Circuit Court for Baltimore City
Case No. 121312011

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1149

September Term, 2022

TAYAUN WOODARD

v.

STATE OF MARYLAND

Reed,
Tang,
Albright,

JJ.

Opinion by Albright, J.

Filed: February 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 Maryland Rule 1-104(a)(2)(B).

A jury sitting in the Circuit Court for Baltimore City found Appellant Tayaun Woodard guilty of ten charged offenses: armed robbery (Count 3); assault in the first degree (Count 5); use of a firearm in the commission of a crime of violence or felony (Count 8); illegal possession of a regulated firearm (Count 9); wear, carry, or transport a handgun on or about the person (Count 10); illegal possession of ammunition (Count 11); conspiracy to commit armed robbery (Count 13); conspiracy to commit assault in the first degree (Count 15); conspiracy to use a handgun in the commission of a crime of violence (Count 18); and conspiracy to wear, carry, or transport a handgun on or about the person (Count 19).[1]

For his convictions, the trial court sentenced Mr. Woodard to 45 years' incarceration, with all but 25 years suspended, and four years of supervised probation. Specifically, Mr. Woodard was sentenced to 20 years for armed robbery and 25 years, suspending all but five years, for assault in the first degree, consecutive to his armed robbery sentence.[2] Mr. Woodard was also sentenced to 20 years for conspiracy to commit

[1] The count numbers on the verdict sheet differed from the count numbers in the indictment because, during the trial, the State dismissed robbery (Count 4) and conspiracy to commit robbery (Count 16).

At the sentencing hearing, after some confusion, the circuit court announced Mr. Woodard's sentences based upon the count numbers in the indictment. Likewise, we use the count numbers herein as they appear in the indictment.

[2] At the sentencing hearing on September 1, 2022, the court sentenced Mr. Woodard to 20 years of incarceration for armed robbery, and then to 25 years of incarceration for assault in the first degree, "consecutive but with 20 years suspended." Mr. Woodard's commitment record, dated September 2, 2022, is nonetheless silent on Mr. Woodard's sentence for armed robbery; instead, the record provides that Mr.

armed robbery, 25 years for conspiracy to commit assault in the first degree, five years (without parole) for use of a firearm in the commission of a crime of violence or felony, and one year for illegal possession of ammunition, all to run concurrently with the sentences he received for armed robbery and assault in the first degree.[3] This appeal timely followed.

Mr. Woodard presents three issues on appeal,[4] which we have reworded as:

1. Whether the trial court's jury instructions on flight and "mere presence" gave rise to reversible error.
2. Whether the trial court erred by imposing separate and consecutive sentences for armed robbery and assault in the first degree.

Woodard was sentenced to 25 years for assault in the first degree, without mentioning any suspended sentence. Also according to the commitment record, all other sentences are to run concurrently with Mr. Woodard's sentence for assault in the first degree. "When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Lawson v. State*, 187 Md. App. 101, 108 (2009). Because Mr. Woodard has not challenged the accuracy of the transcript, we treat his sentences as they appear on the transcript.

[3] The circuit court merged Mr. Woodard's other convictions for sentencing purposes.

[4] Mr. Woodard presented the following questions:

1. Did the trial court err by instructing the jury on flight and mere presence when defense counsel made multiple timely, unequivocal statements that the identity of the offender was the only contested issue in the case?
2. Did the trial court err by imposing separate sentences for first-degree assault and armed robbery when the record was ambiguous as to whether the jury convicted the Appellant of each crime based on separate facts?
3. Did the trial court err by failing to vacate all but one of the Appellant's convictions for conspiracy?

3. Whether the trial court erred by failing to vacate all but one conviction for conspiracy.

For the reasons below, we answer question one in the negative, questions two and three in the affirmative, and remand for resentencing.

I. BACKGROUND

A. The shooting

On September 15, 2021, police officers responding to a reported shooting at an apartment in Baltimore City found the victim, Joseph Berti, bleeding from his face. Mr. Berti told the responding officers that two individuals robbed him and one of them shot him in the face. The shooter, according to Mr. Berti, was Mr. Woodard, whom he had known as "Dink." A search of the apartment recovered only a single bullet casing near the front door. Mr. Berti was transferred to the hospital for treatment and released 24 hours later. No bullets were recovered from his body.

On September 19, 2021, two detectives visited Mr. Berti and conducted a recorded interview. During the interview, the detectives showed him a photo array of potential suspects. Mr. Berti identified Mr. Woodard as one of the two suspects, signed the photo array, and provided a written statement that Mr. Woodard shot him.

B. The trial

1. Mr. Berti's testimony

At trial, Mr. Berti recalled that Mr. Woodard, whom he identified from the witness stand as the shooter, had come by his apartment twice in the afternoon of the shooting. Mr. Woodard first came alone to retrieve some belongings. Having met him before, and

recognizing him as a former boyfriend of "Damo," the woman who was subletting the apartment to him, Mr. Berti let Mr. Woodard in. Later that day, Mr. Woodard returned with someone wearing a "Covid face mask," whom Mr. Berti did not recognize. Mr. Woodard told Mr. Berti that he and his friend needed to retrieve something from the back room. The two men went into the room. Two or three minutes later, as they came out of the room, both men pointed handguns at Mr. Berti, demanded he give them marijuana, and proceeded to rob him. Mr. Berti testified that Mr. Woodard and the masked individual stole a bag containing over $43,000, which included approximately $3,400 of his personal cash and $40,000 from ticket sales for a West Virginia festival he claimed to work for. Mr. Berti also testified that he said to Mr. Woodard, "I thought we were friends, Dink," to which Mr. Woodard allegedly responded, "I don't give a f**k what you think," before shooting him three times.

On cross-examination, multiple inconsistencies were highlighted between Mr. Berti's testimony and his earlier out-of-court statements to the detectives. While Mr. Berti told the police that he had met Mr. Woodard only "like a couple" of times, Mr. Berti admitted at the trial that he had met Mr. Woodard more than a dozen times. Mr. Berti also testified that he had been staying in the apartment for about two months but told the detectives that it was only a week or two and that during that time, he had only been there a "couple of days here and there." Mr. Berti admitted that, while talking to the detectives, he tried to "make it sound like [he] was just there for a week or two," because he was worried about being caught with an illegal sublet. While Mr. Berti testified that a

bag containing over $43,000 in cash was stolen, he had no documentation to support that claim or that he even worked for the festival. Mr. Berti did not mention the ticket money to the detectives and only reported that approximately $2,000 was stolen from the apartment. Mr. Berti also admitted that in 2014, he had been convicted of possession with intent to distribute marijuana; that he used ketamine and medical marijuana without a prescription; and that he had tested positive for cocaine, marijuana, and fentanyl during a urine screening at the hospital on the day of the shooting.

2. The surveillance footage

During Mr. Berti's testimony, the State introduced video surveillance footage from Mr. Berti's apartment complex and played it for the jury. The video showed two individuals (Individual 1 and Individual 2) entering the building. Individual 1 wore a white shirt, baseball cap, and light-colored mask. Individual 2 wore a black hooded sweatshirt with the hood raised, obscuring his face, so it was unclear if he also wore a mask. About three minutes after entering the building, Individual 1 and Individual 2 burst out the door. Individual 1 had a bag under his left arm. Individual 2 used his left hand to hold his hood as he ran. Mr. Berti, bleeding from his face, staggered out of the building shortly afterwards.

3. Jury instructions

After the State rested its case, the court held a lengthy colloquy, during which flight and "mere presence" instructions were discussed. Mr. Woodard objected to the jury instructions on flight and "mere presence." The following exchange took place.

[The Court:] So there was testimony from Mr. Berti that

Dink[,] the person that he knew as Dink[,] fled the scene and was the person in the footage running away following the shooting.

[Defense Counsel:] **My whole thing is that that is not my client.**

[The State:] Well, there has been evidence generated.

[Defense Counsel:] I don't think it is an appropriate instruction in this case.

[The Court:] Do you really need it?

[The State:] Yes.

[Defense Counsel:] I believe there was a recent case on this. I can't remember what it was. But I'm not – **if the defense is that the person is not – the identity is at issue like whether the person running is actually the defendant, I don't believe that instruction is appropriate.**

[The Court:] Well, he did leave the scene, the shooter –

[Defense Counsel:] Well the person left the scene. **But my whole defense is that this is not Mr. Woodard.**

[The Court:] Okay. Fine. I'm going to give it. You can note an objection.

Presence at the scene.

[Defense Counsel:] **I'm also objecting to that too for the same reasons.**

[The Court:] Overruled. Well, when I give them then I'll bring you back up and then you'll make your – note your objection.

[Defense Counsel:] Okay.

(emphasis added).

After Mr. Woodard rested his case, he made his second objection to the jury instructions on flight and "mere presence."[5]

> [Defense Counsel:] Before you bring [the jury] out, I would like to renew my objection to the Court instructing the jury as to flight and presence at the scene.
>
> **Again, it is not my position that Mr. Woodard was present at the scene or that is him fleeing the scene. It is not the case that I am arguing that the people that were in the video were fleeing the scene for another reason or that they were present at the scene for another reason.**
>
> It is simply not applicable in this case. And for the Court to give those instructions when **the defense is that that wasn't Mr. Woodard, he wasn't there, he wasn't present there,** it is just simply not applicable, it is prejudicial to him coming from the Court. It sounds as if the way the instruction were written that it implies that the person fleeing the scene and present at the scene is Mr. Woodard.
>
> And I don't think it is appropriate in this case because I am not arguing that the two people that are seen on the video did not have an involvement in the case. And the State is free to make any argument he may make about people fleeing from the scene. I just think it is inappropriate as a jury instruction under the facts of this case.

(emphasis added).

The State then countered that it had put forth evidence that Mr. Woodard was present at the scene and one of the people in the video fleeing the scene.

> [The State:] . . . [T]he instruction says that you may consider all or none. The reason the flight may be a reason, or it may be innocuous. The State has put on evidence that Mr. Woodard was one of the people fleeing the scene. The Court isn't rubber stamping that the defendant was actually the

[5] This second objection was made after the trial court denied Mr. Woodard's renewed motion for acquittal.

> person leaving the scene. It is based upon what the jury has already heard. So it is an appropriate instruction.

Mr. Woodard responded.

> [Defense Counsel:] I just think that in this case it is obvious that the people were fleeing the scene. It is obvious what they are doing. The jury doesn't need to be instructed as to why people were fleeing the scene. It just doesn't fit anything in this case or this scenario.

The trial court agreed with the State. The court reasoned that the flight instruction was appropriate if the jury believed the fleeing individual was Mr. Woodard. Nonetheless, the court offered to amend the language of the instruction to read that if the jury was convinced beyond a reasonable doubt that there was evidence of flight, it must then decide whether the flight showed a consciousness of guilt. Mr. Woodard declined the offer, asking only that the court note his objection. The trial court then gave the instructions to the jury regarding flight and "mere presence." Mr. Woodard raised his third objection, which the court noted.

We provide additional facts as needed in the discussion below.

II. DISCUSSION

A. Instructing on flight and mere presence was not an abuse of discretion

Under Maryland Rule 4-325(c), 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." Md. Rule 4-325(c). In other words, a trial court must give a jury instruction as requested by a party when: " . . . (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; (3) and the

content of the requested instruction [is] not fairly covered elsewhere in the jury instruction actually given." *Wright v. State*, 474 Md. 467, 484 (2021) (citation omitted).

On appeal, Mr. Woodard argues that the trial court's instructions on flight and "mere presence" were inappropriate because the sole contested issue in the case was the identity of the fleeing offender who was present at the alleged robbing and shooting of Mr. Berti and fled the scene thereafter. The State counters that the instructions were warranted because it presented evidence that Mr. Woodard was the fleeing offender in question.

We review a trial court's decision to propound or not propound a proposed jury instruction for abuse of discretion. *See, e.g.*, *Wright v. State*, 474 Md. 467, 482 (2021); *Taylor v. State*, 473 Md. 205, 229-31 (2021). "A trial court abuses its discretion if it commits an error of law in giving an instruction." *Wright*, 474 Md. at 482 (citing *Harris v. State*, 458 Md. 370, 406 (2018)).[6] Furthermore, instructions that are "ambiguous, misleading or confusing" to the jury result in reversal and a remand for a new trial. *Smith v. State*, 403 Md. 659, 663 (2008).

[6] We disagree with Mr. Woodard's claim that *de novo* is the proper standard of review. The thrust of Mr. Woodard's appellate argument is that because he made the identity of the fleeing offender the sole contested issue in the case, the giving of flight and "mere presence" instructions was inappropriate. Our Supreme Court addressed the same argument in *Wright v. State*, *supra*, 474 Md. 467 (2021), and reviewed the trial court's flight instruction for abuse of discretion. *Id.* at 482. Because *Wright* controls, we will review the trial court's instructions here for abuse of discretion. In any event, our conclusion would be the same either under a *de novo* or an abuse of discretion standard.

1. Flight

Here, the trial court instructed the jury on flight as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough evidence—is not enough by itself to establish guilt. But it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors some of which are fully consistent with innocence.
>
> You must first decide whether there is evidence beyond a reasonable doubt of the defendant's flight. If you decide there is evidence of flight, then you must decide whether this flight shows a consciousness of guilt.

As our Supreme Court held in *Wright*, "in general, it is error to give the flight instruction where the defense does not contest that whoever fled the scene is guilty of the charged offense, and instead contends only that the State failed to prove that the defendant was the fleeing offender" because consciousness of guilt is irrelevant when "[a]ll the jury must decide is whether the defendant on trial was the fleeing offender." 474 Md. at 486. However, in order to "render a flight instruction inapplicable," *Id.* at 488, the defendant "must expressly and unambiguously state—prior to the jury charge—that the defense solely contests the identity of the defendant as the fleeing offender." *Id.*

Without such an unequivocal statement from the defendant, the trial court retains the discretion to instruct the jury on flight. *Id.* at 495. Further, once the defendant indicates in opening statement or during cross-examination that "other elements besides the identity of the fleeing offender are in dispute . . . a statement by [the defendant] during the jury instruction conference that the defense will contest only identity during

closing argument" may not prevent the trial court from instructing on flight. *Id.* at 487 n.5.

Here, Mr. Woodard did not expressly and unambiguously state that his identity as one of the fleeing individuals was the sole contested issue. In his opening statement, Mr. Woodard focused on the sufficiency of the evidence to prove the elements of the charged offenses, arguing there was no solid evidence to say that he robbed or shot Mr. Berti. Mr. Woodard said, "[t]here is going to be no forensic evidence, no fingerprints, no DNA, no clear video of the suspect, and no independent witnesses." Mr. Woodard also reminded the jury that "the State must prove its evidence beyond a reasonable doubt . . . [and] they are not going to be able to prove their case. Their case is based on simply the word of one person."

Similarly, throughout the trial, Mr. Woodard did not make the identity of the fleeing offender the sole issue of the case; instead, he challenged the State's case from various directions. Mr. Woodard's cross-examination focused on Mr. Berti's credibility, poking at inconsistencies in Mr. Berti's prior statements to police about his living arrangements, his job, and the number of times he allegedly met Mr. Woodard, whom he had known as "Dink." In his motion for acquittal, Mr. Woodard focused on the State's failure to prove requisite intent or premeditation to kill Mr. Berti, necessary elements of his attempted first-degree murder and second-degree murder charges, stating:

> Specifically count number one charges Mr. Woodard . . . with attempted first-degree murder with premeditation, malice aforethought. There was no testimony that any premeditation was involved in this case.

It was not until the trial court's colloquy about the jury instructions that Mr. Woodard contended that his identity as the fleeing offender was at issue. Still, that statement would not render Mr. Woodard's identity the *sole* contested issue. Even after the colloquy, when Mr. Woodard renewed his motion for acquittal, he again addressed issues not related to the identity of the individuals fleeing the scene. Instead, Mr. Woodard continued to emphasize that the credibility of Mr. Berti had "been challenged and impeached by both the prior conviction and by his statements . . . and by the physical evidence in this case." In short, the identity of the fleeing individuals in the surveillance footage was one of many issues, rather than the sole issue, raised by Mr. Woodard before the giving of the jury instructions.

Wright is clear: without a stipulation or other unambiguous statement that the sole contested issue is the identity of the fleeing offender, a flight instruction is not inappropriate. 474 Md. at 487. Not only did Mr. Woodard fail to inform the court that the identity of the fleeing individuals was the sole contested issue, he also made his mental state another disputed issue by arguing the State's failure to prove the intent or premeditation elements for the first-degree murder charge. *See id.* at 489 (finding that the jury instruction on flight was appropriate where the defendant "suggested during opening statement and in his cross-examination . . . that the mental state . . . might well be a live issue.").

To render the identity of the fleeing offender the sole issue in the case, as *Wright* requires, Mr. Woodard must do more than stating that the issue of the fleeing offender's

identity is his "whole thing." *See* 474 Md. at 489 (holding that the defendant's statement that the identity of the shooter is "the whole crux of the case" was insufficient to foreclose the giving of flight instruction). If Mr. Woodard believed that the giving of flight instruction would be improper because he was going to dispute only the issue of identity in closing argument, it was his burden to clarify that the State proved all the other elements of the charged offenses, including the requisite mental states. *See Wright*, 474 Md. at 489-90. Mr. Woodard did not do so.

We disagree that, as Mr. Woodard claims, this is a "drastic step" to take. As our Supreme Court noted, "[t]rial judges are not clairvoyant," *Wright*, 474 Md. at 489, and neither are jurors. Up until closing argument, the trial court and the jurors had heard defense challenges to the State's proof of intent and Mr. Berti's credibility, among other issues. Therefore, absent Mr. Woodard's express and unambiguous statement that he concedes all but the identity of the fleeing offender, " . . . the trial court (*and the jury*) could have concluded that the defense was keeping open the option of arguing . . . that the State had failed to prove" other elements of the charged offenses. *Id.* (emphasis added). In other words, *Wright* requires an unequivocal statement from the defendant that he "would concede . . . that the State had proved all the other elements of the charged offenses" to avoid confusing the jury. 474 Md. at 489. Here, there was no such statement.

Because Mr. Woodard did not make an express and unequivocal statement conceding that the State had proved all the other elements of his charged offenses, he

failed to make the identity of the fleeing offender the sole contested issue here, as *Wright* requires. Therefore, the trial court's instruction on flight was not inappropriate.

2. Mere presence

Mr. Woodard's arguments on the "mere presence" instruction also fail. The trial court's instruction on "mere presence" was as follows:

> A person's presence at the time and place of a crime without more is not enough to prove defendant committed a crime. The fact that a person witnessed a crime, made no objection, or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of a crime is a fact in determining whether defendant is guilty or not guilty.

Mr. Woodard contends that *Wright* applies to the "mere presence" instruction because the sole contested issue in the case was his identity as the offender. But *Wright* does not apply to a "mere presence" instruction. *See* 474 Md. at 483. Even if it did, as above, Mr. Woodard did not make clear that his identity as the one "merely present" was the sole uncontested issue in this case. Accordingly, as above, the trial court's "mere presence" instruction was not inappropriate.

3. Harmless Error

Even assuming that the giving of the flight and "mere presence" instructions was an error, "if the error is merely harmless, then the judgment will stand." *Rainey v. State*, 480 Md. 230, 269 (2022) (quoting *Conyers v. State*, 354 Md. 132, 160 (1999)) (cleaned up). "An error is harmless when [a reviewing court] can find, beyond a reasonable doubt, that the error did not influence the verdict." *Rainey*, 480 Md. at 268 (citing *Dorsey v. State*, 276 Md. 638, 659 (1976)). In other words, the error must be "unimportant in relation to

everything else the jury considered on the issue in question, as revealed by the record." *Rainey*, 480 Md. at 269 (citing *Bellamy v. State*, 403 Md. 308, 332 (2008)).

Our Supreme Court has recognized two types of harm that may result from an unwarranted flight instruction. The *first* occurs where the defendant's identity as the person who fled the crime scene is undisputed but the defendant contends that the State failed to prove that the flight suggested a consciousness of guilt related to the charged offense. In this situation, the giving of a flight instruction may impermissibly emphasize the probative value of the flight as circumstantial evidence. *Thompson v. State*, 393 Md. 291, 309 (2006). The grievous nature of this harm has led some other jurisdictions, though not Maryland, to hold that the giving of flight instruction is *per se* improper. *Id.* at 309-10 (discussing the out-of-state cases that found the giving of a flight instruction to be a reversible error).

The *second* occurs where the defendant does not dispute the probative value of flight *vel non* but instead argues that he was not the person who fled. In this situation, the flight instruction may prejudice the defendant by implying that the defendant was the person who fled. *Wright*, 474 Md. at 485-86 (citing *Commonwealth v. Bastaldo*, 32 N.E. 3d 873, 888 (Mass. 2015)). This harm requires a case-specific analysis, in light of whether the flight instruction at issue could "aid the jury in clearly understanding the case, provide guidance for the jury's deliberations, and help the jury arrive at a correct verdict." *Wright*, 474 Md. at 485 (quoting *Chambers v. State*, 337 Md. 44, 48 (1994)) (cleaned up).

On appeal, Mr. Woodard contends that the giving of the instructions on flight and "mere presence" affected the verdict, and therefore resulted in harmful error, by misleading the jury to believe Mr. Berti's testimony, wherein Mr. Berti identified Mr. Woodard as the person who was present at the crime scene and fled afterwards.

We disagree. Even if the giving of the flight and "mere presence" instructions were an error, we are persuaded beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered" on the identification of Mr. Woodard as the person who robbed and shot Mr. Berti, and thus did not influence, or contribute to, the verdict. *Rainey*, 480 Md. at 268-69.

Immediately after instructing the jury on flight and "mere presence," the trial court gave a lengthy instruction on the identification of the offender as follows:

> The State has to prove – has the burden to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You heard evidence about the identification of the defendant as the person who committed the crime.
>
> In assessing the accuracy and reliability of the identification, you should consider all the circumstances surrounding the identification. Among the circumstances you should consider are one, the opportunity of the witness to observe the person who committed the crime including the length of time the witness observed the person, the distance between the witness and the person, the distance between the witness and the person, the extent to which the person's features were visible, the lighting conditions at the time of the observation, whether there were any distractions occurring during the observation, and any other circumstance that effected the witness's opportunity to observe the person committing the crime.
>
> The ability of a witness to observe the person committing the

> crime – in assessing ability to observe, you should consider whether the witness was affected by stress or fright at the time of the observation, personal motivations, bias or prejudices, uncorrected visual defects, fatigue or injury and drugs or alcohol.
>
> Other circumstances surrounding the identification including length of time between the crime and identification, the manner in which the defendant was presented to the witness, and whether the identification procedure was suggestive and influenced the witness to identify the defendant, the accuracy of the witness's prior description of the person, the witness's degree of certainty.
>
> * * *
>
> You should also consider whether the witness knew the defendant or had previous exposure to him.
>
> * * *
>
> The identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.
>
> Finally, you should consider any other factors [a]ffecting the reliability of the witness's identification including the witness's credibility or lack of credibility. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

In sum, the trial court gave the jury an extensive list of factors they must consider in assessing the probative value of Mr. Berti's identification. Even if the giving of the flight and "mere presence" instructions rendered Mr. Berti's testimony somewhat more credible by implying that Mr. Woodard was present at, and fled from, the crime scene, such prejudice would have been offset by numerous other factors that the trial court listed

above. We are confident that "jurors will follow the trial judge's instructions." *E.g.*, *Alston v. State*, 414 Md. 92, 108 (2010); *State v. Moulden*, 292 Md. 666, 678 (1982). We are also confident that "the jury would consider the entire jury charge and employ its common sense" before determining whether Mr. Woodard was one of the individuals who fled and, if so, whether his flight was relevant to proving the charged offenses. *Wright*, 474 Md. at 494.

Moreover, to the extent that the instructions might have led the jury to think that the trial court believed Mr. Woodard was the fleeing offender, the court adequately mitigated such impression by informing the jury, " . . . You should not draw any conclusions about my view of the case . . . ." and ". . . You are the sole judge of whether a witness should be believed . . . ." *See id.* at 493 (noting that the trial court's cautionary instruction on its "views of the case" and the State's burden of proof alleviated potential prejudice).

Mr. Woodard maintains that the prejudice from the giving of flight and "mere presence" instructions was particularly great in this case because the State's evidence against him was not overwhelming. We again disagree. The jury only deliberated about two hours over 19 charges. *See Rainey*, 480 Md. at 273 (noting that "[t]he jury only deliberated for a few hours following a six-day trial."). Five jury notes were submitted but none of them pertained to the flight and "mere presence" instructions or Mr. Berti's

identification.[7] *See id.* (finding the giving of a jury instruction on destruction or concealment of evidence, even if in error, to be harmless where none of the jury notes showed confusion as to the issue).

Additionally, even though the State's case relied largely upon the reliability and credibility of Mr. Berti's identification, the jury did not have to weigh Mr. Berti's credibility in a vacuum. Mr. Berti testified that Mr. Woodard came to his apartment with another man wearing a mask before shooting him and stealing his bag containing cash. The surveillance footage corroborated the details of Mr. Berti's testimony. It showed two individuals entering the building and later fleeing. One was masked and clutching a bag as he ran away. The footage also showed Mr. Berti emerging from the building soon after, holding his face and bleeding. The video was published to the jury at the trial. Thus, aside from Mr. Woodard's presence at the scene and flight, the jury could reasonably have concluded that because Mr. Berti's overall description of the episode was credible, his identification of Mr. Woodard as the assailant was credible as well. Therefore, we conclude that even if the giving of the flight and "mere presence" instructions was error (either one or both together), such error was unimportant in light of everything else the jury heard, and considered, before reaching the verdict.

[7] The first jury note asked whether the surveillance footage video was timestamped. The second note asked if a juror could get a notebook she left in a room. The third jury note asked about the number of bullet casings collected from the crime scene. The fourth jury note asked for the legal definition of "reasonable doubt" and the fifth note asked for the "legal definitions for attempted murder in first, attempted murder in second, conspiracy to commit assault in first, conspiracy to commit assault in second, conspiracy to commit armed robbery, conspiracy to commit murder."

In sum, we hold that the trial court acted within its discretion by instructing on flight and "mere presence." Both instructions correctly stated the law, were applicable under the facts of the case, and not fairly covered elsewhere. Even if there were an instructional error, that error would be harmless. We see no abuse of discretion here.

B. Mr. Woodard's convictions for armed robbery and assault in the first degree should have merged for sentencing

Mr. Woodard and the State contend, and we agree, that his sentence for assault in the first degree (25 years' incarceration, with all but five years suspended, and four years' supervised probation) is illegal under Maryland Rule 4-345(a) because it should have merged into his sentence for armed robbery (20 years' incarceration).

Merger of convictions at sentencing protects a convicted defendant from multiple punishments for the same offense. *See Brooks v. State*, 439 Md. 698, 737 (2014). Merger is required when: "(1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id.* Failure to merge a sentence "is considered to be an 'illegal sentence' within the contemplation of [Maryland Rule 4-345]." *Pair v. State*, 202 Md. App. 617, 624 (2011). When the trial court fails to merge convictions where required "but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error." *Id.* (citation omitted).

Unless the shooting (assault) of Mr. Berti was a distinct act from the armed robbery of him, Mr. Woodard's conviction for assault in the first degree, as a lesser included offense, should have merged with the armed robbery conviction. In this case, the

indictment charged Mr. Woodard with armed robbery and assault in the first degree based on the same date, location, and victim. The State did not allege that the assault was separate or distinct from the robbery at any time during its opening argument, case-in-chief, or closing argument.

To the extent that any ambiguity exists as to what particular conduct the jury relied upon to support assault and armed robbery convictions, such ambiguity must be resolved in favor of Mr. Woodard and, therefore, the convictions should merge. *Snowden v. State*, 321 Md. 612, 618-19 (1991); *see also Gerald v. State*, 137 Md. App. 295, 312 (2001) (citing *Snowden*, 312 Md. at 618-19) ("With an ambiguity in the indictment, and non-curative instructions, the first degree assault conviction must indeed merge into the robbery conviction").

Because Mr. Woodard's conviction for assault in first degree should have merged with the armed robbery conviction, we shall vacate his sentence for assault in the first degree as well. *See Jones v. State*, 175 Md. App. 58, 88 (2007) ("When merger of two offenses is required . . . the court must impose a sentence only for the offense that has an additional element or elements."). Before discussing the impact of vacating this sentence on his overall sentence, though, we address Mr. Woodard's challenge to his multiple conspiracy convictions.

C. All but one of Mr. Woodard's conspiracy convictions should be vacated

Mr. Woodard contends that all but one of his conspiracy convictions should be vacated because the State did not prove that more than one conspiracy existed. The State

agrees and so do we.

In Maryland, when multiple conspiracies are charged, "the unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). "The conviction of a defendant for more than one conspiracy turns, therefore, on whether there exists more than one unlawful agreement." *Molina v. State*, 244 Md. App. 67, 169 (2019) (citations and quotations omitted). "Where the State fails to establish a second conspiracy, there is merely one continuous conspiratorial relationship," even if multiple acts or agreements exist in its furtherance. *Id.* (citations and quotations omitted). When only one conspiracy has been proven, "only one penalty should be assessed." *Id.* at 171 (citations and quotations omitted) (holding that one of the defendant's duplicative conspiracy convictions should be vacated even where the convictions had been merged for sentencing purposes).

Here, Mr. Woodard was charged with eight conspiracies and convicted of four,[8] but the State acknowledges that there was no evidence of multiple agreements. Nor, as

[8] Mr. Woodard was convicted of the following conspiracies: (1) conspiracy to commit armed robbery; (2) conspiracy to commit assault in the first degree; (3) conspiracy to use a handgun in the commission of a crime of violence; and (4) conspiracy to wear, carry, and transport a handgun on or about the person. Of those, the convictions for conspiracy to use a handgun in the commission of a crime of violence and conspiracy to wear, carry, and transport a handgun on or about the person were already merged for the sentencing purposes and no separate sentence was imposed for those two convictions. Still, Mr. Woodard argues, and the State concedes, that three conspiracy convictions (conspiracy to commit armed robbery, conspiracy to use a handgun in the commission of a crime of violence, and conspiracy to wear, carry, and transport a handgun on or about the person) should be vacated, with only one (conspiracy to commit assault in the first degree) remaining.

further conceded by the State, was the jury instructed that it had to find the existence of multiple agreements in order to convict Mr. Woodard of multiple conspiracies. The State thus admits that only one of Mr. Woodard's conspiracy convictions should remain.

The next inquiry is which of Mr. Woodard's conspiracy convictions should remain. Mr. Woodard claims that all but his conviction for conspiracy to commit armed robbery should be vacated. On the other hand, the State argues that Mr. Woodard's conviction for conspiracy to commit assault in the first degree is the one that should remain. We agree with the State.

When vacating multiple conspiracy convictions and sentences for failure to prove the existence of separate agreements, we must leave "standing the conviction for conspiracy to commit the crime with the greater maximum penalty." *McClurkin v. State*, 222 Md. App. 461, 490-91 (2015) (citing *Jordan v. State*, 323 Md. 151, 162 (1991)). In this case, the offense with the greatest maximum penalty is the conspiracy to commit assault in the first degree, which is subject to a maximum penalty of 25 years imprisonment. *See* CR § 3-202(c).[9] Thus, we vacate all of Mr. Woodard conspiracy convictions, except his conviction for conspiracy to commit assault in the first degree.

D. Remand for resentencing is proper remedy

With respect to a remedy, Mr. Woodard asks only that we vacate his sentence for assault in the first degree and all but one of his conspiracy convictions. The State seeks

[9] Conspiracy to commit armed robbery carries the maximum penalty of 20 years imprisonment. *See* CR § 3-403(b).

more, requesting that we vacate his remaining sentences as a whole and remand his remaining convictions for resentencing under *Twigg v. State*, 447 Md. 1 (2016).[10] According to the State, simply vacating sentences for the convictions that should be merged, without a remand, does not fully afford the trial court the flexibility to fashion a proper sentence.

Generally, "where merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged without ordering a new sentencing hearing." *Carroll v. State*, 202 Md. App. 487, 518 (2011). Nonetheless, Maryland Rule 8-604 authorizes, if not requires, remand for resentencing under certain circumstances. Rule 8-604(d)(2) requires remand for resentencing if we "reverse[] the judgment for error in the sentence or sentencing proceeding[.]" *Twigg*, 447 Md. at 20 (quoting Md. Rule 8-604(d)(2)). In addition, an appellate court may remand a case if it "concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings." *Twigg*, 447 Md. at 20 (quoting Md. Rule 8-604(d)(1)).

In *Twigg*, our Supreme Court recognized that when appellate courts unwrap the trial court's "sentencing package" by removing a single charge (or multiple charges), the sentencing judge "is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape." 447 Md. at 28 (citations omitted). According to

[10] In its Brief, the State asks us to remand "all" of Mr. Woodard's convictions for resentencing. We interpret this as a request to remand the convictions that remain after we vacate the convictions that the State concedes should be vacated.

Twigg, appellate courts tend to view individual sentences as components of an overall sentencing scheme. 446 Md. at 28 (listing cases from other state appellate courts). Thus, remand for resentencing gives the sentencing judge the opportunity to revise the initial sentencing package while preserving the sentencing scheme originally intended. *See Twigg*, 446 Md. at 28 (citing *State v. Goncalves*, 941 A.2d 842, 848 (R.I. 2008)).

Mr. Woodard attempts to distinguish this case from *Twigg* by arguing that merely vacating his sentences for the merged convictions would not result in an "extreme and anomalous" sentence warranting a remand. Specifically, Mr. Woodard argues that, even after vacating his sentences for all merged convictions, he "would still have the same active incarceration time, and his overall sentence would only be reduced by 4 years of supervised probation."

We are unpersuaded by Mr. Woodard's argument. As Mr. Woodard acknowledges, vacating his sentences for all merged convictions, including conviction for assault in the first degree, would result in the loss of four years of supervised probation. "Probation is designed to serve both society and the offender." *Christian v. State*, 62 Md. App. 296, 304 (1985). Here, by imposing relatively a long period of probation (four years) and suspending a rather lengthy sentence (20 years), it may be said that the sentencing judge demonstrated his intent "to promote the reformation and rehabilitation of" Mr. Woodard. *Id.* As such, vacating the supervised probation imposed (without an opportunity for resentencing) would run counter to that intent. It would also be at odds with *Twigg*'s proposition that recognized the appellate courts' *discretionary* power "to

remand cases for resentencing in response to their decision that the trial court's sentencing package has been disrupted by mergers the trial court didn't anticipate or consider." *Johnson v. State*, 248 Md. App. 348, 357 (2020) (interpreting *Twigg*).

Remand is appropriate here. Without remand, today's decision would eliminate a lengthy suspended sentence and a lengthy period of supervised probation from the sentences originally imposed. The trial court is "in the best position" to restructure the package and effectuate the original sentencing goal. *Twigg*, 447 Md. at 28. Therefore, we shall vacate and remand Mr. Woodard's sentences for use of a firearm in the commission of a crime of violence or felony (Count 8 of the indictment), illegal possession of ammunition (Count 11 of the indictment), and conspiracy to commit assault in the first degree (Count 15 of the indictment) for resentencing. Mr. Woodard's 20-year sentence for armed robbery (Count 3 of the indictment) shall remain. On remand, the circuit court may consider matters subsequent to the original sentencing and exercise its discretion accordingly in resentencing Mr. Woodard. *See Jones v. State*, 414 Md. 686 (2010) (citing *Sanders v. State*, 105 Md. App. 247, 254 (1995)).

CONVICTION AND SENTENCE FOR ARMED ROBBERY SHALL BE AFFIRMED.

CONVICTION AND SENTENCE FOR ASSAULT IN THE FIRST DEGREE SHALL BE VACATED.

WITH THE EXCEPTION OF CONSPIRACY TO COMMIT ASSAULT IN THE FIRST DEGREE, ALL

CONVICTIONS AND SENTENCES FOR CONSPIRACY SHALL BE VACATED.

SENTENCES FOR USE OF A FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE OR FELONY, ILLEGAL POSSESSION OF AMMUNITION, AND CONSPIRACY TO COMMIT ASSAULT IN THE FIRST DEGREE SHALL BE VACATED AND THE MATTER IS REMANDED FOR RESENTENCING ON THESE THREE CONVICTIONS.

ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY SHALL BE AFFIRMED.

COST TO BE PAID 50% BY APPELLANT AND 50% BY MAYOR AND CITY COUNCIL OF BALTIMORE.