Circuit Court for Baltimore County
Case No. C-03-CR-22-001263

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2426

September Term, 2023

DEON SHERIDAN SMITH, JR.

v.

STATE OF MARYLAND

Wells, C.J.,
Ripken,
Meredith, Timothy E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: March 4, 2025

*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).

In November of 2023, Deon Sheridan Smith, Jr. ("Appellant") was tried before a jury in the Circuit Court for Baltimore County on multiple charges related to the armed robbery and murder of Errol Davis. Appellant was found guilty of first-degree felony murder, robbery with a dangerous weapon, and use of a firearm in the commission of a crime of violence. Appellant was also convicted of first-degree assault of Antwoine West, who was with Errol Davis at the time of the murder. The court sentenced Appellant to an aggregate sentence of life incarceration for the murder conviction, with twenty years to run concurrently for each of the other counts. Appellant noted this timely appeal.

ISSUES PRESENTED FOR REVIEW

Appellant has submitted the following issues for our review, which we have consolidated and rephrased:[1]

I. Whether the evidence was legally sufficient to support Appellant's convictions.

II. Whether the circuit court erred in basing Appellant's sentence on a consideration that was improper.

III. Whether Appellant's sentence for the underlying offense of robbery with a dangerous weapon is required to merge into the sentence for felony murder.

For the reasons to follow, we shall affirm Appellant's convictions; however, we shall remand this matter for resentencing related to sentencing considerations and with guidance related to the merger issue.

[1] Rephrased from:

1. Was the evidence legally insufficient to support Appellant's convictions?
2. Was the life sentence based on erroneous information about Appellant's eligibility for future sentencing relief?
3. Did the court err in failing to merge the sentence for armed robbery into the sentence for felony murder?

FACTUAL AND PROCEDURAL BACKGROUND

The following facts were adduced at trial.

West Testimony

In July of 2021, Errol Davis Jr.—then twenty-six years old—borrowed $600 from his eighteen-year-old cousin, Antwoine West. Shortly thereafter, Davis asked West to assist him in procuring a purchaser for three pounds of marijuana. West and Davis agreed that West would earn a commission of $200 per pound, or $600 total, in the event of a successful sale.

To facilitate this exchange, West used Instagram to contact a friend from high school, Ramon Day, to determine whether Day knew of anyone interested in purchasing the three pounds of marijuana. In exchange for brokering a purchaser, West stated that he would "give [Day] $50 from each [pound]." Day provided West with the phone number of a prospective purchaser,[2] whom Day indicated wanted to buy "all three" pounds.

West testified that he acted as an intermediary between Davis and Appellant, relaying the price, quantity, negotiations, and ultimate agreement. According to West, the deal was finalized such that Appellant would purchase all three pounds of marijuana for a total of $6,000. The parties agreed to meet in person on the evening of July 23, 2021, to complete the sale. That day, Appellant designated a meeting location and provided West with an address on Brookmill Road, which West communicated to Davis.

[2] West did not testify regarding the identity of the purchaser. However, in Appellant's interview with police, Appellant acknowledged that he was the prospective purchaser. We shall therefore refer to him as "Appellant" through our discussion of West's testimony.

At the conclusion of West's work shift, Davis picked him up in a vehicle, and they travelled to the address provided. Once Davis and West arrived, Appellant entered Davis's vehicle on the front passenger side.[3] Davis displayed and opened one of the three bags of marijuana. After examining the marijuana for a few minutes, Appellant indicated that he would go inside to obtain a scale. West testified that Appellant returned a few minutes later, indicating he was arguing on the phone with a woman. Appellant claimed to have forgotten the scale. He then asked Davis to move the vehicle forward, which Davis did. Appellant then returned to the apartment, claiming once again to be obtaining a scale.

West testified that several minutes elapsed following Appellant's second return to the apartment building. Concerned by the delay, Davis passed one of the three vacuum-sealed marijuana bags—the one that had been opened and which Appellant had examined—to West in the back seat. The other two bags remained in the front with Davis. West was likewise concerned by the delay and attempted to contact Day to obtain more information regarding Appellant.[4] West testified that Davis was scrolling through Instagram and various games on his phone.[5] Because of the concern surrounding the delay,

[3] West testified that he recognized the voice of the person who entered the car as the person he communicated with by phone in arranging the transaction.

[4] Instagram data which was admitted during trial corroborated West's account that during this time, West initiated several Instagram video calls to Day.

[5] Cell phone extraction data which was admitted during trial demonstrated that during this time, Davis was attempting to contact Rondell Stewart, Davis's and West's uncle who Davis had requested assist that evening as a lookout in the event the sale did not go to plan.

West suggested that Davis leave the car in "drive" in the event they needed to make a quick escape.

West testified that they then "basically just got ambushed" and that shooting started abruptly. West stated that he attempted to open the rear driver's side door—the same side the gunshots were coming from—but that the door would not open, and so he remained in the back seat and acted as though he was dead. West testified that when the gunfire ceased, the vehicle ended up resting on the curb. He testified that there were two assailants and that he heard one of them say, "Grab this. Let the car crash."[6] West testified that the assailants opened the driver's door and reached over Davis. He testified that they also went through his pockets. After the assailants left, West remained in the car "for as long as [he] could." West testified that Davis did not speak, and that he tried unsuccessfully to wake Davis. West eventually got out of the car and ran because he was afraid. West did not take anything with him when he ran from the car. West called the police and returned to the car when he heard the police sirens.

First Responder Testimony

Officer Daniel Pahl, one of the police officers to arrive following the reports of gunfire, testified that he arrived at the scene along with other officers and Corporal Zachary Small.[7] Cpl. Small was equipped with a body worn camera. Ofc. Pahl testified that upon

[6] West testified that he recognized the voice of the speaker as the person who had entered Davis's car earlier that night, and as the person with whom he had been communicating to arrange the sale.

[7] Cpl. Small was an officer, not yet a corporal, in July of 2021.

arrival, Davis's vehicle was stopped on a sidewalk and stairs up an embankment and was in "drive." Multiple bystanders were attempting to render first aid to Davis. Ofc. Pahl testified that he and other officers removed Davis from the vehicle and attempted to provide further first aid. Ofc. Pahl testified he attempted to locate the source of Davis's injury and ultimately determined that the injury was to the back of Davis's head. Ofc. Pahl testified that officers continued to provide first aid until medics arrived and pronounced Davis deceased.

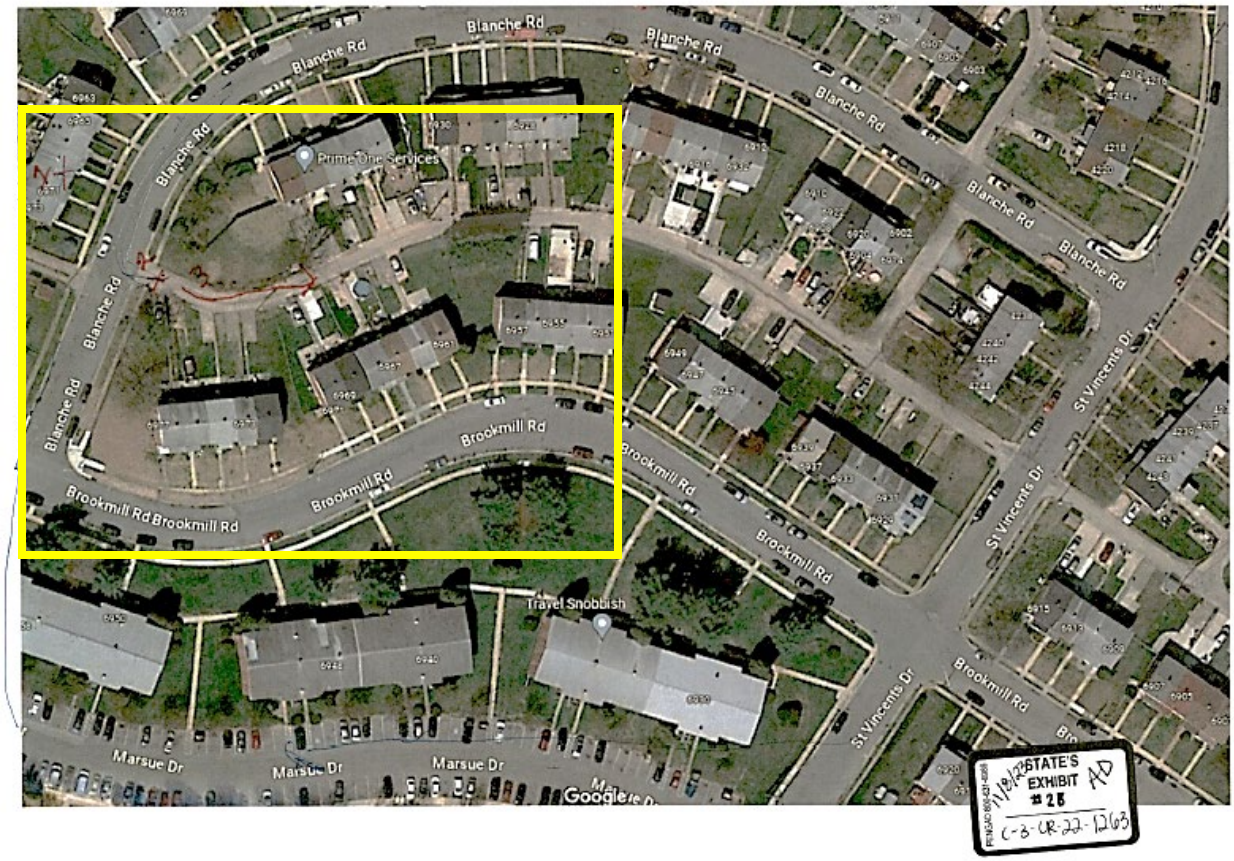
Ofc. Pahl testified that in assessing the scene, he observed multiple bullet holes to the driver's side of the vehicle. He also observed a bag in the rear of the vehicle that contained a green substance. Ofc. Pahl indicated that he spoke to West at the scene.

The body worn camera footage from Cpl. Small's camera was entered into evidence and published to the jury by playing. The footage depicted the events as described by Ofc. Pahl.

Harvey Testimony

In addition to the police officers and West, the State also called a bystander, Shayaro Harvey, to testify. Harvey testified that he was attending a cookout on the evening of July 23, 2021, and while outside on the porch of the residence, he observed a vehicle drive to the "top part" of the alley and then turn off the lights. Harvey observed two people get out of the car, yell "[t]hey got one[,]" and run down Blanche Road, making a left on Brookmill Road. Harvey then heard gunshots. He observed the individuals run back to the car, and

observed it being driven away through the alley. While testifying, Harvey demonstrated his location in connection with the alley and the vehicle using the following visual aid:



Harvey indicated his location at the cookout with a red "X" accompanied by the number one. He indicated the location of the vehicle parked in the alley with another red "X" accompanied by the number two. Finally, Harvey indicated with a red arrow the direction that the car took in leaving the alley.[8]

Harvey photographed the vehicle while it was parked in the alley. He later shared this photograph with police.

[8] The visual aid was admitted as State's Exhibit 2B. We have highlighted the markings made by Harvey using a yellow box for ease of viewing. We have also increased the brightness of the exhibit for ease of viewing the red markings.

Police Investigation

Detective Eric Dunton also testified regarding the investigation into the shooting. Det. Dunton testified that he was assigned to the case as the primary detective. He indicated that he encountered West at the scene, and that West was subsequently interviewed at the police headquarters. Det. Dunton testified that during the interview, West indicated that the dispute involved marijuana. Det. Dunton also stated that as part of the investigation, police examined West's phone, including his Instagram and text messages which preceded the incident.

In examining the Instagram messages, Det. Dunton observed messages between West and Day, and observed that Day had put West in touch with someone via a phone number—identified as (410) 805-1449—for the purpose of arranging a three-pound marijuana sale. Based on that information, per Det. Dunton, police obtained the "entire account information" for Day's Instagram and confirmed the account belonged to Day. In addition, Det. Dunton testified that police identified Appellant as the owner of the phone number with whom West had communicated.[9] After obtaining Day's Instagram records, police observed that Day's Instagram was in contact with another user's Instagram account during the same time period, identified by the profile name "tse_killa_1600." Police obtained the Instagram records for the "tse_killa_1600" profile and learned that the profile was associated with the same phone number previously linked to Appellant.

[9] Det. Dunton testified that, after applying for a court order, police identified the owner of the phone number by obtaining subscriber records, phone records, and cell phone tower records from the location of the phone.

Det. Dunton testified that during the investigation, police discovered several communications between Day and Appellant. On July 23, 2021—the day of the shooting—Day sent Appellant a message at 2:27 p.m. stating "Yes, lord." On the same day, at 11:28 p.m., there was a video call from Day to Appellant that lasted for one minute and seven seconds.

The following exchange of messages occurred between Appellant and Day at 12:29 a.m. on July 24, 2021—less than an hour after the shooting of Davis:

[Day:] Yo

[Appellant:] Yea

[Day:] U str8?

[Appellant:] Yea

A series of video calls were exchanged between Day and Appellant. Day and Appellant continued to exchange messages confirming the other was good and requesting calls.

At 9:19 p.m. on July 24, 2021, Appellant and Day exchanged the following messages:

[Day:] Bro

[Day:] U myswell put me on wit da weed

[Appellant:] Rd bet I got u

[Day:] Reacted [heart] to [Appellant's] message

[Day:] Already

[Appellant:] Just be on ya s[***] dummy

Det. Dunton testified that during the investigation of the shooting, police obtained a search warrant for Appellant's home, which was executed in September of 2021. During the search, Det. Dunton observed a gray Acura car in the driveway of Appellant's home that appeared similar to the picture of the vehicle seen in the alley on the night of the shooting. In addition, police recovered twenty phones from the house. They did not locate the phone associated with the (410) 805-1449 number.

Video Footage

In addition to the testimony, there was video footage that depicted some of the events that transpired on the evening of July 23, 2021. Det. Dunton summarized the chronology of the video footage, and the footage was published to the jury by being played.

The first video clip, taken from surveillance footage of a building across the street from 6948 Brookmill Road, showed an individual waiting in the vestibule of the 6948 complex at 11:30 p.m. Then Davis's vehicle arrived and pulled up to an open curb, parking there at 11:33:39 p.m. A subject was then seen approaching Davis's vehicle and entering the front passenger seat at 11:34:50 p.m. That person remained in the car for just under two minutes. The surveillance footage demonstrated that he left the vehicle at 11:36:33 p.m. The subject could then be seen walking back into the vestibule of the 6948 complex, and then re-entering the car at 11:38:07 p.m. The footage next showed the vehicle being driven a short distance down the street and out of the frame of that video at 11:38:49 p.m.

The second video clip commenced where the prior video ended.[10] It showed Davis's vehicle stopping after being driven the short distance down the street. The subject was then seen leaving the front passenger seat and walking back towards 6948 Brookmill Road. The video also showed Davis's vehicle being driven in reverse back down the street and stopping at the initial location where it was parked in front of 6948 Brookmill Road.

The third video clip showed the subject re-enter the vestibule at 6948 Brookmill Road at 11:40:52. It also depicted another angle of Davis's car returning to the initial parking spot at 11:41:35 p.m.

The fourth video clip was from a surveillance camera that recorded footage of the alley running parallel to Brookmill Road. This clip showed a vehicle arriving in the alley, stopping, and the exterior lights being turned off. Two individuals could then be seen exiting the car. It showed both individuals walking down Blanche Road towards Brookmill Road.

The fifth video clip showed the same information from the fourth video clip at a different angle. This clip, however, contained a time stamp, indicating that the vehicle was parked in the alley at 11:45:58 p.m. The two individuals walked out of view of the camera frame at 11:47 p.m.

The sixth video clip, starting at 11:47:43 p.m., depicted footage facing Brookmill Road. The footage displayed Davis's vehicle, parked. The footage displayed the two individuals approaching Davis's vehicle. The individuals concealed their approach by

[10] This camera footage did not contain a time stamp.

hiding behind other parked cars. At 11:48:12 p.m., the individuals rapidly approached Davis's vehicle. One person approached the driver's door and opened it; the other person walked behind the car and began to approach the right side. The car was instantaneously driven forward, and one suspect fired multiple shots at the driver's side. The car continued to move forward, and both individuals chased the car down the road. After the individuals exited the frame,[11] they re-entered the scope of the camera at 11:48:54 p.m., when they ran in the opposite direction down Brookmill Road towards the location of the alley. One individual dropped something, turned around to pick it up, and resumed running out of the frame.

The seventh video clip contained footage showing the same series of events but from a different angle.

The eighth and ninth video clips contained footage of the alley where the individuals had parked the car. The footage showed two individuals running up Blanche Road, away from Brookmill Road. These clips showed the individuals entering the vehicle[12] and quickly speeding away down the alley.

The tenth video clip showed a portion of the yard in which Davis's vehicle ultimately crashed. This footage contained both audio and video. The footage first contained audio of the shots fired. It then showed Davis's vehicle coasting down Brookmill Road towards the location of the camera. It showed the two individuals chasing the car,

[11] The second individual left the frame at 11:48:31 p.m.

[12] The second individual entered the vehicle parked in the alley at 11:49:17 p.m.

approaching the driver's side once again as it slowed, and standing beside it as it crashed. The footage also contained audio of the individuals speaking. Because of the headlights from Davis's car and its approach to the camera, the individuals' activities on that side of the car were obscured. The footage then showed the individuals running away from the scene. Two minutes and forty-five seconds after the assailants fled, the surveillance footage showed West emerging from the right rear side of the vehicle and running away from the scene, heading in the opposite direction from the location from which the assailants fled.[13]

Appellant's Interview

Appellant participated in an interview with Det. Dunton, which was recorded audially and visually. A recording of the interview was entered into evidence and published to the jury by playing. Appellant acknowledged that he had entered Davis's car—and volunteered the make and model of the car. He acknowledged that he had arranged to purchase marijuana after being connected with West through Day. He acknowledged leaving the vehicle to obtain a scale. He stated that after he had returned to the apartments, he heard shots. He stated that he knew people who lived in the apartments at Brookmill Road, and acknowledged providing the address to "Ant", the person with whom he had

[13] The same video clip showed several bystanders arriving to the scene, approximately one minute after West left. The footage showed the approach of several bystanders and the arrival of Davis's and West's uncle, Rondell Stewart. Other bystanders were present when Stewart ran to the driver's side of Davis's vehicle. After a sound—described by Det. Dunton as a negligent discharge of Stewart's firearm—Stewart ran back to his own car and immediately returned to Davis's car. He briefly opened the right rear door, but immediately shut it and joined the other bystanders on the driver's side of the car. The footage showed the bystanders attempting to render aid to Davis, and showed the arrival of the police, corresponding with the footage shown on the body worn camera footage.

been communicating by phone to arrange the purchase. He stated that he saw West in the back seat of the car. He acknowledged that the car in the picture of the alley was his car.

Appellant initially stated that he was the "only one who ha[d] the car[,]" and that "[he] was driving." However, Appellant later stated that he allowed Day to drive his car on the day of the shooting, and that Day had picked up the car at around 6:30 p.m. that evening. Appellant stated that Day and another person who he did not know were present in Appellant's car on the day of the shooting. When Det. Dunton asked Appellant whether he had communicated with Day during the time that Appellant was engaging with Davis and walking back to the apartment to procure the scale, Appellant responded that he had not, because Day "was already outside." Appellant indicated that Day was there to ensure that Appellant successfully obtained the marijuana.

During the interview, Appellant made several attempts to clarify that he personally did not do the shooting. He stated that "me shooting some other person, I didn't do that . . . . I'm saying I [didn't] take his life for three pounds of [marijuana]." After listening to Det. Dunton describe the series of events that occurred, Appellant responded: "No, I understand everything you just said . . . . I'm telling you like I didn't kill him though." Appellant further suggested the following: "What if I wasn't on the scene when that happened to him? What if I already got my [marijuana] and then somebody killed him. I don't know."

In addition, Appellant acknowledged that the phone number (410) 805-1449 was his at one point. Throughout the interview, he repeatedly acknowledged that the "tse_killa_4600" Instagram profile was his profile.

Physical Evidence and Stipulations

Physical evidence was collected from the scene and the vehicle. Among the evidence that was collected were several bullets and bullet casings; the bag of marijuana from the backseat; and torn pieces of a vacuum-sealed bag. In addition, fingerprints were lifted from the scene.

The State and Appellant entered several stipulations into evidence concerning the physical evidence. As to ballistics, the parties stipulated that one bullet and six bullet fragments were recovered from Davis's car. As to controlled dangerous substances, the parties stipulated to the entry of a report concerning the vacuum-sealed bag in the backseat. According to that report, the "[p]lastic bag with plant matter" weighed approximately 473 grams[14] and tested positive for the presence of THC. The parties stipulated that THC is a component of marijuana. As to fingerprints, the parties stipulated that a fingerprint lifted from the front exterior passenger window of Davis's car positively matched to Appellant.[15] The parties also stipulated to the entry of an autopsy report indicating that Davis's cause of

[14] 473 grams is equal to 1.04 pounds. *See United States v. Chevallier*, 828 F. App'x 882, 887 n.3 (4th Cir. 2020) ("One pound is equal to approximately 454 grams."); *see also* U.S. CENSUS BUREAU, *Guide to International Trade Statistics: Conversion Tables and Units of Quantity*, https://perma.cc/EB7F-RTSA (last visited Feb. 26, 2025) (Conversion of grams to kilograms should be done by multiplying grams by a ratio of 0.001. Here, 473 grams multiplied by 0.001 is equal to 0.473. According to the Census Bureau, conversion of kilograms to pounds should be done by multiplying the pounds by a ratio of 0.4536. The inverse then is also true, and pounds can be found by dividing the weight of the kilogram figure by a ratio of 0.4536. Here, 0.473 kilograms divided by the ratio of 0.4536 results in 1.04 pounds).

[15] Other prints taken from the scene matched Davis; an individual identified by West as a friend of his and a neighbor of Davis; and an individual unknown to the investigation.

death was a gunshot wound to the left side of his head, and that the manner of his death was a homicide.

Motion for Acquittal

At the close of the State's case, Appellant moved for a judgment of acquittal based on insufficiency of the evidence. Appellant argued that there was no evidence of his communications with other individuals suggesting that he had "orchestrated a robbery"; he argued that there was no evidence that he was one of the two individuals who had approached the car, and that there was no evidence to show that "there was [a] meeting of the minds prior to the events that occurred[.]" Appellant argued that because there was insufficient evidence to prove that he committed robbery with a dangerous weapon or attempted robbery, there was likewise insufficient evidence to prove the charges of felony murder or firearm use in the commission of a crime of violence. Finally, he argued that the count relating to first degree assault of West failed because the State could not show a conspiracy.

The State responded that the felony murder charge hinged on the underlying robbery with a dangerous weapon and was based on a theory of accessory liability. The State argued that there was evidence that Appellant was involved in the robbery and participated by repeatedly stalling and delaying the victims, who, based on Appellant's actions, did not believe the deal was complete. Therefore, the State argued, even if Appellant was not "the person who actually brandishe[d] the weapon," because he participated in aiding or abetting, he was criminally responsible as an accomplice. The circuit court denied the motion for judgment of acquittal.

The defense rested without presenting any evidence. Appellant renewed his motion for judgment of acquittal, which was also denied.

Conviction and Appeal

The case was submitted to the jury. Appellant was subsequently convicted of first-degree felony murder; robbery with a dangerous weapon; first-degree assault; and use of a firearm in the commission of a felony. Appellant was sentenced to a term of life incarceration for the murder conviction; a concurrent twenty-year term for the robbery with a dangerous weapon conviction; a concurrent twenty-year term for the firearm conviction; and a concurrent twenty-year term for the first-degree assault conviction. This timely appeal followed.

DISCUSSION

I. THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS

A. Party Contentions

Appellant contends that the evidence adduced at trial was insufficient to support his convictions. Appellant attacks the credibility of West, asserting that he was the State's "primary witness" and that he testified in a manner that was "inherently incredible and inconsistent with the rest of the State's evidence[.]" Thus, Appellant asserts, no jury could have found him credible and therefore his convictions must be reversed.[16]

[16] Appellant also implies, as he did at trial, that either West or Stewart could have arranged the robbery, and that the State's failure to introduce the phone records of West and Stewart allowed for "speculat[ion]" on the jury's part that Appellant "set up the drug deal as a ruse for committing a robbery in which he participated[.]" However, Appellant does not make a legal argument concerning this contention other than to describe the evidence as

The State contends that the evidence and its inferences were sufficient to convict Appellant. The State claims that based on the appellate standard of review, this Court should not be concerned with the weight or credibility assigned to a piece of evidence, but rather whether the evidence as a whole supports the verdict. Because there was some evidence in this case that supported the verdict, and because witness credibility is decided by the jury, the State asserts that the evidence was legally sufficient to support the convictions.

B. Standard of Review

"When reviewing the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Krikstan*, 483 Md. 43, 63 (2023) (citation and internal quotation marks omitted). In conducting this review, we give deference to the jury's "finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *White v. State*, 363 Md. 150, 162 (2001). The test is not whether the evidence "*should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Painter v. State*, 157 Md. App. 1, 11 (2004) (emphasis in original).

"woefully deficient." Because Appellant does not make a legal argument concerning this assertion, we decline to address it further.

C. Analysis

i. West's testimony was not "inherently incredible" under the Kucharczyk Doctrine

Appellant's argument is that there was insufficient evidence to support his robbery conviction, and that accordingly, the remainder of the convictions fail. In reaching this conclusion, Appellant, relying on *Kucharczyk v. State*, 235 Md. 334 (1964), claims that the State's case depended entirely on West's testimony, which Appellant describes as "inherently incredible and inconsistent with the rest of the State's evidence."

This Court has previously disposed of an identical argument in *Rothe v. State*, 242 Md. App. 272 (2019). In *Rothe*, the defendant argued that under *Kucharczyk*, the evidence was insufficient to sustain his convictions for burglary and theft because the State's case was circumstantial and relied "entirely" on the victim's "inherently incredible" testimony that his garage had been broken into and that the defendant did not have permission to enter the garage or take the items. *Id.* at 276. We revisited *Kucharczyk*, explaining that therein, the Supreme Court of Maryland held that the evidence was insufficient to support a conviction where

> the State's entire case of guilt had consisted of the uncorroborated testimony of a single witness whose testimony was rent by unresolved contradictions *about the very happening of the crime itself*. The issue was not credibility per se. It was rather the utter absence of any plausible assertion that the crime had even taken place.

Id. (emphasis added). We further explained that other cases expounding on *Kucharczyk* confirm that the holding of that case is "confined to unresolved contradictions within a

single witness's trial testimony *as to the central issue of the case*." *Id.* at 278 (emphasis added) (quoting *Bailey v. State*, 16 Md. App. 83, 95 (1972)).

We further emphasized that

> *Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court or, indeed, in some other trial. Nor does *Kucharczyk* apply where a witness's trial testimony contradicts itself as to minor or peripheral details but not as to the core issues of the very occurrence of the *corpus delicti* or of the criminal agency of the defendant. Nor does *Kucharczyk* apply where the testimony of a witness is 'equivocal, doubtful and enigmatical' as to surrounding detail. Nor does *Kucharczyk* apply where a witness is forgetful as to even major details or testifies as to what may seem improbable conduct. Nor does *Kucharczyk* apply where a witness is initially hesitant about giving inculpatory testimony but subsequently does inculpate a defendant. Nor does *Kucharczyk* apply where a witness appears initially to have contradicted himself but later explains or resolves the apparent contradiction. Nor does *Kucharczyk* apply where a State's witness is contradicted by other State's witnesses. Nor does *Kucharczyk* apply where a State's witness is contradicted by defense witnesses. Nor does *Kucharczyk* apply where a witness does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version.

Id. at 279–81 (quoting *Bailey*, 16 Md. App. at 95–97) (footnotes and alterations omitted).

We concluded that "the *Kucharczyk* Doctrine, if it ever lived, is dead[,]" and that "[d]amaged credibility is not necessarily inherent incredibility." *Id.* at 285. We confirmed that "[t]rial testimony frequently is replete with contradictions and inconsistencies, major and minor[,]" and that "[i]t is then at the very core of the common law trial by jury . . . to trust in its fact finders, after full disclosure to them, to assess the credibility of the witnesses and to weigh the impact of their testimony." *Id.* at 278 (emphasis omitted) (quoting *Bailey*, 16 Md. App. at 93–94).

Here, Appellant highlighted several aspects of West's testimony that he claims are so contradictory that West's entire testimony, and the remainder of the State's case, must be discarded. Appellant first references several peripheral elements of West's testimony, including: 1) West's statement that he was crouched down in the backseat of the car and that he believed the buyer could not see him; 2) West's statement that the shooters rifled through his pockets, which he had not previously told police; 3) West's statement that he believed he recognized the voice of one of the shooters as Appellant's voice from the transactions over the phone; and 4) West's statement during the police interview—which occurred in the immediate aftermath of the shooting—when he told police that he thought the shooters had emerged from the same apartment where the prospective buyer retired.

We disagree with Appellant that these aspects of West's testimony render his testimony "inherently incredible" under *Kucharczyk*. As explained in *Rothe*, the doctrine does not apply when "a witness's trial testimony contradicts itself as to minor or peripheral details but not as to the core issues of the very occurrence of the *corpus delicti* or of the criminal agency of the defendant[,]" and does not apply even if the witness testifies "as to what may seem improbable conduct." *Rothe*, 242 Md. App. at 279–80 (quoting *Bailey*, 16 Md. App. at 96). Assuming without agreeing that each of the issues highlighted by Appellant—whether West believed the buyer could see him in the backseat of the car, whether the shooters rifled through West's pockets, whether West believed he recognized Appellant's voice as one of the shooters, and whether West's initial impression of the direction from which the shooters approached was plausible—qualify as contradictions, they are each peripheral to the testimony regarding the criminal conduct at issue.

Appellant additionally highlights West's conduct in the immediate aftermath of the shooting, including West's admission that he had initially informed police prior to the interview that he and Davis were selling shoes rather than marijuana, and that he had deleted text messages from his phone out of fear he and Davis would be in trouble. As explained in *Rothe*, "*Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court or, indeed, in some other trial." *Rothe*, 242 Md. App. at 279 (quoting *Bailey*, 16 Md. App. at 95). Although West's prior inconsistent statement may have been appropriate to bring to the jury's attention through cross examination—which Appellant did—a past inconsistency does not render a witness's testimony inherently unreliable under *Kucharczyk*.

Because West's testimony was not "inherently incredible" under *Kucharczyk*, issues concerning credibility or requiring the resolutions of testimonial inconsistencies were tasks left for the jury. "Contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency." *Smiley v. State*, 138 Md. App. 709, 719 (2001). "[T]he assessment of testimonial credibility has always been the fundamental responsibility of the factfinder, jury or trial judge, as a matter of fact." *Rothe*, 242 Md. App. at 283. "In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness'[s] testimony are solely within the province of the jury." *Bohnert v. State*, 312 Md. 266, 277 (1988). Appellate courts do not "weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact." *Pryor v. State*, 195 Md. App. 311, 329 (2010). We decline to usurp the jury's credibility assessment here.

ii. There was sufficient evidence to support Appellant's convictions

Robbery with a Dangerous Weapon

The State charged Appellant with robbery with a dangerous weapon under an accomplice theory. To prove Appellant was guilty of robbery as an accomplice, the State was required to demonstrate that the underlying robbery occurred, and that the Appellant "in some way participate[d] in the commission of the [robbery with a dangerous weapon], by aiding, commanding, counseling, or encouraging" the other participants. *Sweeney v. State*, 242 Md. App. 160, 174 (2019) (quoting *Pope v. State*, 284 Md. 309, 331 (1979)); *see also* MPJI-Cr 6:00, *Accomplice Liability*.

"Robbery is 'a larceny from the person[,] accomplished by either an assault (putting in fear) or a battery (violence).'" *Morris v. State*, 192 Md. App. 1, 33 (2010) (quoting *Snowden v. State*, 321 Md. 612, 618 (1991)).[17] Section 3-403 of the Criminal Law Article ("CL") to the Maryland Code (2002, 2021 Repl. Vol.), "does not create a new offense but merely provides a more severe penalty where the robbery is committed by the use of a dangerous or deadly weapon." *McCord v. State*, 15 Md. App. 63, 70 (1972).

Here, there was substantial evidence from which the jury could determine that a robbery with a dangerous weapon occurred, and that Appellant participated in its commission. Viewing the evidence in a light most favorable to the State,[18] there was

[17] Despite its assignment to a code in the Criminal Law Article of the Maryland Code, the crime of robbery "retains its judicially determined meaning." Md. Code, (2002, 2021 Repl. Vol.), Criminal Law Article ("CL") § 3-401(e).

[18] *See Krikstan*, 483 Md. at 63.

substantial evidence, consisting of testimony from multiple witnesses and corroborated by Davis's text messages with West, the Instagram messages between West and Day, the Instagram messages between Day and Appellant, Appellant's own interview, and the stipulations regarding the physical evidence, that West arranged a meeting for him and Davis with Appellant for the sale of three pounds of marijuana. The evidence demonstrated that Appellant provided the address of the Brookmill Road apartments as the meeting place. There was evidence that when West and Davis arrived, Appellant entered Davis's car to inspect the marijuana, and then delayed the sale by going back into the apartment twice. There was evidence that Appellant called Day minutes before West and Davis arrived.

There was evidence—from Appellant's police interview—that Appellant knew that Day and another individual were there, that they were using his car with his permission, and that they knew there would be three pounds of marijuana in Davis's car. There was evidence that Appellant's car was parked in the alley parallel to Brookmill Road. The evidence showed that the assailants opened the car door prior to shooting, demonstrating the primary goal of taking the marijuana. The evidence then demonstrated that the assailants used a firearm to prevent Davis from leaving. There was evidence that two pounds of marijuana were removed from the car by the assailants following and as a result of the shooting.

The evidence showed that Appellant communicated with Day several times in the immediate aftermath of the shooting and the following day, which included Instagram messages indicating that Appellant possessed the marijuana that was taken from Davis.

A rational juror could have concluded from this evidence that the assailants knew what car to approach to take the marijuana by force, and additionally that Appellant was involved in orchestrating the event. There was substantial evidence available, and inferences that could be drawn therefrom, to support the jury's finding that Appellant was guilty of robbery with a dangerous weapon as an accomplice.

First-Degree Felony Murder

There was also substantial evidence to support Appellant's conviction of first-degree felony murder that arose from the underlying robbery conviction. To establish felony murder, the State was required to prove that the killing of Davis was committed during the perpetration of the robbery with a dangerous weapon under CL section 3-403. *See Morris*, 192 Md. App. at 34; *see also* CL § 2-201(a)(4)(ix). "[T]he intent to commit the underlying felony must exist prior to or concurrent with the performance of the act causing the death of the victim." *Purnell v. State*, 250 Md. App. 703, 719 (2021) (quoting *State v. Allen*, 387 Md. 389, 402 (2005)). Further, Appellant need not have been the individual who pulled the trigger to be convicted of Davis's killing. "[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense[.]" *Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013) (quoting *State v. Williams,* 397 Md. 172, 195 (2007), abrogated on other grounds by *Price v. State*, 405 Md. 10 (2008)). Therefore, the State was required to prove that Appellant was a participant in the underlying felony—in this case, armed robbery; that a participant in the armed robbery killed Davis; and that the shooting of Davis occurred during the commission of the armed

robbery. *See Diggs & Allen*, 213 Md. App. at 90–91; *see also* MPJI-Cr 4:17.7, *Homicide -- First Degree Felony Murder*.

As described above, there was substantial evidence that Appellant was an accomplice, and therefore, a participant in the robbery with a dangerous weapon. There was substantial evidence that a participant in the robbery with a dangerous weapon killed Davis. This included the surveillance footage showing the two assailants disembarking from Appellant's car in the alley, attempting to open Davis's car door, and immediately opening gunfire on the car when Davis attempted to drive away. There was evidence that Davis was killed by a gunshot wound to the left side of his head, consistent with the direction of the assailant's gunfire. There was also evidence that Davis was deceased before West left the vehicle and before anyone else arrived at the scene.

There was substantial evidence that Davis was killed during the commission of the robbery, as demonstrated by the assailant's attempt to open his car door before shooting at Davis; their re-approach to the vehicle as it was crashing; and the evidence that two pounds of marijuana were taken by the assailants. Further, there was evidence that the intent to commit the underlying felony arose prior to the killing of Davis, as demonstrated by Appellant's and Day's underlying Instagram messages and communications; Appellant's stalling of the marijuana sale, allowing time for the other participants in the robbery to arrive; the other participants' arrival in the alley in Appellant's car; and the other participants' strategic approach to Davis's car.

Thus, there was substantial evidence available, and inferences that could be drawn therefrom, to support the jury's finding that Appellant was guilty of first-degree felony murder.

First-Degree Assault

There was also sufficient evidence to support Appellant's conviction for first-degree assault of West as an accomplice.[19] To convict Appellant of first-degree assault, the State was required to "prove all the elements of assault in the second-degree," in addition to "at least one of the statutory aggravating factors." *Snyder v. State*, 210 Md. App. 370, 379 (2013). "Statutory second-degree assault encompasses three types of common law assault and battery: (1) the 'intent to frighten' assault, (2) attempted battery and (3) battery." *Id.* at 380. Only the attempted battery variety of assault is relevant in this case. To prove the attempted battery variety of second-degree assault, the State was required prove that (1) Appellant or his accomplice tried to cause physical harm to West; (2) that Appellant or his accomplice intended to bring about physical harm to West[;] and (3) that Appellant's actions (or those of his accomplice) were not legally justified. *See id.*; *see also* MPJI-Cr 4:01, *Second Degree Assault*. "The State may prove a defendant's intent through direct

[19] As explained above, Appellant was charged as an accomplice to the assault of West. "[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense[.]" *Diggs & Allen*, 213 Md. App. at 90 (quoting *Williams*, 397 Md. at 195). The assault of West arose in the course of the robbery with a dangerous weapon, for which, as explained above, there was sufficient evidence to convict Appellant. Therefore, Appellant could be convicted of the assault of West, even if he did not initially intend to participate in that specific criminal activity.

evidence or circumstantial evidence." *Jones v. State*, 440 Md. 450, 455 (2014) (citation and internal quotation marks omitted).

To prove first-degree assault, in addition to proving the elements of second-degree assault, the State was also required to prove that Appellant or his accomplice either used a firearm to commit an assault, or intended to cause serious physical injury in the commission of the assault. *See Snyder*, 210 Md. App. at 380; *see also* CL § 3-202(b)(1). The statutory definition of "serious physical injury" includes physical injury that "creates a substantial risk of death[.]" CL § 3-201(d)(1).

Here, the evidence showed that the assailants fired at least eight shots at the driver's side of Davis's car. The evidence also showed that immediately prior to the shooting, the assailants opened the car door and the car's interior lights illuminated, displaying West's shape. From the circumstances, the jury could rationally infer that the shooter would not fire rounds in the direction of West if he did not intend to harm West with at least one of those rounds. The jury could also rationally infer that there was no legal justification for the shooter to fire at West, as the shooter instigated the shooting as part of a robbery orchestrated by Appellant and his associates. There was also substantial evidence—including the surveillance footage, West's testimony, the photographs of Davis's car, and the recovered projectiles—that a firearm was used to commit the assault.

There was substantial evidence available, and inferences that could be drawn therefrom, to support the jury's finding that Appellant was guilty of first-degree assault as an accomplice.

Use of a Firearm in the Commission of a Felony

There was likewise sufficient evidence to support Appellant's conviction for use of a firearm in the commission of felony.[20] Use of a firearm in the commission of a felony is a statutory offense. *See* CL § 4-204(b). To convict Appellant of this offense, the State was required to prove that Appellant or his accomplice used a firearm, and did so in the commission of a felony or a crime of violence. *See Sequeira v. State*, 250 Md. App. 161, 183 (2021); *see also* MPJI-Cr 4:35.4, *Weapons -- Use of a Handgun or Firearm in the Commission of a Felony or Crime of Violence*. The statutory definition of a firearm includes "a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive[.]" CL § 4-204(a)(1).

Here, as described above, there was evidence sufficient to convict Appellant of robbery with a dangerous weapon, first-degree felony murder, and first-degree assault. There was also substantial evidence that Appellant's accomplices used a firearm. This included surveillance footage that displayed both audio and visual recordings of the shooting; West's testimony, describing the shots that he heard; the photographs of Davis's car depicting multiple bullet holes; and the stipulation describing the recovered projectiles.

[20] Appellant was charged with this offense as an accomplice. "[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense[.]" *Diggs & Allen*, 213 Md. App. at 90 (quoting *Williams*, 397 Md. at 195). The use of the firearm arose during the course of the robbery with a dangerous weapon, for which, as explained above, there was sufficient evidence to convict Appellant. Therefore, Appellant could be convicted of this offense as an accomplice.

There was substantial evidence that a firearm was used in the commission of the underlying felonies.

We conclude that there was sufficient evidence to support Appellant's convictions beyond a reasonable doubt.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN BASING APPELLANT'S SENTENCE ON AN IMPROPER CONSIDERATION

A. Additional Facts

During Appellant's sentencing hearing, Appellant's counsel requested that Appellant be sentenced to life incarceration with all but forty years suspended, rather than to a life sentence. In response to that request, the following colloquy occurred:

> [The State]: Your Honor, the only thing that I would respond [to] in Counsel's argument is that because of the Defendant's age in, I believe 20 years, after he serves a certain amount of time, I think it's 20 years, he will have the ability to modify his sentence at that point in time. So, I don't think that you should take into consideration that when -- that there won't be other modifications down the road for 2020 -- I think it's every three years, he can get a modification.
>
> THE COURT: That's a modification he can seek of a [j]udge --
>
> [The State]: Mm-hmm.
>
> THE COURT: -- as opposed to being considered for parole after whatever number of years?
>
> [The State]: Correct.
>
> THE COURT: All right.
>
> [The State]: So, parole would be with a life sentence regardless, in 15 years --
>
> THE COURT: Fifteen years.

[The State]: -- he would have -- yeah, he would have his first parole hearing. And then, but that has nothing to do with a modification --

THE COURT: Understood.

[The State]: -- so, he would have --

THE COURT: So, when is he --

[The State]: -- a five-year in the 20 years.

THE COURT: -- when is he eligible for a modification?

[The State]: Five year, well --

THE COURT: Well --

[The State]: -- I'm assuming Counsel will do a Motion for Modification.

THE COURT: Right.

[The State]: So, in five years, he would have that ability and then again in -- because of his age, 20 -- after 20 -- he serves 20 years. And then, if it's denied, he gets one in two years and if it's denied, he gets another one in two years. So, those are all -- now, within the last couple of years, new and different ways that sentences can be modified now, for men of his age.

THE COURT: Okay. All right, thank you for that.

Appellant's counsel did not object to any of the State's comments. Prior to imposing the sentence, the court stated the following, referencing the comments by the State:

> The [c]ourt does also find important the point that [the State] made and that is that after, of course, the [Appellant] can file a motion to modify whatever ultimate sentence I hand down, which the [c]ourt can hold sub curia or deny, as [c]ounsel pointed out. But that there will be -- that there is an opportunity, with a person sentenced to life, after 20 years to seek a modification and opportunities after that.

The court then imposed a sentence of life for the murder conviction; a twenty-year concurrent sentence for the robbery with a dangerous weapon conviction; another twenty-

year concurrent sentence for the first-degree assault conviction; and another twenty-year concurrent sentence for the use of a firearm in the commission of a felony conviction.

B. Party Contentions

Appellant and the State agree that in imposing the sentence, the sentencing judge referenced impermissible considerations—specifically, the prosecutor's improper reference to the Juvenile Restoration Act,[21] which is inapplicable to Appellant. The State observes that, while Appellant did not object and the issue is not preserved, this Court may still review the unpreserved sentencing claim here because review will not unfairly prejudice either of the parties and will promote orderly administration of justice.[22] The parties agree that Appellant's sentences should be vacated and the case remanded for resentencing.

C. Preservation

Allegations of impermissible consideration at sentencing must ordinarily be raised in or decided by the trial court to be preserved for appellate review. *Abdul-Maleek v. State*, 426 Md. 59, 68–69 (2012). However, Maryland Rule 8-131(a) grants an appellate court discretion to consider issues deemed waived for failure to make a contemporaneous objection. *Abdul-Maleek*, 426 Md. at 68–69. In deciding whether to review an issue that

[21] *See* Md. Code, (2001, 2018 Repl. Vol., 2022 Supp.), § 8-110 of the Criminal Procedure ("CP") Article.

[22] Appellant acknowledges that the sentencing issue is unpreserved; however, he suggests that this Court may nevertheless reach the issue based on ineffective assistance of his trial counsel. We need not reach the issue of ineffective assistance of counsel, as we exercise discretionary review of the unpreserved sentencing claim under *Abdul-Maleek v. State*, 426 Md. 59 (2012).

has been waived, this court considers whether the exercise of discretion first "will work unfair prejudice to either of the parties"; and second "will promote the orderly administration of justice." *Id.* at 70 (internal citations and quotation marks omitted). Here, the State acknowledges that the sentencing court's consideration of relief under CP § 8-110 "was prompted by the State's incorrect assertion" that such relief would be available to Appellant. The State further suggests that in light of this apparent reliance, the interests of justice would be served by this Court exercising discretionary review. We agree. Because neither party would be prejudiced by our exercise of discretion, and because the interests of justice would be best served by our review of the improper sentencing consideration, we exercise our discretion to review the unpreserved issue.

D. Analysis

"A trial court 'may exercise wide discretion in fashioning a defendant's sentence.'" *Sharp v. State*, 446 Md. 669, 685 (2016) (quoting *McGlone v. State*, 406 Md. 545, 557 (2008)). "There are 'only three grounds for appellate review of a sentence: (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the trial court was motivated by ill-will, prejudice, or other impermissible considerations; and (3) whether the sentence is within statutory limits.'" *Id.* at 685–86 (quoting *Jones v. State*, 414 Md. 686, 693 (2010)). In determining whether a trial court was motivated by an impermissible consideration during sentencing, "an appellate court must read the trial court's statements 'in the context of the entire sentencing proceeding' to determine whether the trial court's statements 'could lead a reasonable

person to infer that the trial court might have been motivated by an impermissible consideration.'" *Id.* at 689 (quoting *Abdul-Maleek*, 426 Md. at 73).

Here, the parties agree that in the context of the sentencing proceeding, the references to Appellant's age, the passage of twenty years, the ability to submit a renewed request for modified sentence three years thereafter, and the description of such activity as a judicial modification rather than parole, all suggest reliance on provisions of the Juvenile Restoration Act. The parties likewise agree that Appellant is categorically ineligible for the relief under CP section 8-110 that was described by the State, as he was not a minor on the date of the offenses in this case, and further, he was sentenced after October 1, 2021, the threshold date identified in CP section 8-110. Finally, before announcing its sentence, the sentencing court indicated that it found "important" the State's comments regarding Appellant's ability to seek multiple modifications after twenty years—modifications that Appellant was not, in fact, eligible to seek. In this context, the trial court's statements could "lead a reasonable person to infer" that the trial court's sentencing might have been motivated by an impermissible consideration—namely, an improper reliance on CP section 8-110. *See Abdul-Maleek*, 426 Md. at 73.

Because review of the sentencing record could lead a reasonable person to infer that the court erroneously relied on CP section 8-110 in imposing Appellant's sentences, we vacate the sentences and remand the matter for resentencing.

III. FOR GUIDANCE ON REMAND, APPELLANT'S SENTENCE FOR THE UNDERLYING OFFENCE OF ROBBERY WITH A DANGEROUS WEAPON IS REQUIRED TO MERGE INTO HIS SENTENCE FOR FELONY MURDER

Finally, Appellant addresses the circuit court's imposition of a life sentence for felony murder with a separate, twenty-year sentence for the underlying felony. Appellant contends that under the required evidence test, the robbery with a dangerous weapon conviction is required to merge with the felony murder conviction. The State agrees. Although we have vacated the sentences for the reasons explained in Section II *supra*, we nevertheless address this issue to offer guidance to the sentencing court on remand.

"Whether a conviction merges for sentencing purposes is a question of law that is assessed under a de novo standard of review." *Koushall v. State*, 479 Md. 124, 148 (2022). "Maryland recognizes three grounds for merging a defendant's convictions . . . : '(1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness.'" *Id.* at 156 (quoting *Carroll v. State*, 428 Md. 679, 694 (2012)). Under the required evidence test, the sentences for two convictions must be merged when "the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014).

The Supreme Court of Maryland has consistently applied the required evidence test to hold that the sentence for an underlying felony conviction merges into the sentence for a felony murder conviction. *See Borchardt v. State*, 367 Md. 91, 142 (2001). The Court has explained:

> In *Newton*, we concluded that felony murder and the underlying felony must be treated as one offense for double jeopardy purposes and that, for sentencing, the underlying felony must merge into the murder. That is

> because felony murder contains every element contained in the underlying felony and therefore does not present the situation in which each offense contains an element not found in the other.

Id. (citing *Newton v. State*, 280 Md. 260 (1977)). The Supreme Court has further explained that for double jeopardy purposes, under the required evidence test "the felony murder and the underlying felony must be deemed the same[.]" *State v. Johnson*, 442 Md. 211, 220 (2015) (quoting *Newton*, 280 Md. at 268). Otherwise, the separate sentences for the felony and the murder committed in the perpetration of that felony constitute "double punishment for the same offense[.]" *Newton*, 280 Md. at 273–74.

Here, Appellant's conviction for first-degree felony murder was predicated on his conviction for the felony of robbery with a dangerous weapon. The trial court sentenced Appellant to separate sentences for each of these convictions—a term of life for the felony murder conviction, and a concurrent term of twenty years for the robbery with a dangerous weapon felony conviction. Appellant argues, and the State agrees, that robbery with a dangerous weapon served as the predicate for the felony murder conviction, and the sentences therefore should have merged. We likewise agree. Appellant's conviction for felony murder "contains every element contained in the underlying felony" of robbery with a dangerous weapon. *See Borchardt*, 367 Md. at 142. Therefore, under the required evidence test, the sentences for those two convictions were required to merge. Although we have vacated the sentences for the reasons explained in Section II *supra*, for guidance on remand, when the trial court re-sentences Appellant, the court should merge these convictions.

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR RE-SENTENCING. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.