Circuit Court for Montgomery County
Case Nos. 133793C & 133794C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1606

September Term, 2019

STEPHAN LEROY LUNNINGHAM

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Wells,

JJ.

Opinion by Nazarian, J.

Filed: June 8, 2021

Stephan Lunningham was convicted of voluntary manslaughter by hot-blooded response to provocation and of second-degree arson, and he was sentenced to twenty-five years' imprisonment—the statutory maximum for manslaughter, ten years, plus the statutory maximum for second-degree arson, fifteen years, to be served consecutively. On appeal, he contends that the trial court erred in admitting statements he made during a police interrogation, wrongly excluded expert testimony on his state of mind, and violated his due process rights in sentencing him. We find no error in the trial court's denial of his motion to suppress, but we agree with him that the court erred in excluding his expert testimony and find that the error wasn't harmless, at least to the extent that he might have established perfect self-defense against the manslaughter charge. We do not reach Mr. Lunningham's contention regarding the illegality of his sentence. The result is that we affirm his conviction for arson, which wasn't subject to the self-defense defense, reverse the manslaughter conviction, and remand for further proceedings.

I. BACKGROUND

After graduating from high school, Mr. Lunningham enrolled in college, but after a semester of classes, found that he was unable to make ends meet financially. Over a period of several years, he worked full time and was promoted to managerial positions.

Beginning in early 2017, though, Mr. Lunningham became addicted to crack cocaine and met Angela Fay Thomas, a crack dealer in the Germantown area. Soon after, Mr. Lunningham started not only to buy crack cocaine from Ms. Thomas, but also to smoke it with her and her friends on a daily basis. A month or so later, Mr. Lunningham began to

ride around with Ms. Thomas and serve as her driver. In the beginning, Ms. Thomas was supportive and kind towards Mr. Lunningham, but over time, their relationship changed. Ms. Thomas began withholding crack cocaine from Mr. Lunningham unless he completed tasks for her, such as driving her to do errands or to pick up food. From March through October 2017, Mr. Lunningham drove every day for Ms. Thomas, and his addiction and his work for her led to a decline in his mental health and diminished his ability to stay employed.

In October 2017, Mr. Lunningham sought help. He told his mother about his addiction, and he was admitted to Mountain Manor, a drug rehabilitation facility, in November 2017. One month later, after completing the program, Mr. Lunningham was discharged and started to receive counseling from an outpatient recovery facility. He was doing well in recovery and took several measures to avoid Ms. Thomas and others that he associated with his addiction. In January 2018, Mr. Lunningham started a new job and began taking college classes.

In February, Ms. Thomas and her friends approached Mr. Lunningham while he was walking home. She passed him a few grams of crack, then drove away. Mr. Lunningham returned home, succumbed to his addiction, and smoked the crack. He could not smoke the large quantity of crack Ms. Thomas passed to him, so he left his house to smoke the remainder with Ms. Thomas and her friends.

After resuming crack use, Mr. Lunningham did not return to the outpatient recovery facility and stopped attending class. At first he continued to work, but he spent more and

more time smoking crack and driving Ms. Thomas and her friends around town in exchange for drugs.

On March 11, 2018, as Mr. Lunningham was getting ready to go to work, Ms. Thomas told him that she needed him to drive her into Washington D.C. to pick up crack from her supplier. Mr. Lunningham called work and got the day off so that he could drive her. Ms. Thomas and Mr. Lunningham drove to the supplier in D.C., got the drugs, and headed home. On the way back, Mr. Lunningham took a detour, which made Ms. Thomas upset, and she started hitting him in the face and chest while he drove. Mr. Lunningham pushed her away with his right arm. Then, Ms. Thomas opened the glove compartment and pulled out a knife. Mr. Lunningham pulled the car over as Ms. Thomas swung the knife. He blocked her arm and "ended up stabbing her." Mr. Lunningham took the knife and stabbed Ms. Thomas several more times while she fought back, then continued stabbing until her body was limp.

In shock from the events, Mr. Lunningham drove around the Germantown area for a few days. During that time, he moved Ms. Thomas's body from the front seat to the back seat of the car, withdrew money from Ms. Thomas's account at an ATM, got gas, and attempted suicide several times.

Three days later, early in the morning on March 14, 2018, Mr. Lunningham purchased gas for the second time—using a gas can—because the car had run out of gas. After pouring some of the gas from the can into the car's fuel tank, Mr. Lunningham found an open area on the side of the road to pull over. He poured the remainder of the gas into

the car with Ms. Thomas's body, then lit the car on fire.

Less than an hour later, emergency personnel arrived to put out the fire. Police found Ms. Thomas's body in the back seat of her car, and they began a homicide investigation. The medical examiner determined there were nineteen stab wounds and twenty-three cutting wounds on Ms. Thomas's body, the majority of which were soft tissue injuries and would not normally be fatal. Several of her wounds were categorized as defensive because they were on her forearms, hands, and legs. The medical examiner opined that the more likely cause of Ms. Thomas's death was blunt force trauma to her skull and the fact that her stabbing and cutting wounds were left untreated. Moreover, Ms. Thomas's body was severely burned and charred.

As detectives began investigating Ms. Thomas's homicide, Mr. Lunningham became a suspect, and on March 21, 2018, police arrested him. Detectives questioned him and charged him with murder and arson. The recorded police interrogation lasted nearly four hours. Over the course of the interview, Mr. Lunningham changed his story several times, but in the end, he confessed to murdering Ms. Thomas and burning her car.

Before trial, Mr. Lunningham moved to suppress the statements he made during the police interview. The circuit court held hearings on May 3, 2019 and May 29, 2019, and denied the motion to suppress. Also, the State filed a motion *in limine* to preclude Mr. Lunningham from offering expert testimony about his mental health and psychiatric profile. The expert, Dr. Solomon Meltzer, diagnosed Mr. Lunningham with Unspecified Depressive Disorder, Cannabis Use Disorder, and Cocaine Use Disorder and described

how these disorders affected Mr. Lunningham's mental state at the time of the incident. The trial court held a hearing on June 6, 2019 and granted the State's motion *in limine* precluding Dr. Meltzer from testifying at trial.

At the end of a six-day trial, Mr. Lunningham was found not guilty of first-degree and second-degree murder, guilty of voluntary manslaughter by hot-blooded response to provocation, and guilty of second-degree arson. The court sentenced him to twenty-five years of active incarceration—ten years for manslaughter and fifteen years for second-degree arson, to be served consecutively. He filed this timely appeal on October 16, 2019. We supply additional facts as needed below.

II. DISCUSSION

On appeal, Mr. Lunningham makes three arguments. He contends that the trial court erred in (1) finding that his statements to police were voluntary and denying his motion to suppress, (2) precluding his mental health expert from testifying at trial, and (3) sentencing him to the maximum statutory sentences for both of his convictions.[1] The State responds

[1] Mr. Lunningham framed his Questions Presented as follows:

> I. Did the trial court err by admitting inculpatory statements made by Appellant during a nearly four-hour police interview where the statements were improperly induced, and therefore not voluntarily made under Maryland law, and violated *Miranda* and its progeny?
>
> II. Did the trial court err in precluding Appellant from calling a mental health expert to offer testimony regarding Appellant's psychological profile that was relevant to his *mens rea* at the time of the offenses?
>
> III. Did the trial court punish Appellant for his acquittals for murder and impose a sentence that exceeded the statutory

that the circuit court (1) properly denied Mr. Lunningham's motion to suppress, (2) exercised proper discretion in granting the State's motion to excluded the mental health expert's testimony, and (3) exercised proper discretion in sentencing Mr. Lunningham.

A. Mr. Lunningham's Statements To Police Were Not Involuntary.

Mr. Lunningham argues that the inculpatory statements he made during the police interrogation were involuntary and, therefore, that the trial court erred when it admitted them. He contends that the statements were involuntary under Maryland nonconstituional law and that his *Miranda*[2] rights were violated because the detectives' statements vitiated his *Miranda* warnings, and that the State did not carry its burden of proving that his statements were voluntary and constitutional at the pre-trial suppression hearing. The State responds that his statements were voluntary under Maryland common law and not obtained through improper promises. In addition, the State says, Mr. Lunningham's *Miranda* rights weren't violated because the detectives never indicated that the interrogation would be confidential and that his statements could not be used against him, but merely asked him to tell the truth and provide Ms. Thomas's family with answers.

1. Mr. Lunningham's statements were voluntary.

The question of whether a statement was voluntary is a mixed question of law and fact that we review *de novo*. *See, e.g.*, *Smith v. State*, 220 Md. App. 256, 271–72 (2014). On review, "[w]e are limited to the facts presented at the suppression hearing, and we must

maximum penalty of ten years for manslaughter?

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

view the 'evidence and inferences that may be reasonably drawn therefrom in the light most favorable to the prevailing party.'" *Id.* (*quoting Lee v. State*, 418 Md. 136, 148 (2011)).

The confession of an accused will only be admitted if the State carries the burden of proving that the confession was (1) voluntary under Maryland nonconstitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with *Miranda*. *See, e.g.*, *Id.* at 273. On appeal, Mr. Lunningham does not challenge the voluntariness of his statements under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution nor Article 22 of the Maryland Declaration of Rights, so we address voluntariness under Maryland nonconstitutional law, as well as the detectives' compliance with *Miranda*. To determine whether a confession was voluntary, we look to "the totality of circumstances affecting the interrogation and confession." *Winder v. State*, 362 Md. 275, 307 (2001). Additionally, if "an accused alleges he was told that confessing would be to his advantage," we look to the test articulated in *Hillard v. State*, 286 Md. 145, 150 (1979). *Id.* at 307–08.

Under Maryland nonconstitutional law, "[w]hen the voluntariness of a confession is challenged properly, the State carries the burden of 'showing affirmatively that the inculpatory statement was freely and voluntarily made and thus was the product of neither a promise or a threat." *Winder*, 362 Md. at 306 (*quoting Hillard*, 286 Md. at 151). As in this case, "[w]hen a proper pretrial suppression motion is filed, the State must establish the

voluntariness of the statement by a preponderance of the evidence." *Id.* In general, courts assess voluntariness by weighing the totality of circumstances against a non-exhaustive list of factors, including the length of the interrogation, the manner in which the interrogation was conducted, the number of police officers present throughout the interrogation, and the age, education, and experience of the suspect. There is no set formula or specific weight courts give to one factor over another. *E.g.*, *Smith*, 220 Md. App. at 273.

"[A] confession is involuntary if it is the product of certain improper threats, promises, or inducements by the police." *Lee*, 418 Md. at 161. Put another way, "a confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession." *Williams v. State*, 375 Md. 404, 429 (2003). Inducement is improper when "it is implied, that making an inculpatory statement will be to [the defendant's] advantage, in that [the defendant] will be given help or some special consideration, and he makes remarks in reliance on that inducement." *Hillard*, 286 Md. at 153. Police can appeal to a suspect's "inner conscience" when conducting interrogations since a person who has committed a crime is not always eager to share the truth. *Winder*, 362 Md. at 305. But police confessions coerced through improper promises of leniency will be suppressed. *See, e.g.*, *id.*

A defendant seeking to exclude a confession must establish its coercive nature and that they relied on it in deciding to confess. We look *first* at whether "a police officer or an agent of the police force promises or implies to a suspect that he or she will be given special

consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession." *Id.* at 309. *Second*, we look at whether "the suspect makes a confession in apparent reliance on the police officer's statement." *Id.* The officer's promise must *cause* the suspect to confess—what matters is whether the statements *induced* him to confess. *See id.*; *see also Reynolds v. State*, 327 Md. 494, 509 (1992).

In this case, before trial, Mr. Lunningham moved to suppress his statements to police on the grounds that they were involuntary under the U.S. and Maryland constitutions and that the police violated his *Miranda* rights. The State countered that his statements were voluntary under the totality of the circumstances and that the police did not make implicit or explicit promises of leniency to induce Mr. Lunningham's confession and that police did not violate his *Miranda* rights. We agree with the State.

First, under Maryland nonconstitutional law, the trial court analyzed the totality of the circumstances appropriately. The court acknowledged that Mr. Lunningham was a high school graduate and recently had started college with a major in engineering and computers:

> THE COURT: There was nothing in his demeanor or manner that indicated that he had any confusion about that advice. His responses that were given were promptly given. And he said that he was in, I believe, in his first year of college or completed first year I forget which but either way a high school graduate and in fact majoring in engineering and computers in college.

The court also considered Mr. Lunningham's age and the length of the interrogation ("He is 30 years old. The interview was three and a half or three and a half plus hours

long."), as well as his demeanor and ability to communicate. And although Mr. Lunningham did look uncomfortable at times during the interrogation, there was no impairment in his ability to communicate effectively:

> THE COURT: In essence the argument that the totality of the circumstances on a number of factors serve to overcome the will of the defendant and voluntariness of his statement, his back pain which was apparent when he first entered the room and sat down. At times, I believe twice he had complained about his back, but it was in passing it wasn't in connection with a request for care.
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> I'll note that for virtually the entire interview of three and a half hours the defendant was in a rigid metal chair without back support beyond just the back of the chair, but not anything that had appearance of being in any way ergonomic. His communication and demeanor during the course of the interview did not reflect that he was in pain, that was impairing his ability to communicate, to articulate or to understand what was going on, or that he had any kind of impairment in communicating and taking in what the police officers said to him during the course of the interview because of pain.

The court added that Mr. Lunningham's vital signs were normal when he was examined shortly after the interrogation, and that his demeanor during the interrogation showed an "absolutely appropriate level of distress." Mr. Lunningham said at the time that he was sober, and the court found his actions consistent with that. After watching the interrogation video, we see no error in the trial court's finding that, under the totality of the circumstances, Mr. Lunningham's statements were voluntary.

Second, the trial court found that Mr. Lunningham's statements weren't induced by promises the police made either explicitly or implicitly:

> THE COURT: With respect to the allegation that there's an improper promise of leniency relied upon by the defendant.

> First of all on the issue of suggesting if you will a defense or suggestion that he may have acted in self-defense, that the victim was perhaps a hothead or difficult to get along with, they state that this is, if, was the word repeatedly used by the detectives. If this then it would be self-defense and it would change, it would not be first-degree murder, which frankly is a legally true statement.
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> It's not an inducement either directly or I think reasonably inferred by anyone to mean that, hey you just tell us its self-defense and we can forget about this first-degree murder charge that we told you is going to come down today regardless. And they said that that would change things and that is true.
>
> It is not an improper promise to induce him to make a statement it was a suggestion to him that, well, perhaps there is an explanation here. You know, maybe it was accident, or if it was self-defense . . . .

The court then addressed each statement made by the detectives and found that the detectives did not promise to protect Mr. Lunningham's family against retaliation:

> THE COURT: The offer of protection for the family was stated to by the police officer's job, that's what we do we'd protect you, we would protect your family, and that was raised by the defendant as I perceive his -- and I suggest a reasonable person would perceive his statement to be that, look, I, implying, I'd tell you the truth but I'm concerned that my family's going to get hurt. And the police officer at worst gives him some assurance that, look our job is to protect people and offer of police protection not in return for a prosecutorial benefit, the court does not find to be improper. It's not an implication of a special consideration upon which the defendant relied. It is a statement that in fact that's part of our duty as police officers to help protect people.

The trial court found that the detectives were telling Mr. Lunningham to tell them the truth but made it clear that Mr. Lunningham's statements were "not going to undercut a murder charge" other than if it were self-defense which "could have an impact on what

charges would be provable."

Mr. Lunningham points us to *Hill v. State*, but the interrogation in *Hill* contrasts easily with the interrogation here. 418 Md. 62 (2011). There, the detective told the defendant that the victim's family "did not want to see him get into any trouble, but they only wanted an apology." *Id.* at 78. The Court of Appeals held that the "objectively reasonable interpretation of the word 'trouble,' is trouble with the law" and that a layperson would not understand that the prosecutor could bring charges against the victim's wishes. *Id.* In Mr. Lunningham's interrogation, the detectives told him that they were seeking the truth *for* Ms. Thomas's family but didn't claim that Ms. Thomas's family wanted the State to be lenient with him. Further, the detectives never said or insinuated that the State might not charge Mr. Lunningham with murder. The detectives stated, accurately, that a legitimate claim of self-defense could mitigate the charges and that nothing Mr. Lunningham said during the interrogation would change the charge of first-degree murder. *See Ball v. State*, 347 Md. 156, 176 (1997) (holding that it is not inducement to tell a defendant that it would benefit them to provide a written confession); *Williams*, 219 Md. App. 295, 335 (2014) (detective's statement, "It could be as simple as a robbery gone bad or a flat out cold blooded first degree murder," was not improper inducement). We see nothing in this interrogation that qualifies as an inducement, improper or otherwise.

And even if the detectives' statements were viewed as inducements, there is no evidence that Mr. Lunningham relied on them in deciding to confess. We analyze the evidence presented at the suppression hearing in the light most favorable to the prevailing

party, the State. Mr. Lunningham did not testify at the suppression hearing, and the video of the interrogation doesn't reveal any basis on which we can conclude that he relied on the detectives' statements when making his confession. The video does reveal, as the trial court observed, that Mr. Lunningham offered different stories over the course of the interrogation because he understood that he would be charged with first-degree murder. The court found that Mr. Lunningham understood the seriousness of the situation, and "he repeatedly lied in recognition of that":

> THE COURT: So, the Court finds in both the totality of the circumstances and as to the individual sub issues that have been discussed that there was not improper inducement, improper promises. That [Mr. Lunningham]'s will was not overcome or overborne, the preponderance of the evidence reflects that, that he was not forced, unduly influenced or improperly promised or relied upon any improper promise to make the statements that were made by [] [Mr. Lunningham].

After four hours, Mr. Lunningham realized that the detectives had enough information to question his prior narratives and that trying to tell alternative versions of the event was not helping. But he didn't confess in reliance on any promise by the detectives. We see no error in the circuit court's conclusion that Mr. Lunningham's confession was voluntary.

2. Mr. Lunningham's Miranda *rights were not violated.*

The premise of Mr. Lunningham's *Miranda* argument is that the detectives were seeking a confession from him to provide the truth to Ms. Thomas's family and that saying so signaled to Mr. Lunningham that his confession was only for Ms. Thomas's family and was not intended or capable of being used against him in the court of law. The State

counters with *Ball v. State*, and the argument that "an officer's mere admonition to the suspect to speak the truth does not render a statement involuntary." 347 Md. at 175.

The warnings required by *Miranda v. Arizona* protect a suspect's Fifth Amendment right against self-incrimination. U.S. Const. amend V.; *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). "The *Miranda* Court put into place 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Lee*, 418 Md. at 149. These rights include the right to remain silent, the warning that anything the defendant says can be used against him in the court of law, the right to an attorney during interrogation, and the notice that if the defendant cannot afford an attorney, one will be appointed for them. *Miranda* rights continue throughout an interrogation, and police "may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspect's earlier waiver by rendering it unknowing, involuntary, or both." *Id.* at 151. If police subvert the *Miranda* warnings, the ensuing statements will be suppressed. *See id.* at 151–52. And when determining if *Miranda* rights have been subverted, we analyze what a layperson in the defendant's "position would have understood the words to mean," not what the detective thought or meant. *Id.* at 156.

Mr. Lunningham relies on *Lee v. State*, but the analogy doesn't work. In *Lee*, the Court of Appeals found a *Miranda* violation where the defendant asked the detective to clarify that the interrogation was being recorded, and the detective responded that it was "just between you and me, bud. Only you and me are in here." *Id.* at 157. The Court of

Appeals premised its holding and analysis on several cases that turned either on a detective insinuating that the questions would be confidential or the defendant requesting to make statements "off the record" after waiving their *Miranda* rights. That's not the same as a detective pressing Mr. Lunningham to tell the truth. The detectives requested a confession here because they wanted to "tell [Ms. Thomas's] mom what happened" and were "trying to get her mom answers, that's all it is. That's all it is." These and the other similar statements by the detectives didn't vitiate Mr. Lunningham's *Miranda* warnings—on their face, they sought the truth and the opportunity to share it, not to create a confidential confession environment. We read the record the same way the trial court did:

> THE COURT: The video does clearly reflect that he was advised of his rights, that he responded to those advice of rights after every statement affirmatively that he understood usually saying the word okay, and after each separate part of the *Miranda* warnings saying a statement like that, and at the end of the *Miranda* warnings noted that he did understand that advice of rights.
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> THE COURT: During the course of the interview the Court perceived no misunderstanding on his part about what was going on, what was being said to him or in any difficulty in communicating with clarity with the officers although there was a repeated failure on Mr. Lunningham's part to tell the truth. And I would say as an overall matter what I perceive the police officers to have done, and I'll get more specific on some of the specific assertions, was a pleading with him to tell the truth. And they implored what is reasonable such as saying, you know that's just not, that doesn't make any sense, nobody's going to believe that story, you don't believe that story.

Mr. Lunningham never appeared to believe that the interrogation was confidential. To the contrary, he knew he was going to be charged with first-degree murder, and the

versions of events he offered during the interrogation suggested that he knew his statements and confession would be used against him. We affirm the trial court's denial of Mr. Lunningham's motion to suppress.

B. The Trial Court Erred In Excluding Mr. Lunningham's Mental Health Expert.

Next, Mr. Lunningham argues that the trial court erred by precluding mental health expert testimony at trial because the testimony was relevant to the *mens rea* elements of the homicide charges. He contends that the expert testimony would have provided a psychological profile that was relevant to help the jury understand his mental state at the time of the incident. The State responds that the expert testimony lacked a nexus to Mr. Lunningham's *mens rea* at the time of the crime and was not supported by a sufficient factual basis. As we explain, though, *mens rea* issues were critical to the outcome of this case—Mr. Lunningham was acquitted of the murder charges and convicted of manslaughter, despite the absence of doubt that he caused Ms. Thomas's death. And because he had asserted a perfect self-defense defense, he should have had the opportunity to offer appropriately tailored expert psychological profile testimony, and the trial court erred in excluding it categorically.

Normally, the trial court's decision to exclude expert testimony is reviewed for abuse of discretion. "It is well settled that 'the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Clemons v. State*, 392 Md. 339, 359 (2006) (*quoting Oken v. State*, 327 Md. 628, 659 (1992)). "When the evidence offered

is in the form of expert testimony the admissibility of that evidence is largely left to the domain of the trial judge." *Simmons v. State*, 313 Md. 33, 41 (1988) (*citing Johnson v. State*, 303 Md. 487, 515 (1985)). Before admitting expert testimony, the trial court must make several determinations: (1) the evidence must be the proper subject for expert testimony, (2) whether the expert is qualified, and (3) "the expert's conclusions must be based upon a legally sufficient factual foundation." *Id.* at 41–42. Once these criteria are met, expert testimony is admissible so long as it does not reach an opinion on the ultimate issue in the case. *Id.* at 42. The purpose of expert testimony, though, is to aid the fact finder. *Id.* at 43. If it is possible that the jury could "draw the inference or conclusion from the evidence presented without the aid of the expert's opinion," it is unlikely that the expert testimony will be admitted. *Id.*

1. Defenses of perfect and imperfect self-defense

Mr. Lunningham raised both forms of the self-defense defense: perfect and imperfect. Perfect self-defense is a complete defense to a homicide charge and, if proven, results in acquittal—the fact finder will have found the homicide justifiable or excusable. *Dykes v. State*, 319 Md. 206, 210–11 (1990). To establish perfect self-defense, a defendant must prove (1) a reasonable belief that they were in imminent threat of deadly or serious bodily harm, (2) that they believed they were in danger at the time of the incident, (3) that they were not the aggressor, and (4) that the force was reasonable and not excessive.

Imperfect self-defense operates "to negate malice, an element the State must prove to establish murder" and mitigates a murder charge to voluntary manslaughter. *Dykes*, 319

Md. at 212 (*quoting State v. Faulkner*, 301 Md. 482, 486 (1984)). "Imperfect self-defense, however, requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so." *State v. Faulkner*, 301 Md. at 500 (*quoting Faulkner v. State*, 54 Md. App. 113, 115 (1983)). "If established, the killer remains culpable and his actions are excused only to the extent that mitigation is invoked." *Id.* (*quoting Faulkner*, 54 Md. App. at 115). For either form of self-defense, the defendant must think honestly that they were in imminent danger, but the defense is imperfect if that belief was unreasonable. *See id.*

The defendant must produce "some evidence" as to the defense to generate the jury instruction for either form of self-defense. *Dykes*, 319 Md. 215. This is a low threshold and requires only enough evidence to create a jury issue. *Id.* "Once the issue has been generated by the evidence, however, the State must carry the ultimate burden of persuasion beyond a reasonable doubt" to negate the elements of "mitigating circumstances or self-defense." *State v. Evans*, 278 Md. 197, 208 (1976).

At the conclusion of Mr. Lunningham's trial, the jury was instructed on perfect and imperfect self-defense, as well as hot-blooded response.[3] The court grounded its decision

[3] Hot-blooded response is a mitigating circumstance and, like imperfect self-defense, reduces the level of guilt from murder to manslaughter. For hot-blooded response to exist the defendant must prove that he "reacted to something in a hot blooded rage," the rage was caused by legally adequate provocation, "the defendant was still enraged when [he] [she] killed the victim," there was no time between the provocation and the killing for the defendant's rage to cool, and "the victim was the person who provoked the rage." MPJI-Cr. 4:17.4 (alteration in original).

to give those instructions on several considerations. *First*, there was no factual dispute that the victim brandished a knife at Mr. Lunningham and that a knife is a deadly weapon. From that fact, the jury could infer that Mr. Lunningham believed he was in danger of deadly or serious bodily harm. *Second*, the court concluded that the jury could infer that the force was not excessive from the medical examiner's testimony that the victim died from a combination of injuries rather than from a single wound. And *last*, the jury could conclude "that [] [Mr. Lunningham] was not in a position to safely exit the car given the production of the knife":

> THE COURT: Okay. The Court will give the instruction as requested by the defense. There is no dispute here, but that a knife was produced, a knife in and of itself can be a deadly weapon, and the jury is not limited in considering the issue to what the defendant says, but also is permitted to infer form the facts and circumstances of any given event further information than what is specifically stated. The jury certainly at least can infer that the production of a knife was perceived by the defendant as potentially deadly or seriously, physically a threat of harm, serious harm to him.
>
> With respect to the issue about excessive force or not, that is subject to inference as well from the jury and the testimony from the Medical Examiner is that actually, quite literally, that none of the wounds inflicted were in and of themselves deadly and, and that death occurred after as an accumulation of those wounds, accumulation of those wounds.
>
> And with respect to the issue of retreat, certainly, the state has, has plenty of argument that is rational, but a jury could infer that the defendant was not in a position to safely exit the car given the production of the knife by, that's alleged to have been by the victim. So, the Court finds that there's a reasonable basis upon which to, to give the requested instruction on perfect and imperfect self-defense requested by the defendant.

Both instructions were appropriate in light of the record developed at trial. The

question now is whether the proffered expert testimony by Dr. Meltzer would have supported Mr. Lunningham's defense of perfect self-defense and specifically, the required element that self-defense was a reasonable, objective response to the circumstances.

2. The proffered statement

On appeal, Mr. Lunningham argues that his testimony at trial about his state of mind created a "factual predicate" for a mental health expert to testify about his state of mind during the incident, testimony that would have supported his perfect self-defense defense. We agree, and we hold that the circuit court erred in excluding it.

Expert testimony regarding mental health is admissible when the expert testifies about a person's psychological profile. *See Hartless v. State*, 327 Md. 558, 575 (1992). A profile must go "beyond a simple recitation of the defendant's background" and must instead support a nexus between the mental health expert's testimony and the facts of the defendant's mental state. *Id.* at 575, 577. An expert may not, however, testify to a defendant's actual intent at the time of the offense. *See id.* at 573. That is the ultimate question the fact finder must decide.

We can see the dividing line between admissible and inadmissible state of mind testimony in the contrast between two cases, *Hartless* and *Simmons*. The proposed expert testimony was excluded in *Hartless* because there was no rational nexus between the expert's testimony—the defendant's psychological profile revealing extreme stress from his father—and the issues of premeditation, intent, or state of mine at the time of the offense. *Id.* at 572–73, 591–92. In simple terms, the testimony must be helpful to the jury

in resolving the factual questions the case presents. In *Simmons*, the Court of Appeals reversed and remanded to the trial court because expert testimony of the defendant's psychological profile was admissible to support the defendant's testimony about his subjective belief that he was acting in imperfect self-defense. *Simmons*, 313 Md. 33 at 47. An expert cannot reconstruct a person's emotional or mental state at a precise moment. But "expert testimony frequently is offered as to a defendant's subjective beliefs when the defendant seeks complete justification for a homicide by asserting self-defense." *Id*. "[C]ourts admitting this form of evidence have limited the testimony to the expert's diagnosis of the defendant, characteristics of the defendant's personality disorder, and the impact which the disorder generally has on a person's perceptions and behaviors." *Id.* (*citing Phillips v. Wainwright*, 624 F.2d 585 (5th Cir. 1980)).

At the hearing for the State's motion *in limine* to exclude Dr. Meltzer's testimony, Mr. Lunningham argued that *his* testimony would provide the subjective beliefs and that *the expert testimony* would "substantiate Mr. Lunningham's descriptions of his subjective beliefs in light of his psychiatric profile," thus allow a jury to find his reactions objectively reasonable.

Mr. Lunningham proffered that his testimony and the subsequent testimony of the expert would describe "Mr. Lunningham's symptoms, based on a psychiatric evaluation of Mr. Lunningham":

> THE COURT: Where are the defendant's, where's the evidence or the proposed evidence of the defendant's subjective beliefs that would render, rise to the level of a defense such as imperfect self-defense.

> [DEFENSE COUNSEL]: In this case, Your Honor, it will be testimony from the defendant himself. He intends to take the stand and to offer that evidence.
>
> THE COURT: So we'll find out at trial? The State will find out at trial when the defendant testifies?
>
> [DEFENSE COUNSEL]: Yes that would be the case, Your Honor, that's how in *Simmons* as well the factual predicate for the expert testimony was the defendant's own testimony.
>
> * * *
>
> COURT: So I guess what I'm saying is not to ramble on here but to ask can you articulate what that subjective unreasonable belief is, because that, in the Court's estimation must be a necessary foundation, not necessarily in and of itself enough, but a necessary foundation to properly put the State on notice with expert opinion that's about to come in at the trial and about which the Sate should have an opportunity to obtain contrary expert opinion.
>
> [DEFENSE COUNSEL]: So if in, Your Honor's, hypothetical there were an extreme version of events presented by the defendant on trial it would not enable the expert's testimony to go much beyond what the expert has disclosed will be the substance of his opinion.

Mr. Lunningham proffered that Dr. Meltzer would testify about Mr. Lunningham's perception of the events through his diagnosis and psychiatric profile:

> THE COURT: And where does the Dr. tie it into the mens rea required for a finding of murder?
>
> [DEFENSE COUNSEL]: His mentioning of the manner in which he perceived the victim's behavior towards him as a kind of stress that that caused for him. Just to you know quote again, "she also subjected him to insulting remarks in an effort to further put him down and control his behavior." This along with the symptoms are just a couple of sentences up about mood problems and severe irritability these are all issues that the expert will testify to as connecting the psychiatric profile to Mr. Lunningham's description of events. . . .
>
> We would submit that the testimony offered here is exactly the

> kind of evidence that the Court deemed relevant in *Simmons* as speaking to the critical question if Mr. Lunningham's possessed the requisite mental state for murder. And we would ask that this Court exercise its discretion to permit that testimony or if the State would like to conduct its own mental exam that permit maybe time for that to affirm. . . .
>
> The first, the State asserts that Dr. Meltzer intends to, as they call it speculate, as to the fact of Mr. Lunningham's mental state at the time of the incident. We can assure the Court that Dr. Meltzer does not intend to make any statements as to the fact of Mr. Lunninham's mental state at the actual time of the alleged offenses. That won't be a part of his testimony, it's about consistency between his exam and Mr. Lunningham's own testimony.

The trial court excluded Dr. Meltzer's testimony because it found that the proffered psychiatric profile did not constitute a conclusion supporting Mr. Lunningham's perception at the time of the incident:

> THE COURT: So I'll continue with the doctor's report: "Additionally Mr. Lunningham's aggression was directed at the victim who he felt was purposefully luring him in and controlling him with drugs to take advantage to him. And with the result that he was not able to sustain a more positive healthy life that he had worked so hard to attain during and after his time at Mountain Manor." That describes what the Court perceives to be a retaliatory motive for perceived slights and control and being put down but does not connect if you will to, or connect a subjective belief to the psychological profile that would lead to a defense of some sort in this case.
>
> And finally the report says: "Mr. Lunningham's psychiatric state during this period cause him to be prone to severely agitated states." That does not contain in the Court's estimation a conclusion that is, that I don't think it's, even comes to a conclusion to the extent that somebody might call that a conclusion; that a psychological profile was consistent with some subjective belief. It is not consistent with the case law on admissibility. It does not negate, also, it does not negate it does not draw a connection between the psychological profile and mens rea or specific intent to commit the crime.

* * *

> So the Court finds that the proposed testimony from the expert witness is not supported in not only its conclusions but also the law that applies to such items of evidence. And the Court will grant the State's motion in limine.

In arriving at its conclusion, the trial court quoted (above) and relied on a portion of the expert's report. But the first half of the very same paragraph of the report contained language that spoke directly to Mr. Lunningham's psychiatric profile:

> Mr. Lunningham was in a very compromised mental state during the offenses. In addition to symptoms of depression including depressed mood and feelings of worthlessness, his mood problems and severe irritability were exacerbated by substance use. He was extremely stressed by losing his girlfriend and he believed he was at risk of losing his employment again due to his drug us. He felt that the victim used crack to control and take advantage of him. She also subjected him to insulting remarks in an effort to further put him down and control his behavior.

As in *Simmons*, "the proffered testimony has some relevance in that consistency between the specific subjective belief testified to by [Mr. Lunningham] and [Mr. Lunningham's] psychological profile tends to make it more likely that [he] in fact held that subjective belief. *Simmons*, 313 Md. at 48. There was, therefore, a nexus between Mr. Lunningham's testimony and his mental state, and Dr. Meltzer's psychological profile of Mr. Lunningham would have assisted the jury's assessment of Mr. Lunningham's mental state, particularly whether and to what extent he acted in self-defense. The psychological profile testimony, therefore, could provide a baseline against which the jury could measure the objective reasonableness of Mr. Lunningham's response and actions. Put another way, the profile was meant to provide a contextual backdrop the jury otherwise would lack. And

because the trial court determined that the evidence generated jury instructions both for perfect and imperfect self-defense, the mental health expert's testimony should have been admitted, and the court abused its discretion in excluding it *in toto*.

3. Harmless error

From there, we need to determine whether the exclusion of the expert testimony was harmless error. Maryland adopted the test for harmless error in *Dorsey v. State*, which asks us to decide whether there is a reasonable possibility the excluded evidence could have contributed to the guilty verdict:

> When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

276 Md. 638, 659 (1976).

"Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal." *Bellamy v. State*, 403 Md. 308, 333 (2008). Once error is established, the "reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey*, 276 Md. at 659. In other words, "an error is harmless only if it did not play **any role** in the jury's verdict." *Bellamy*, 403 Md. at 332 (emphasis added). That is because, it is for the jury to determine

"what evidence to believe, what weight to be given it, and what facts flow from that evidence." *Dykes*, 319 Md. at 224.

The perfect self-defense defense required the jury to determine if the defendant's belief of imminent threat of deadly or serious bodily harm was reasonable. In this instance, the trial court categorically excluded the expert testimony: "the proposed testimony from the expert witness is not supported in not only its conclusions but also the law that applies to such items of evidence." But had the jury heard the expert testimony on Mr. Lunningham's psychological profile alongside his own testimony regarding his subjective beliefs of self-defense, we cannot say beyond a reasonable doubt that the jury would not have found perfect self-defense. To its credit, the State acknowledged at argument before this Court that if perfect self-defense had been raised and if we found the expert testimony should have been admitted, the error would not be harmless. Accordingly, we reverse Mr. Lunningham's conviction for manslaughter and remand for further proceedings.

Our decisions do not affect Mr. Lunningham's conviction for arson, for which self-defense is not a defense. They also obviate the need to consider Mr. Lunningham's sentencing arguments, all of which arose from the cumulative effect of his manslaughter and arson sentences. If, after a new trial, he is convicted anew of manslaughter, he will be free to raise any issues that might arise from the sentence that results.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED AS TO SECOND-DEGREE ARSON, REVERSED AS TO

MANSLAUGHTER, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MONTGOMERY COUNTY TO PAY COSTS.

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

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1606s19cn.pdf