Circuit Court for Montgomery County
Case No. 137277-C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1161

September Term, 2022

GEOFREY GAITAN

v.

STATE OF MARYLAND

Arthur,
Leahy,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: August 14, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

** 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.

Geofrey Gaitan, appellant, was charged with attempted first- and second-degree murder and first-degree assault of his elderly landlord, Nicholas Miranda. A jury trial was held on those charges in the Circuit Court for Montgomery County. Because Gaitan claimed that he had acted in self-defense, the jury was additionally instructed on the lesser-included offenses of attempted voluntary manslaughter and second-degree assault. After the jury declared it was deadlocked (but indicated that it had reached a verdict on some offenses), the defendant asked the court to take a partial verdict, as is permitted by Maryland Rule 4-327(d). But the court declared a mistrial as to all five charges that had been submitted to the jury.

Gaitan thereafter filed a motion to dismiss on the ground of double jeopardy. The circuit court granted his motion as to the charges of assault in the first degree and assault in the second degree, but otherwise denied the motion. Gaitan noted this interlocutory appeal.[1] He contends that all charges should have been dismissed on the grounds of double jeopardy and collateral estoppel.[2]

[1] "A defendant has the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim." *Kendall v. State*, 429 Md. 476, 484 n.10 (2012) (citing *Pulley v. State*, 287 Md. 406, 414 (1980)).

[2] The "Question Presented" in appellant's brief reads:

> Did the trial court err in not granting Appellant's motion to dismiss the counts of attempted first and second degree murder as well as attempted voluntary manslaughter and bar retrial under principles of double jeopardy and collateral estoppel, when it granted Appellant's motion to dismiss the first and second degree assault charges and bar retrial on those same principles?

We shall affirm the ruling of the circuit court and remand the case for further proceedings.

BACKGROUND

The Alleged Crimes

The alleged victim in this case, Nicholas Miranda, owned a home in Silver Spring in Montgomery County. Miranda rented rooms to people he found by placing advertisements in media such as Craigslist. Gaitan was one of his tenants. Other tenants who occupied Miranda's home contemporaneously with Gaitan included Vincent Shepherd, Kevin Hollis, and Harry Yang. Shepherd and Hollis were at home on the day of the attack alleged in this case, but Yang was not present.

Shepherd testified at trial that he lived in a basement room, and that Miranda, Hollis and Yang occupied rooms on the second floor. Gaitan's room was on the first floor.

According to Shepherd, during the afternoon of Sunday, April 19, 2020, he was at "home chilling watching TV[,]" when he heard a "loud thud" on the floor above, which prompted him to go upstairs to investigate. Upon arriving in the first-floor kitchen, Shepherd observed Miranda lying "on the floor[.]" According to Shepherd, Gaitan was standing over Miranda and "stomping on his head." Shepherd "started screaming at him stop," but, according to Shepherd, Gaitan "continued to stomp on" Miranda. Shepherd further testified that the scene was a "mess[,]" with food "on the floor[,]" a "table leg that was splintered in half," and "blood everywhere."[3]

[3] At Gaitan's trial, Shepherd testified, over objection, that if Gaitan "had continued" stomping on Miranda's head, he "probably" would have "killed him."

Shepherd retreated downstairs, locked his door, and called 911. He told the 911 operator that his housemate, "Jeff Gaitan[,]" "assaulted my landlord[,]" and "was beating him and stomping on him." He pleaded for help to "please get here," stating that his landlord was "lying on the kitchen floor groaning. He has blood everywhere."

Hollis gave similar testimony at trial. According to Hollis, he woke up late on April 19, 2020, intending to go downstairs to the kitchen to fix a meal, but when he heard Miranda "come out of his room" and "go downstairs," Hollis "decided to wait[.]" Shortly afterward, Hollis "heard a very loud thump and loud voices like people arguing." Hollis went downstairs to investigate and saw Gaitan "standing by the car in the driveway with his bag on the trunk[.]" Hollis said Gaitan turned toward him, but didn't say anything. When Hollis "started walking towards the kitchen to see what had happened[,]" he saw Miranda lying on the floor, in a pool of blood, "moaning," with a table leg on the floor under his arm. Hollis then "carefully walked back through the living room," intending to return to his bedroom so that he could call 911. While he still was in the living room, he encountered Gaitan once again. According to Hollis, Gaitan complained that Miranda owed him money or was "keeping my money," or "something to that effect." Hollis retreated upstairs "as fast as [he] could," locked the door, and called 911.

Emergency Response

Emergency responders, including Montgomery County Police and Fire Department personnel, arrived at the scene shortly after the 911 calls were placed. Upon arriving, they found Miranda lying in a pool of blood, unresponsive, and suffering from life-threatening traumatic head injuries. A paramedic who responded to the scene stated that Miranda was

not "cognitive[,]" but he was "combative," which is "indicative of a traumatic brain injury[.]"

Outside, police officers encountered Gaitan, carrying a duffel bag and claiming that he "was just out for a run." Officers observed that Gaitan appeared "[v]ery calm" and "nonchalant[,]" and he did not appear to have any visible injuries. From Gaitan's duffel bag, police recovered his passport and birth certificate, among other things.

Emergency medical technicians ("EMTs") transported Miranda to MedStar Washington Hospital Center in the District of Columbia. Rocco Armonda, M.D., a board-certified neurosurgeon, performed emergency brain surgery because Miranda was suffering from such severe brain swelling that his life was in danger.[4]

Although doctors were able to save Miranda's life, he no longer can live at home and needs assistance in performing the most rudimentary tasks such as dressing, bathing, or even walking. His long-time friend and romantic partner testified that Miranda: "[c]an't dress himself. . . . He can't feed himself. He doesn't watch TV anymore. He doesn't read. He can't see."

[4] Among other duties, Dr. Armonda is a professor of neurosurgery at Georgetown University Hospital.

Legal Proceedings

An indictment charged Gaitan with attempted murder in the first degree, attempted murder in the second degree, and assault in the first degree. Two years later, a jury trial was held.[5]

Presumably because Miranda continued to suffer from debilitating injuries, the State elected not to call him to testify, "even though he [was] alive." In addition to Shepherd and Hollis, whose testimony is summarized above, the State called a number of police officers and an EMT who were on the scene on the day of the alleged attack, a forensic specialist who also was an expert in bloodstain pattern analysis, a DNA expert, and Dr. Armonda, the neurosurgeon who treated Miranda.

Dr. Armonda testified that Miranda sustained numerous skull fractures in various parts of his head. According to Dr. Armonda, Miranda had been struck in the head at least four times with "an edged instrument[.]" The force of impact was "enormous[,]" comparable to being struck in the head with a baseball bat being swung by an athlete. The State argued to the jury that the "edged instrument" was apparently the broken table leg found at the scene, which was soaked in Miranda's blood.

Gaitan testified on his own behalf. According to Gaitan, on the day of the encounter, he was out of work, and he had asked Miranda, for the second or third time, "to print out

[5] The underlying events took place at the height of the COVID pandemic. Maryland courts were closed during much of the time period between the alleged attack and the commencement of trial.

some résumés[,]" a favor Miranda had done for him on a previous occasion.[6] But, according to Gaitan's trial testimony, an argument broke out this time because he was behind on the rent. Gaitan—who was 22-years-old at the time—claimed that the 63-year-old Miranda "just showed a real strong aggression, and he turned around and started to grab" Gaitan, causing Gaitan to feel endangered. According to Gaitan, after Miranda "grabbed" his left arm and pulled Gaitan toward him, Gaitan "hit him in the face[.]" Gaitan further testified that Miranda hit him on his shoulder, and in response, he "swung on" Miranda two more times. Then, Miranda fell to the floor "with a loud bang."[7]

As a result of Gaitan's testimony that he had acted in self-defense, the parties agreed that, in addition to attempted first- and second-degree murder and first-degree assault, the jury also would be instructed on the lesser-included offenses of attempted voluntary manslaughter and second-degree assault, and the court would instruct the jury on the law regarding self-defense and imperfect self-defense. The court instructed the jury accordingly as follows:

> The defendant is charged with attempted first-degree murder, attempted second-degree murder, and first-degree assault. . . . [A]s well as attempted voluntary manslaughter and second-degree assault -- unless otherwise instructed, you should consider each charge separately and return a separate verdict for each charge.

[6] At the time, Gaitan had been laid off from his job "because of the COVID pandemic."

[7] On cross-examination, Gaitan testified that he "hit [Miranda] about three to four times" in the face. The prosecutor impeached Gaitan with statements he had made to police (which were recorded on a body camera video) shortly after the incident. In addition to acknowledging, repeatedly, that he had "lied" to the police, Gaitan conceded that Miranda's injuries were "wildly out of proportion to" any apparent injuries Gaitan incurred that day, although he denied that he had used excessive force.

* * *

The defendant is charged with a crime of attempted murder. This charge includes attempted first-degree murder, attempted second-degree murder, and attempted voluntary manslaughter.

Attempt is a substantial step, beyond mere preparation, towards the commission of a crime combined with an intent to commit that crime. Attempted first-degree murder is a substantial step, beyond mere preparation, towards the commission of a murder in the first degree combined with an intent to commit the crime.

In order to convict the defendant of attempted murder in the first degree, the State must prove that the defendant took a substantial step, beyond mere preparation, towards the commission of a murder in the first degree; that the defendant had the apparent ability at that time to commit the crime of murder in the first degree; and that the defendant willfully and with premeditation and deliberation intended to kill Nicholas Miranda.

Willful means that a defendant actually intended to kill Nicholas Miranda. Deliberate means that the defendant was conscious of the intent to kill. Premeditated means that the defendant thought about the killing and that there was enough time, though it may not have -- though only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice.

Attempted second-degree murder is a substantial step, beyond mere preparation, towards the commission of a murder in the second degree combined with the intent to commit the crime.

In order to convict the defendant of attempted murder in the second degree, the State must prove that the defendant took a substantial step, beyond mere preparation, towards the commission of murder in the second degree; that the defendant had the apparent ability at the time to commit the crime of murder in the second degree; and that the defendant actually intended to kill Nicholas Miranda.

Attempted voluntary manslaughter is a substantial step, beyond mere preparation, towards the intentional taking of a life, which would be attempted murder but is not attempted murder because the defendant acted in partial self-defense. Partial self-defense does not result in a verdict of not

guilty but, rather, reduces the level of guilt from attempted murder to attempted manslaughter.

You have heard the evidence that the defendant attempted to kill Nicholas Miranda in self-defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case.

In order to convict the defendant of attempted murder, the State must prove that the defendant did not act in either complete self-defense or partial self-defense. If the defendant did act in complete self-defense, the verdict must be not guilty. If the defendant did not act in complete self-defense but acted in partial self-defense, the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.

Self-defense is a complete defense, and you are required to find the defendant not guilty if the following four factors are present: one, the defendant was not the aggressor; two, the defendant actually believed that he was in immediate or imminent danger of death or serious bodily injury; three, that the defendant's belief was reasonable; and, four, that the defendant used no more force than was reasonably necessary to defend himself in the light of the threatened or actual force.

In order to convict the defendant of attempted murder, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors of complete self-defense was absent.

Even if you find that the defendant did not act in complete self-defense, the defendant may still have acted in partial self-defense. If the defendant actually believed that he was in immediate or imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict should be guilty of attempted voluntary manslaughter rather than attempted murder. If the defendant used greater force than a reasonable person would have used but the defendant actually believed that force used was necessary, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict should be guilty of attempted voluntary manslaughter rather than attempted murder.

In order to convict the defendant of attempted murder, the State must prove that the defendant did not act in complete self-defense or in partial self-defense. If the defendant did act in complete self-defense, the verdict

must be not guilty. If the defendant did not act in complete self-defense but did act in partial self-defense, the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.

The defendant is also charged with the crime of first-degree assault. In order to convict the defendant of first-degree assault, the State must prove all of the elements of second-degree assault, which I'm going to explain to you in a moment, and also must prove that the defendant intended to cause serious physical injury in the commission of the assault.

Serious physical injury means that creates [sic] a substantial risk of death or causes serious and permanent or serious and protracted disfigurement, loss or impairment of any function of the -- any bodily member or organ.

Second-degree assault. The defendant is charged with the crime of assault. Assault is causing offensive physical contact to another person. In order to convict the defendant of the assault, the State must prove that the defendant caused offensive physical contact to or physical harm to Nicholas Miranda, that the contact was the result of an intentional or reckless act of the defendant and was not accidental, and that the contact was not -- and the contact was not consented to by Nicholas Miranda and not legally justified.

You have heard that -- evidence that the defendant acted in self-defense. Self-defense is a complete defense, and you're required to find the defendant not guilty, again, if all four factors are present: defendant was not the aggressor, the defendant actually believed that he was in immediate or imminent danger of bodily injury, and that the defendant was -- belief was reasonable and that the defendant used no more force than reasonably necessary to defend himself in light of the threatened or actual harm.

Deadly force is the amount of force reasonably calculated to cause death or serious bodily harm. If you find the defendant used deadly force, you must decide whether the use of deadly force was reasonable. Deadly force is reasonable if the defendant actually had a reasonable belief that the aggressor's force posed an immediate or imminent threat of death or serious bodily harm.

Even if you find that the defendant did not act in complete self-defense, the defendant may still have acted in partial self-defense. If the defendant actually believed that he was in immediate or imminent danger of death or serious bodily harm, even though that a reasonable person would not have believed so, the defendant's actual, though unreasonable, belief is a

partial defense and the verdict should be guilty of second-degree assault rather than first-degree assault. If the defendant used greater force than a reasonable person would have used but the defendant actually believed the force used was necessary, the defendant actually [sic], though unreasonable, belief is a partial self-defense and the verdict of that first-degree assault should be guilty of second-degree assault rather than first-degree assault.

Again, in order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors of complete self-defense was absent.

The court also provided the jury a written copy of the instructions.

The jury was given a verdict sheet which stated as follows:

a) As to Count 1, Attempted First Degree Murder, we the jury find the Defendant:

Not Guilty_____ Guilty _____

If you find the Defendant Guilty of Count 1 conclude your deliberations. If you find the Defendant Not Guilty of Count 1, proceed to Count 2 below.

b) As to Count 2, Attempted Second Degree Murder, we the jury find the Defendant:

Not Guilty_____ Guilty _____

If you find the Defendant Guilty of Count 2 conclude your deliberations. If you find the Defendant Not Guilty of Count 2, proceed to Attempted Voluntary Manslaughter below.

c) As to Attempted Voluntary Manslaughter, we the jury find the Defendant:

Not Guilty_____ Guilty _____

If you find the Defendant Guilty of Attempted Voluntary Manslaughter, conclude your deliberations. If you find the Defendant Not Guilty of Attempted Voluntary Manslaughter, proceed to Count 3 below.

d) As to Count 3, Assault in the First Degree, we the jury find the Defendant:

Not Guilty_____ Guilty _____

If you find the Defendant Guilty of Count 3 conclude your deliberations. If you find the Defendant Not Guilty of Count 3, proceed to Assault in the Second Degree below.

e) As to Assault in the Second Degree, we the jury find the Defendant:

Not Guilty_____ Guilty _____

Jury Deliberations and the Declaration of a Mistrial

Jury deliberations began on the afternoon of April 7, 2022, and resumed the following morning. In total, the jury submitted fifteen notes to the court, prompting the prosecutor to declare, at one point, that "they've barely been deliberating and they're spending half their time writing notes."

The first inkling that the jury was having trouble deciding whether Gaitan had committed either murder or manslaughter came at 5:27 p.m. on the afternoon of April 7, when the jury sent a note to the court, asking whether, to establish attempted voluntary manslaughter, it was required that the defendant "have an intent to kill the victim[.]" After convening a bench conference, the court, with the concurrence of the parties, instructed the assembled jurors:

> So, first of all, the answer to the jury note with regards to, for a voluntary manslaughter charge, does the defendant need to have an intent to kill the

> victim[;] and the answer is yes, and I'm going to refer you to 4:17.14, which is in the instructions.[8]

At 10:44 a.m. the following morning, the jurors passed a note to the court, stating: "We can't come to a unanimous decision on the first charge, can we move on to the subsequent charges?" After convening a bench conference, the court replied to the note, with the concurrence of the parties: "Please continue to deliberate on all the charges, but you may deliberate in any fashion that you choose."

At 12:36 p.m. that day, the jurors passed a note to the court stating: "We [cannot] come to an agreement on a verdict. We are not going to reach a verdict." After convening a bench conference, the court, with the concurrence of the parties, gave the jury a modified *Allen* instruction that was substantially similar to MPJI-Cr 2:01 (Jury's Duty to Deliberate).

At 1:46 p.m., the jurors passed a note to the court, asking whether each charge should be considered separately "as stated in [MPJI-Cr] 3:06A" or whether they should "consider the verdict sheet in order[.]"[9] In addition, the note asked: "Does unanimous vote apply to both guilty and not guilty?" After a bench conference and with the parties' agreement, the court replied to the first question: "Each charge is to be determined separately as stated in 3:06A. However, you may consider the verdict in any order in your

[8] The court was referring to Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:17.14 (Homicide--Attempted First Degree Murder, Attempted Second Degree Murder, and Attempted Voluntary Manslaughter (Imperfect Self-Defense)) (Maryland State Bar Ass'n 2012, 2022 Repl. Pages).

[9] This question and the court's response referred to MPJI-Cr 3:06, version A (Separate Consideration of Multiple Counts as to One Defendant).

deliberations[.]" In response to the second question, the court replied: "Yes both verdicts, guilty or not guilty[,] must be unanimous[.]"

At 3:16 p.m., the jurors passed a note to the court, stating: "We have an incomplete verdict sheet. We are at an [impasse] and jurors have not changed verdict on two remaining counts." A bench conference followed. The prosecutor expressed concern that "they're not following the directions on the verdict sheet and moving on to counts that they shouldn't move on to." The prosecutor further asserted that, if the jury "can't complete the verdict sheet, according to the instructions, it should be a hung jury." With the parties' agreement, the court replied to the note by asking: "Have you reached a unanimous verdict on any of the counts—you all agree guilty or not guilty[?] If so which counts? Please do not disclose the verdict—i.e., guilty or not guilty."

Several minutes after receiving the court's reply, the jurors sent another note, stating:

> Count 3
> Count 4
> Count 5
> on the verdict sheet[10]

[10] The indictment included only three counts—attempted first-degree murder, attempted second-degree murder, and first-degree assault—and only those three charges were referred to as "counts" numbered 1, 2, and 3 respectively on the verdict sheet. But the jury was also instructed on two lesser-included offenses—attempted voluntary manslaughter and second-degree assault—and the verdict sheet provided the spaces for the jury's finding of guilty or not guilty for those lesser included offenses. During the bench conference in which this note was discussed, the court stated, "Count 3 is attempted voluntary manslaughter; Count 4, is the first degree assault; and Count 5 is the battery on the verdict sheet." The parties thereafter adopted that nomenclature, both in the circuit court and in their briefs, and we shall likewise assume that Counts 3, 4, and 5 refer, respectively, to attempted voluntary manslaughter, first-degree assault, and second-degree (continued…)

After receiving that response from the jury, the court suggested to the parties that it "could ask them a question whether or not further deliberation would enable them to reach a verdict on Counts 1 and 3 [sic], and we could all just sit here and wait for them to respond." The prosecutor replied:

> So, my issue is we cannot take a verdict on Count 3 without a verdict on 1 and 2, because the instructions specifically say you cannot get to a lesser included count until you've reached a verdict on the greater counts, because, basically, reaching a verdict on Count 3 is tantamount to an acquittal on Counts 1 and 2, because we cannot, no matter what the verdict is on Count 3, re-try Counts 1 and 2 if there's a verdict on Count 3.
>
> And, so, if they are hung on Counts 1 and 2, we cannot take a verdict on Count 3, because they're not supposed to even get there, and that's in the jury instructions.

The court stated that it would "cross that bridge" when it gets there, and it replied to the jurors' note with a question: "Would further deliberations be productive[?]"

At 3:57 p.m., the jurors passed another note to the court, requesting definitions of murder in the first degree and "first degree manslaughter." Another bench conference ensued. The court pointed out to counsel "there is no first degree manslaughter[.]" After obtaining the agreement of the parties, the court instructed the jurors that they should consult MPJI-Cr 4:17.14, the pattern instruction on attempted voluntary manslaughter which the court previously had provided.

At 3:58 p.m., the jurors passed another note to the court, stating: "Further deliberation would not be productive[.]" At the bench conference that followed, the

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assault. Nevertheless, we recognize that the offense of attempted voluntary manslaughter was placed on the verdict sheet as a result of the defendant's contention that he acted in self-defense.

prosecutor asked that a mistrial be declared "on everything." She further explained that regardless of any verdict on attempted voluntary manslaughter, taking a partial verdict on that charge would be tantamount to directing a judgment of acquittal on both murder charges, and that would be inconsistent with the jury's indication that it was deadlocked on the two murder charges.

Defense counsel replied: "I guess I agree with the State, but that's why I think we should take a partial verdict under analysis, but I draw the opposite conclusion." The court recessed to review pertinent case law.

When the court reconvened, the following colloquy occurred:

> THE COURT: … So, I have reviewed the attempted voluntary manslaughter instruction, and it's clear that they've been instructed that if they reach a verdict on this count, they shouldn't have reached a verdict on the other counts. So, I'm concerned with regards to certain things. I don't know what the verdict is in this particular case, but I'll hear you on declaring a mistrial, Mr. [Defense Counsel].
>
> [DEFENSE COUNSEL]: **I would ask that the Court take a partial verdict.** I was in the process of sending two cases to the parties and the Court, State v. Simms[11] --
>
> THE COURT: I saw Simms.
>
> [DEFENSE COUNSEL]: -- and in Simms they also cite Fennell.[12]
>
> THE COURT: Yes, which my clerk told me about, but Simms is discretionary; it says it's abuse of discretion. It's up to the trial court whether or not to take a partial verdict and that had to do with extraordinary circumstances which was the closing of the courts.
>
> * * *

[11] It appears that counsel was referring to *Simms v. State*, 240 Md. App. 606 (2019).

[12] *State v. Fennell*, 431 Md. 500 (2013).

> [DEFENSE COUNSEL]: The Fennell [case] was whether or not, given that they agreed on a bunch of counts and were only hung I think on one, whether or not they should have taken a partial verdict, because the court didn't take a partial verdict and the [Supreme Court of Maryland] said that they should have taken the partial verdict.[13]

(Emphasis added.)

The court declared another recess so that it could review more case law. When it reconvened, the following colloquy occurred:

> THE COURT: Yes. They're just wondering what -- okay. So, you know, I think they have made it clear that any further deliberations would not be fruitful. And, so, the concern that I have is the issue of preclusion, and, also, the inconsistency of verdicts, and whether [or] not they have, in fact, reached a unanimous decision.
>
> And, so, is the State still asking for a mistrial, understanding that [if] the State is wrong, that it might be double jeopardy involved?
>
> [PROSECUTOR]: Yes. And I am still asking for a mistrial, and I would argue that this Fennell case is very distinguishable from what we have here. In that case, they actually sent out a completed verdict sheet indicating that they had acquitted on the lead counts, and there was nothing about that -- so, that's number one. They sent out a completed verdict sheet. Here, we don't have a completed verdict sheet.
>
> Number two is that that completed verdict sheet followed the law and followed the instructions on the verdict sheet indicating that they understood what they were doing. And, in our case, we don't have a completed verdict sheet, in fact, we have a note that said we can't complete the verdict sheet.

[13] 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. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules, or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

> And then we have an indication that they're not following the instructions on the verdict sheet by saying that they had -- that they sent back in response to have you reached any sort of agreement, and they said 3, 4, and 5. That would be in violation of the instructions on the verdict sheet.
>
> And then after that indicating further ambiguity about whether or not they had reached an agreement, they asked for a definition on first degree murder and, significantly, first degree manslaughter. I think we all agree that they're talking about the attempted voluntary manslaughter charge. And, so, I don't see how we can see [sic] that they've reached a verdict on a count that they are asking for the definition of.
>
> THE COURT: Yes.
>
> [PROSECUTOR]: And then after that they said further deliberation would not be productive.
>
> So, I think, in this case, the only option is to declare a mistrial --
>
> THE COURT: Okay.
>
> [PROSECUTOR]: -- on all counts.

The defense requested that the court take a partial verdict on attempted voluntary manslaughter and the assault charges:

> [DEFENSE COUNSEL]: . . . I don't think that the note asking about the first degree manslaughter, since that wasn't a charge listed, I don't think that calls into question any of the verdict, and I don't --
>
> THE COURT: Well, I don't think they meant to write first degree manslaughter. I mean there isn't -- I mean I think that was -- I think a reasonable person could conclude it's voluntary manslaughter, but go ahead.
>
> [DEFENSE COUNSEL]: **But, anyway, so they have a verdict on the three counts. I think we should ask if they still have that verdict on three counts, and I think we should take a partial verdict.** And I think that exactly like in the Fennell case **there is not manifest necessity to do anything else, to declare a mistrial under those counts.**

(Emphasis added.)

The court overruled the defendant's request to take a partial verdict and granted the State's motion to declare a mistrial as to all charges, stating:

> With regards to determining manifest necessity, it's whether or not other reasonable alternatives exist. And, so, **the other reasonable alternatives are to take a jury [sic] that is inconsistent possibly with the verdict. And, in this particular case, I think we all agree that being deadlocked in Counts 1 and 2, or generally deadlocked on it, is not indicative of having a completed verdict**, because, quite frankly, the question is whether or not you sent them back for inconsistent and they've already told us that they were deadlocked.
>
> So, I'm going to declare a mistrial in this case -- you can bring out the jurors -- and declare it's manifest necessity.[14]

(Emphasis added.)

[14] Gaitan argues in his brief: "There is no way . . . that the jury could have reached a verdict on attempted voluntary murder [sic] and not have reached a finding with respect to the facts necessary to resolve the guilt or innocence of Appellant of attempted first and second degree murder."

But the State counters in its brief that Gaitan

> does not account for why (or how) the jury would be hopelessly deadlocked on Counts 1 & 2, if the jury had, in fact, actually decided any issue of ultimate fact in his favor with respect to Count 3.
>
> There is, however, a rational explanation that *would* account for the jury's ability to reach some form of unanimous agreement as to Counts 3-5, while still being deadlocked on Counts 1 & 2. Specifically, the jury could have unanimously agreed that Gaitan was guilty of first- and second-degree assault (Counts 4 & 5), and that he had not acted in self-defense, thus resolving the question of attempted voluntary manslaughter (Count 3), but could not unanimously agree whether the attempt to kill Miranda was wil[l]ful, premedi[t]ated, and deliberate (attempted first-degree murder), or not (attempted second-degree murder) (Counts 1 & 2). Put simply, the jury could have been working through the verdict sheet by going from "the bottom to the top."

The Motion to Dismiss and State Opposition

In June 2022, Gaitan filed a motion to dismiss, in which he pointed out that the trial court had granted the State's motion for a mistrial over defense objection although there was, he asserted, no manifest necessity to do so with respect to Counts 3, 4, and 5, on which the jury had indicated it had reached a verdict. Gaitan asserted in the motion that, "if there was any doubt about the jury's unanimity on any count, the Court should have 'inquired reasonably regarding the jury's intention to render a partial verdict.'" (Quoting *Fennell*, 431 Md. at 518.)

Gaitan further argued in the motion that, because double jeopardy precluded retrial of the charges on which the trial court declined to take a partial verdict, retrial of other counts was also precluded, stating:

> 18. Because attempted voluntary manslaughter is a lesser included offense of first degree murder, retrial is barred by principles of double jeopardy.
>
> 19. That because first degree assault is a lesser included offense of attempted murder and attempted voluntary manslaughter, retrial is barred on those counts as well.

The State filed an opposition, contending that the trial court properly refused to accept a partial verdict, as the defense had requested, because the verdict at that time was only tentative. The State argued that the jury's verdict on Counts 1 and 3 was still in flux because the jury had asked for further instructions on the definitions of first-degree murder and "first degree manslaughter" right before declaring that "[f]urther deliberation would not be productive[.]" Quoting *Fennell*, 431 Md. at 524, the State observed that "a trial judge 'must not accept a verdict that is tentative . . . .'" The State continued: "It is important

that the trial court 'guard against the danger of transforming a provisional decision into a final verdict.'" *Id*. (quoting *Caldwell v. State*, 164 Md. App. 612, 643 (2003)) (further quotation marks and citation omitted). The State further quoted language in *Caldwell*, 164 Md. App. at 642-43, stating that a partial verdict must be '"unambiguous and unconditional and must be final[.]'" The State pointed out that here, after the jury indicated it had reached a verdict as to Counts 3, 4, and 5, the jury sent a note asking the court for additional instruction on the legal definition of attempted voluntary manslaughter, thereby demonstrating that its "previous note indicating agreement on 'Count 3 Count 4 Count 5' was only tentative."

The State further maintained that taking a partial verdict on Count 3 would have been legally inconsistent with the jury's claim of deadlock on Counts 1 and 2 because "the finding of either guilt or non-guilt on the attempted voluntary manslaughter charge could not be made without resolving the attempted murder charges, which the jury indicated on more than one occasion that it was unable to do."

Even though Gaitan had not expressly argued collateral estoppel in his motion, the State asserted: "Under the principle of collateral estoppel, the State would have been barred from re-trying either of the attempted murder charges if any verdict at all were taken on the attempted involuntary manslaughter charge." The State indicated that, consequently, a partial verdict on attempted voluntary manslaughter would have been the functional equivalent of a judgment of acquittal as to the murder charges, even though the jury was clearly deadlocked on those counts. The State insisted that this was a strong reason not to take a partial verdict on Count 3 that "would have been tantamount to directing a verdict

of not guilty on the attempted murder charges, charges for which the jury indicated they had no agreement and were continuing deliberations on, as seen by their additional request for the definition of murder." For all those reasons, the State maintained that there was manifest necessity to declare a mistrial as to all counts.

The Hearing and the Circuit Court's Ruling

The trial court subsequently held a hearing on Gaitan's motion to dismiss. At the outset of the hearing, the court stated: "All right, yesterday we continued this for [defense counsel] to have a conversation with his client with regards . . . to trial strategy moving forward, so I'll hear from you, counsel." Defense counsel conceded that the record was unclear whether the jury had ever reached a final verdict on Count 3:

> [DEFENSE COUNSEL]: . . . **We would move forward [on the motion to dismiss] as to questions four and five, which were the first degree assault and second degree assault.** Given the jury note [requesting further instruction on manslaughter], **I think there is some question as to whether or not the jury was, in fact, unanimous or intended to register a partial verdict as to the attempted-manslaughter count**. I have read Woodson.[15] I understand the Court's position on Woodson and the reliance on Woodson. I guess I understand that the Court's not going to be inclined nor are we in a position to overrule Woodson[.]
>
> * * *
>
> [DEFENSE COUNSEL]: . . . I do think it is somewhat distinguishable just that at least in Woodson appeared that the Court on its own granted the request for a mistrial; whereas, here it was the State's request I think and the State's request was motivated in large part to avoid a verdict that they were unhappy with because they were afraid at least at some point I think before

[15] Defense counsel was referring to *State v. Woodson*, 338 Md. 322 (1995), which held that, where a trial court had erroneously declared a mistrial as to a lesser-included offense but appropriately declared a mistrial as to a greater offense, the State was not barred by principles of double jeopardy (or collateral estoppel) from retrying the defendant on the greater offense. *Id.* at 325, 329-38.

> we got the jury note about the manslaughter question about the implications and collateral estoppel implications of that manslaughter verdict. Additionally --
>
> THE COURT: I still don't think there is any, just so you know --
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: -- because there's other elements and Woodson says if there's other elements, then there's no collateral estoppel.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And **you would have the burden to prove that it was collaterally estopped, and there's nothing in any of those notes that would indicate that they had reached a verdict that was dispositive in your favor as to any element.** I don't think that that's the evidence as such.

(Emphasis added.)

Notwithstanding *Woodson*, defense counsel initially maintained that the trial court's declaration of a mistrial as to Counts 4 and 5 despite the lack of manifest necessity to do so barred not only retrial on those counts but also barred retrial on the homicide counts (Counts 1, 2, and 3) because Counts 4 and 5 are lesser-included offenses of Counts 1 through 3.

The court then explained to defense counsel the court's view that, under *Woodson*, retrial would be barred only on Counts 4 and 5. The court also urged defense counsel to consider whether it was really in Gaitan's best interest for a retrial of Counts 1 and 2 to be limited to just Counts 1 and 2 (without providing the jury an option of considering Count 3). In other words, if the court granted Gaitan's motion to dismiss the charge of attempted voluntary manslaughter, then, upon a retrial on Counts 1 and 2, the defense would be forced to adopt an all-or-nothing strategy (rather than ask the court to instruct on the lesser-

included offense of attempted voluntary manslaughter). Urging defense counsel to consider the implications of continuing to press for dismissal of Count 3, the court said: "I just want to make sure you've ha[d] that conversation [with your client] because I don't want to have this redone in five years under a postconviction."

The discussion continued:

> THE COURT: . . . I'm just making decisions up here based upon your trial strategies and I'm just telling you it's not likely given Woodson that I am getting rid of Counts 1 and 2 and **I'll hear argument on 3 if you want to do that**, but they're not going away. And so you are leaving this jury, a jury, a petit jury with the choices of 1, 2, or not guilty, first or second attempted degree murder or not guilty, and I just want to make sure for the record, okay, moving down the road it's just like selecting a jury trial or a Court trial that your client fully understands and you understand what may end up happening down the road. I just want to make sure everybody understands that. That's why I asked what are you asking for.
>
> [DEFENSE COUNSEL]: Right, and --
>
> THE COURT: Just want to make it totally clear.
>
> [DEFENSE COUNSEL]: -- **that's why I'm not asking for that remedy as to Count 3 if you think it** --
>
> THE COURT: All right, okay.
>
> [DEFENSE COUNSEL]: And the other thing I would say is that, you know, Your Honor said that we were sort of asking the Court to do things but ultimately it's the State's request to grant the mistrial or the State's request for a mistrial on all counts of this putting Mr. Gaitan in a position where he's forced to choose this trial strategy issue or assert his rights under the constitution in double jeopardy so --

(Emphasis added.)

At that point in the hearing, the court requested a response from the State, which conceded that the motion to dismiss should be granted as to Counts 4 and 5, but not as to Count 3:

> THE COURT: All right, okay, **they're not arguing Count 3, so I will hear you on Counts 4 and 5 if you have any distinguishing in terms of Woodson, Madam State.**
>
> [PROSECUTOR]: I don't object to what he's asking for in Counts 4 and 5 --
>
> THE COURT: All right.
>
> [PROSECUTOR]: -- not for the same reasoning but I will defer to Your Honor --
>
> THE COURT: Okay.
>
> [PROSECUTOR]: -- on State's 4 and 5.

(Emphasis added.)

After argument had concluded, the trial court announced its ruling, granting the motion to dismiss as to Counts 4 and 5, but denying the motion as to the remaining counts. The court referred to a passage from *Woodson*, 338 Md. at 331-32,[16] and said the court found it equally applicable to Gaitan's case. The court observed:

[16] The passage of *Woodson* referenced by the court states, in pertinent part:

> Thus, in the instant case, Woodson has the burden of establishing that the jury actually decided an issue in his favor on the possession count which would prevent relitigation of that issue in a trial on Count 2, possession with intent to distribute. It is clear from the record of the proceedings in the instant case that Woodson has not met his burden. No verdict was actually delivered on the possession count in the instant case. Because the jury did not render

(continued…)

It says, first and foremost, when I talked about with regards to them having the burden of proving that a jury had decided something and in Woodson it said no verdict was actually delivered on the possession count in the instant case and remember that was a possession and possession with intent. Because the jury did not render a verdict on the possession count, there is no judgment from which findings of fact in favor of Woodson can be inferred, and I find that we are in the same place here as to the voluntary manslaughter.

* * *

So as to Counts 4 and 5, I'm going to find that under Woodson that in those cases that the jury had reached a verdict. I should have probably taken it on that and since I did not, we are barred[.][17] [A]s to Count 3[,] I think their questions indicate that they had not reached a verdict and so I don't think that that was at that point in time it was a decision that they had made that was absolute and undeniable and so as to Counts 1, 2, and 3, I'm going to allow retrial and that is as to the attempted first degree, the attempted second degree, and the attempted voluntary manslaughter. As to 4 and 5, we won't be going forward on them, okay?

This interlocutory appeal followed.

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a verdict on the possession count, there is no judgment from which findings of fact in favor of Woodson can be inferred.

338 Md. at 331-32.

[17] We agree with the State that, when the court's statement is read in context, the punctuation in the transcript is obviously in error, and we have corrected it in the quote above. For comparison, we note that, uncorrected, the transcript reads:

> So as to Counts 4 and 5, I'm going to find that under Woodson that in those cases that the jury had reached a verdict. I should have probably taken it on that and since I did not, we are barred as to Count 3. I think their questions indicate that they had not reached a verdict and so I don't think that that was at that point in time it was a decision that they had made that was absolute and undeniable and so as to Counts 1, 2, and 3, I'm going to allow retrial[.]

DISCUSSION

Parties' Contentions

Gaitan contends that the circuit court erred in denying his motion to dismiss all charges on the ground of double jeopardy. He asserts that the trial court abused its discretion in refusing to accept a partial verdict on the three lesser-included offenses—attempted voluntary manslaughter, first-degree assault, and second-degree assault—and that, therefore, all three of those charges should have been dismissed pursuant to *Woodson*. He then contends that those dismissals, in turn, also required dismissal of the remaining two greater offenses because, he argues, acquittal of all lesser-included offenses typically precludes retrial for the greater offenses. He asserts in his brief:

> It is Appellant's position that after recognizing its original error in declaring a mistrial without manifest necessity, the trial court was correct in dismissing the charges of first and second degree assault against Appellant and barring any retrial on these counts. **Appellant maintains, however, that the trial court erred when it failed to dismiss the count of attempted voluntary manslaughter which the jury, as it had with the assault counts, announced that it had reached a final verdict.** Finally, Appellant maintains that **principles of collateral estoppel and double jeopardy which bar Appellant's retrial on attempted voluntary manslaughter and assault also bar Appellant's retrial on attempted first and second degree murder**.

(Emphasis added.)

Resorting to speculation as to what the jury meant by its note indicating that it had reached a verdict as to "Count 3[,] Count 4[,] Count 5 on the verdict sheet[,]" Gaitan explains why he contends that jurors' note referring to "Count 3" necessitates dismissal of the attempted murder charges, stating: "Here, . . . unlike the situation in *Woodson*, the verdicts that the trial court erroneously failed to take on the charges of first and second

degree assault and attempted voluntary manslaughter were actually verdicts which determined that Appellant was not guilty of first and second degree attempted murder." He asserts that any "verdict on attempted voluntary manslaughter, whether it was guilty or not guilty, established that the jury could not find Appellant guilty of first or second degree attempted murder." In his view, if the unreturned verdict on attempted voluntary manslaughter was not guilty, then acquittal would be mandated on the attempted murder charges. But he further contends that, even if the verdict on attempted voluntary manslaughter was guilty, that would mean that the jury necessarily found that Gaitan had acted in imperfect self-defense, a finding of a mitigating fact which precludes a finding of guilt on the attempted murder charges. Therefore, according to Gaitan, *all* charges against him must be dismissed on the grounds of double jeopardy and collateral estoppel.

The State counters that, as a preliminary matter, Gaitan's argument for dismissal of the charge of attempted voluntary manslaughter was waived during the hearing on the motion dismiss. And, on the merits, the State contends that Gaitan's argument fails because (a) the jury's request for further instructions on manslaughter showed that the jury had not reached a final decision on the attempted voluntary manslaughter charge, and therefore, the court did not err in failing to take a verdict on that charge; and (b) as in *Woodson*, the record here does not support a conclusion that the jury actually found any issue of ultimate fact favorable to Gaitan that precludes a finding of guilt on the greater offenses.

As we will explain, we agree with the State that, under the circumstances of this case, retrial of the murder counts is not precluded by either double jeopardy or collateral estoppel.

Analysis

Preservation and Waiver

Here, the motion to dismiss asserted that the jury had reached a partial verdict on attempted voluntary manslaughter, first-degree assault, and second-degree assault. During the ensuing hearing on the motion, however, defense counsel conceded that "there is some question as to whether or not the jury was, in fact, unanimous or intended to register a partial verdict as to the attempted-manslaughter count." Accordingly, defense counsel proceeded to argue on the motion "on a modified basis[.]" Defense counsel nonetheless maintained that, because the jury clearly had reached a partial verdict on the assault charges (and therefore the trial court erred in refusing to accept a partial verdict), and those charges are lesser-included offenses of the homicide charges, the court should dismiss all the charges.

The court's comments indicated that—based upon defense counsel's concession—the court believed that defense counsel had abandoned any claim that retrial of "Count 3" was precluded because the court had not taken a verdict on that charge. When the court asked the State to respond to defense counsel's arguments, the court stated: "All right, okay, **they're not arguing Count 3**, so I will hear you on Counts 4 and 5 if you have any distinguishing in terms of Woodson, Madam State." (Emphasis added.) Defense counsel made no attempt to correct the court's assertion that "they're not arguing Count 3[.]" Indeed, after hearing the court's cautionary comments about trial strategy if the court denied the motion to dismiss as to Counts 1 and 2, defense counsel had told the court: "I'm not asking for that remedy as to Count 3[.]" The prosecutor replied that she would defer

to the court's ruling as to Counts 4 and 5. The court granted Gaitan's motion in part and denied it in part. The net result was that Counts 4 and 5 (the assault charges) were dismissed, but the State could proceed on both attempted murder charges, and Gaitan could again request that the jury be instructed on the lesser-included offense of attempted voluntary manslaughter.[18]

Now, on appeal, Gaitan is again "arguing Count 3" as he maintains in his brief that the trial court erred in denying his motion to dismiss the attempted voluntary manslaughter charge. We agree with the State that, although a request to dismiss Count 3 on double jeopardy grounds for failure to take the jury's verdict on that claim was raised initially in the motion to dismiss, that argument was waived during the hearing on that motion and cannot be resuscitated on appeal. Md. Rule 4-323(c); *see, e.g.*, *Lopez-Villa v. State*, 478 Md. 1, 12 (2022) (noting that Rule 4-323(c) requires that "an objection or indication of disagreement must be made contemporaneous[ly] with the court's action").[19]

[18] In criminal trials, Maryland Rule 4-323(c) governs rulings other than the admission or exclusion of evidence and provides:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, **at the time the ruling or order is made or sought**, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

(Emphasis added.)

[19] The circumstances here, unlike those in *Lopez-Villa*, amount to a waiver, not merely a forfeiture of the claim. In *Lopez-Villa*, the defense failed to assert a claim at the time the court ruled on it (it had asserted the claim beforehand), 478 Md. at 11-12, 18, (continued…)

But, in any event, as an alternative holding, we conclude that this argument would have failed even if it had not been waived in the circuit court. In the interest of completeness, we explain why the court did not err in declining to take a verdict on Count 3, and the court's dismissal of the assault charges does not require dismissal of the homicide charges on grounds of collateral estoppel.[20]

Merits of the Claim

Homicide and Its Lesser-Included Offenses

Gaitan was charged with attempted first- and second-degree murder and first-degree assault. His testimonial claim of having acted in self-defense generated a jury question, and therefore, the jury also was instructed on attempted voluntary manslaughter and second-degree assault. *See, e.g.*, *Wilson v. State*, 422 Md. 533, 543-44 (2011) (holding that a defendant's testimony ("[k]ill or be killed"), even if it appears "preposterous" or "overwhelmed by evidence to the contrary," is sufficient to generate a jury instruction on imperfect self-defense (quotation marks and citation omitted)); *Dykes v. State*, 319 Md. 206, 217 (1990) (holding that if "there is any evidence relied on by the defendant which, if

whereas here, defense counsel's comments at the hearing on the motion affirmatively abandoned the argument Gaitan asserts on appeal. *See*, *e.g.*, *State v. Rich*, 415 Md. 567, 581 (2010) (finding intentional waiver where trial counsel "(1) argued that the issue of voluntary manslaughter was generated by the evidence, and (2) made a specific request for a voluntary manslaughter instruction," but contended "on appeal that the evidence was insufficient to support the voluntary manslaughter conviction").

[20] This latter contention was addressed during the hearing on the motion to dismiss and is all that remains of Gaitan's argument on appeal after stripping out the unpreserved argument concerning the circuit court's refusal to dismiss Count 3.

believed, would support his claim that he acted in self-defense," the court is required to give a jury instruction on self-defense).

The flagship charge was attempted first-degree murder. To find attempted first-degree murder, the jury must conclude, beyond a reasonable doubt, that the defendant took a substantial step, beyond mere preparation, toward the commission of a murder in the first degree; that he had the apparent ability at that time to commit the crime of murder in the first degree; and that he willfully and with premeditation and deliberation intended to kill the victim. *State v. Earp*, 319 Md. 156, 162-63 (1990).

Attempted second-degree murder is a lesser-included offense of attempted first-degree murder. To find attempted second-degree murder, the jury must conclude, beyond a reasonable doubt, that the defendant took a substantial step, beyond mere preparation, toward the commission of a murder in the second degree; that he had the apparent ability at that time to commit the crime of murder in the second degree; and that he actually intended to kill the victim. *Id.*

First-degree assault predicated upon the specific intent to cause serious bodily injury is a lesser-included offense of both attempted first- and second-degree murder. *See, e.g.*, *Middleton v. State*, 238 Md. App. 295, 308-09 (2018). To find first-degree assault, the jury must conclude, beyond a reasonable doubt, that the defendant committed a second-degree assault (here, in the mode of battery) and that he intended to cause serious physical injury in the commission of the assault. Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CL"), § 3-202(b)(1).

Perfect self-defense results in a verdict of not guilty on all charges. *Porter v. State*, 455 Md. 220, 235 (2017); *Dykes*, 319 Md. at 210-11; *Bryant v. State*, 83 Md. App. 237, 245-46 (1990). Imperfect self-defense mitigates attempted murder (of either degree) to attempted voluntary manslaughter, *Cox v. State*, 311 Md. 326, 334 (1988); *State v. Faulkner*, 301 Md. 482, 500 (1984), and, at the same time, mitigates first-degree assault predicated upon the specific intent to cause serious bodily injury to second-degree assault. *Christian v. State*, 405 Md. 306, 309-10 (2008).[21]

Double Jeopardy and Collateral Estoppel

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Fifth Amendment prohibition against double jeopardy "is applicable to the states through the Fourteenth Amendment." *Scriber v. State*, 437 Md. 399, 407 (2014).[22] Although the Constitution of Maryland lacks a direct analogue to the federal Double Jeopardy Clause, "Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *Id*. at 408 (quotation marks and citations omitted).

[21] The circuit court's instructions on perfect and imperfect self-defense were substantially similar to MPJI-Cr 4:17.14 and are reproduced in the Background section above.

[22] The United States Supreme Court first held that the Double Jeopardy Clause of the Fifth Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment in *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

The Double Jeopardy Clause "had its origin in the three common-law pleas of *autrefois acquit, autrefois convict*, and pardon." *United States v. Scott*, 437 U.S. 82, 87 (1978). Those three pleas "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *Id.*

The collateral estoppel effect of double jeopardy, in contrast, is a more-recently recognized variant—adopted by the United States Supreme Court in *Ashe v. Swenson*, 397 U.S. 436 (1970)—that applies when a dispositive issue of ultimate fact has been determined by a prior valid and final judgment. The Supreme Court of Maryland explained in *Woodson*, 338 Md. at 331:

> Collateral estoppel is embodied within the Fifth Amendment's guarantee against double jeopardy. *See Ashe v. Swenson*, 397 U.S. 436, 446 (1970). The doctrine of collateral estoppel provides that "when a[n] issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. We have held that although collateral estoppel is usually invoked when there has been a prior acquittal, the "critical consideration is whether an issue of ultimate fact has been previously determined in favor of the defendant." *See Butler v. State*, 335 Md. 238, 253 (1994). In a collateral estoppel challenge, the burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). It has been held that a defendant has a difficult burden to overcome in establishing that the issue was actually decided in the first proceeding. *See United States v. Clark*, 613 F.2d 391, 400 (2d Cir. 1979), *cert. denied*, 449 U.S. 820 (1980), cited in *Butler*, 335 Md. at 254.

This determination is intensively fact-based and requires a defendant to demonstrate that a jury necessarily resolved an issue of ultimate fact in his favor that precludes a judgment in an ongoing prosecution. *Currier v. Virginia*, 585 U.S. __, 138 S. Ct. 2144, 2150 (2018); *Bravo-Fernandez v. United States*, 580 U.S. 5, 12 (2016). The test envisioned

by *Ashe* and its progeny "is a demanding one." *Currier*, 585 U.S. at __, 138 S. Ct. at 2150. "A second trial 'is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question.'" *Id.* (quoting *Yeager v. United States*, 557 U.S. 110, 133-34 (2009) (Alito, J., dissenting)). Rather, to "say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Id.* (quoting *Yeager*, 557 U.S. at 127 (Kennedy, J., concurring in part and concurring in the judgment)).

An additional limitation comes into play where, as here, the jury reaches a partial verdict, but the result is unknown because the verdict was not taken. As noted above, in *Woodson*, 338 Md. 322, the Supreme Court of Maryland considered such a circumstance. In that case, the defendant was charged in the circuit court with distribution of a controlled dangerous substance ("CDS") (Count 1), possession of a CDS with intent to distribute (Count 2), possession of a CDS (Count 3), and conspiracy to distribute a CDS (Count 4). *Id.* at 325. A jury trial was held on those charges. After the close of all the evidence, the court granted judgment of acquittal on Count 4 (the conspiracy count), and the three remaining counts went to the jury. *Id.*

"The next day, the jury submitted a note informing the judge that it had reached verdicts on two of the remaining three counts and that it was at an 'impasse' on the other count." *Id.* at 325-26. In response to the note, the court asked the jury whether it had reached a verdict on Count 1 (distribution), to which the jury replied "that it had reached a

verdict of 'not guilty' on that count," and "the court recorded that verdict." *Id.* at 326. Next, the court asked the jury whether it had reached a verdict on Count 2 (possession with intent to distribute), and the jury replied that it had not. *Id.* Subsequently, the jury informed the court that it was '"irrevocably deadlocked[,]"' and the court declared a mistrial on Counts 2 and 3 without inquiring further about any verdict on Count 3 (simple possession), even though the jury had previously reported that it had reached a verdict on two of the three counts. *Id.* Nevertheless, at the time the court declared a mistrial, "[n]either Woodson nor the prosecutor objected to the court's failure to take the verdict on Count 3." *Id*.

Prior to retrial, Woodson filed a motion to dismiss on the ground of double jeopardy. He contended "that the court's failure to take the verdict on Count 3 amounted to an acquittal of that count[,] and because Count 3 was a lesser included offense of Count 2, double jeopardy bar[red] retrial of Count 2." *Id.* Initially his motion was denied, and he was tried and convicted of both possession and possession of a CDS with intent to distribute, but his renewed, post-trial motion to dismiss both counts was granted. *Id.* at 326-27. The State appealed, and this Court affirmed. *State v. Woodson*, 100 Md. App. 97 (1994). The State then sought further review in the Supreme Court of Maryland. *State v. Woodson*, 336 Md. 354 (1994) (granting certiorari).

The Supreme Court affirmed as to Count 3, but reversed as to Count 2. *Woodson*, 338 Md. 322. The Court accepted the State's concession that there had been no manifest necessity to declare a mistrial as to Count 3 because the jury had informed the court that it had reached a verdict, and therefore, the Court held that double jeopardy barred retrial on

Count 3. *Id.* at 329-30. But the Court concluded that, even though Count 3 was a lesser-included offense of Count 2, and retrial of Count 3 was barred by double jeopardy, retrial of Count 2 was not barred by the dismissal—on double jeopardy grounds—of Count 3. *Id.* at 330-31.

In determining whether retrial of the greater offense in Count 2 was also precluded by the doctrine of collateral estoppel because of the Court's conclusion that double jeopardy barred retrial of the lesser-included offense in Count 3, the Court observed that Woodson had

> the burden of establishing that the jury actually decided an issue in his favor on the possession count [Count 3] which would prevent relitigation of that issue in a trial on Count 2, possession with intent to distribute. It is clear from the record of the proceedings in the instant case that Woodson has not met his burden. **No verdict was actually delivered on the possession count** in the instant case. **Because the jury did not render a verdict on the possession count, there is no judgment from which findings of fact in favor of Woodson can be inferred.** *See Schiro v. Farley*, [510 U.S. 222, 236] (1994) (holding that "the failure to return a verdict does not have collateral estoppel effect ... unless the record establishes that the issue was actually and necessarily decided in the defendant's favor").

Id. at 331-32 (emphasis added). As noted above, the trial judge in Gaitan's case came to the same conclusion regarding his argument that Counts 1 through 3 should be dismissed based upon collateral estoppel and double jeopardy.[23]

[23] The *Woodson* Court's rejection of Woodson's alternative claim—that the failure to take the verdict on a lesser-included offense "amounted to an acquittal of that count[,]" and retrial on the greater offense would violate double jeopardy, 338 Md. at 332—also weighs against Gaitan's argument for dismissal of all charges. In *Woodson*, the Court analogized the bar against retrial of the lesser-included offense to the entry of a nolle prosequi on that offense after jeopardy has attached. *Id.* at 333. The Court noted that "*an entry of a nolle prosequi on a lesser included offense after jeopardy has attached* is only (continued…)

The *Woodson* Court further emphasized that collateral estoppel "requires a finding that an issue was *actually decided*" and that it "cannot arise from speculation as to what facts may have been found when nothing in the record indicates that any facts were found in favor of Woodson." *Id.* at 332 (emphasis added). That limitation applies in the instant case**.**

With respect to Gaitan's argument that the court erred in granting the motion to dismiss Count 3, we conclude that the trial court was justified in declining to take a verdict on Count 3 because the jury's subsequent request for instruction on "first degree manslaughter" indicated a lack of final agreement on Count 3. And we agree with the State that Gaitan waived his motion to dismiss Count 3 during the hearing on the motion. But we also agree with the State's argument that, under *Woodson*, even if the trial court had erred by not taking a verdict on Count 3, and even if Gaitan had not withdrawn his motion to dismiss Count 3, that would not have required dismissal of the greater offenses in Counts 1 and 2. This is because, as explained in *Woodson*, where the grant of a motion to dismiss on grounds of double jeopardy is based upon the failure to take a jury verdict, "there is no judgment from which findings of fact in favor of [the defendant] can be inferred." *Id*. And

an acquittal on that count for double jeopardy purposes and *does not represent either an adjudication of not guilty of the offense or factual findings in favor of a defendant*," *and therefore, "the continuation of the trial on the greater offense is permissible*." *Id.* at 335-36 (emphasis added). Because the latter "does not operate as an acquittal of the underlying offense[,]" the Court reasoned that "the erroneous declaration of a mistrial" on a lesser-included offense "should not preclude retrial of" a greater offense "on which a mistrial was declared because of manifest necessity." *Id.* at 333.

the failure to take a jury's verdict on Count 3 "did not amount to an adjudication of not guilty of the offense[.]" *Id*. at 336.[24]

As in *Woodson*, Gaitan did not meet his "difficult burden" to satisfy the requirements for collateral estoppel to apply by demonstrating that the jury's unknown verdicts establish "that an issue was actually decided" in his favor that bars retrial on the greater counts. *Id.* at 332. As our Supreme Court observed, collateral estoppel "cannot arise from speculation as to what facts may have been found when nothing in the record indicates that any facts were found in favor of" the defendant. *Id.* Furthermore, as in *Woodson*, the dismissal of Counts 4 and 5 has no preclusive effect on retrial of the greater offenses. *Id.* at 335-36.

The circuit court correctly denied Gaitan's motion to dismiss Counts 1, 2, and 3, and we remand for further proceedings.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLANT.

[24] *Cf. Woodson*, 338 Md. at 332, wherein the Court stated:

> Collateral estoppel requires a finding that an issue was actually decided. In the instant case, collateral estoppel cannot arise from speculation as to what facts may have been found when nothing in the record indicates that any facts were found in favor of Woodson. In fact, the unannounced verdict in the instant case was in all likelihood a verdict of guilty. The most probable scenario is that the jury decided that Woodson was guilty of possession but could not agree on whether he had the intent to distribute.