Circuit Court for Baltimore City
Case No. 120196025

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1814

September Term, 2022

ANTONIO OLIVER JANIFER

v.

STATE OF MARYLAND

Reed,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: March 20, 2024

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

Appellant, Antonio Janifer, was convicted in the Circuit Court for Baltimore City of two counts of attempted first-degree murder, carjacking, attempted carjacking, attempted armed robbery, home invasion, reckless endangerment, resisting arrest, and various firearms and traffic offenses. Appellant presents the following questions for our review:

1. "Did the trial court err in unduly limiting Appellant's right to cross-examine the State's witnesses?
2. Did the trial court err in failing to merge Appellant's convictions?
3. Did the State present inadmissible and prejudicial ballistics evidence to the jurors?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City of two counts of attempted first-degree murder, two counts of attempted second-degree murder, four counts of first-degree assault, one count of carjacking, one count of attempted carjacking, one count of attempted armed robbery, two counts of home invasion, one count of reckless endangerment, one count of resisting arrest, four counts of use of a firearm in the commission of a crime of violence, two counts of discharge of a firearm, one count of prohibited possession of a regulated firearm by a person with a disqualifying felony, one count of transporting a firearm in a vehicle, one count of wearing, carrying, or transporting a firearm on the person, four counts of possession of a handgun near a place of public

assembly, one count of possession of illegal ammunition, one count of reckless driving, one count of hit and run, and four counts of fleeing and eluding.

The jury found appellant not guilty of resisting arrest. The jury rendered no verdict on the lesser included offenses of attempted second-degree murder, first-degree assault, and one count of home invasion. The jury found appellant guilty of all other counts. For sentencing purposes, the court merged wearing, carrying, or transporting a firearm on the person with transporting a firearm in a vehicle, merged all of the counts of possession of a handgun near a place of public assembly into a single count, and merged all of the counts of fleeing and eluding into a single count. The court imposed to two consecutive life sentences for attempted first degree murder and terms of incarceration totalling 213 years on the remaining counts.[1]

On May 26, 2020, appellant was driving in Baltimore City. Officer Joshua Jackson of the Baltimore City Police Department approached appellant's car when he observed that it was stopped at a green light and holding up the cars behind it. Appellant appeared to be

[1] The court imposed two consecutive life sentences for attempted first-degree murder, a term of incarceration of thirty years for carjacking, a term of incarceration of thirty years for attempted carjacking, a term of incarceration of twenty years for attempted armed robbery, a term of incarceration of twenty-five years for home invasion, a term of incarceration of five years for reckless endangerment, a term of incarceration of twenty years for each count of use of a firearm in the commission of a crime of violence, a term of incarceration of one year for each count of discharge of a firearm, a term of incarceration of fifteen years for prohibited possession of a regulated firearm by a person with a disqualifying felony, a term of incarceration of three years for transporting a firearm in a vehicle, a term of incarceration of one year for possession of a handgun near a place of public assembly, a term of incarceration of one year for possession of illegal ammunition, a term of incarceration of one year for fleeing and eluding, and a one hundred dollar fine for reckless driving. All terms of imprisonment were to be served consecutively.

unconscious and looked as though he had overdosed. Officer Jackson nudged appellant several times. When appellant woke up and saw the officer, he immediately put the car in motion. Officer Jackson returned to his police vehicle and began to chase appellant.

Appellant drove erratically and well above the posted speed limit until he hit the curb and another car. Appellant dove out of his crashed car and attempted to flee. Officer Jackson gave chase and restrained appellant. Officer Jackson held appellant in what the officer described as a "hug." When appellant stopped resisting, Officer Jackson removed one of his hands from the "hug" to reach for his radio. At that point, appellant pulled out a gun and shot Officer Jackson three times in the stomach. The attack on Officer Jackson was recorded on both bodycam footage and surveillance footage from a store across the street. After he recovered from his injuries, Officer Jackson identified appellant from a photo array as the man who had shot him.

After appellant shot Officer Jackson, he escaped, once again. He approached the car of Brian Winfield, who had pulled onto a cross street when he heard the police chase and stopped at a red light. From approximately one arm's-length away, appellant shot at Mr. Winfield's head through the driver's side window. The car stopped the bullet and Mr. Winfield escaped in the car. Mr. Winfield's dashboard camera recorded the incident. Mr. Winfield identified appellant for the police and, later, before the jury, based on the footage from his dashboard camera. Surveilance footage from the area shows appellant approaching Mr. Winfield's car, shoot at Mr. Winfield's car and then run down the street towards Mr. Benamur's car.

Mr. Benamur had stopped his car to order food on the same cross street as Mr. Winfield. He heard sirens and what sounded like gun shots. He saw a man running towards him, pointing a gun towards him. Mr. Benamur got out of his car because he was afraid. The man jumped into the car and drove off. Mr. Benamur's car was later found abandoned in Washington D.C. Mr. Benamur stopped a police officer, reported what had happened, and described his attacker. The description matched appellant. Mr. Benamur was unable to identify his attacker when the police showed him a photo array.

At trial, on direct examination, Mr. Benamur testified about what had happened to him while he was parked. He testified to the same description of his attacker that he had given the police. He did not testify about his attempt to identify his attacker from a photo array, nor did he make an in-court identification of his attacker. On cross-examination, appellant sought to question him about his inability to identify his attacker for the police. The trial court permitted cross-examination on the description Mr. Benamur gave, but, because the witness made no identification (either to the police or at trial), the court precluded testimony about the photo array.

Mr. Anthony Ricotilli lived a short distance from the area where the car chase and the shootings had happened. On the evening of May 26, 2020, there was a knock on his door. Mr. Ricotilli answered the door and saw a man pointing a gun at him. The man entered Mr. Ricotilli's house and demanded Mr. Ricotilli's car keys. Mr. Ricotilli told the man that he did not have car keys and the man left. Mr. Ricotilli called the police and gave them a description of the man who had entered his house. The next day, Mr. Ricotilli was shown a photo array by the police and was unable to make an identification. However, in

court, Mr. Ricotilli identified appellant as the man who had entered his house and pointed a gun at him.

Appellant sought to cross-examine Mr. Ricotilli on the failed photo array. Initially, defense counsel asked the following questions without objection:

> [Defense Counsel]: Do you remember that at some point they had taken you to the Homicide department for the Baltimore City Police Department?
>
> Mr. Ricotilli: Yes. That is correct.
>
> [Defense Counsel]: And was that the same evening?
>
> Mr. Ricotilli: Yes.
>
> [Defense Counsel]: Now, and at that opportunity —you had an opportunity at that point to meet with a police officer that showed you a series of photographs which they commonly refer to as a "photo array."
>
> Mr. Ricotilli: Uh-huh.
>
> [Defense Counsel]: And do you recall—do you recall that?
>
> Mr. Ricotilli: Incident, yes.
>
> [Defense Counsel]: Yeah.
>
> Mr. Ricotilli: Yes.
>
> [Defense Counsel]: And they in fact did show you six photographs, did they not, or a series of photographs?
>
> Mr. Ricotilli: Yes. A series, yes.
>
> [Defense Counsel]: All right. And do you recall that, in fact, you were unable to identify anyone in those pictures that was

> the same individual that had just come to your door [at your address]?[2]
>
> Mr. Ricotilli: Not a hundred percent correct, yeah.
>
> [Defense Counsel]: Well, did you say not a hundred [percent] to them, or did you just say, "I don't recognize anyone"?
>
> Mr. Ricotilli: I couldn't narrow down the—I had a—in the series I could discern that one was, but I wasn't a hundred percent sure, is what I said.
>
> [Defense Counsel]: So you—and you told that to the officer—
>
> Mr. Ricotilli: Yeah.
>
> [Defense Counsel]: —that showed you the pictures?
>
> Mr. Ricotilli: Uh-huh.

Defense counsel then circled back several minutes later and attempted to show Mr. Ricotilli the photos from the array and have him identify them as the photo array he was shown by the police. At the bench, the State objected to the use of the photo array. Appellant's counsel asserted that the questions about the photo array were relevant because the physical description Mr. Ricotilli gave the police matched all the photos in the photo array and Mr. Ricotilli was unable to identify appellant. Appellant's counsel acknowledged, however, that he had no intention of admitting the photos from the photo array. The court sustained the objection.

[2] We have removed the witness's address for privacy reasons.

In addition to the testimony of eyewitnesses and police officers, the State called a forensic analyst who testified that appellant's DNA was present on the interior and exterior of Mr. Ricotilli's door and the steering wheel cover of the car stolen from Mr. Benamur.

The State also offered the testimony of Daniel Lamont, a firearms examiner for the Baltimore Police Department. Mr. Lamont was offered as an expert in the examination, identification, function, and operability of firearms and ammunition. He testified that he analyzed five spent cartridges, a bullet recovered from the area where Officer Jackson was shot, and a single cartridge from the block where Mr. Winfield was fired upon. Mr. Lamont analyzed the cartridges using a microscopic analysis. This analysis relied upon a theory that there are unique microscopic marks left on the barrel or breech of a firearm durring manufacture. These marks can be transferred to a cartridge or bullet as the gun is fired. The firearms examiner matches the marks found on various cartridges to determine whether they were fired from the same gun. He testified that all of the cartridges and the bullet came from the same gun.

At the close of trial, the jury found appellant guilty and the court sentenced him as described above. This timely appeal followed.

II.

Appellant argues first that the circuit court erred in precluding appellant from cross-examining Mr. Benamur and Mr. Ricotilli about the failed photo arrays to the extent that he was precluded from doing so. Appellant notes that questions designed to impeach the credibility of a witness's testimony are always relevant on cross-examination. Md. Rule

5-616. Appellant argues that the witnesses' inability to identify appellant in a photo array at a time proximate to the crimes bears directly on the witness' credibility as an identifying witness at trial and on the accuracy of the witness' recollections. As a result, precluding appellant from cross-examining the witnesses on the failed photo arrays was prejudicial to appellant because it prevented him from undermining the reliability of key State witnesses.

The State argues that the court properly precluded cross-examination of Mr. Benamur regarding the photo array. The State points out that Mr. Benamur did not identify appellant at trial or at any time prior to trial. He simply gave a general description of the man who shot at him. Therefore, there was no identification offered by the State for appellant to undermine. Cross-examination about the failed photo array was not pertinent to the witness's credibility. It was irrelevant and outside the scope of direct examination.

As for the cross-examination of Mr. Ricotilli, the State notes that appellant was permitted to cross-examine the witness that there had been a photo array and that the witness was unable to identify appellant. The State objected only when appellant attempted to show the witness the photo array, which he did not intend to introduce, and to question the witness about the details of that array. The State contends that no proffer was made about the relevance of the details of the photo array and any claim that those details were excluded improperly is not preserved. To the extent any claim is preserved, the State argues that the details of the photo array are irrelevant in the context of the State's direct examination.

Appellant next argues that the court erred in admitting the testimony from the ballistics expert that all of the recovered cartridges were from the same gun. Since

appellant's trial, the Supreme Court of Maryland considered the admissibility of expert conclusions reached using the same methodology employed by Mr. Lamont in *Abruquah v. State*, 483 Md. 637 (2023). After considering the extensive research on the reliability of this methodology produced over the last two decades, the Supreme Court concluded:

> "[T]he firearms identification methodology employed in this case can support reliable conclusions that patterns and markings on bullets are consistent or inconsistent with those on bullets fired from a particular firearm. Those reports, studies, and testimony do not, however, demonstrate that that methodology can reliably support an unqualified conclusion that such bullets were fired from a particular firearm."

As a result, under the *Daubert* test adopted by this Court in *Rochkind v. Stevenson*, 471 Md. 1 (2020), experts may not offer unqualified conclusions on the subject. *Id.* Appellant maintains that the trial court erred by allowing the expert to offer an unqualified conclusion about the ballistics in this case. Appellant acknowledges that this issue was not raised at trial and is not preserved for our review. Appellant requests that this court exercise its discretion and review the issue under plain error review.

The State argues that there was no plain error. The State argues that before we can exercise plain error review the legal error must have been obvious and not subject to reasonable dispute at the time of the trial. The State notes that *Abruquah* was not decided until after appellant's trial and argues that, at the time of trial, the admissibility of ballistics evidence was in flux. At the time of trial, the *Daubert/Rochkind* standard had been adopted in Maryland recently, and as a result, the admissibility of expert testimony was undergoing a massive series of changes. The State argues that the trial judge's decision to admit the ballistics evidence cannot have been plain error.

In addition, the State argues that plain error must be error that seriously affects the outcome of the proceedings, and assuming error, this error did not. The State notes that, even under *Abruquah*, the State would have been able to offer *some* firearms evidence. In particular, the firearms examiner would have been permitted to testify about markings found on the cartridges and to conclude that they were consistent with the cartridges having been fired from the same gun. The State argues that, in light of the strength of the evidence presented in this case, the difference between a qualified expert conclusion and an unqualified expert conclusion is unlikely to have substantially affected the outcome of the trial.

Finally, appellant argues that several counts upon which he was convicted should merge for sentencing purposes. First, he notes that for each of the shootings (directed at Officer Jackson and Mr. Winfield) he was charged with discharge of a firearm, and attempted first-degree murder. For the incident involving Mr. Winfield, he was charged also with reckless endangerment. He contends that the convictions for discharge of a firearm and reckless endangerment should merge with the applicable charges for attempted first-degree murder. He argues that a conviction merges if the jury could have based multiple convictions on the same conduct. Both the reckless endangerment charge and the discharge of a firearm charge were predicated on appellant's firing a bullet at the relevant target, the same conduct for which appellant was charged with attempted first-degree murder. Second, and on the same legal theory, he contends that his conviction for the attempted carjacking of Mr. Winfield merges with his sentence for the attempted murder of Mr. Winfield.

The State argues that reckless endangerment does not merge with attempted murder because, while both charges were predicated on appellant's firing of a bullet in the direction of Mr. Winfield, the victims of the two crimes were different. Attempted murder charges a crime against a person, in this case, Mr. Winfield. Reckless endangerment charges a crime against the public, and therefore, is not a lesser included offense to attempted murder. The State argues that discharge of a firearm and attempted carjacking do not merge with attempted murder because each crime requires proving an element that the others do not. Attempted murder requires that appellant have had the intent to kill. Discharge of a firearm, as a violation of the Baltimore City Code, requires that the crime take place in Baltimore and that it involve a firearm specifically, rather than some other means of killing. Attempted Carjacking requires the attempt to take a car.

III.

We begin with appellant's contention that he was precluded from questioning Mr. Benamur and Mr. Ricotilli about their inability to identify appellant in photo arrays. The Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights protect a defendant's right to cross-examine the witnesses against him. *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018). Cross-examination, however, is not permitted on matters that are irrelevant to the trial issues. *Rowe v. State*, 62 Md. App. 486, 495 (1985). Generally, the scope of cross-examination is limited to the matters addressed on direct examination. *Ashton v. State*, 185 Md. App. 607, 621 (2009). The cross-examining party is, however, given latitude to rebut the witness' testimony or to delve into the witness'

bias, memory, or credibility. *Bryant v. State*, 4 Md. App. 572, 580 (1968). The question of whether a matter is sufficiently probative is left to the sound judgment of the trial court. *Rowe*, 62 Md. App. At 495. We review the circuit court's decision to preclude the two lines of questioning for an abuse of discretion. *Id.*

Beginning with the cross-examination of Mr. Benamur, the key factor in our analysis is that Mr. Benamur made no identification of appellant on direct examination. He neither asserted that he had identified appellant on any previous occasion, nor attempted to identify appellant in court during his testimony. Thus, questioning about the weakness of any identification he had made in the past or could make, in the future, would not rebut any of his testimony on direct examination. Absent any direct-examination testimony to rebut, the testimony about Mr. Benamur's inability to make a photo array identification was not relevant. The court did not abuse its discretion.

The cross-examination of Mr. Ricotilli presents a different issue. Mr. Ricotilli did make an identification on direct examination. He identified appellant as the man who entered his home. Thus, on cross-examination, questioning about his past inability to identify his attacker in a photo array was relevant to undermine his testimony on direct examination. Significantly, contrary to appellant's argument, appellant was permitted to question Mr. Ricotilli on precisely that point. Appellant established that Mr. Ricotilli had viewed a photo array one day after the incident and that Mr. Ricotilli was unable to make an identification. The court, therefore, did not preclude appellant from cross-examining Mr. Ricotilli about his previous inability to identify his attacker.

The crux of appellant's argument is that the court should have permitted him to go further, to show the photo array to the witness, and to cross-examine the witness on specific features of the photo array. Interestingly, appellant did not seem to believe the details of the photo array were sufficiently relevant to offer the array into evidence. At trial, appellant alleged that the photos were relevant because they all matched the description of the attacker that Mr. Ricotilli gave to the police. Even assuming, *arguendo*, that questioning about the similarities between the photographs would have been appropriate when the photographs were not in evidence, the probative value to the appellant's case in demonstrating that the pictures in the photo array were similar to one another or that they matched the description the witness gave to the police is illusory.[3]

Appellant did not proffer any other reason at trial, nor does he provide any reason before this Court why questioning about the exact pictures in the photo array was relevant or would undermine the witness's testimony on direct examination. We see no relevance to this entire line of questioning beyond the simple fact, already established, that the witness was shown a photo array *and was unable to identify a suspect.* Appellant did not need to show the witness the photographs establish that. As a result, we find no abuse of discretion in the court's decision to limit this line of cross-examination.

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[3] If anything, the fact that the pictures were similar, making appellant harder to pick out seems marginally helpful to the State's case, not appellant's. Isn't that the goal of police photographic arrarys? To select similar photos?

IV.

We next turn to appellant's request for plain error review of the court's decision to admit expert testimony on ballistics. Md. Rule 8-131(a) dictates that appellate courts will not address claims of error that have not been raised or decided in the trial court. *Graham v. State*, 325 Md. 398, 411 (1992). Here, appellant concedes that he did not object to the expert testimony in the proceedings below, but requests that we exercise our discretion to engage in plain error review.

Plain error review is appropriate when (1) there is an error or defect that has not been intentionally relinquished or abandoned, (2) the legal error is clear and obvious, (3) the error affected appellant's substantial rights, and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Newton v. State*, 455 Md. 341, 364 (2017).

Here, appellant has failed to meet the second and third requirements, that the error was clear, that the error affected appellant's substantial rights and that the error affected the fairness of the judicial proceedings. For an error to have been "clear and obvious" in the relevant sense, it must have been "clear and obvious" at the time of trial. *James v. State*, 191 Md. App. 233, 247 (2010). In cases where the law was unsettled at the time of trial, but has been settled later, this court has declined to exercise plain error review. *Id.* Thus, unless appellant can show that the court's ruling was clearly, and obviously error before the Supreme Court decided *Abruquah,* we will not find plain error.

This Court has carved out an exception to that requirement for cases in which the law was settled at the time of trial and settled in a manner contrary to the law at the time

of appeal. *Hallowell v. State*, 235 Md. App. 484, 505-06 (2018). In *Hallowell*, the trial judge followed the existing law correctly in crafting a felony murder jury instruction. *Id.* In the interim, between the trial and the appeal, the law changed such that the crime described by the jury instructions became non-existent. *Id.* As a result, this Court exercised plain error review to avoid a situation in which counsel must make a litany of objections to evidence that is admissible as a settled matter of law just in case the law changes. *Id.* If, in this case, courts had held *before* appellant's trial that ballistics evidence of the type offered met the *Daubert/Rochkind* standard, the *Hallowell* exception might apply. That was not the state of the law prior to appellant's trial. The key distinction is that, in *Hallowell,* the law was settled (in *Roary,* a case not yet overruled), and in this case, the law was unsettled with respect to the admissibility of similar ballistic testimony under *Daubert/Rochkind.*

At the time of appellant's trial, the admissibility of ballistics evidence was in flux. Maryland courts had adopted the *Daubert/Rochkind* standard in 2020. *Rochkind v. Stevenson*, 471 Md. 1 (2020). Neither this Court nor the Maryland Supreme Court had opined upon the admissibility of firearms identification evidence under the new standard. Among jurisdictions using the *Daubert/Rochkind* standard, there is wide variation in the degree to which courts permitted experts to match bullets with specific firearms. *Compare United State v. Johnson*, No. 14-CR-00412-THE, 2015 WL 5012949, at *6-11 (N.D. Cal. Aug. 24, 2015) (permitting such evidence under the *Daubert* standard), *and State v. Boss*, 577 S.W.3d 509, 517 (Mo. Ct. App. 2019) (same), *and United State v. Hunt*, 464 F. Supp. 3d 1252, 1260 (D. Okla. 2020), *with Garnder v. United States*, 140 A.3d 1172, 1184 (D.C.

2016) (permitting some ballistics identification evidence but prohibiting experts from testifying to an unqualified match between a particular firearm and a particular bullet), *with United State v. Shipp*, 422 F. Supp. 3d 762, 783 (E.D.N.Y. 2019) (precluding an expert from testifying that a particular bullet was a match for a particular firearm).

The decision to admit expert testimony on firearm identification was neither a clear and obvious error nor something so clearly and obviously legally appropriate that the *Hallowell* exception applies. Therefore, appellant has failed to meet the prerequisites for plain error review. We could stop out analysis here, but appellant has failed to meet the third prong for plain error review—that any error affects his substantial rights.

As for the third requirement, this Court has held that plain error is error that affects appellant's substantial rights. *Newton*, 455 Md. at 364. Ordinarily, this means that appellant must demonstrate that the error affected the outcome of the proceedings. *Beckwitt v. State*, 477 Md. 398, 464 (2022). Appellant has failed to do so.

In evaluating this requirement, it is important to be clear about the extent of the alleged error in this case. In *Abruquah*, the Supreme Court of Maryland did not hold that all testimony about firearms identification is inadmissible. Rather, the Court acknowledged that the relevant firearms identification procedures "can support reliable conclusions that patterns and markings on bullets *are consistent or inconsistent with* those on bullets fired from a particular firearm," but cannot "support an unqualified conclusion that such bullets *were* fired from a particular firearm." *Abruquah*, 483 Md. at 648. Thus, the alleged error, in this case, was not in permitting the State's expert to testify about his analysis of the cartridges. It was in permitting him to testify *definitively* that they were

fired from the same weapon rather than that they were "consistent with having been fired from the same weapon."

As the Supreme Court held in *Abruquah*, such a distinction is not without import. *Id.* at 697-98. But, in light of the extensive evidence presented in this case, it did not affect the outcome of the trial. Appellant was identified by multiple eyewitnesses at trial. He was identifiable on video approaching both Mr. Winfield and Mr. Benamur's cars. His DNA was found on Benamur's car and at Mr. Ricotilli's home. In light of that evidence, the difference between a "consistent with" conclusion and a match conclusion is not likely to have affected the outcome of the trial.

We decline to exercise plain error review.

V.

We next turn to appellant's merger contentions. "Merger" is the common law principal stemming from the Double Jeopardy Clause of the Fifth Amendment. *State v. Frazier*, 469 Md. 627, 641 (2020). It protects defendants from receiving multiple punishments for the same offense. *Id.* When a court fails to merge a sentence as required, the sentence is illegal as a matter of law. *White v. State*, 250 Md. App. 604, 643 (2021). We review the trial court's decision not to merge sentences *de novo*. *Clark v. State*, 246 Md. App. 123, 131 (2020). Ordinarily, in reviewing merger issues to determine whether an offense merges into another, we use the "required evidence test." *Sifrit v. State*, 383 Md. 116, 137 (2004). We look to the elements of the offenses and if all of the elements of one offense are included in the other offense, the former merges into the latter offense. *Id.*

"Merger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test and when the offenses are based on the same act or acts." *Nicolas v. State,* 426 Md. 385, 408 (2012).

We begin with the argument that appellant's conviction for reckless endangerment should merge with his conviction for the attempted murder of Mr. Winfield. This Court has held that reckless endangerment can merge with attempted first-degree murder. We held in *McClurkin v. State*, 222 Md. App. 461, 480 (2015) that the move from reckless endangerment "where one is simply indifferent to the threat to the victim" to attempted murder "where death or serious bodily harm is affirmatively desired or specifically intended . . . primarily involves ratcheting the *mens rea* up to the next level of blameworthiness." As a result, the Court held that a conviction for reckless endangerment can merge into a conviction for attempted first-degree murder. *Id.* It depends upon the circumstances.

In *McClurkin*, the Court's reasoning turned on the fact that the reckless endangerment was predicated on the same *actus reus* towards the same victim. *Id.* Only the *mens rea* changed. *Id.* Here, appellant was charged with attempted first-degree murder of Mr. Winfield. He was charged with reckless endangerment of the general public. These are not the same victims, as was the case in *McClurkin*. Where the same general transaction affects different victims, the offenses do not merge. *Price v. State*, 261 Md. 563, 580 (1971). Accordingly, the trial court did not err in declining to merge appellant's sentence for reckless endangerment of the general public and his sentence for attempted first-degree murder of Mr. Winfield.

We turn next to the argument that appellant's convictions for discharge of a firearm under Baltimore City Code Art. 19 § 59-2 must merge with his convictions for attempted murder. Art. 19 § 59-2 of the Baltimore City Code prohibits the "fir[ing] or discharg[ing] [of] any gun, pistol, or firearm within the City unless it be on some occasion of military parade, and then by order of some officer having the command."

We hold that no merger is required. This Court addressed recently whether the "firearm modality" of first-degree assault must merge with a homicide charge. *Wright v. State*, 255 Md. App. 407, 417-18 (2022). The firearm modality of first-degree assault prohibits the commission of an assault "with a firearm." Md. Code. Ann., Crim. Law § 3-202(b)(2). This Court held that the firearm modality does not merge with any of the homicide crimes because "[f]irst-degree assault with the use of a firearm includes the element of possessing a firearm. But a homicide, whether in the form of murder in either degree or manslaughter, can be committed without a firearm." *Wright*, 255 Md. App. at 417. The same issue presents itself here. To violate the Baltimore City Code Art. 19 § 59-2, the defendant must have discharged a firearm in Baltimore. Discharge of a firearm is not a required element of attempted first-degree murder. Therefore, § 59-2 contains a required element that first degree murder does not. Likewise, attempted first-degree murder requires premeditation and deliberation, which § 59-2 does not. As a result, the convictions do not merge.

Finally, we turn to the argument that appellant's conviction for attempted carjacking should merge with his conviction for attempted murder. Once again, these are not the same offenses. Attempted murder requires an attempt to commit a "deliberate, willful, and

premeditated killing." Md. Code. Ann., Crim. Law § 2-201. One can attempt to commit a carjacking without attempting to kill (in a premeditated manner or otherwise). Indeed, this case presents just such a carjacking: the carjacking of Mr. Benamur's vehicle.

Carjacking requires that (1) the defendant obtain unauthorized possession or control of a motor vehicle; (2) that the motor vehicle was in the actual possession of another person at that time; and (3) that the defendant used force or violence against that person, or put that person in fear through intimidation or threat of force or violence, in order to obtain the motor vehicle. *Teixeira v. State,* 213 Md. App. 664, 680-681 (2013). One can commit attempted first-degree murder without attempting to take possession of a vehicle. These two crimes each contain an element that the other crime does not. Attempted first-degree murder requires an intent to kill. Attempted carjacking requires an attempt to take possession of a vehicle from another person. Attempted carjacking and attempted first-degree murder are not the same offense. The convictions do not merge.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.