v. State,* 299 Md. 158, 179 (1984).

Historically, the return of a jury verdict "has been comprised of three distinct procedures": (1) the foreperson orally "stating the verdict of the jury in open court"; (2) polling; and (3) hearkening "the jury . . . to its verdict as a traditional formality

announcing the recording of the verdict." *Ogundipe v. State*, 424 Md. 58, 69-70 (2011) (Citations and quotation marks omitted). "Absent a demand for a poll, the verdict becomes final upon its acceptance when hearkened." *Givens v. State*, 449 Md. 433, 457 (2016) (quoting *Smith*, 299 Md. at 168). However, "neither hearkening nor polling cures a verdict that is defective when it is hearkened . . . in its defective form." *Hoffert v. State*, 319 Md. 377, 390 (1990) (Chasanow, J., dissenting) (quoting *Smith*, 299 Md. at 169). Moreover, "a jury's verdict cannot be deemed to have been accepted by the trial court where the trial court is faced with an objection as to allegedly legally inconsistent verdicts before the verdicts are final and the jury is discharged." *Givens*, 449 Md. at 480. As the Court of Appeals stated over seventy years ago, "[i]t is a generally accepted rule that if the jury should return a verdict which is defective in form or substance, it should not be accepted by the trial judge." *Heinze v. State*, 184 Md. 613, 617 (1945).

The essence of Johnson's argument on appeal is to insist upon the importance of procedural formalism: he contends that because his defense counsel objected with respect to the inconsistent verdicts—those concerning the felony murder, robbery, and armed robbery counts—before the trial judge accepted the verdicts, and because the trial judge then sent the jury back to re-deliberate to resolve that inconsistency, the judge's actions, in doing so, put the separate premeditated murder count back onto the table (*i.e.*, dissipating the guilty verdict that had been announced and hearkened for premeditated murder). As such, Johnson argues that when the judge subsequently interrupted the jury's re-deliberations prematurely to accept the verdicts as previously announced, there was no

longer a premeditated murder conviction to accept. In addition, he claims that because the jury forewoman never re-announced any verdict upon the jury's return, and because the jury was not re-hearkened, the court never properly accepted any verdict. Thus, in seeking to vacate not only his felony murder conviction, but his first-degree premeditated murder conviction as well, Johnson would have us stress the necessity of adhering to procedural steps as a matter of formalism, even when the substance of the jury's verdict may otherwise not be seriously in doubt. *See, e.g.*, *Givens*, 449 Md. at 480 ("[A] jury's verdict cannot be deemed to have been accepted by the trial court where the trial court is faced with an objection as to allegedly legally inconsistent verdicts before the verdicts are final and the jury is discharged."); *Price v. State*, 405 Md. 10, 41-42 (Harrell, J., concurring) (When jurors are sent to resume deliberating legally inconsistent verdicts, "[u]ntil the announcement that the verdict has been recorded, the jury has the right to amend or change *any* verdict; and when it is so amended it is the real verdict of the jury and it may be properly accepted by the court.") (Emphasis added); *id*. at 41 ("A verdict that has not been followed by either polling or hearkening, has not been properly rendered and recorded, and is a nullity.").[11]

In short, Johnson argues that the guilty verdict for premeditated murder metaphysically dissipated upon the jury's being instructed to resolve the inconsistency between the felony murder, robbery, and armed robbery counts, because at that point the

[11] The portion of Judge Harrell's concurring opinion in *Price* that is relevant to the case before us was formally adopted by the Court of Appeals in *Givens v. State*. 449 Md. at 486.

jury was free to reconsider *any* verdict.[12] We do not believe such a conclusion is compelled under the particular circumstances of this case.

Notwithstanding Johnson's formalistic critique, it is evident from the transcript of the trial proceedings that at no relevant point did any of the parties think that the premeditated murder conviction was being put back on the table when the judge sent the jury back to resolve the inconsistency between the felony murder, robbery, and armed robbery counts.[13] As mentioned earlier: (1) defense counsel only requested that the Court

[12] To support this argument, Johnson emphasizes the Supreme Court's decision in *Blueford v. Arkansas*, in which "the Court noted that[] because the jury was sent for further deliberations, but was not instructed that it could not reconsider the two offenses as to which it reached a unanimous agreement, any finality that might have attached to the jury's announcement dissipated." *State v. Fennell*, 431 Md. 500, 519 (2013) (discussing *Blueford*, 566 U.S. 599, 608 (2012)). However, *Blueford* did not ground this observation as a matter of constitutional principle, and in *Fennell* the Court of Appeals expressly treated *Blueford's* reasoning as not necessarily controlling. 431 Md. at 525. (Notably, the Arkansas law at issue did not permit taking partial verdicts in the same manner permitted by Maryland law.). Indeed, we are especially mindful that *Fennell* concerned a situation where the jury had returned a verdict sheet that was unanimous with respect to three counts, but undecided on two other counts. The trial judge had then instructed the jury to "[p]lease continue to deliberate regarding the counts to which you are undecided." *Id*. (Emphasis removed). The Court in *Fennell* determined that "unlike in *Blueford*, the instructions to the jury could be understood reasonably as instructing the jury to continue deliberations only as to the [two undecided counts]. Although the trial court in no way prohibited the jury from reconsidering its prior vote, the instructions . . . [could be reasonably interpreted as] that the trial court directed the jury to [only] continue deliberating as to the two counts to which it indicated it had been unable to achieve unanimity." *Id*. Then, when a subsequent exchange between the judge and the foreperson "did not indicate that the jury had changed its mind as to the other three charges[,]" the Court concluded that the previous verdict sheet was "essentially uncontradicted." *Id*. at 526.

[13] Indeed, it could arguably be posited that Johnson's defense counsel waived any claim of error, or acquiesced, with respect to the premeditated murder count. After all, Johnson's defense counsel only objected to the inconsistency between the felony murder

(Continued…)

"send the jury back to deliberate that particular count" (*i.e.*, the felony murder count); (2) during the bench conference about the legally inconsistent verdicts, the court, the State, and defense counsel agreed that the court would send the jury back "to resolve that apparent[] inconsistency" as to "count two only" (*i.e.*, the felony murder count); and (3) the court then instructed the jury that it was being asked "to resolve th[e] inconsistency with respect to count two, Felony Murder[.]" It would strain credulity to think, on appeal, that the jury would have thought it was being asked to reconsider the distinct premeditated murder count. *See State v. Fennell*, 431 Md. 500, 525 (2013) ("[T]he instructions to the jury could be understood reasonably as instructing the jury to continue

count and the related robbery counts. Then, at the pertinent bench conference that addressed the apparent inconsistency, defense counsel (1) only asked to have the jury resume deliberations in order to resolve the felony murder count, (2) did not mention the premeditated murder count, and (3) expressed no opposition to sending the jury back to "resolve the inconsistency." Later, when the judge announced that he would be accepting the jury's verdicts as given, defense counsel raised no specific objection on the record with respect to the premeditated murder count. *Price*, 405 Md. at 40-41 (Harrell, J. concurring) ("If a defendant claims that a verdict is inconsistent to the point of being self-destructive, he must present that claim to the circuit court before the jury is discharged; if he does not, he waives the claim."); *Simms v. State*, 240 Md. App. 606, 617-18 (2019) (When a party "acquiesces in a court's ruling, there is no basis for appeal from that ruling . . . [t]he doctrine of acquiescence—or waiver—is that a voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review.") (Citations and quotation marks omitted, emphasis removed); Md. Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.").

deliberations only as to the charges of second degree assault and robbery [and not as to three other counts].").

We also believe that the trial judge's instruction to the jury was, in this particular context, appropriate and sufficiently clear. "Upon timely objection by the defendant to legally inconsistent verdicts, the trial court should instruct or re-instruct the jury on the need for consistency *and the range of permissible verdicts* . . . The jury is free to *resolve the inconsistency* either by returning verdict in the defendant's favor, convicting on the implicated counts, or deadlocking on a charge so that no inconsistent finding results." *Price*, 405 Md. 10, 41-42 (Harrell, J., concurring) (Emphasis added). As noted, the trial judge informed the jurors that there appeared to be a logical inconsistency between "the felonies that were the basis . . . for Felony Murder, count two, [] Robbery and Armed Robbery." The judge then told the jurors that they were being sent back to "resolve th[e] inconsistency with respect to count two, Felony Murder[.]"

Thus, we believe it is of critical importance that the specific inconsistency at issue concerned a felony murder conviction (that had been expressly predicated on robbery or armed robbery) where the jury simultaneously acquitted on those predicate felonies. In other words, the only inconsistency for the jury to resolve was whether Johnson was guilty of (armed) robbery: if so, then at least one of the robbery counts should have yielded a guilty verdict; if not, Johnson should have been acquitted of felony murder. The homicide itself was no longer relevant, and there was no reason at all for the jury to

reconsider whether Johnson had intended to kill Kaiyon.[14] Put another way: there was no need for the jury to even consider the homicide aspect of the felony murder count in order to resolve the inconsistency. Under these circumstances, we believe that now vacating Johnson's premeditated murder conviction when it had been announced, hearkened, and ultimately accepted by the trial judge[15]—and never specifically called into question on the record during the course of the trial proceedings—would yield the sort of inadvertent "windfall" that the Court of Appeals has specifically cautioned against (as a rationale for requiring defendants to object at the time to legally inconsistent verdicts). *Price*, 405 Md. 10 at 40 (Harrell, J., concurring) ("[W]e should not permit the defendant to accept the jury's lenity in the trial court, only to seek a windfall reversal on appeal by arguing that the jury's verdicts are inconsistent. Accordingly, a defendant must note his or her objection to allegedly inconsistent verdicts prior to the verdicts becoming final and the discharge of the jury.").

In sum, we believe it is simply too much of a stretch to hypothesize that the jury in this case, upon being told to resolve the inconsistency between the felony murder count

[14] As the State points out, had the circuit court, at the time, simply overruled Johnson's objection to the legal inconsistency, we would not be required on appeal to vacate the conviction for premeditated murder, but only the convictions that were marred by the legal inconsistency. *See, e.g.*, *State v. Hawkins*, 326 Md. 270, 291 (1992); *Godwin v. State*, 41 Md. App. 233 (1979).

[15] Because we conclude that the first-degree premeditated murder conviction was sufficiently announced, hearkened, and accepted, we are not persuaded by Johnson's alternative (yet conceptually similar) argument on appeal: that the failure to ensure a proper reading, hearkening, and recording rendered the verdicts a "nullity" and Johnson's sentence illegal under Rule 4-345.

and the robbery counts, *might* have come back and announced that it had actually changed its mind on a completely unrelated count (premeditated murder), given that the elements of that unrelated count (homicide and premeditation) were not relevant to resolving the inconsistency at hand, and in light of the fact that the jury had already announced and hearkened its verdict on premeditated murder without objection or dissent, or any uncertainty or confusion on the part of the jurors. *See Ogundipe*, 424 Md. at 73 (Notwithstanding that there were certain inconsistencies marked on the verdict sheet, it was not error to have only asked the jury to announce and hearken the counts that were not inconsistent); *Armacost v. Davis*, 462 Md. 504, 539 (2019) ("[I]t was not unreasonable to conclude that the jury in this case appeared to be deadlocked[]" even though the jury "had not explicitly stated that it was deadlocked[.]"); *Hall v. State*, 214 Md. App. 208, 226 (2013) (When a juror had indicated agreement with the sole guilty count during initial polling, her later agreement on that same count was not construed to be the result of coercion, even though the juror had specifically indicated disagreement on a separate count); *Mayne v. State*, 45 Md. App. 483, 487 (1980) (When "the meaning of the verdict is so unmistakable, mere inartificiality in its form will not be sufficient to defeat justice by nullification of a verdict which plainly declared the intent of the jury[.]") (Citation omitted); *Caldwell*, 164 Md. App. at 644 (When there is no doubt that "jurors, while deliberating on their own timetable, carved out and finally decided certain counts[,]" the court may accept the partial verdict); *id*. at 642-43 (A verdict is unanimous when it is "unambiguous and unconditional and [] final—in the sense of not being

provisional or tentative and, to the contrary, being intended as the last resolution of the issue and not subject to change in further deliberation."); *Brightwell v. State*, 223 Md. App. 481, 492 (2015) ("Even though the transcript does not reflect a response from the jury, it is clear from the subsequent actions of the trial court, as well as the silence of defense counsel, that the jury either expressed their unanimous agreement in a non verbal way or failed to indicate any dissent to the announcements of the verdicts."); *Wooten-Bey v. State*, 308 Md. 534, 543-45 (1987) (The manner in which the jury resolved certain counts did not compel a logical inference about a separate count that had distinct elements); *Malik v. State*, 152 Md. App. 305, 335-36 (2003) (Though failure to instruct on second-degree murder necessitated vacating the convictions for first-degree premeditated murder and conspiracy to commit murder, "this error did not infect the other convictions, including Malik's convictions for felony murder."). Just as the Court of Appeals has warned trial judges against prejudicing jury deliberations to the point that the judge's actions may risk "transforming a provisional decision into a final verdict," *Fennell*, 431 Md. at 524 (Citation omitted), it has cautioned against "pressur[ing] the jury to reconsider what it had actually decided[.]" *Id*. Here, we are wary of transforming a final verdict into a provisional decision.

Additionally, we are mindful that no matter how the jury may have otherwise resolved the inconsistency, there would have been no practical impact or effect at sentencing, given Maryland's law of merger. In felony murder, the underlying felony is an "essential ingredient" that merges into the felony murder conviction. *Hook v. State*,

315 Md. 25, 31 (1989); *State v. Frye*, 283 Md. 709, 712 (1978). And though the common-law crimes of first-degree premeditated murder and first-degree felony murder "are exclusive charges" under the required evidence test, *Malik*, 152 Md. App. at 330, "generally for purposes of the double jeopardy provisions against . . .multiple punishments, [they are] deemed the same offense." *Wooten-Bey*, 308 Md. at 539. Thus, a defendant "cannot receive both a sentence for deliberate and premeditated murder . . . and a separate sentence for felony murder[.]" *Williams v. State*, 323 Md. 312, 325 (1991). In other words: by announcing that he would "deal with the inconsistency at sentencing[,]" the judge's actions (at least implicitly) recognized that regardless of how the jury resolved the inconsistency between the felony murder count and the related robbery counts, nothing would be affected at sentencing. Had the jury convicted Johnson of felony murder and either robbery count, the robbery count(s) would have merged, but then the judge would not have been able to sentence Johnson for felony murder as well as premeditated murder. *See id.* ("In Maryland the homicide of one person ordinarily gives rise to a single homicide offense, and multiple prosecutions or punishments for different homicide offenses, based on the slaying of one person, are generally precluded."). On the other hand, had the jury acquitted Johnson of felony murder and the robbery counts, the judge would still have been able to sentence Johnson for the first-degree premeditated murder, given that premeditated murder is a distinct offense from felony murder. In short, regardless of how the jury resolved the inconsistency between felony murder and the robbery counts, the judge would have been able to sentence Johnson to life without

parole for first-degree premeditated murder. And indeed, at sentencing the judge announced that he was only "sentenc[ing] the Defendant on premeditated first degree murder and use of a firearm in a crime of violence." We believe that the judge's actions at trial, in accepting the verdicts before the jury had finally resolved the inconsistency between felony murder and the robbery counts, effectively reflected that understanding.

In sum, we affirm Johnson's conviction for premeditated first-degree murder. As the State agrees that Johnson's felony murder conviction should be reversed or vacated, on the basis of the unresolved legal inconsistency, we do so. However, because Johnson was not sentenced for felony murder, resentencing is not necessary.

CONVICTION FOR FIRST-DEGREE PREMEDITATED MURDER AFFIRMED. CONVICTION FOR FIRST-DEGREE FELONY MURDER VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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