UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2108

September Term, 2014

STEPHON PRATHER

v.

STATE OF MARYLAND

Woodward,
Berger,
Arthur,

JJ.

Opinion by Berger, J.

Filed: December 2, 2015

Stephon Prather ("Prather"), appellant, was convicted of multiple counts of attempted murder, reckless endangerment, and associated offenses in the Circuit Court for Howard County. On appeal, Prather raises four issues for our review, which we have rephrased as follows:

1. Whether the circuit court erred by denying Prather's motion to dismiss.

2. Whether the circuit court erred by declining to issue Prather's requested self-defense and imperfect self-defense instructions.

3. Whether the evidence was sufficient to sustain Prather's convictions for attempted second-degree murder.

4. Whether the circuit court erred by not merging reckless endangerment with the other offenses for sentencing purposes.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

I. Factual Background

On October 23, 2013, an altercation occurred between Prather and multiple police officers which resulted in the non-fatal shooting of one officer by Prather. The incident began when Prather entered a car dealership shortly before 4:00 p.m. on that date. The manager of the car dealership, Adrian Ledesma, observed that Prather was dressed in dirty clothing, appeared nervous, and "was acting weird." Mr. Ledesma further observed that Prather kept his jacket on even though it was a warm day and that Prather kept his right hand inside the jacket. Prather asked to test-drive a vehicle, but Mr. Ledesma did not feel

comfortable permitting Prather to do so. Mr. Ledesma told Prather that he would have to wait ten to fifteen minutes before test-driving the vehicle. Mr. Ledesma's "impression at all times" was that Prather "ha[d] a gun [in] his pocket" based upon "[t]he way [his] jacket fell."

While Prather was waiting, Renan Augustin Palacios, a courier for the car dealership, arrived. Mr. Palacios observed the bullet cartridge of a gun in Prather's pocket. Mr. Ledesma walked toward a back room and signaled for Mr. Palacios to follow him. Thereafter, Mr. Ledesma called 9-1-1. Officer Stella Dieu responded to the 9-1-1 call and arrived at the car dealership shortly thereafter. She observed Prather walking out of the dealership, appearing dirty and "very agitated." Officer Dieu introduced herself to Prather and asked Prather how he was doing, but Prather told her to leave him alone. Prather continued walking, keeping his right hand in his pocket. Officer Dieu told Prather to remove his hands from his pockets, but Prather did not respond. Prather continued walking northbound, in the center median of Route 1, without waiting for traffic to stop. Officer Dieu followed Prather walking generally in the same direction, along the shoulder of the road. Officer Dieu also called for backup.

Firefighter/EMT Justin Savage was in the area, driving an ambulance on Route 1, when he observed Officer Dieu engaged with Prather, who was walking in the middle of the street. Because traffic was still moving and cars were getting close to Officer Dieu, Savage activated the ambulance's lights and siren and pulled up in order to stop traffic.

Firefighter/paramedic Veronica Conner was riding in the front passenger seat of the ambulance. She observed Prather acting in an agitated manner. Conner explained that "[w]hen [the ambulance] pulled up, [Prather] seemed to walk more aggressively and then he began to pivot between the ambulance and the police officer." Conner saw Prather remove his left hand from his pocket and begin to wave it in the air. Thereafter, Conner saw Prather "withdr[a]w his right hand which had a gun in it." Conner yelled to Savage that she saw a gun, and Savage drove the ambulance further up the road.

Officers Steven Houk and John Jackson responded to Officer Dieu's call for backup. As Officer Houk exited his car, he held his gun at his side, pointed toward the ground. Officer Jackson also exited the car with his gun drawn. Officer Jackson moved toward Prather with his gun raised and pointed at Prather. Officer Jackson ordered Prather to get on the ground, but Prather did not comply. Instead, Prather withdrew a handgun from his pocket, pulled it, and raised it toward the officers. Officer Dieu testified that Prather was moving his weapon "back and forth between the three" officers "but not at a specific person." At that point, Prather, Officer Houk, Officer Dieu, and Officer Jackson all began firing. According to Officer Jackson, Officer Jackson's "gun was the first weapon [he] heard go off but [Prather] immediately fired, if not the same time, right after [Officer Jackson]." Officer Houk testified that he could not tell which gun was fired first, but that he started shooting when he saw Prather turn toward Officer Jackson with a gun in his hand. Prather then turned his gun toward Officer Houk and shot the officer in the abdomen.

Ultimately Prather retreated backwards towards a wooded area. Prather continued to shoot as he retreated.

Various civilian witnesses who had been driving on Route 1 at the time observed the altercation between Prather and the police officers. The testimony of the civilian witnesses was consistent with that of the police officers. At trial, the State introduced a cell phone video of the incident which had been taken by a civilian driving on Route 1.

After Prather went into the wooded area, Officer Dieu noticed that Officer Houk had been shot. Officer Dieu assisted Officer Houk and observed Emergency Medical Services personnel begin to treat him. After the incident, the officers who had been involved in the shooting were quarantined, and other officers arrived in order to attempt to locate Prather. Sergeant Jason Ellis heard what he believed to be a gunshot coming from the wooded area along Route 1 shortly after midnight.

The following day, police officers saw Prather walking along Route 1, near the scene of the shooting, with a shirt wrapped around his head and wearing dirty pants. Prather had a gunshot wound in his leg. The officers approached Prather and Prather said, "I'm Stephon Prather, I'm who you are looking for." One officer asked Prather where the gun was. Prather answered that it was in the woods. Officers searched a drainage tunnel near the crime scene and recovered a bullet shell without a shell casing, as well as a backpack with a handgun, ammunition, and Prather's driver's license. Prather was subsequently arrested.

II. Procedural History

Prather was charged with three counts of attempted second degree murder against Officers Houk, Dieu, and Jackson; three counts of first-degree assault against the three officers; three counts of the use of a handgun in a crime of violence against the three officers; second-degree assault of a law enforcement officer against Officer Houk; and reckless endangerment.

On December 12, 2013, the parties appeared in court for a scheduling conference before Judge Richard Bernhardt, to whom the case had been specially assigned. The parties discussed a motions date of March 6, 2014 and a trial date of April 15, 2014. Judge Bernhardt expressed concern that the dates were close to the *Hicks* date[1] of May 6, 2014, commenting that the April 15, 2014 trial date "seem[ed] awfully close to the expiration of *Hicks*, it doesn't leave much wiggle room should there be minor adjustments made to the schedule." The court inquired whether that date was "the best [the State and defense counsel] could do," and the parties responded that the proposed dates had been provided by the court's calendar management office and were based upon the availability of the parties as well as Judge Bernhardt.

[1] The "*Hicks* date" refers to the requirement set forth in Md. Rule 4-271 that a criminal trial be scheduled within 180 days of the appearance of counsel or the defendant's first appearance before the circuit court, whichever is earlier, unless the trial date is postponed for good cause.

On February 21, 2014, the circuit court received a letter from Prather himself, dated February 14, 2014, in which Prather wrote: "I do not want to wavie [sic] my hicks Date no matter what my public defender Samuel Truette say. I also don't [sic] want to continue any of my court date for any reason." (Emphasis in original).

Approximately two weeks before trial, on March 31, 2014, Prather's attorney, Sam Truette, filed a suggestion of incompetence and moved for a court-ordered competency evaluation. Attached to the suggestion of incompetence to stand trial was a proposed order, which requested sixty days for the completion of a competency evaluation and report. The court granted the motion, issuing an order the same day which required the Department of Health and Mental Hygiene to submit an report within sixty days.

On April 2, 2014, at a previously scheduled motions' hearing, the issue of the competency evaluation, and its connection to the *Hicks* deadline, was discussed. In the following colloquy, Judge Bernhardt explained to Prather the significance of the suggestion of incompetence, as well as its effects:

> THE COURT: Alright. Mr. Prather, there's been a pleading filed by [defense counsel that is] called a suggestion of incompetence to stand trial, do you understand?
>
> He's told you that, sir?
>
> THE DEFENDANT: Yeah, he talked to me about some stuff.
>
> THE COURT: Alright. When that happens, sir, we can't proceed with the case until there's been an evaluation and I make a decision about whether or not you're competent to stand trial. Which means that we're not [going to] do motions today

and [there] won't be a trial on the 8th, I think is what the scheduled date was.[2] So, I wanted you to be brought here today so that you would see what happened and you would understand why these dates have been moved.

You understand, sir?

[DEFENSE COUNSEL]: I will explain to Mr. Prather this, and this is something I would explain to him, Your Honor, Mr. Prather is resolute that he does not want to waive *Hicks*. And he has informed me that he does not intend to waive *Hicks*. And I told him that based on what I filed on his behalf today he could not waive *Hicks* in any event.

THE COURT: Okay.

[DEFENSE COUNSEL]: And is this a correct -- is that correct, Mr. Prather?

THE DEFENDANT: Yeah.

[DEFENSE COUNSEL]: Okay.

THE COURT: Alright.

There's been a suggestion of incompetency filed, I signed the order requiring an evaluation to be done.

Instead of just putting this into a -- to the side I'd like to have dates set right now.

[DEFENSE COUNSEL]: That's fine, Your Honor.

* * *

THE CLERK: How far out do you want the trial?

[2] As discussed *supra*, the actual scheduled trial date was April 15, 2014.

THE COURT: Mr. Prather would like it as soon as possible, I'm sure, after --

[DEFENSE COUNSEL]: That's correct.

THE COURT: -- the motions we can get five days together.

* * *

THE COURT: June 30th?

[THE PROSECUTOR]: That's fine with the State, Your Honor.

THE COURT: Is June 30th acceptable, [defense counsel]?

[DEFENSE COUNSEL]: June 30th would be acceptable.

* * *

THE COURT: Alright, thank you, please, be seated.

We're back on the record in State versus Prather case 13-K-13-053853. This matter is scheduled today for motions, there's been a suggestion of incompetency filed, I signed an order requiring an evaluation be done. Because of the filing and the suggestion we can't proceed with motions tod[a]y nor can we proceed with trial, the scheduled trial date of April the 8th [sic].

Mr. Prather is present.

For that reason I've directed that a new motions date and a new trial date be ascertained. I understand that July the 14th is the earliest trial date available for a five day spread. I also understand that motions have been reset for June the 10th --

[DEFENSE COUNSEL]: That's correct, Your Honor.

THE COURT: -- and that should give enough time for the competency evaluation to be completed.

> So with that, I'll find that good cause exists to continue both of these dates due to the filing.
>
> Does the State feel that there's any further findings that need to be placed upon the record?
>
> [THE PROSECUTOR]: No, Your Honor.
>
> THE COURT: I understand Mr. Prather's executed notice; is that right, [defense counsel]?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor, and he has a copy. All parties have signed it and the original and green copy have been submitted to the Clerk.
>
> THE COURT: Alright, very good.

On June 3, 2014, Prather moved to dismiss the indictment for, *inter alia*, failure to comply with Md. Code (2001, 2008 Repl. Vol.), § 6-103 of the Criminal Procedure Article ("CP") and Md. Rule 4-271, which provide that postponements beyond the *Hicks* deadline are required to be made by "the county administrative judge" or his or her designee. Prather drafted the motion and his attorney, Janette DeBoissiere, filed the motion along with an accompanying memorandum. Ms. DeBoissiere entered her appearance on June 3, 2014, the same day she filed the motion to dismiss.

On June 10, 2014, the circuit court received a letter from the Department of Health and Mental Hygiene requesting more time to complete Prather's competency evaluation. Also on June 10, 2014, the parties appeared in court for a motions hearing. Defense counsel told the court that Prather wanted to "waive the concern about competence" and proceed without the evaluator's report. Defense counsel further indicated that "if [she] had to make

[her] own assessment of" Prather, based on her experiences interacting with Prather, she had "not found him to be incompetent." The court observed that Prather had not cooperated with evaluators and opined that Prather's lack of cooperation could be indicative of incompetency. The court determined that "the issue of competency . . . really need[ed] to be resolved before anything else." The court granted the Department of Health and Mental Hygiene's request for additional time and reserved ruling on the motion to dismiss.

Ultimately, in a report dated June 27, 2014, the Department of Health and Mental Hygiene concluded that Prather was competent to stand trial. On July 14, 2014, the circuit court found, beyond a reasonable doubt, that Prather was competent. The court further addressed Prather's motion to dismiss. The court explained that it believed that "the requirements of [Criminal Procedure §] 6-103, and Maryland Rule 4-271 do not apply in instances such as this case" where a case had been specially assigned to a particular judge. Judge Bernhardt explained that he believed that, as the specially assigned judge, it was his responsibility, and not the responsibility of the administrative judge, to rule on the motion for a competency evaluation. The court further explained that, because the competency evaluation had been ordered, the court "had by necessity and operation of law made it impossible to commence the trial before . . . the expiration of the hundred and eighty day period." The court concluded that Prather was "not legally available for trial until [he was] deemed to be competent." The court alternatively found that defense counsel had consented

to a trial beyond the *Hicks* date and that Prather's "opposition to the required change of the trial date [did] not negate the actions of his attorney."

The jury trial commenced on July 14, 2014. Before the case was sent to the jury, defense counsel requested a jury instruction on perfect and imperfect self defense, arguing that Prather "wasn't intending to kill the officers" but "was only trying to defend himself." The court declined to give the requested instructions.

The jury found Prather guilty of three counts of attempted second-degree murder, three counts of first-degree assault, three counts of use of a handgun in connection with a crime of violence, one count of second-degree assault, and one count of reckless endangerment. At sentencing, the court merged the convictions for first-degree assault of Officer Houk and second-degree assault of a law enforcement officer into the conviction for attempted second-degree murder of Officer Houk. The court further merged the convictions for first-degree assault against Officers Jackson and Dieu into the convictions for attempted second-degree murder against Officers Jackson and Dieu. The court did not merge the reckless endangerment conviction with any other conviction.

This timely appeal followed.

DISCUSSION

I.

Prather's first contention is that the circuit court erred by denying his motion to dismiss because Maryland Rule 4-271 was violated when Judge Bernhardt, rather than the

administrative judge or her designee, continued the trial date beyond the *Hicks* deadline. The State responds that Prather is precluded from seeking dismissal under Rule 4-271 because both Prather and his attorney consented to the scheduling of a trial date beyond the *Hicks* deadline. We agree with the State.

The term "*Hicks* date" or "*Hicks* deadline" is a reference to the case of *State v. Hicks*, 285 Md. 310 (1979), in which the Court of Appeals analyzed the predecessors to the current speedy trial statute and rule. In *Hicks*, the Court held that dismissal of a case is the appropriate sanction when a criminal trial is not scheduled within 180 days of the earlier of the appearance of counsel or the defendant's first appearance before the circuit court, absent a good cause determination by the county administrative judge or his or her designee. Pursuant to section 6-103 of the Criminal Procedure Article[3] and Md. Rule 4-271,[4]

[3] CP § 6-103 provides:

> (a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.
>
> (b)(1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:

(continued...)

postponements beyond the *Hicks* deadline are required to be made by "the county administrative judge" or his or her designee.

In the present case, Judge Bernhardt, and not the county administrative judge, continued Prather's trial beyond the *Hicks* date after Prather's counsel filed a suggestion of incompetency thirty-six days before the *Hicks* deadline. Indeed, Prather's counsel expressly

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[3] (...continued)

> (i) on motion of a party; or
>
> (ii) on the initiative of the circuit court.
>
> (2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.

[4] Md. Rule 4-271 provides:

> The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

sought and agreed to a trial date beyond the *Hicks* date. As we shall explain, under these circumstances, whether Judge Bernhardt was the administrative judge or her designee when Prather's trial date was rescheduled is irrelevant.

The Court of Appeals explained in *Hicks* that, in certain circumstances, dismissal is an inappropriate sanction for a *Hicks* violation. 285 Md. at 335. One such circumstance is when a defendant or defense counsel has consented to a trial date after the *Hicks* date. *Id.* The Court explained:

> [I]t is inappropriate to dismiss the criminal charges is where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date in violation of Rule 746.[5] It would, in our judgment, be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation. In this respect, the situation is analogous to the well-established principle that a criminal defendant who seeks or expressly consents to a mistrial, even though the required "manifest necessity" standard for the mistrial may have been absent, cannot take advantage of his own act and prevent a retrial on double jeopardy grounds.

Id. This principle has been reiterated in several cases. *See, e.g.*, *Jules v. State*, 171 Md. App. 458, 475 (2006) (holding that dismissal sanction was unavailable when "[a]ppellant, through his attorney, and because of his attorney's vacation schedule, requested a trial date beyond the window prescribed by Maryland Rule 4-271 and *Hicks*."); *Dyson v. State*, 122 Md. App. 413, 418-19 (1998), *judgment rev'd on other grounds*, 527 U.S. 465 (1999) (discussing the "inappropriateness of the dismissal sanction when the defendant has

[5] Rule 746 was the predecessor to the current Rule 4-271.

consented to the violation of the [*Hicks*] Rule"); *State v. Dorsey*, 114 Md. App. 678, 702 (1997) *aff'd*, 349 Md. 688 (1998) ("A defendant will not be heard to complain about a trial date in excess of Hicks's 180-day limit if the defendant . . . . seeks or expressly consents to a trial date in violation of the rule.") (internal quotation omitted); *Woodlock v. State*, 99 Md. App. 728, 738 (1994) ("Where counsel, being aware of the [*Hicks*] Rule, consents to a trial date beyond the limitations set by the Rule, dismissal would be an inappropriate sanction for non-compliance.").

In *Jules*, *supra*, 171 Md. App. at 471-2, 474, we explained that where there is "some overt act evidencing an intent to consent to the delay," either by the defendant or by the defense attorney, "the sanction of dismissal is inapplicable" because "'[i]t would . . . be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation.'" We have further emphasized that the defendant himself need not expressly consent to a post-*Hicks* trial date in order for dismissal to be an inappropriate sanction. *Dyson*, *supra*, 122 Md. App. at 419 ("The actions of counsel in this regard, moreover, are binding on a defendant and are not sapped of vitality simply because the defendant has not directly or personally participated in the decision-making process.").

In the present case, Prather, through his attorney, requested sixty days for a competency evaluation by the Department of Health and Mental Hygiene and submitted a proposed order allowing for sixty days in order to complete the evaluation. Furthermore, defense counsel expressly agreed to the new trial date beyond the *Hicks* deadline. Indeed,

Prather himself signed the notice of the new trial date. Each of these various overt acts -- the request for the competency evaluation, defense counsel's agreement to the new trial date, and Prather's signing of the notice -- is sufficient to demonstrate an intent to consent to the delay beyond the *Hicks* deadline. Accordingly, the sanction of dismissal is plainly inappropriate.[6]

II.

Prather's next contention is that the circuit court erred by declining to issue his requested jury instructions on self-defense and imperfect self-defense. Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" With respect to the appellate standard of review of a trial court's decision whether to propound a requested jury instruction, the Court of Appeals has explained:

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

[6] In light of our determination that the dismissal sanction is unavailable to Prather given Prather's and defense counsel's overt acts evidencing intent to consent to a trial date beyond the *Hicks* deadline, we need not address whether Prather was legally unavailable prior to the expiration of the *Hicks* deadline due to the pending competency evaluation.

Stabb v. State, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

When determining whether the trial court abused its discretion by declining to give a particular jury instruction, we consider the following:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Bazzle v. State, 426 Md. 541, 549 (2012) (quoting *Stabb*, *supra*, 423 Md. at 465 (quoting *In re Don Mc.*, 344 Md. 194, 201 (1996))). "Whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). On appeal, our task "is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.*

The pattern jury instruction on self-defense sets forth the particular elements that must be satisfied in order to find that a defendant acted in self-defense:

> (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
>
> (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 5:07 (2nd ed., 2012). *See also Haile v. State*, 431 Md. 448, 471-72 (2013) (setting forth the elements of self-defense). "Ordinarily, where self-defense has been generated by the evidence, imperfect self-defense is generated as well." *State v. Martin*, 329 Md. 351, 359 (1993). Imperfect self-defense does not require an objectively reasonable belief that force was reasonable. *Id.* at 357 ("[I]mperfect self-defense, . . . requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so.") (internal quotation omitted). Imperfect self-defense "is not a complete defense; it mitigates murder to voluntary manslaughter rather than completely exonerating the defendant." *Id.* at 358.

Prather argues that the self-defense instructions were generated by the evidence because Prather tried to walk away from officers. Prather further argues that witnesses' testimony that Prather appeared out of sorts suggested that Prather was in fear for his life. Prather additionally points to the fact that there were bullets left in his weapon, which

Prather argues supports an inference that he used no more force than necessary in order to defend himself. In our view, none of the evidence pointed to by Prather supports a self-defense instruction.

First, we observe that Prather did not testify as to his state of mind. Although testimony by the defendant is not essential to generate a self-defense instruction, it is typical. *See Martin*, *supra*, 329 Md. at 361 (commenting that in the context of imperfect self-defense, "[o]rdinarily, the source of the evidence of the defendant's state of mind will be testimony by the defendant"); *Bryant v. State*, 83 Md. App. 237, 241 (1990) (commenting that "[t]he appellant, by his own testimony, generated genuine jury issues with respect to . . . self-defense" and "imperfect self-defense").

We now turn our attention to the evidence which Prather contends generates a self-defense instruction. Prather asserts that he tried to walk away from the officers, but Officer Dieu testified that Prather began to retreat only after he had fired upon Officers Jackson and Houk. Furthermore, we find entirely speculative Prather's assertion that the testimony that he appeared "agitated," "weird," or "bizarre" supports a finding that he was in fear for his life. No witness testified that Prather appeared to be afraid, and the testimony about Prather's observed behavior does not support an inference that he feared death or bodily harm.

Finally, the fact that bullets were left in Prather's gun when he ultimately retreated is not evidence that he used no more force than necessary to defend himself, or that he was

not the initial aggressor. We agree with the trial court that the record reflects that Prather was the initial aggressor. Although Officer Jackson testified that he fired immediately before or at the same time as Prather, he fired his weapon only after he observed Prather draw his weapon and point it towards Officers Houk and Dieu. Prather was the initial aggressor because he displayed his weapon before any officer fired a weapon. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").[7]

Our review of the evidence presented at trial leads us to agree with the trial court that there was not "some" evidence presented which would have permitted a trier of fact to find that Prather acted in self-defense when he fired his weapon at Officers Houk, Jackson, and Dieu. Accordingly, we hold that the circuit court did not err by declining to propound Prather's requested self-defense instructions.

[7] The circuit court relied upon *Garner*, *supra*, when declining to give Prather's requested self-defense instruction. On appeal, Prather argues that because there was no evidence that Prather was threatening death or serious physical injury to anyone, the trial court's reliance upon *Garner* was misplaced. We reject Prather's characterization of the evidence. The evidence established that Prather drew his weapon and pointed it towards police officers before any shots were fired.

III.

Prather contends that the evidence was insufficient to support his convictions for attempted second-degree murder because there was no evidence of a specific attempt to kill. We are unpersuaded.

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court of Appeals has explained:

> It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to the jury's inferences and determine whether they are supported by the evidence.

Id. at 185 (internal citations omitted).

In order for a defendant to be convicted of attempted second-degree murder, the State must prove "a specific intent to kill." *Harrison v. State*, 382 Md. 477, 488 (2004) (internal quotation omitted). *See also State v. Earp*, 319 Md. 156, 167 (1990) (explaining that attempted murder requires "the specific intent to murder, i.e., the specific intent to kill under circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter"); *State v. Jenkins*, 307 Md. 501, 515 (1986) ("[T]he intent element of assault

with intent to murder requires proof of a specific intent to kill under circumstances such that if the victim had died, the offense would be murder.") (modification in original).

The specific intent to kill may be proved by circumstantial evidence. *Smallwood v. State*, 343 Md. 97, 104 (1996) ("[G]iven the fact that most defendants do not announce their intent to kill to witnesses or other third parties, we are forced to look to other factors as reflecting the defendant's intent to kill."); *Graham v. State*, 117 Md. App. 280, 284 (1997) ("[T]he trier of fact is permitted to infer the requisite intent from the surrounding circumstances."). We have explained that "[e]vidence showing a design to commit grievous bodily injury, such as using a deadly weapon directed at a vital part of the body, is sufficient circumstantial evidence because it gives rise to an evidentiary inference of an intent to murder." *Graham*, *supra*, 117 Md. App. at 284.

In the present case, there was ample evidence presented upon which a reasonable trier of fact could have concluded that Prather had a specific intent to kill Officers Houk, Jackson, and Dieu when he fired his weapon in their direction. The officers testified that Prather fired in the officers' direction. Prather asserts that because he shot Officer Houk below the belt buckle, the injury was not aimed at a vital part of the body. Officer Houk testified that the gunshot wound to his lower abdomen required surgery. Officer Houk required surgical repair to his bladder and also suffered a fractured hip. A reasonable fact-finder could have inferred, based upon the evidence presented, that Prather fired his weapon at Officer Houk's body and did so because he intended to kill Officer Houk.

Furthermore, Officer Dieu and Officer Jackson each testified that Prather shot at them. Officer Dieu testified that she heard bullets as they "whizzed" by her right side, and Officer Jackson testified that Prather drew his weapon and "leveled it up towards the other officers . . . . directly at Officers Dieu and Houk." Based upon this testimony, a reasonable fact-finder could have inferred that Prather fired his weapon with the intent to kill the officers. Accordingly, we hold that there was sufficient evidence to sustain Prather's convictions for second-degree murder.

IV.

Prather's final allegation of error is that the circuit court improperly failed to merge the reckless endangerment conviction with the attempted murder convictions. Prather argues that it was ambiguous whether the reckless endangerment conviction was based upon harm to individuals other than the officers, such as bystanders in the area, or whether the conviction was based upon Prather's conduct in recklessly endangering the officers and no one else. Prather posits that if the reckless endangerment conviction was based upon danger to the officers alone, the conviction was a lesser-included offense of attempted murder and assault. Because, as we shall explain, the record reflects that the reckless endangerment conviction was based upon the danger to other individuals in the area rather than the officers, we reject Prather's contention that the circuit court erred by failing to merge the offenses.

When the allegation on appeal is that the jury's verdict is ambiguous with respect to whether the jury found the appellant guilty of one act giving rise to multiple convictions (which then would merge under the required evidence test) or separate acts (which would not merge), the reviewing court looks to the "transcript, the judge's instructions to the jury, and the verdict sheet" in order to determine the factual basis for each verdict. *Nicolas v. State*, 426 Md. 385, 412 (2012). If the court is unable to resolve the potential ambiguity, and a reasonable fact-finder could have found that the appellant was guilty of a single act giving rise to multiple convictions, merger of the convictions is required. *Id.*

In the instant case, the record reflects no such ambiguity. The indictment sets forth each charge relating to a particular officer in sequential order. The charges for conduct against one officer are set out, and then the charges for conduct against the second officer are set out, and finally the charges for conduct against the third officer. The reckless endangerment charge follows the counts relating to conduct against each individual officer and specifically charges that Prather "did recklessly engage in conduct to wit discharging a handgun that created a substantial risk of death or serious physical injury to person at, around, or nearby 9551 Washington Boulevard." Unlike the counts relating to the individual officers, the reckless endangerment count charged conduct relating to a "person" in general.

The verdict sheet similarly indicates that the reckless endangerment conviction was based upon risk to individuals other than the officers. Unlike the instructions for each individual charge where the identified officer is the victim, the verdict sheet does not contain

an instruction to skip the reckless endangerment charge if the jury found Prather guilty of any greater-inclusive offense to the officers. Furthermore, the circuit court's instructions on the offense of reckless endangerment referred to risk of death or serious physical injury "to another" rather than to a specific officer.

Defense counsel's comments in closing argument further support a conclusion that the reckless endangerment was based upon risk of harm to individuals other than the officers. The defense attorney argued that "the reckless endangerment that's created by that situation, his reckless endangerment was walking in traffic."

Having considered the charging document, the court's instructions, the verdict sheet, evidence presented to the jury, and defense counsel's closing argument, we conclude that the jury's reckless endangerment verdict was not ambiguous. Accordingly, we hold that the circuit court did not err by failing to merge the reckless endangerment conviction.

For the foregoing reasons, we affirm the judgments of the Circuit Court for Howard County.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.