Circuit Court for Baltimore City
Case No. 121250002

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1446

September Term, 2022

TIONN CASEY

v.

STATE OF MARYLAND

Wells, C.J.,
Shaw,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: November 16, 2023

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

Appellant Tionn Casey asked his apartment management company to fix his air conditioner on multiple occasions. Akkra Tucker, a maintenance technician, reported to Casey's apartment after each request. During the last visit, an argument ensued between the two. Casey then shot Tucker three times in the left leg. Subsequently, Casey was arrested and charged with attempted first-degree murder, attempted second degree murder, attempted voluntary manslaughter, first- and second-degree assault, use of a firearm in a crime of violence, and discharging a firearm within Baltimore City limits.

At trial, on its own initiative, the court instructed the jury on imperfect self-defense for the attempted murder-related charges, in addition to instructing for perfect self-defense on all charges. However, the court did not similarly give an imperfect self-defense instruction for the first- and second-degree assault charges. Casey was ultimately acquitted of all the attempted murder charges but was convicted of first-degree assault, use of a firearm in a crime of violence, and discharging a firearm in Baltimore City. The court sentenced him to forty years in prison.

On appeal, Casey submits the following issues for our review, which we have slightly rephrased:[1]

[1] Casey's questions presented verbatim are as follows:

1. Did the Circuit Court commit reversible error by failing to instruct the jury that the defense of imperfect self-defense applies to first degree assault?

2. Did the Circuit Court commit reversible error by imposing a sentence greater than the maximum penalty for attempted voluntary manslaughter, of which Appellant was acquitted?

1. Did the circuit court err by not instructing the jury about imperfect self-defense for the first-degree assault charge, and

2. Did the circuit court properly impose a twenty-year sentence for first-degree assault?

For the reasons we will discuss, we affirm the circuit court on both issues.

FACTUAL AND PROCEDURAL BACKGROUND

Leading up to the shooting that happened here, Casey made several requests to his apartment's maintenance office for air conditioning service because his apartment would not cool. Casey made these requests because he suffers from sarcoidosis, a severe lung disease that makes breathing more difficult in hotter temperatures. Tucker responded to each request and told Casey the air conditioner was functioning within the prescribed parameters. With each subsequent visit, the interactions between Casey and Tucker became more hostile because Casey adamantly disagreed with Tucker's assessment that the air conditioner was working properly.

On August 13, 2021, Tucker arrived at Casey's apartment to once again service Casey's air conditioner. At trial, Tucker testified that he entered the apartment and within five minutes found the air conditioner to be in good working condition, despite the apartment being eighty degrees Fahrenheit. The two began arguing, leading Casey to demand Tucker leave his apartment and threatening to call his manager. Eventually, Casey shot Tucker three times in the left leg. Casey was arrested and charged with attempted first-degree murder, attempted second-degree murder, attempted voluntary manslaughter, first- and second-degree assault, use of a firearm in a crime of violence, and discharging a

firearm within Baltimore City limits. Casey's criminal trial occurred from July 14, 2022, to July 18, 2022.

Casey did not deny shooting Tucker; rather, he testified he acted in self-defense only after the altercation with Tucker became hostile. During trial, Casey, laying out his self-defense claim, argued Tucker would have hurt him if given the chance; however, Casey did not delineate how Tucker's actions posed an immediate threat of serious bodily injury.[2] Furthermore, the evidence indicated Casey armed himself with his legal firearm before Tucker entered his apartment.

At the close of the evidence, the judge discussed the jury instructions both parties had proposed. Unprompted by either side, the judge said that he was prepared to also give the instruction for imperfect self-defense for attempted murder. Later, the court gave the jury the following instruction:

> Attempted voluntary manslaughter is a substantial step beyond mere preparation for the intentional taking of a life which would be attempted murder but is not 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 evidence that the Defendant attempted to kill Akkra Tucker in self-defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case. 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 did act in partial self-

[2] Casey testified that "if [Tucker] put his hands on [him], he can do body harm to [him]." Several other questions lead Mr. Casey to describe what Tucker "might do" or what "might happen." Casey claimed Tucker "jumped at him," tried to "wrestle him," and ultimately "came to close" to him, violating (what Casey described as) Casey's "idiosyncratic personal-space radius."

> defense, the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.

(cleaned up). The judge also instructed the jury on perfect self-defense for all charges; but the judge did not give an imperfect self-defense instruction for the assault-related charges. Significantly, neither the defense nor the State asked for or objected to the omission of this instruction. Further, the judge did not initially provide the jury with an instruction for the charge of second-degree assault, but after the jury informed the court of this omission, the court provided the Maryland Pattern Jury Instruction on second degree assault, without objection from either party.

The jury acquitted Casey of all attempted murder-related charges but convicted him of first-degree assault, using a firearm in a crime of violence, and discharging a firearm in Baltimore City. At sentencing, the State recommended the court depart from the guidelines for the first-degree assault and use of a firearm in a crime of violence convictions, advocating for an increased sentence twenty and fifteen years, respectively.[3] The court sentenced Casey to a total of forty years—twenty years for each of the aforementioned charges, to be served consecutively, and one year to be served concurrently for discharging a firearm in Baltimore City.

On October 25, 2022, Casey timely filled a Notice of Appeal. The State responded timely.

[3] The trial court judge commented harshly on Casey's actions: "I have no idea how this level of violence resulted from Tucker doing his job. . .." Casey's actions were "completely senseless." Lastly, the judge stated that "this is not a guidelines case . . .[,] and [she was] truly, just as a human being stunned by what [Casey] did in this case."

We will supply additional details whenever relevant to our analysis.

DISCUSSION

Casey asserts the circuit court committed two reversible errors. *First*, Casey argues the jury was not properly instructed on imperfect self-defense regarding the first-degree assault charge. Specifically, Casey claims he was entitled to an imperfect self-defense instruction, and he did not receive the instruction because his counsel was allegedly ineffective and the court neglected to spontaneously provide the instruction, constituting plain error. *Second*, Casey contends the court illegally sentenced him for first degree assault to a term exceeding the maximum penalty for attempted voluntary manslaughter, for which one first degree assault modality is a lesser included crime.

The State makes several counterarguments. *First*, discussing the imperfect self-defense issue, the State makes four sub-arguments: 1) Casey was not entitled to an imperfect self-defense instruction for first-degree assault because the precedent he relies upon is no longer good law; 2) Casey was not factually entitled to an imperfect self-defense instruction because there was no evidence that Casey subjectively believed he was in immediate or imminent danger of death or serious bodily harm; 3) Casey failed to establish defense counsel was constitutionally ineffective; and 4) Casey failed to show the court committed plain error when it did not provide the instruction *sua sponte*. *Second*, the State contends the court properly imposed a twenty-year sentence for first degree assault.

A. Casey Did Not Preserve the Issue of an Imperfect Self-Defense Instruction for the Assault Charges and We Decline to Review for Plain Error

As far as the imperfect self-defense issue is concerned, we start by noting that the issue has not been preserved for our review. At trial, the defense did not object or otherwise bring to the court's attention the fact that the court had not instructed the jury on imperfect self-defense for the first-degree assault charge. Under Maryland Rule 8-131(a), "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

The second clause in the Rule (beginning with "but the Court may decide") allows us to review unpreserved issues by exercising what is commonly referred to as "plain error review." We rarely exercise that discretion. As the Supreme Court of Maryland has cautioned appellate courts, plain error review is "reserved for errors that are compelling, extraordinary, exceptional, or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). The error must be "so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Id* (quoting *Diggs v. State*, 409 Md. 260, 286 (2009).

Appellate precedent shows that plain error occurs when the error "undermined a core value of constitutional criminal jurisprudence." *Id*; *see e.g., Savoy v. State*, 429 Md. 232, 255 (2011) (the court erred in its reasonable doubt instruction); *State v. Hutchinson*,

287 Md. 198, 208 (1980) (the court failed to instruct the jury that they could find the defendant not guilty). However, the vast majority of appellate courts have declined to exercise discretion. *See, e.g.*, *Trimble v. State*, 300 Md. 387, 399 (1984) (declining to find plain error where the jury instructions omitted intellectual disability as a basis for insanity to find the defendant not guilty); *Boulden v. State*, 414 Md. 284, 313 (2010) (declining to conduct plain error review of efficacy of jury trial waiver); *Rubin v. State*, 325 Md. 552, 588 (1992) (declining to find plain error when the State said in its closing arguments, without any evidentiary basis, that the defendant had attempted to poison someone). Additionally, "because of the difficulty of demonstrating facts that are sufficiently compelling to invoke plain error review, it remains 'a rare, rare, phenomenon,' especially when the alleged error involves a missing or erroneous jury instruction." *Steward v. State*, 218 Md. App. 550, 566 (2014) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003).

As a predicate to exercising our discretion regarding plain error review, there are four conditions that must be met:

> (1) there must be an error or defect, some sort of deviation from the legal rule, that has not been intentionally relinquished or abandoned, i.e., affirmatively waived by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the . . . court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (quoting *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up).

We decline to exercise our discretion to review for plain error in this instance because we do not think the alleged legal error was clear and obvious. The questions are

whether Casey was entitled to an imperfect self-defense instruction for first degree assault, and whether the circuit court judge was required to provide the instruction absent defense counsel's request. Casey contends he was clearly entitled to the jury instruction as both a matter of fact and matter of law. We disagree.

Casey relies on *Green v. State*, 118 Md. App. 547, 562 (1998), asserting that "a trial court must properly instruct the jury on a point of law that is supported by some evidence in the record." Casey argues because he was acquitted of the attempted murder-related charges, the self-defense claim was effective, and therefore that "record evidence" was sufficient to require the judge to provide a similar instruction for first-degree assault. Casey also cites *Christian v. State*, 405 Md. 306 (2008) as direct precedent to support his claim that he is entitled to the imperfect self-defense instruction as a matter of law.

Casey's arguments are flawed for several reasons. *First*, in *Green* we analyzed Maryland Rule 4-325(c) to determine whether an alleged inadequate instruction was improper. Maryland Rule 4-325(c) provides as follows:

> 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. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a request instruction if the matter is fairly covered by instructions actually given.

Id. (emphasis added). Beyond the rules Casey cites, *Green* further emphasized "it is incumbent upon the court, . . . **when requested in a criminal case**, to give an instruction on every essential question or point of law supported by the evidence." *Green*, 119 Md.

App. at 562 (emphasis added).[4] Rule 4-325(c)'s focus is on when a party requests an instruction. That is not what happened here. Neither Casey nor defense counsel requested an imperfect self-defense instruction for first-degree assault. If the party does not request the instruction, Rule 4-325(c) explicitly states that the court "may" instruct the jury as to the applicable law but is not required, and "[w]hether to give a jury supplemental instruction in a criminal case is within the discretion of the trial judge." *Lovell v. State*, 347 Md. 623, 657 (1997).

Second, Casey contends there was sufficient evidence to establish he was entitled to the imperfect self-defense instruction as a matter of fact. A defendant is entitled to a jury instruction where "there is any evidence relied on by the defendant which, if believed, would support his claim," and the instruction is applicable "if the evidence is sufficient to permit a jury to find its factual predicate." *McMillian v. State*, 428 Md. 333, 356 (2012); *Bazzle v. State*, 426 Md. 541, 550 (2012). "The source of the evidence is immaterial; it may emanate solely from the defendant"; however, the evidence must actually be "adduced." *Wilson v. State*, 422 Md. 533, 542 (2011). Whether the evidence is sufficient to permit a jury to finds a claim's factual predicate is an issue the Maryland Supreme Court has discussed in the past; the Court explained as follows:

[4] The court in *Green* ultimately held: "In view of the court's failure to give an instruction that included the defense asserted here, we must reverse and remand for new trial." 119 Md. App. at 564. The court ignored a defense that was sufficiently asserted regarding a specific charge, whereas Casey did not assert imperfect self-defense for first degree assault. *See also Preston v.* State, 444 Md. 67, 81 (2015) ("Whether to give a requested jury instruction lies within the sound discretion of the trial judge unless the refusal amounts to a clear error of law.").

> The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a prima facie case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.

Bazzle, 426 Md. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292–93 (1998)).[5] The Court in *Bazzle* was analyzing another situation with a requested jury instruction, which we do not have here; however, when applying the "some evidence" threshold to this case, Casey failed to produce the minimum threshold of evidence necessary to establish imperfect self-defense.

For imperfect self-defense, the defendant must only show that he actually believed he was in danger, even if that belief was unreasonable. *Porter v. State,* 455 Md. 220, 235 (2017). To assert imperfect self-defense, the defendant is not required to show that he used a reasonable amount of force against his attacker—only that he actually believed the amount of force used was necessary. *Id.* (citing *State v. Smullen*, 380 Md. 233, 252 (2004)).

Casey did not provide sufficient evidence that during the altercation with Tucker he believed he was in immediate or imminent danger of death or serious bodily injury. Our

[5]"[T]he threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction: '*Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says— 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Bazzle*, 426 Md. at 551 (emphasis added) (The Petitioner failed to show "some" evidence to support his defense, even after setting forth evidence of his blood alcohol content and memory loss on the night of the crime, combined with a witness's testimony that the petitioner was "almost about to pass out," and the illogical way the assault was committed).

review of the record reveals that Casey asserted he was "weary (sic)[6] of Tucker" and stated "if [Tucker] put his hands on me, he can do body harm to me." Additionally, Casey said there was an argument, and Tucker got too close to him—four feet away—but nothing to indicate Tucker threatened him with a tool or some sort of physical force that would cause Casey to feel an immediate threat of serious bodily harm or death. Rather, Casey felt "weary (sic)" due to a past altercation where Tucker "got in his face," but a prior mental state will not suffice to show an actual belief at that given time. *See State v. Martin,* 329 Md. 351, 365 (1993) ("It is the defendant's subjective belief at the moment that the fatal shot is fired that is relevant and probative, evidence of a prior mental state will not suffice to support an imperfect self-defense jury instruction."). Additionally, Casey testified that Tucker tried to "jump" at him and "wrestle" him, but he did not discuss how Tucker's actions made him fear serious bodily injury or death. [7]

Even if Tucker moved too close to Casey's face, tried to jump at him, and attempted to wrestle him, that is still not sufficient evidence of Casey's actual belief of immediate or

[6] At oral argument, it became apparent there were competing views of what Casey actually meant by the use of the word "weary." The AAG thought Casey meant what he said, "weary." Two judges on the panel said they thought he meant something different. One judge thought Casey meant he was *leery* of Tucker. Another judge thought Casey was *wary* of Tucker.

[7] To support Casey's assertion, defense counsel cross examined Tucker, in part, regarding Tucker allegedly "lunging" at Casey, causing Casey to fear serious bodily injury. Further evidence did not substantiate the questioning, but defense counsel attempted to utilize Tucker's statements about his location in the apartment to contradict his testimony that he was facing the door when he was shot. However, there was no corroborative evidence beyond the question.

imminent serious bodily harm and does not provide justification for shooting Tucker three times. Maryland appellate courts have determined what sufficiently constitutes "adducing" "some evidence." *Bazzle*, 426 Md. at 551. For example, the Maryland Supreme Court emphasized a defendant who testified he thought he had to "kill or be killed" dispositively showed the requisite mental state. *Wilson*, 422 Md. at 543. Additionally, the Court held similarly when the defendant testified at trial that the victim "grabbed a steak knife cut . . . threw [him] on the bed, got on top of [his] chest[,] . . . [and] hollered that he was going to kill him . . . ." *Dykes v. State*, 319 Md. 206, 219 (1990). *But see Lee v. State*, 193 Md. App. 45, 65 (holding that the defendant testifying that "maybe one of those people would get hurt" was not "some evidence" of the requisite mental state).[8] No facts in the record can support even an unreasonable belief that Casey actually believed he was in imminent danger of serious harm to justify shooting Tucker. Casey did not testify as to his mental state like the defendants in *Wilson* and *Dykes*; rather, he only explained what "might happen," similar to the defendant in *Lee*. Therefore, Casey was not entitled to the imperfect self-defense instruction as a matter of fact.

Finally, whether Casey was entitled to the instruction as a matter of law raises an unsettled legal issue and therefore does not merit plain error review. The lack of clarity concerns whether *Christian v. State*, 405 Md. 306 (2008) is still good law. Casey contends first-degree assault is "a shadow form" of homicide, which allows imperfect self-defense

[8] Although discussing defense of others, the mental state similarly requires that "the defendant **actually believed** that the person defended was in immediate and imminent danger of death or serious bodily harm." *Lee*, 193 Md. App. at 57 (emphasis added).

to be used as a mitigator. *Christian*, which relied on *Roary v. State*, 385 Md. 217 (2005), holds that imperfect self-defense applies to first degree assault:

> [T]he result of *Roary* is that the statutory crime of first degree assault . . . could supply the malice necessary to charge a defendant with murder if the victim dies. That intent to commit first degree assault may now serve to sustain a murder charge convinces us that statutory first degree assault should be considered, under certain circumstances, a shadow form of homicide in Maryland. The application of mitigation defense is still limited to only criminal homicide and its shadow forms on the basis that only homicide and its shadow forms require the same prove of malice. But under *Roary*, the intent to commit first degree assault suffices to imply the malice required for a murder conviction. Where such intent may be imputed to underlie a murder conviction, . . . mitigation defenses should be available for charges of first degree assault.

Christian, 405 Md. at 332–33.

But the State points out that *Jones v. State*, 451 Md. 680 (2017), overturned *Roary*. In *Jones*, the Maryland Supreme Court explicitly overturned the holding in *Roary*,[9] holding, "first degree assault, either intent to inflict serious bodily injury or assault with a firearm, cannot, as a matter of law, serve as the underlying felony to support felony murder," therefore, "*Roary v. State* . . . is overturned." *Jones*, 451 Md. at 708.

Casey contends *Jones* does not overturn *Christian* simply because it abrogated *Roary*. He argues that *Christian*'s holding discusses mitigation, whereas the court in *Roary* explicitly states mitigation was not at issue. While an interesting distinction, we disagree. The language Casey cites from *Christian* regarding the application of mitigating first

[9] The Court in *Roary* held assault in the first degree "when committed in a manner inherently dangerous to human life may be a predicate felony for second degree felony murder," thus mitigation defenses for murder apply to first-degree assault.

degree assault with imperfect self-defense appears to come directly from the holding set forth in *Roary*. Although *Roary* may not discuss mitigation, *Christian* applies its holding to render mitigation defenses for murder as available for first degree assault, which logically includes imperfect self-defense.

Jones held that first degree assault was not "a shadow form" of murder, the very theory upon which *Christian* reasoned mitigation defenses apply to first degree assault. Therefore, logically it would follow that *Jones* eviscerates *Christian*. Mindful of our place in the judicial hierarchy, we leave it to our Supreme Court, should it see fit, to formally abrogate *Christian*. On this point we agree with Casey: "[i]t is not up to this Court . . . to overrule a decision of the [Maryland Supreme Court] that is directly on point . . . . The rulings of the [Supreme Court] remain the law of this State until and unless those decisions are either explained away or overruled by the [Supreme Court]." *Foster v. State*, 247 Md. App. 642, 651 (2020). Accordingly, in so far as we are concerned with the application of plain error, we cannot say that *Christian*'s holding is so obvious that circuit court plainly erred in not spontaneously providing Casey with an imperfect self-defense instruction for first-degree assault.

B. We Decline to Address Casey's Claim of Ineffective Assistance of Counsel on Direct Appeal

As a separate issue, we decline to review Casey's claim of ineffective assistance of counsel on direct appeal. It is well settled that ineffective assistance of counsel claims should be reviewed at the trial court level on post-conviction review rather than on direct appeal. *Mosley v. State*, 378 Md. 548, 565 (2003). However, there "may be exceptional

cases where the trial record reveals counsel's ineffectiveness to be so blatant and egregious that review on appeal is appropriate." *Id.* at 562 (internal citations omitted). The Maryland Supreme Court has held that "the rare instances in which we have permitted review on direct appeal" are "only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel." *Id.* at 566; *see also In re Parris W.*, 363 Md. 717, 726 (2001) (the exception applies "when the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim").

This case is not one so "blatant and egregious" as to illustrate the ineffectiveness of defense counsel. After all, Casey was seemingly well-served by counsel in securing acquittals on three attempted-murder related charges. Whether it was counsel's strategy not to ask for imperfect self-defense for first-degree assault is not sufficiently developed in this record. His claim of ineffective assistance must wait for a post-conviction proceeding, should he wish to raise it.

C. Casey's Sentence for First-Degree Assault Was Not Illegal

Next, we discuss Casey's twenty-year sentence for first-degree assault. His basic premise is that we do not know (or there is at least an ambiguity about) the modality under which the jury convicted Casey of first-degree assault. Further, he asks whether first-degree assault merges into attempted voluntary manslaughter as a lesser included offense. We need not discuss the merger issue because Casey was not convicted of attempted voluntary manslaughter. There can be no merger into a non-existent offense. Thus, the issue of which modality of first-degree assault Casey was convicted of is irrelevant. We explain.

Maryland law articulates two modalities for first degree assault: 1) intentionally causing or attempting to cause serious physical injury, and 2) committing an assault with a firearm. Md. Crim. § 3-202. The Maryland Supreme Court has held the "serious physical injury modality" merges as a "lesser included offense of the greater offense of attempted voluntary manslaughter." *Dixon v. State*, 364 Md. 209, 241 (2001). Although *Dixon* is binding precedent on this court, the general rule of merger does not apply to Casey's convictions, therefore *Dixon* does not apply in the manner Casey contends.

Merger is "the mechanism used to 'protect a convicted defendant **from multiple punishments** for the same offense.'" *State v. Frazier*, 469 Md. 627, 641 (2020) (quoting *Brooks v. State*, 439 Md. 698, 737 (2014) (emphasis added); *see also In re Montrail M.*, 325 Md. 527, 534 (1991) ("[O]ne of the protections the doctrine of merger affords goes to the preclusion of multiple punishments for the same offense. A merger serves, ordinarily, to preclude a separate sentence on each offense. The permissible punishment is that imposed on the greater offense."). The merger doctrine protects a defendant from being punished for a lesser included offense when he "is convicted of a greater included offense." *Moore v. State*, 198 Md. App. 655, 689 (2011) (citations omitted).[10]

Maryland caselaw discussing the merger doctrine analyzes it under the intentions set forth in the Double Jeopardy Clause of the United States Constitution; to protect a defendant from being punished multiple times for the same offense. To be punished

[10] While Maryland law follows both the Required Evidence Test and the Rule of Lenity when determining if two offenses should merge, we need not discuss them because both tests only apply when the defendant has been convicted of both offenses.

multiple times requires there to be multiple punishments for the court to effectively merge the offenses. Casey was not punished multiple times for the same offense for the merger doctrine to apply. Casey was convicted of two separate offenses; however, the merger doctrine applies to the offenses classified as the lesser and greater offenses, which in this case, according to Casey, would be first degree assault and attempted voluntary manslaughter. But Casey was acquitted of the voluntary manslaughter charge, therefore, there is no greater offense for first degree assault to merge into. Because the merger doctrine does not apply, which assault modality the jury chose to convict Casey is irrelevant.

Finally, the court's well-stated reasons to go above the Sentencing Guidelines and sentence Casey to twenty years for first degree assault are amply set forth in the record. In brief, the court determined that Casey's conduct, arming himself with a handgun prior to meeting Tucker in what was a seemingly endless dispute about Casey's air conditioner and then shooting him multiple times was outrageous. In short, the court explained why it gave the sentence it did. The sentence is within the statutory limits and is not illegal.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY THE COSTS.