Circuit Court for Baltimore County
Case No. C-03-CR-20-002226

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 798

September Term, 2021

NASIR KHALIF GEORGE

v.

STATE OF MARYLAND

Graeff,
Arthur,
Reed,

JJ.

Opinion by Graeff, J.

Filed: June 14, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury in the Circuit Court for Baltimore County convicted Nasir Khalif George, appellant, of first-degree felony murder, second-degree murder, conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, conspiracy to commit home invasion, home invasion, first-degree assault, and use of a firearm in the commission of a crime of violence. The court sentenced appellant to an aggregate sentence of "life plus 40 years, the first five of which must be served without the possibility of parole."

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err by not instructing the jury on involuntary manslaughter, as requested by appellant?

2. Did the circuit court err by imposing a separate, consecutive sentence for robbery with a dangerous weapon when that offense was the predicate crime for felony murder?

3. Did the circuit court err by imposing two separate sentences for conspiracy to commit home invasion and conspiracy to commit robbery with a dangerous weapon when the State proved only one agreement at trial?

For the reasons set forth below, we agree that the court erred by not instructing the jury on involuntary manslaughter, but we conclude that the error tainted only the second-degree murder conviction. We also agree that the court erred by imposing a separate sentence for appellant's conviction for robbery with a dangerous weapon and imposing two separate sentences for conspiracy. Accordingly, we shall reverse appellant's conviction for second-degree murder, affirm the rest of appellant's convictions, vacate his sentence, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 6:00 p.m. on November 4, 2019, Michael McCoy, age 24, was shot twice in the head while inside a residence at 3830 Cedar Drive in the Lochearn neighborhood of Baltimore County. He died of his injuries. Appellant and four other men—Omoro Floyd, Corey Downs, Cameron Alston, and Taikee Carter—were charged with crimes related to the shooting. Mr. Carter ultimately cooperated with the State, subject to a proffer agreement, and he pleaded guilty to conspiracy to commit armed robbery and use of a handgun in the commission of a crime of violence.

Appellant was charged in an 18-count indictment. Count I charged appellant with the murder of Mr. McCoy, consistent with the statutory short form, pursuant to Md. Code Ann., Crim. Law Art. ("CL") § 2-208(a) (2021 Repl. Vol.).[1] He also was charged with two counts of first-degree assault, two counts of use of a firearm in the commission of a crime of violence, home invasion, robbery, robbery with a deadly weapon, conspiracy to commit first-degree murder, conspiracy to commit home invasion, conspiracy to commit armed robbery, and related charges. The case against appellant was tried before a jury over seven days in May 2021.

The State's theory at trial was that appellant conspired with Mr. Floyd, Mr. Downs, Mr. Alston, and Mr. Carter to rob two marijuana dealers, Christian Steinbach and Ryan

[1] Md. Code Ann., Crim. Law Art. § 2-208(a) (2021 Repl. Vol.), provides that "[a]n indictment for murder or manslaughter is sufficient if it substantially states," as follows: "'(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and murdered) (name of victim) against the peace, government, and dignity of the State.'"

Wade. The State posited that Mr. Floyd was the "idea man," appellant was the "shooter," Mr. Carter and Mr. Alston were "extra muscle," and Mr. Downs was the getaway car driver. Mr. Steinbach and Mr. Wade both testified in the State's case, although neither identified appellant as the shooter.

The State's evidence showed that, on the morning of November 4, 2019, Mr. Floyd was with appellant, Mr. Carter, Mr. Alston, and Mr. Downs at the apartment of their friend, Jamahl Simmons, in West Baltimore. While there, Mr. Carter accidently discharged his .45 caliber handgun, firing a bullet through the floor of Mr. Simmons' apartment and into the apartment below. Brittany Nagy, Mr. Floyd's girlfriend, picked up the group of men, except Mr. Simmons, in her Hyundai Accent. They drove north to Sparks, Maryland, in Baltimore County, where Ms. Nagy worked, dropped her off, and Mr. Floyd kept her car while she was at work.

At some point in the early afternoon, Mr. Floyd mentioned that he knew a guy who "sold a lot of marijuana," and he suggested that they "get him." Mr. Floyd contacted Mr. Steinbach and arranged to purchase one pound of marijuana for $2,000. Mr. Steinbach knew Mr. Floyd as "Jeter." They had met at parties but were not close friends. Mr. Steinbach provided his address. Mr. Floyd told Mr. Steinbach that he would be coming with his friend "Mahl."

Mr. Steinbach lived with Mr. Wade at 3830 Cedar Drive. The house was equipped with five security cameras: two in the front; two in the rear; and one in the basement. The front and rear cameras faced inwards, with overlapping coverage of the front and rear of

the house. A monitor displaying the video feed from the cameras was in the basement. There also was a recording studio in the basement. The front door of the house was secured by two doors, a solid wooden door that could be locked from the inside with a deadbolt, and a glass storm door with metal security bars that could be locked from the inside with a key.

Mr. Floyd drove Ms. Nagy's car to 3830 Cedar Drive. There was evidence that appellant was in the front passenger seat and Mr. Carter, Mr. Alston, and Mr. Downs were in the backseat. Mr. Carter testified that he was armed with a .45 caliber pistol, and appellant and Mr. Alston each were armed with a .40 caliber handgun. They all had cell phones with them. Appellant was wearing a Moncler hooded, puffy jacket.

Mr. Floyd parked down the street from 3830 Cedar Drive, and he and appellant walked toward the house. Mr. Carter and Mr. Alston waited, and Mr. Downs climbed into the driver's seat.

The surveillance footage from the front security cameras shows that Mr. Floyd and appellant walked to the front door at 5:55 p.m.[2] Mr. Steinbach and Mr. Wade were in the basement when they arrived. Mr. McCoy, their friend and an aspiring rap artist who used their recording studio, was upstairs lying on a couch by the front door.

[2] Detective Needham testified that the time stamp from the security cameras was advanced by approximately 13 minutes. He determined this by comparing the time that the 911 call was received with the video, which depicts Mr. Wade making the 911 call. We shall use the adjusted times in this opinion.

Mr. Steinbach and Mr. Wade observed Mr. Floyd and appellant approaching on the security camera monitor. Mr. Steinbach went upstairs, let them inside and then relocked the storm door with a key and the wood door with the deadbolt behind them. He led Mr. Floyd and appellant to the basement.

In the basement, Mr. Steinbach showed Mr. Floyd and appellant two varieties of marijuana. The video footage shows appellant wearing a puffy coat with a hood. At 5:56 p.m., appellant appears to be holding a cell phone in his hand. Also at 5:56 p.m., a phone linked to appellant sent a text message to a phone linked to Mr. Downs saying: "House with the red Sonata, come on now." Seconds later, he sent another text saying: "Door locked. Ima open it." As indicated, however, the storm door could be unlocked only with a key.

Appellant asked to use the bathroom. The video footage shows that Mr. Wade took him upstairs at 5:57 p.m., before returning to the basement. At that time, a third text from appellant's phone to Mr. Downs' phone repeated: "Come on now." At 5:58, appellant texted Mr. Downs: "U out front?"

Meanwhile, Mr. Steinbach offered Mr. Floyd a beer and went upstairs to the kitchen to retrieve a bottle opener. The kitchen was to the right of the basement stairs, and the living room was to the left. As Mr. Steinbach walked back toward the basement stairs, he was confronted by appellant holding Mr. McCoy "at gunpoint." Appellant was behind Mr. McCoy, holding a gun in his right hand pointed at the back of Mr. McCoy's neck. Suddenly, Mr. McCoy spun around and pushed appellant against a counter-height table

across from the basement steps and next to a refrigerator. With Mr. McCoy and appellant now face-to-face, Mr. McCoy grabbed appellant's shirt and "shov[ed] [his back] up against the table."

Mr. Steinbach started to move toward them to "help Mikey," but he stopped when he "saw a flash and . . . heard a gunshot." He dropped to the ground just inside the living room and took cover. After the shots were fired, appellant ordered Mr. Steinbach to unlock the front door. Mr. Steinbach also heard someone yell: "Grab the weed." When Mr. Steinbach went to the front door, there were two men outside. After he unlocked the front door, one of the men from outside directed him to get on the ground. He heard the men "scurrying throughout the house for like maybe a minute[.]" After the men left, Mr. Steinbach locked the front doors and returned to the basement, where Mr. Wade was hiding.

Mr. Wade heard "scruffling or something" upstairs and then gunshots. Someone upstairs yelled: "Get the weed." The security footage shows Mr. Wade and Mr. Floyd react to something at 6:00 p.m. Immediately thereafter, Mr. Floyd grabbed both bags of marijuana and ran upstairs.

Mr. Wade looked at the security camera monitor and observed two men outside. He hid in a back room. A minute later, he started upstairs, but he retreated when he saw a man in a black hoodie staring at Mr. McCoy's body. He stayed in the basement until Mr. Steinbach came down.

The security footage showed Mr. Carter and Mr. Alston approaching the front of the house at approximately 5:58 p.m. They tried the front door, but it was locked. Mr. Carter texted appellant: "Locked." Mr. Carter and Mr. Alston walked back to the car, and as they were about to get in, they heard gunshots from inside the house. Mr. Carter drew his weapon, chambered a bullet, and ran back toward the house with his gun drawn. Mr. Alston followed. The security footage shows this happening at 6:00 p.m.

The door was open, but the glass storm door remained locked with a key. Mr. Carter observed Mr. Steinbach inside, pointed his gun at him, and ordered him to unlock the door. Mr. Carter entered the house briefly and observed Mr. McCoy bleeding on the floor near the basement steps.

Mr. Floyd, appellant, Mr. Carter, and Mr. Alston returned to the car, and Mr. Downs drove them to his house in Garrison, Baltimore County. As they drove there, Mr. Floyd threw his cell phone out the window. Mr. Downs' brother later drove appellant, Mr. Carter, and Mr. Downs downtown. From there, according to Mr. Carter, appellant took a Lyft to Delaware, where his girlfriend attended college. Mr. Carter went to his grandparents' house and then to Virginia.

After the men fled, Mr. Wade and Mr. Steinbach did not immediately call 911. Mr. Wade went upstairs with Mr. Steinbach, and they observed McCoy on the floor struggling to breathe and bleeding from the head. They began moving several suitcases out of the house to Mr. Steinbach's car, a red Hyundai Sonata, which was parked on the street in front of the house. Mr. Wade and Mr. Steinbach both testified that they were removing

marijuana from the home. Mr. Wade also intentionally damaged the digital video recorder ("DVR") for the security system. He then called 911 from Mr. McCoy's cell phone, and Mr. Steinbach left in his vehicle with the marijuana.

The 911 call came into the Baltimore County Police Department at 6:08 p.m. The responding officer met Mr. Wade on the front lawn. Mr. Wade took the officer to the back door because the front storm door remained locked. The police and emergency medical technicians rendered aid to Mr. McCoy, and he was transported by ambulance to Sinai Hospital, where he was pronounced dead.

Police transported Mr. Wade to police headquarters. Shortly before 8:00 p.m., Mr. Steinbach returned to the house on foot and was transported to police headquarters. Mr. Steinbach had scratches on his left temple, redness, a contusion, and bruising under his left eye. He was photographed at the station.

Detective Christopher Needham, the lead homicide detective assigned to the case, interviewed both Mr. Steinbach and Mr. Wade. The police analyzed Mr. Wade's cell phone, but Mr. Steinbach claimed to have lost his phone sometime after he communicated with Mr. Floyd about the marijuana sale. He denied that he disposed of it.

During a search of 3830 Cedar Drive, police recovered five cartridge casings in the area where Mr. Steinbach stated that the shooting occurred.[3] Three spent bullets were

[3] The cartridge casings were located: (1) on an ottoman to the left of the table where the struggle occurred; (2) on the carpet to the right of the table; (3) behind the refrigerator, which also was to the right of the table; (4) directly in front of the basement door; and (5) next to where Mr. McCoy's body was found.

recovered from the house: (1) one that had penetrated the couch next to the front door and lodged in the wall behind it; (2) a second that penetrated a kitchen cabinet and lodged in the molding of the kitchen window; and (3) a third that grazed the solid wooden door and lodged in the doorframe of the front door, between the solid wooden door and the storm door. According to the lead forensic services technician, the solid wooden door must have been open when the third bullet was fired. Bullet fragments were recovered from inside the kitchen cabinet and next to the front door.

A black hood from a Moncler jacket was found on the floor in front of the refrigerator and across from where Mr. McCoy's body was found. The surveillance footage showed that appellant had a hood on his jacket when he entered the Cedar Drive residence, but not when he left.

Detective Needham developed Mr. Floyd as a suspect after his fingerprint was found on the interior of the storm door at 3830 Cedar Drive, and Mr. Steinbach identified Mr. Floyd from a video. After acquiring cell phone records for a phone number associated with Mr. Floyd,[4] Detective Needham identified Mr. Alston, Mr. Downs, Mr. Carter, and Mr. Simmons as suspects. Mr. Alston's fingerprint later was found on an exterior front porch column at the house, which was consistent with the surveillance footage showing the man whom Mr. Carter identified as Mr. Alston standing on the front porch with his hand on the column while Mr. Carter tried to open the front door.

[4] The phone number became inactive shortly after the shooting. According to Ms. Nagy, Mr. Floyd acquired a cheap, disposable cell phone on November 5, 2019.

On November 25 and 26, 2019, Mr. Floyd, Mr. Downs, Mr. Carter, and Mr. Simmons were arrested by warrant apprehension teams. The police recovered a cell phone from each of them. Ms. Nagy's Hyundai Accent was impounded, searched, and processed for evidence. On December 13, 2019, Mr. Alston was arrested.

In July 2020, Mr. Carter agreed to cooperate with the police. Based on information provided by Mr. Carter and analysis of cell phone data, Mr. Simmons was ruled out as a suspect.

In August 2020, police received information that appellant, who was the last suspect to be identified, was at the Towson Town Mall. A surveillance and apprehension team determined that he was driving a Honda Accord registered to his girlfriend. Police attempted to conduct a traffic stop on Dulaney Valley Road, but appellant fled. A police pursuit ensued, ending on Franklintown Road, where a fallen tree blocked the road. Appellant was apprehended after he bailed out of the vehicle, ran into the woods, and tripped. Appellant's girlfriend, a passenger in the Honda Accord, was searched. She had three cell phones, one of which she identified as her phone, and a second that was linked to appellant.

Data extracted from the cell phone linked to appellant revealed that he had a photograph of Mr. McCoy stored on his phone. The photo, which originally had been posted by Mr. McCoy on Instagram, had been saved on November 5, 2019. It was modified with text that stated: "R.i.p. Dummy N****z crazy," followed by an emoji of a man with his palm over his face. In the photograph, a smiling Mr. McCoy was holding a gun in one

hand and a soda in the other. Mr. Steinbach testified that the "shotgun" in the photograph belonged to him, and the photograph was taken in the basement at 3830 Cedar Drive on an unknown date. Mr. Steinbach testified that the gun was still in the house on November 4, 2019. It was not, however, recovered by the police.

Dr. John Stash, a physician and assistant medical examiner, supervised the autopsy of Mr. McCoy. A "deformed" bullet was found inside the body bag after Mr. McCoy was removed from it at the medical examiners' office and was inventoried as evidence. Two gunshot entrance wounds were present on the upper left side of Mr. McCoy's head. The bullets were both lodged in his brain, fragmenting as they passed through brain tissue. The bullets and fragments were recovered. Both gunshot wounds caused significant brain damage and each was fatal. The trajectory of both bullets was front to back, left to right, and downward. Dr. Stash opined that the cause of Mr. McCoy's death was two gunshot wounds to the head, and the manner of death was homicide.

Stippling was present on Mr. McCoy's left cheek, left ear, left upper neck, and the left side of his scalp. No soot deposition was noted.[5] Dr. Stash testified that stippling is ordinarily seen when a shot is fired while the barrel of the gun is positioned between two to three feet away from the skin, whereas soot deposition occurs at closer range, between eight and 12 inches. He opined that hair and clothing may prevent stippling and soot deposition on the skin. Mr. McCoy had thick hair covering both entrance wounds (which were shaved by Dr. Stash during the autopsy). Mr. McCoy's heart blood tested positive

[5] Soot deposition is defined as "black powdery material that is burned gunpowder."

for the presence of amphetamine. His urine was positive for the presence of amphetamine and phenylpropanolamine.[6]

The firearms examiner's report concluded that all five cartridge casings were .40 caliber casings fired from the same weapon, and that the bullets all were .40 caliber and fired from the same weapon. Numerous bullet fragments that were recovered from the scene were not suitable for comparison. No weapon was recovered by police.

Mathew Wilde, a special agent with the Federal Bureau of Investigation, testified as an expert in historical cellular record analysis. His analysis of the cell phone records of Mr. Floyd, Mr. Downs, Mr. Carter, and Mr. Alston generally corroborated Mr. Carter's testimony about their movements on November 4, 2019. Because the police did not initially develop appellant as a suspect and subpoena his cell phone records, however, some aspects of the call detail records were not available. Agent Wilde could testify only that, between 6:08 p.m. and 6:12 p.m. on November 4, 2019, appellant's cell phone connected with three different cell towers, one due east from 3830 Cedar Drive, and the other two northeast and due north of the house. He testified that it was possible that all three calls were made from I-695, which was the route that Mr. Downs took on his way home after the shooting.

[6] "Phenylpropanolamine is an ingredient used in many over-the-counter (OTC) and prescription cough and cold medications as a decongestant and in OTC weight loss products." *FDA Issues Public Health Warning on Phenylpropanolamine*, U.S. FOOD & DRUG ADMIN. (current as of Dec. 7, 2015), https://www.fda.gov/drugs/information-drug-class/fda-issues-public-health-warning-phenylpropanolamine.

Appellant elected not to testify in his case, and he did not call any witnesses. His theory of defense, developed through cross-examination, primarily was a lack of criminal agency. Defense counsel emphasized the lack of forensic evidence tying appellant to the crime scene, as compared to the other four men, and that the police initially arrested Mr. Simmons. Alternatively, he theorized that Mr. Floyd was purchasing drugs from Mr. Steinbach and Mr. Wade, not stealing them, and that, even if appellant was there and was the shooter, the ballistic evidence did not support the State's theory of premeditated or intentional murder.

DISCUSSION

I.

Involuntary Manslaughter Instruction

Appellant contends that the trial court committed reversible error by not instructing the jury on involuntary manslaughter as provided by Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:17.9(A). He asserts that, because he was indicted by means of the statutory short form for murder, he was charged with all lesser-included offenses, including involuntary manslaughter.

The State argues that appellant was charged with involuntary manslaughter, but it contends that the jury instruction was not generated by the evidence because there was "no evidence of some specific 'gross negligence' act" by appellant. In any event, the State asserts that any error essentially was harmless given that the jury acquitted appellant of first-degree premeditated murder and convicted him of first-degree felony murder.

A.

Standard of Review

Md. Rule 4-325(c) provides that the "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." That Rule

> has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.

Dickey v. State, 404 Md. 187, 197–98 (2008). *Accord Wright v. State*, 474 Md. 467, 484 (2021). We review a trial court's decision to give (or refuse to give) a jury instruction under the abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (2011).

Here, the only dispute is the second part of the test, i.e., whether the requested instruction on involuntary manslaughter was applicable under the facts of the case. "For an instruction to be factually generated, the defendant must produce 'some evidence' sufficient to raise the jury issue." *Arthur v. State*, 420 Md. 512, 525 (2011). The initial determination of whether the evidence is sufficient to support a requested jury instruction is a question of law decided by the trial court. *Dishman v. State*, 352 Md. 279, 292 (1998) (citing *Dykes v. State*, 319 Md. 206, 221 (1990)). On review, we must determine whether "that minimum threshold of evidence necessary to establish a *prima facie* case," has been produced from which a rational jury could conclude that the defendant committed the offense for which the instruction is requested. *Id.* "In evaluating whether competent

evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *General v. State*, 367 Md. 475, 487 (2002).

The Supreme Court of Maryland has explained the "some evidence" requirement as follows:

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says – 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.' The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the [evidence] is overwhelmed by evidence to the contrary.

Dykes, 319 Md. at 216–17 (emphasis in original).[7] "On the other hand, where the evidence would not logically support a finding that the defendant committed the offense covered by the instruction, the trial court should not instruct the jury on that offense." *Dishman*, 352 Md. at 293.

B.

Proceedings Below

Appellant requested that the court give MPJI-Cr 4:17.9(A), which provides, as follows:

> The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove:
>
> (1) that the defendant acted in a grossly negligent manner; and
> (2) that this grossly negligent conduct caused the death of (name).

[7] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

> Grossly negligent means that the defendant, while aware of the risk, acted in a manner that created a high degree of risk to, and showed a reckless disregard for, human life.

The State objected to giving that jury instruction, arguing that there was no factual basis for the jury to find that appellant engaged in a grossly negligent act. The prosecutor emphasized that appellant fired five shots, two of which penetrated Mr. McCoy's skull at close range. Alternatively, the State argued that appellant was not entitled to an involuntary manslaughter instruction because that offense is not a lesser included offense of first-degree premeditated murder, second-degree specific intent-to-kill murder, or felony murder, asserting that involuntary manslaughter was a lesser included offense only of depraved heart second-degree murder, which the State was not "sending back."

Defense counsel argued that there was a factual basis for the instruction. He noted that Mr. Wade and Mr. Steinbach each testified that their interactions with Mr. Floyd and appellant in the basement prior to the shooting were amicable, and they had no reason to suspect that anything was amiss. Counsel pointed to the lack of evidence regarding what transpired between appellant and Mr. McCoy on the first floor of the house before Mr. Steinbach encountered them. He added that the ballistic evidence was not "nearly as neat" as the State suggested, stating that the location of the three projectiles recovered from the house, and the projectile fragments, supported an inference that the gun discharged during a struggle, which a rational juror could find was a grossly negligent act, not an intentional act. Counsel argued:

> We have a projectile fragment that comes out of the door frame, we have a—or a projectile that comes out of the door frame, a fragment that comes—is

> right by the door. And there's a bullet that goes through the couch into the wall that's—and it's to the exterior of the front of the house. There are—there's a bullet and—in the kitchen cabinet, and a bullet fragment that's actually in the window frame. So there's really no easy explanation of what actually transpired.
>
> And, yes, there are two gunshots to the head. But at that time, we—if you're—if that point there is no—the jury makes a determination that no robbery had been planned and the intent didn't exist, then the jury could make a determination that the act was grossly negligent in regard to the manner of the fight, and the gun may have discharged in a way that wasn't intended which caused the death of Mr. McCoy.

The court ruled that it would not give the manslaughter instruction, reasoning: "I don't believe the facts have generated that. I don't believe that that's a . . . lesser included under the facts or legal theory . . . of this particular case, so I will not give involuntary manslaughter. . . . [I]t's not a grossly negligent act."

C.

Analysis

In *Dishman*, 352 Md. at 289–90, the Supreme Court held that the statutory short form indictment for first-degree murder set forth in CL § 2-208(a) also charges second degree murder, and manslaughter. Thus, unless the prosecution has entered a nolle prosequi of the manslaughter charge, which did not occur here, "the trial court was required to give the manslaughter instruction so long as it was a permissible verdict generated by the evidence." *Id*. at 292.

We thus turn to whether the instruction was generated by the evidence in this case. Involuntary manslaughter is "'the unintentional killing of a human being irrespective, of malice.'" *Beckwitt v. State*, 477 Md. 398, 429 (2022) (quoting *State v. Thomas*, 464 Md.

133, 152 (2019)). It takes three primary forms: "(1) unlawful act manslaughter – doing some unlawful act endangering life but which does not amount to a felony; (2) gross negligence manslaughter – negligently doing some act lawful in itself; and (3) the negligent omission to perform a legal duty." *Id*. at 430.

The contours of gross negligence involuntary manslaughter involving weapons have been defined in several cases decided by this Court and the Supreme Court. In *Mills v. State*, 13 Md. App. 196, 198–99 (1971), this Court addressed a situation where a 16-year-old defendant brought a gun to a school dance, pointed it at another youth, who pushed it away, causing it to fall to the ground and discharge, killing another boy. This Court found that Mills' decision to bring a weapon into that setting and to engage in loading and unloading it in the presence of other juveniles, was grossly negligent. *Id*. at 201–02.

In *State v. Albrecht*, 336 Md. 475 (1994), the Supreme Court held that the evidence was sufficient to support Albrecht's conviction for gross negligence involuntary manslaughter. The evidence there was that the police officer "removed a shotgun from his vehicle, racked the gun, leveled it at the victim, and, with his finger on the trigger, intended to swing the shotgun to aim it at another person, but instead the gun discharged, and the victim was killed." *Beckwitt*, 477 Md. at 435 (discussing *Albrecht*).

In both of these cases, there was evidence supporting an inference that a weapon discharged unintentionally while a defendant was acting in a manner that created a high degree of risk or acted in reckless disregard of the risk. Appellant contends that a rational juror could have found the same in this case, arguing that the State did not prove that he

"willfully or intentionally shot [Mr.] McCoy, but rather, that the shooting was the result of a struggle between [him] and [Mr.] McCoy in the kitchen." He argued that, similar to *Mills*, the jury could have found that he "brought a handgun to the scene that was loaded[;] . . . pointed the loaded handgun at another person[;] . . . was struck by another person while he was holding the handgun[; and] . . . the gun discharged during the struggle, killing [Mr.] McCoy."

Appellant did not testify, but he notes that three projectiles were fired that landed far afield from the location of the alleged struggle. Moreover, Mr. Steinbach testified that Mr. McCoy, who was bigger than appellant, spun around and grabbed appellant by the shirt while pushing him up against a table. Immediately thereafter, Mr. Steinbach saw a flash and heard a gunshot. Mr. Carter testified that appellant stated that, after he pulled his gun on Mr. McCoy, there was a fight with two guys, and "someone was trying to get the gun," so appellant "grabbed [Mr.] McCoy's hair, and that is when the gun fired." Moreover, Mr. Carter testified that, when appellant left 3830 Cedar Drive, his coat was ripped, causing the down filling to fall out, and he had a cut on his lip. Appellant asserts that this evidence, along with evidence of Mr. Steinbach's facial abrasions and contusions, supported an inference that Mr. McCoy initiated or escalated an altercation that ultimately led to an unintentional, grossly negligent homicide.

We agree that, given the low bar of adducing "some" evidence supporting the giving of a gross negligence involuntary manslaughter instruction, the instruction was generated by the evidence. A rational juror could find, based on the evidence, that appellant fired

one or both of the fatal shots while struggling with Mr. McCoy for control of the gun and did not do so intentionally, but rather, in a grossly negligent manner. The court erred by not instructing the jury on gross negligent involuntary manslaughter.

We next turn to assess the effect of this error. The State contends that, because the jury convicted appellant of felony murder, any instructional error relative to involuntary manslaughter, a lesser included offense of first-degree premeditated murder, but not felony murder, did not affect the felony murder conviction. Appellant argues, relying on *Hook v. State*, 315 Md. 25, 42 (1989), that the failure to give an involuntary manslaughter instruction tainted all of his convictions and justifies a complete reversal.

In *Hook*, the defendant confessed to shooting his girlfriend and another man, killing them both, before stealing their belongings and fleeing. *Id.* at 34. He was charged with murder, felony murder, predicated on armed robbery, and use of a handgun in the commission of a crime of violence. *Id*. at 32–33. His anticipated defense at trial was voluntary intoxication, which he sought to argue mitigated the crime to second-degree murder. *Id*. at 34–35. At the conclusion of trial, however, the prosecutor entered a nolle prosequi on the second-degree murder charge over defense counsel's objection. *Id*. at 35. The jury convicted him of first-degree premeditated murder, first-degree felony murder, armed robbery, and use of a handgun in the commission of a crime of violence. *Id*. at 32–33.

On appeal, the Supreme Court held that it was error for the trial court to permit the prosecutor to withdraw second-degree murder from consideration, over Hook's objection.

Id. at 41–42. Although voluntary intoxication was not a defense to murder, it could "negate the mens rea required for a first-degree murder conviction." *Id*. at 29 (quotation marks and citation omitted). It also serves as a defense to robbery, a specific intent crime, because it can negate the specific intent necessary to support a conviction. *Id*. at 31. Thus, because robbery was the predicate crime for the felony murder charge, it followed that voluntary intoxication was a defense to both varieties of first-degree murder that were sent to the jury. *Id*. at 32.

The Supreme Court reversed on the grounds of fundamental fairness. A nolle prosequi in a case that leaves the jury with only the "all-or-nothing choice" between murder and innocence creates a "distortion of the factfinding process," which can result in an improper conviction. *Id*. at 40–41 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). In such a circumstance, there is a "risk that the jury will convict, not because it is persuaded that the defendant is guilty," "but simply to avoid setting the defendant free." *Id.* at 40 (quoting *Spaziano*, 468 U.S. at 455). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 38 (quoting *Keeble v. United States*, 412 U.S. 205, 213 (1973)). Thus, the State's broad right to enter a nolle prosequi must be "temper[ed]" when doing so is inconsistent with "that fundamental fairness essential to the very concept of justice." *Id*. at 41–42.

Given that Hook's "criminal agency stood bright and clear," the jury was "called upon to render judgment on an admitted murderer and thief with no alternative but to find

him guilty or not guilty of murder in the first degree and guilty or not guilty of armed robbery." *Id.* at 42. Because the Court could not, upon its independent review of the record, conclude that the error in the entry of the nolle prosequi was harmless beyond a reasonable doubt, it concluded that the error "tainted all of the verdicts" and reversed. *Id.*

Here, the homicide charges sent to the jury were first-degree murder, second-degree specific intent murder, and felony murder predicated on robbery with a deadly weapon. The jury was instructed that, to convict appellant of first- or second-degree murder, they must find that he acted with the intent to kill Mr. McCoy and/or to cause serious bodily injury likely to result in death. As discussed, the jury acquitted appellant of first-degree murder but convicted him of second-degree murder. Had the circuit court instructed the jury on involuntary manslaughter, the jury *may* have convicted appellant of that offense instead of second-degree specific intent murder. Accordingly, we reverse appellant's conviction for second-degree murder.

Unlike in *Hook*, however, the felony murder conviction here does not need to be vacated. "There is no lesser included second-degree form or manslaughter form of [felony murder]." *Lee v. State*, 186 Md. App. 631, 662 (2009), *rev'd on other grounds*, 418 Md. 136 (2011). "[F]elony murder is defined by the dangerousness of the underlying conduct, rather than the intent to kill." *Nicholson v. State*, 239 Md. App. 228, 247 (2018), *cert. denied*, 462 Md. 576 (2019). As the court properly instructed, in order to convict appellant of felony murder, the jury was not required to find that he intended to kill Mr. McCoy. Rather, it could convict him of first-degree felony murder if it found that he and/or others

acting in agreement with him committed a robbery with a dangerous weapon; that appellant or his coconspirators killed Mr. McCoy; that appellant and/or his coconspirators had the intent to commit the robbery at the same time or before the shooting; and that the shooting occurred during the commission of the robbery.

Unlike in *Hook*, where voluntary intoxication potentially could have impacted the conviction of the felony underlying the felony murder conviction, an instruction on involuntary manslaughter in this case would have had no bearing upon the charge of first-degree felony murder. Moreover, appellant presents no argument as to how the erroneous failure to instruct on involuntary manslaughter could have prejudiced him with regard to the convictions for the other offenses of which he was convicted. Because we are satisfied that the error was harmless beyond a reasonable doubt with respect to the remaining convictions, we affirm them. *See Nicholson*, 239 Md. App. at 239–250 (trial court erred by refusing to instruct the jury on self-defense, but error was harmless and did not warrant reversal because self-defense was not a defense to second-degree felony murder, and appellant was acquitted of all other homicide charges).

II.

Sentencing

Appellant contends, and the State agrees, that the circuit court erred in imposing a separate consecutive sentence for the conviction of robbery with a dangerous weapon and two separate sentences for conspiracy. We agree.

"The court may correct an illegal sentence at any time." Md. Rule 4-345(a). "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule." *Pair v. State*, 202 Md. App. 617, 624 (2011), *cert. denied*, 425 Md. 397 (2012).

A.

Sentence for Robbery with a Dangerous Weapon

Appellant was convicted of felony murder and robbery with a deadly weapon, the latter of which was the predicate crime for the felony murder conviction. The court sentenced appellant to life imprisonment for the felony murder conviction, and it imposed a consecutive 20-year sentence for the conviction of robbery with a deadly weapon. The law is clear that when there is a single predicate felony supporting a conviction for felony murder, the conviction for the underlying felony merges for sentencing purposes. *State v. Johnson*, 442 Md. 211, 220 (2015) ("In *Newton v. State*, 280 Md. 260, 262–63, 268 (1977), this Court addressed merger for sentencing purposes in the context of a conviction for felony murder and a conviction for a predicate felony (attempted robbery), and held that, '. . . the felony murder and the underlying felony must be deemed the same for double jeopardy purposes,'") (quoting *Newton*, 280 Md. at 262–63). *See Moore v. State*, 194 Md. App. 327, 364 (2010) (When felony murder is supported by the felony of attempted robbery, they are the "same offense under federal double jeopardy principles,") (quoting *Newton*, 280 Md. at 265), *rev'd on other ground*s, 422 Md. 516 (2011). The sentence imposed for robbery with a deadly weapon is an illegal sentence.

B.

Sentences for Conspiracy Convictions

The circuit court imposed separate sentences of 20 years and 25 years, respectively, for the convictions of conspiracy to commit robbery with a deadly weapon and conspiracy to commit home invasion, with both sentences to run concurrent to the life sentence. This Court held in *Savage v. State*, 212 Md. App. 1, 26 (2013), *cert. denied*, 450 Md. 237 (2016), that, if the State proves one conspiracy, a defendant may not be convicted and sentenced for multiple conspiracies. *Accord Molina v. State*, 244 Md. App. 67, 169 (2019) ("'If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated.'") (quoting *Savage*, 212 Md. App. at 26).

Here, the State's theory was that there was one conspiracy to rob Mr. Steinbach and Mr. Wade during a purported drug sale. Accordingly, there could be only one sentence for conspiracy, and the court was not authorized to impose both sentences.

C.

Remand for Resentencing

The State asks us to vacate all the sentences imposed and remand for resentencing. We shall exercise our discretion to do so to allow the sentencing court the maximum flexibility in fashioning "a proper sentence that takes into account all of the relevant facts and circumstances." *Scott v. State*, 230 Md. App. 411, 449 (2016) (quoting *Twigg v. State*, 447 Md. 1, 30 n.14 (2016)). On remand, "the trial court can impose longer sentences on

the counts where the original sentences were vacated solely for sentencing package purposes, 'but yielding an aggregate sentence no longer than the aggregate sentence initially imposed.'" *Id*. (quoting *Greenlaw v. United States*, 554 U.S. 237, 253 (2008)).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. JUDGMENT OF CONVICTION FOR SECOND-DEGREE MURDER REVERSED; ALL OTHER CONVICTIONS AFFIRMED. SENTENCE VACATED AND CASE IS REMANDED FOR RESENTENCING. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY BALTIMORE COUNTY.

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

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0798s21cn.pdf