UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 605

September Term, 2016

TAVON MILES

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Berger, J.

Filed: May 22, 2017

Appellant, Tavon Miles, was indicted in the Circuit Court for Montgomery County, Maryland, and charged with first degree murder of Marc St. Aubin, first degree burglary of the dwelling of Marc St. Aubin, and four counts of armed robbery of Marc St. Aubin, Stephen Roman, Justin Gray, and Oliver Nosil, respectively.[1] At the end of the State's case-in-chief, the court granted a motion for judgment of acquittal with respect to the armed robbery counts concerning Gray and Nosil. The jury convicted appellant of first degree felony murder of Marc St. Aubin, first degree burglary, and armed robbery of Roman. Appellant was acquitted of armed robbery of St. Aubin. Appellant was sentenced to life imprisonment for felony murder, a consecutive 20 years, with all but 10 years suspended, for first degree burglary, and a consecutive 20 years, with all but 10 years suspended, for armed robbery of Roman, all to be followed by five years supervised probation upon release. Appellant timely appealed and presents the following questions for our review:

1. Did the lower court err in denying the motion to compel disclosure of a confidential informant's identity?

2. Did the lower court err in denying the motion to suppress?

3. Did the State fail to present sufficient evidence to sustain the convictions?

[1] During argument on the motion, the State acknowledged that the caption for three of the armed robbery charges listed the crime as an attempt, but argued that the text of the counts charged him with armed robbery. *See Thompson v. State*, 371 Md. 473, 489 (2002) ("The character of the offense is determined by what is stated in the body of an indictment, not the statutory reference or caption"). Neither the jury instructions, nor the verdict sheet, listed an attempted armed robbery, and the jury was not asked to consider the lesser offense. Prior to sentencing, the court clarified that appellant was charged, and convicted, of armed robbery on the pertinent count.

4. Did the lower court err at sentencing by refusing to merge either the burglary conviction or the armed robbery conviction into the conviction for felony murder?

For the following reasons, we answer appellant's fourth question in the affirmative and shall remand for resentencing. Otherwise, the judgments are affirmed.

BACKGROUND

Motion to Suppress Statements

On the morning of March 12, 2014, at approximately 9:52 a.m., Detective Sean Riley, of the Montgomery County Police Department, went with another detective, Detective McCoy, to appellant's home. The purpose of the visit related to a fatal shooting of Marc St. Aubin that occurred on March 3, 2014 at a residence on Laughlin Lane. Detective Riley testified that the police had "very little information" but knew that appellant, identified as a gunshot victim, was treated the same day the shooting occurred at Montgomery General Hospital.

When the detectives arrived at appellant's home, they knocked on the door and were greeted by appellant's mother. Appellant was outside, out back of the residence, smoking a cigarette. The police informed appellant's mother that they were there to speak to appellant because he had been shot. The detectives were in plainclothes, and had their police badges visible at the time. Detective Riley also testified that he did not intend to arrest appellant at his home because "I just wanted to hear what had happened to him."[2]

[2] Appellant was not arrested on this day, and was not arrested until March 21, 2014.

When appellant came into the house, he was wearing a black, puffy jacket, loose athletic pants, and was listening to music coming from a pair of headphones. The two detectives stood in the dining room, and appellant stood nearby, leaning up against a wall near the adjacent kitchen. Appellant's mother was in the living room, within earshot of the conversation. Detective Riley also testified that the television was on in the living room and remained on during the entire conversation. At some point, appellant left the kitchen/dining room, went to the living room, and sat down next to his mother.

Detective Riley admitted that he had a recording device secreted about his person at the time. The conversation with appellant was recorded, without appellant's knowledge, and that recording was admitted into evidence at the motions hearing. The audible portions of that recording were transcribed. Pertinent to our discussion on the issues, the court heard the following:

> UNIDENTIFIED FEMALE: Tavon, they just want to talk to you. He's outside smoking a cigarette.
>
> (Unintelligible 10:41:58 – 10:42:05)
>
> DETECTIVE RILEY: How are you, Tavon?
>
> (Unintelligible: 10:42:07 – 10:42:27).
>
> DETECTIVE RILEY: Tavon we'll be real brief.
>
> (Unintelligible 10:42:29 -10:42:39).
>
> DETECTIVE RILEY: So we wanted to give you time to rest. We just wanted to ask you about what happened that night. Do you know who shot you?
>
> (Unintelligible 10:42:45 – 10:42:50).

DETECTIVE RILEY: Do you remember anything before that incident? Like who you were with that night or –

(Unintelligible.)

DETECTIVE RILEY: You were just walking?

MR. MILES: Yeah.

DETECTIVE RILEY: Where were you walking around?

MR. MILES: Outside the hospital.

Appellant stated that he was "chilling" with friends outside Montgomery General, and that, afterwards, he was shot. The conversation continued:

DETECTIVE RILEY: Well, you look good.

(Unintelligible.)

DETECTIVE RILEY: Last week you were in the ICU and now you're home listening to music.

MR. MILES: True that.

(Unintelligible 10:43:53 – 10:43:59).

DETECTIVE McCOY: I'm sorry. So you got shot once in the chest or stomach?

MR. MILES: Yeah.

DETECTIVE McCOY: So where, is that a scar from, you say you (unintelligible) is that the surgery?

MR. MILES: From the surgery.

DETECTIVE McCOY: Okay.

(Unintelligible 10:44:13 – 10:44:33).

DETECTIVE McCOY: You were with your friends?

MR. MILES: (Unintelligible.)

DETECTIVE McCOY: You were by yourself?

DETECTIVE RILEY: You were by yourself when you were shot? You were by yourself?

MR. MILES: Yeah.

DETECTIVE RILEY: Okay. So you had moved on, you went somewhere else, your friends stayed where they were at?

(Unintelligible 10:44:45 – 10:45:12).

MR. MILES: I'm here though, right?

DETECTIVE McCOY: That's true.

Detective Riley informed appellant that, as a crime victim, he was entitled to counseling. He then left appellant his phone number and the two detectives left. Detective Riley also testified that he did not meet appellant in the hospital and that this conversation, at appellant's home on March 12, 2014, was the first time he met him.

Thereafter, on March 21, 2014, the repeat offenders section of the Montgomery County Police arrested appellant on an open warrant and brought him to police headquarters. Appellant was placed in a holding cell, where he was then met again by Detectives Riley and McCoy. The interview was audio and video recorded and the videotape was played for the motions court.[3]

During this interview, the police collected general booking information, which included appellant's admission that he was 26 years old and had completed high school. With respect to his gunshot wounds, appellant lifted his shirt and asked for fire and rescue personnel to respond to the police station. He stated that he was still recovering from the

[3] The video is included in the record on appeal. [Marked as State's Ex. 271].

gunshots and was on Percocet, but that he was sober, and was in good physical condition and, at least at that point in the interview, was willing to talk to the detectives. Detective Riley agreed that the room was cold and that appellant was only wearing a t-shirt. The video also showed appellant with his arms tucked inside that shirt. On a scale of 1 to 10, appellant stated that his pain was at a "7." He also stated that the arresting officer pushed on his back during the arrest.

Appellant was then advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). After Detective Riley placed the form accompanying this advisement on a table near appellant, appellant expressly declined to sign the advice of rights form. This is reflected in the transcript as follows:

> MR. MILES: What is this?
>
> DETECTIVE McCOY: This is just, you just signing you looked at the copy, that you were advised of your rights.
>
> (Unintelligible 11:00:07 – 11:00:20).
>
> DETECTIVE McCOY: -- you're in our custody. If we want to talk to you, we have to advise you of your rights before we can talk to you. You can stop talking to us at any time, and that's fine, that's your right. But what we want to do is, we want to talk to you about some things, but since (unintelligible), right?
>
> MR. MILES: Yeah.
>
> DETECTIVE McCOY: So that means you're under arrest.
>
> (Unintelligible 11:00:38 – 11:00:43).
>
> DETECTIVE RILEY: Do you want assignment [sic], if you don't, it's up to you.
>
> MR. MILES: Yeah, I want an attorney.

DETECTIVE RILEY: Okay.

(Unintelligible 11:00:49 – 11:01:28).

Some of the unintelligible portions of this exchange were clarified during cross-examination. Detective Riley confirmed that appellant stated that he did not want to sign the advice of rights form. He also stated that he was not sure why he was under arrest, notably, at a point during the interview when appellant had not yet been advised of the charges. Detective Riley also confirmed that, in this exchange, Detective McCoy told appellant "you're not giving up anything."[4]

Despite appellant's invocation of his rights, Detective Riley continued to question appellant. Again, the reporter indicated that much of this exchange was unintelligible. However, according to the transcript, Detective Riley informed appellant that they knew he, in fact, was not shot near Montgomery General and that there was ballistic evidence that linked appellant to the site of the fatal shooting in this case. Appellant replied, "If that's what you say." After Riley then informed appellant that the ballistics showed the bullets came from the same gun, appellant replied, "I don't have nothing to say to you, you know what I'm saying?" Appellant again asked for a lawyer, stating, "I'd rather talk to a lawyer (unintelligible) to which the detective replied "[o]kay, well that's your right. But that's why you're here." Detective Riley then continued with his questioning. Detective

[4] Although not reflected in the transcript, our review of the video of this interview shows that, after appellant clearly stated that he did not want to sign the advice of rights form, Detective Riley withdrew the form and literally took it off the table that was adjacent to appellant. After Riley withdrew the form, it was then that Detective McCoy told appellant that he was not "giving up anything" by signing the form, and that the form was not saying "that you have to talk to us[.]" Appellant replied that he had nothing to say.

Riley finally informed appellant of the charges against him, including first degree murder, and told appellant that he knew that "something happened there. I don't think you shot yourself, right? I mean that wasn't what we're dealing with."

Appellant again invoked his right to silence, stating, "I really don't got nothing to say."[5] Detective Riley persisted, stating "Well, we know you were there," and after appellant gave an unintelligible reply, the detective stated "[w]ell, you can stay here."[6] At this point, questioning of appellant ceased, and Detective Riley told appellant that he would get the paramedics to respond to the police station, at appellants' request.

Detective Riley also testified at the motions hearing, and the video confirms, that appellant was not handcuffed when they were talking, but only after the interview concluded. Detective Riley testified that appellant was placed in handcuffs and leg irons immediately before being taken out by the paramedics "[b]ecause he's being transported in an ambulance." The videotape also showed, that after the paramedics arrived, Detective McCoy searched appellant prior to transport. Police recovered a small amount of cash and "a little bag of weed" from appellant's person.

On cross-examination, Detective Riley agreed he knew that police officers spoke with appellant at the hospital on March 3, 2014, when he was treated for his gunshot wound. He also agreed that police considered appellant a suspect that same day. Detective

[5] Again, although not transcribed by the reporter, appellant asked for a lawyer, approximately three more times, during the interview.

[6] According to the video, appellant stated that the police had everything they needed, that "I don't need to talk," and, in reply to Detective McCoy's prodding for appellant's "side of the story," that "I don't have a story."

Riley further confirmed that he spoke to witnesses in this case and was aware that the murder victim shot someone during the incident. Riley believed that the victim shot appellant.

Detective Riley confirmed that he was aware that appellant was released from the hospital on March 10, 2014. He was also aware that appellant was on Percocet two days later when he was interviewed.

As for appellant's arrest, Detective Riley obtained the arrest warrant on March 20, 2014. Appellant was arrested at an apartment complex in Gaithersburg, and then transported to the police station. Detective Riley did not believe that a lot of time passed between the arrest and the transport to the station, but agreed it may have been within a few hours. To his knowledge, the detective did not believe that any other officers spoke to appellant before him. He agreed that, when the interview began, he asked appellant to rate his level of pain on a scale of 1 to 10 and appellant replied 7 and informed him that he was on Percocet. Detective Riley testified he examined appellant's torso, saw the staples and the scar, agreed the injury was serious because it was a gunshot wound, but did not see anything "protruding out of it, there was no blood, there was nothing that was separated. And that's what I was looking for." When appellant was arrested, Detective Riley confirmed that a police officer could have placed a knee in appellants back as he was being handcuffed.

As indicated, Detective Riley also agreed that, when he read appellant his rights, appellant stated that he did not want to sign anything. Although appellant was told during the interview that he was not "giving up anything," Riley testified that appellant would

actually be giving up his right to remain silent and his right to an attorney if he signed the form. He also agreed that, after appellant invoked his rights, in light of continued questioning by the detective, appellant stated that he had nothing to say and that they should "just lock me up now."

After Detective Riley was excused, the court heard argument concerning both interviews. As for the March 12th interview at his house, appellant contended that he was in custody based on several factors, including, that he was a suspect, he was still recovering from his injuries, there were two officers, both of whom were armed, and that the interview was conducted in such a manner as to make it difficult for appellant to walk away. The State responded that the interview on this day was in appellant's home, lasted less than five minutes, was of an "extremely casual nature" and that there was no indication that appellant thought he was considered a suspect.

The court denied the motion with respect to the March 12th interview. The court found that the interview concluded at around 9:52 a.m. and lasted for approximately five minutes or less. Although the officers were armed, they were not in uniform, and identified themselves to the mother, both verbally, and by wearing their badges. Further, when the detectives were invited in by appellant's mother, appellant was in the back yard, smoking a cigarette and listening to music. Although appellant was recovering from gunshot wounds, the court found that he was ambulatory, able to move about freely in his own home. The court further found that it was irrelevant if the police officers considered appellant a suspect, as the proper inquiry was "whether a reasonable person would have felt that his freedom of movement was restrained to the degree associated with a formal

arrest[.]" The court stated that "I do not find that a reasonable person in the circumstances of this defendant would have felt that he was unable to terminate the interrogation or that he was not free to move about the premises or to remove himself from that location." Accordingly, the court denied the motion to suppress the March 12th statements.

With respect to the March 21, 2014 statements at the police station, appellant argued that these statements were not voluntary. Counsel argued appellant was in pain, was on medication, and that, after a police officer placed a knee in appellants back during his arrest, that he wanted to be taken to a hospital. Counsel also argued the police misled appellant when he was told "you're not giving up anything."

In response, the State, who earlier conceded a *Miranda* violation that prohibited them from using the March 21st statements in their case-in-chief, argued that they still were available for impeachment because any statements were obtained voluntarily. The State argued the police called for fire and rescue after appellant complained of pain and that, in any event, appellant's complaint was not determinative on the issue. Appellant also had "the wherewithal and the determination, the will to say, I don't want to sign this piece of paper, I want a lawyer, and I don't want to talk." Appellant was "acting logically, he's acting, he's very lucid. He answers with clarity" and there was no indication that his will was overborne.

After further rebuttal from appellant, the court found that any statements on March 21 were voluntary. The court noted that *Miranda* warnings were given, the entire interview itself lasted about 17 minutes, and appellant was transported out of the room about 53 minutes after the discussion began. The court found that appellant was not

handcuffed or in leg irons during the interview, he was told the charges against him, and he was read his rights. The court ruled as follows:

> In this particular case, looking at the totality of the circumstances, as I said, clearly, he was under arrest but he was not handcuffed. He did claim that he was in pain, and looking at the video, both during the time that he was being interrogated and also when he was left alone while the tape continued to make observation of his demeanor, he did shuffle about, by that time one of his hands was handcuffed to a table, and ultimately he was placed in leg irons.
>
> There was some slowness of movement. There were no exclamations of pain. He did state that he wanted to talk, and this was before he knew he was being accused of murder, or arrested for murder, he did say he wanted to talk before medical personnel were called, but he never gave up the thought that medical personnel should be called.
>
> So I credit that there was some degree of pain being experience[d] by the defendant. Whether he had or had not taken his Percocet that day, at least by his self-report, he had not. He was apparently arrested at an apartment location in Gaithersburg, and at the time of that arrest, I don't think it's before the court, but whether he had had an opportunity or didn't have an opportunity, whether he was giving an accurate report or not, is nothing that I can truly find, except that he apparently told the emergency, he did tell the emergency responders that he had not taken his Percocet that day, although it was prescribed.
>
> Under the totality of the circumstances in this case, I do not find that the statements were made involuntarily. I do not find that the defendant's will was overcome. I do find that he knew and understood what he was saying, even though he said that he had nothing to say, he did continue to respond to the officers by denials, indicating that he wasn't where they were trying to put him and things of that nature.
>
> The interview was not lengthy. It was somewhere in the range of 15 to 17 minutes. And as I said, the statements themselves were lucid, logical, and intelligible. I don't find

> that there were threats, promises, or inducements made to get the defendant to speak. And while clearly violative of the requirements for an admitted statement under Miranda, I am not going to grant the motion, in fact, I will deny the motion, as to the possibility that the March 21st, 2014 statement may be used to impeach.

Trial

This case concerns a home invasion of 15800 Laughlin Lane, located in Silver Spring, Maryland. The residents of the home included the murder victim, Marc St. Aubin, the leaseholder, Steven Roman, and the remaining occupants, Charlotte Hand, Oliver Nosile, Justin Gray, and Greg Renfro. The residents used marijuana, and several witnesses, including Roman, agreed that Roman distributed marijuana from the house. But, there was some disagreement whether St. Aubin also distributed drugs. Roman admitted that, on average, ten people a day would come to the residence to purchase marijuana from him. Roman claimed that St. Aubin sold independently around a pound to a pound and a half a week, while Roman sold five to ten pounds a week. In any event, there was evidence that each man, Roman and St. Aubin, kept marijuana in their separate bedrooms and dealt with separate clients. There was also evidence that the residents knew that St. Aubin collected guns and would sometimes walk around with carrying a handgun in a holster on his person.

On March 3rd, 2014, St. Aubin returned home from a day of snowboarding at Liberty Resort in Pennsylvania between 9:00 and 9:30 p.m. All of the aforementioned residents were home at that time. Sometime after dinner, with estimates ranging from between 9:30 and 11:00 p.m., Hand and Nosile were in their upstairs bedroom with the door closed, when they both heard "banging noises," "loud footsteps," and a "massive

break-in." Hand also testified that it "sounded like a conflict" or fighting, and that "[i]t sounded like somebody may be in pain." Roman, who was also upstairs in his room, testified that he saw two people, dressed in black and possibly wearing body armor, entering the residence through the front door, with more people coming in behind. All told, Roman informed police that five or more subjects came into the house carrying guns and baseball bats.

At first believing the men were part of a SWAT team, Roman realized something was amiss when no one identified themselves as police. Roman then went into Justin Gray's room, told him they were being robbed, and the two of them tried to hide in the bathtub in an upstairs bathroom. This bathroom apparently adjoined St. Aubin's room, and Roman testified that St. Aubin's door was locked.

After hearing loud footsteps coming upstairs and the sound of doors being kicked in, a masked man, armed with a shotgun, entered the bathroom and told Roman and Gray to get out of the tub. The assailant demanded that Roman and Gray go into Gray's room, where they were joined by another man wielding a baseball bat. Roman testified that the armed men "wanted to know where the shit was at. Like, you know, like the money and the weed[.]" Roman told them it was in his room, and offered to lead them there. At that point, a third man entered the room, armed with a handgun. Roman escorted this third man to his bedroom.

Meanwhile, the door to Hand's and Nosile's room was also "smashed open," and two different masked men, wearing dark "tactical" clothing, one of whom apparently was also carrying a shotgun, walked in and started yelling for them to get down on the floor.

Hand and Nosile disagreed over the ultimate number of people that invaded the residence, with Hand suggesting it was three and Nosile testifying he thought there were as many as six other people inside the home. Roman's testimony suggested there were several invaders, because, when he led the man with a handgun to his room, two men stayed behind with Gray, while two other men were standing watch over Hand and Nosile while they were on the ground in their bedroom.

When Roman and the man with a handgun arrived at Roman's bedroom, Roman was ordered to the ground and told not to move. Roman pointed to a U-Haul moving box at the front of his bed, indicating that was where he kept his marijuana. Asked where he kept his money, Roman replied that he did not have any money. According to Roman, that was when he started to hear approximately six or seven gunshots coming from downstairs. The man with the handgun then grabbed the box of marijuana and ran out of the bedroom. Asked to describe the gunshots, Roman testified that he "heard a couple different calibers. Like, all the shots didn't sound the same, some of them sounded different, like they were different kinds of like, guns." Roman also testified that he also heard a loud struggle as the shots were going off, as well as "one yelp" and a sound that he testified was "[l]ike someone got punched or whatever, you know what I mean."

Hand and Nosile also heard gunshots, with Hand testifying she heard approximately six in all. Because the man with the shotgun was no longer standing watch over them,

Nosile grabbed Hand and the two of them went into the upstairs bathroom, closed the door, and started praying.[7]

After a few minutes, the house got quiet. Roman grabbed some money and his scale, and went downstairs to leave. He saw St. Aubin near the front door downstairs and asked him if he was alright. St. Aubin replied that he was not. Roman explained that he did not know St. Aubin had been stabbed, testifying that he simply looked "beat up" to him, and that was why Roman decided to flee the scene. Roman confirmed that he said "Don't call the police" as he fled, explaining that he was worried that he would be charged with a violation of parole regarding a prior drug-related conviction. After taking money and drug paraphernalia to his parent's house, he returned and ultimately was taken into custody and interviewed by police.

Meanwhile, Hand and Nosile had left the safety of the bathroom and discovered that St. Aubin was unable to walk by himself and was asking for help. Nosile testified that he saw blood and knew St. Aubin was injured. According to Nosile, St. Aubin stated "I got him" or "I got one." St. Aubin indicated he "got one" about two times while he was still in his bedroom. Nosile agreed, on cross-examination, that he never saw a gun in St. Aubin's hands and only saw St. Aubin carrying his keys.

Nosile and Hand then led St. Aubin outside towards his car and called 911. Initially, the car door was frozen so Nosile attempted to break into the vehicle by hitting the window.

[7] Another occupant of the residence, Greg Renfro, testified that, he started to investigate noises upstairs, but then immediately fled the residence after he heard gunshots.

St. Aubin managed to say, "Don't break my window." Although Nosile managed to open the car door and start the vehicle, St. Aubin died at the scene.

After the home invasion, and while they were trying to attend to St. Aubin and get him into his car, Gray took several items out of the home, including St. Aubin's guns, a gun crate, and a gun safe. After St. Aubin died, Gray, Hand and Nosile left St. Aubin in the car, and then simply left the area, ultimately going to Gray's mother's house.

Dr. Zebu Ali, an assistant medical examiner, accepted as an expert in forensic pathology, performed the autopsy of St. Aubin. St. Aubin sustained several blunt force injuries to the head, including three lacerations on the top of his head and lacerations to his mouth. His head also showed evidence of bruises, and, at least four fractured teeth. The injuries to the top of the victim's head were consistent with being caused by a "heavy, round object." Some of the injuries were also consistent with the victim being kicked or punched. St. Aubin also sustained blunt force injuries to his torso area. Additionally, St. Aubin had broken ribs, which caused a laceration to his liver. Dr. Ali testified that, normally, a substantial amount of force, such as evident in car accidents, could cause these types of injuries to the torso.

St. Aubin also sustained sharp force injuries, consistent with a sharp instrument such as a single edge knife, to his back, the thigh, his face, and the right upper chest area. This latter stab wound was four and a half inches deep and penetrated St. Aubin's lung, the cardial sac, and perforated his aorta.

Dr. Ali opined that the death of St. Aubin was due to multiple injuries, including three stab wounds and multiple blunt force impacts. The stab wound to the victim's upper

chest, including to the lung and aorta, was the most significant of these. The manner of death was homicide.

Later on the same night the shooting, sometime between 10:29 and 10:49 p.m., a man wearing dark clothing, similar to the clothing worn by one of the home invaders, entered the emergency room at Montgomery County General Hospital. That man was appellant, who was suffering from several gunshot wounds.[8] Ultimately, an examination of appellant by Dr. Nasrin Ansari revealed a bullet hole in appellant's mid-abdomen, a superficial "through and through injury" to his buttocks, and injuries to his upper thigh and lower leg. CAT scans revealed that two bullets were lodged in appellant's body, one near his hip and the other inside his ribcage. Dr. Ansari was unable to remove these bullets. She also clarified that appellant's injuries were consistent with having been struck by more than just two bullets.

Prior to surgery, appellant was undressed and his clothes were collected and stored in evidence bags. Appellant did not respond to any questions about the circumstances of his shooting from police while he was being treated. As his clothes were being gathered, a registered nurse in the emergency room found a bullet on the floor nearby. The bullet was collected and stored for later examination.

[8] Appellant was the only gunshot wound victim treated in the emergency room on the day in question.

Paul Nelson, a forensics evidence technician, seized three projectiles from the walls at 15800 Laughlin Lane. These bullets were collected from the crown molding in the living room, from the atrium area near the front door entrance, and in a hallway near the kitchen.

Mark Williford, accepted as an expert in firearms and tool mark identification, examined the projectiles and bullet specimens submitted into evidence in this case. Starting with the projectile that was recovered from the emergency room floor, Williford testified that that bullet had "a green filament in the nose cavity of the projectile." This bullet was consistent with being a Hornaday "zombie killer 380." A box of ammunition found inside the residence included similar Hornaday .380 "zombie killer" ammunition.[9]

As for the three projectiles collected from the walls, Williford opined that these were .380 caliber projectiles, one of which included the "zombie killer" plug. After examining all four of these projectiles, Williford concluded that they all were fired from the same firearm.

Although the particular handgun used to fire these projectiles was never found, Williford opined that that firearm could have been a Ruger LCP firearm. There was evidence that St. Aubin owned such a firearm. When police compared the regulated guns recovered from St. Aubin's residence with those that were registered by him with the Maryland State Police, only one of the registered firearms was missing; namely, a Ruger .380 pistol. Moreover, according to Williford, after considering the list of guns registered

[9] Williford explained that "zombie killer" was a trademark of manufacturer Hornaday and was exemplified by a small piece of green rubber placed into the nose cavity of a projectile. The purpose of inclusion of this rubber "plug" related to a physical expansion of the projectile upon impact.

to St. Aubin, only the Ruger .380 could have been used to fire the aforementioned projectiles, namely the three found in the walls of the residence and the one found on the emergency room floor.

In addition to this ballistics evidence, police also collected a pair of black Nike sneakers worn by appellant when he arrived at the emergency room. Naomi LoBosco, a forensic scientist with the Montgomery County Police, examined a number of items in this case for DNA evidence. Using known samples from appellant and St. Aubin, LoBosco examined a sample from a blood stain found on appellant's right sneaker. LoBosco determined that St. Aubin was a major contributor to the DNA found on appellant's right sneaker, specifically, on the exterior toe area.

As part of the police investigation, Detective Sean Reilly spoke with appellant on March 12, 2014 at his home in Montgomery Village, while appellant's mother was present. Consistent with Reilly's testimony at the aforementioned motions hearing, Reilly maintained that appellant was not in custody during this interview. When appellant's mother answered the door to the residence, Detective Reilly informed her they wanted to speak to appellant because he was a victim of a shooting. When the secret tape recording of this conversation was played for the jury, the jury heard appellant's claim that he was shot while he was alone and simply walking near the hospital. Appellant also indicated he was not interested in finding out who shot him.[10]

[10] At trial, defense counsel objected to the playing of this recording. After the State responded that the wiretap statute permitted such a recording as part of a murder investigation, the court overruled the objection. *See* Md. Code (1973, 2013 Repl. Vol.,

After the State rested, appellant called another resident of the house, Justin Gray, as his first witness. Gray knew that Roman sold marijuana when he moved into Roman's house and, in fact, purchased marijuana from him on a regular basis. Gray knew that St. Aubin sold marijuana from the house, and that he also had guns. Gray was upstairs in his room when the incident started and testified that he did not hear anyone come in. The first he knew about the incident was when Roman came into Gray's room and told him they were being robbed. Gray ran into the bathroom and hid in the shower until two masked men, wearing dark black clothing, entered and pointed guns at him. Gray believed a total of eight to ten men were in the house that evening. Gray denied that he knew any of these men. Gray was on the ground near his bedroom when he heard approximately six gunshots, testifying that he believed they were fired from different weapons.

Afterwards, Gray packed some belongings and started to leave the house. On the way out, he saw St. Aubin on the stairs, who said he needed to go to the hospital, so Gray called 911. Gray then helped move St. Aubin outside, but St. Aubin died before they could get him into the car.

Appellant also testified on his own behalf. Appellant conceded that he went to 15800 Laughlin Lane on March 3, 2014, the place and day in question, with a friend named "Eric" and an unidentified female to purchase marijuana from "Marc." These three drove to the house and met Marc in the driveway. Marc then took appellant into the entryway of the house, where appellant paid Marc $1200 in order to buy a quarter pound of marijuana.

2016 Supp.) § 10-402 (c) (2) (ii) of the Courts and Judicial Proceedings Article. This issue is not presented on appeal.

After counting out the money, Marc walked away from the entryway for a moment, then returned. At that point, Marc opened the front door and several armed masked men came into the house.

These men demanded money and drugs from appellant and Marc, and then started "fighting." Appellant testified, after he was hit in the head, he gave his money to one of the assailants. When that assailant asked appellant for drugs, appellant said he did not have any, and the man swung his gun towards him. Appellant and Marc both started to fight off the invaders, and that is when appellant heard the gunshots. Appellant was shot several times, and, in response, fell to the ground and played dead while the fighting continued. Appellant testified that "they just kept beating up Marc." When it was over, appellant got out and walked out the door. He returned to his friend Eric's car, and Eric eventually took appellant to the hospital. Appellant denied that he was part of the group of assailants that invaded the home that evening.

Appellant agreed that, when he left the house, Marc was on the ground. Appellant also agreed that he did not try to help him. When asked if he called 911, appellant stated "I ain't had no reason to call 911." Reminded that he had just been shot, appellant replied, "I was going to a car to go to the hospital."

After appellant testified, the State proceeded with cross-examination, and appellant agreed that he never tried to get in touch with "Eric" or the unidentified female after being arrested for murder. But, he later claimed that he tried to look for Eric but could not find him.

Appellant was asked about when he was arrested and taken to the police station. He did not remember being told he was charged with first degree murder. He did not remember being told that he could be connected to the murder and the house through ballistics evidence. After a video of portions of that interview were played for the jury, appellant remembered being interviewed, and remembered that he was cold and his stomach was hurting from the treatment for his wounds.

Appellant also agreed that, in that interview, after police asked him about his presence at the home on Laughlin Lane, he replied, "[y]ou all trying to put me in some place where I was never at." Appellant told the police that he did not have a "story" about what happened to him. Appellant maintained that he had already asked for a lawyer before telling the police that he did not have a story. Appellant denied knowing that there was DNA evidence that connected him to the scene. Appellant claimed he made up being shot while walking near the hospital because he was out on bail and did not want to be revoked. But, appellant maintained that he did not know who shot him.

Appellant agreed that, on March 23, 2014, at 3:52 p.m., he was overheard talking over a phone to an unidentified female. In that recorded conversation, appellant stated "I can be shot by, I can be shot by anybody, you know what I'm saying?" Appellant maintained that he did not know who shot him. He also maintained that "I didn't commit no crime." He also agreed he was overheard, on March 25th, telling an unidentified female over the phone that she should "delete your book for a few months, you know what I'm saying?" This referred to the unidentified female's Facebook account. Appellant also told

this unidentified female, "I don't need no slip ups." Additional facts may be included in the following discussion.

DISCUSSION

I.

Appellant first contends that the court erred in denying his motion to compel disclosure of a confidential informant. The State responds that this issue is not preserved because appellant's reasons for disclosure differ from those raised in the motions court. On the merits, the State asserts that the motions court properly exercised its discretion in denying the motion to compel.

At the motions hearing, defense counsel proffered that a confidential informant told two police officers that "a man named Steve, who lived on the 15000 block of Laughlin Lane, was moving a few pounds of weed a week" as well as Fentanyl patches. According to counsel, Steve Roman admitted, in discovery, that he lived in the house at 15800 Laughlin Lane and had "a couple pounds of marijuana" in his room. Roman also indicated that the victim "was dealing weed as well, maybe a pound or two, and of course the victim had firearms registered in his name." Counsel continued:

> The reason we feel that it's important for us to have the confidential informant in this case is there are, there's six, at least six people living in the house, Steve Roman, Justin Gray (phonetic sp.), Gregory Renfrow (phonetic sp.), Oliver Nozzle (phonetic sp.), Charlotte Nain (phonetic sp.), and Marc St. Aubin.
>
> The search of the house reveals numerous drugs, paraphernalia, guns and safes which were all suggestive of drug use and also distribution. These are on discovery in pages 1 through 6 of the evidence collection log.

> The defense believes, and part of the theory of the defense, will be that there was drug dealing going on. That this could have been drug-related, and that there was an attempt by the occupants of the house to hide drugs and other illegal items after this event.
>
> The gun that was used to shoot somebody that day was actually discarded and not found. We believe that this confidential informant will have information regarding this drug transaction that the members of the house are not going to share with defense counsel or the State, because of the fact that it's exculpatory. This other individual who knows about this information, normally I would agree with the State if this was simply a drug case, that individual would probably never be disclosed.
>
> But in a murder case, where Mr. Miles has the right to defend his case, the fact that this individual knew about drug deals going on, possibly as recently as the date of this crime, requires the defendant to have that in order to prepare for a proper defense.
>
> The defense theory may include evidence of drug dealing occurring on the day, as well as multiple other occasions in this house. So we ask for the information that we requested, the confidential informant's identity.

The State responded that a balancing was required and that the proffered facts were speculative, stating:

> I think that it is really more conjecture. This person provided information that they're generally it's drug dealing from this house. I can tell you that all of these people that counsel has mentioned, Steve Roman, Mr. Gray, Renfrow, Mr. Nozzle, Ms. Nain, we anticipate that they will be witnesses at trial, anticipate that Mr. Roman, Steve Roman, the person that this informant referred to, is going to admit that he was selling marijuana out of the house. And I think it will be clear that marijuana was being sold out of the house.
>
> So there is nothing, there is nothing new or specific that this informant would be able to provide. In fact, there is

> nothing in this that would indicate that the informant witnesses this particular, I guess, transaction. Or certainly this event, other than to, the fact that he heard that there was drug dealing going on out of this house.

The court then asked if the information about the marijuana dealing would be elicited through Steve Roman's testimony at trial, and the State responded that it was anticipated, agreeing that the information sought by appellant was cumulative. The court then denied the motion to compel disclosure, finding in pertinent part:

> In the court's view, the defense needs to show, more specifically, why the identity of this informant is important to the preparation of the case. The privilege ordinarily applies where the informer is a mere tipster who supplies a lead to law enforcement officers, but is not present at the crime scene.
>
> The key element is the materiality of the testimony to the determination of guilt or innocence balanced against the protection of the identity of the informer. And the burden is on the defendant to assert a substantial reason indicating that the identity of the informer is material to defense, or fair determination of the case.
>
> I don't find, from the proffer that has been made, that the defendant has proffered a specific, substantial reason as to why the informer's testimony is material. The court fails to see such a reason, especially because the information provided by the informant, as represented by the State, will be corroborated by witnesses who, at least in the form of Mr. Roman, are anticipated to be available for testimony at trial.
>
> This case is not like Roviaro. Roviaro involved a case where the informant was the only witness in a position to amplify or contradict Government witnesses. And in this case, this information as proffered about drug dealing going on in that particular location, and by occupants of the house, is going to be ascertained from other sources besides the informant.

> So I'm going to deny the defendant's motion, and that, for identification of the informant. And that's at Docket Entry No. 80.

On appeal, we first consider the State's preservation argument. The State asserts that, during the motions hearing, appellant claimed disclosure was necessary because "there was drug dealing go on," "this could have been drug-related," and "there was an attempt by the occupants of the house to hide drugs and other illegal items after this event." The State suggests this is different from appellant's stated reason on appeal that disclosure was "critical to the defense's ability to develop and investigate alternative suspects." Therefore, according to the State, the issue is not properly before us because the grounds asserted by the appellant are different." *See, e.g., Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified") (citation omitted).

But, appellant's grounds on appeal are not as limited as the State asserts. Appellant's brief acknowledges the defense theory in the motions court "may include evidence of . . . drug dealing occurring on the day of this incident" and that "the identity of the confidential informant was necessary to prepare a proper defense." The more specific contention by appellant on appeal, that this was necessary to develop alternative suspects, is a logical extension of the reasons discussed in the motions court. As the Court of Appeals has recognized, "an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced'" below. *See Starr v. State*, 405 Md. 293, 304 (2008) (internal quotations omitted); *see also State v. Greco*, 199 Md. App. 646,

658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal), *aff'd*, 427 Md. 477 (2012). We conclude this issue is properly presented for consideration on appeal.

As for the merits, the State is afforded a privilege to withhold the identity of a confidential informant who has provided law enforcement officers with information about violations of the law. *Edwards v. State*, 350 Md. 433, 440 (1998) (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)); *see also* Md. Rule 4-263 (g) (2) (disclosure is not required "unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant"); *Cantine v. State*, 160 Md. App. 391, 403-04 (2004) (purpose of privilege is to protect the public's interest in law enforcement and is particularly important for the enforcement of narcotics laws), *cert. denied*, 386 Md. 181 (2005). In addition, the privilege of non-disclosure is limited by principles of "fundamental requirements of fairness," and will give way "[w]here disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Edwards*, 350 Md. at 440-41 (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

A balancing test is utilized to determine when the public interest in protecting the flow of information in aid of law enforcement must give way to the defendant's right to prepare a proper defense. *Edwards*, 350 Md. at 441. In reaching the right balance, appellate courts must "look to see whether the court applied correct legal principles and, if so, whether its ruling constituted a fair exercise of discretion." *Edwards*, 350 Md. at 442. The *Edwards* Court explained:

> [C]ourts have (1) drawn a distinction between an informant who actually participated in the criminal activity with which the defendant is charged, who may, as a result, have direct knowledge of what occurred and of the defendant's criminal agency, and who therefore may be a critical witness with respect to the defendant's guilt or innocence, on the one hand, and, on the other, an informant who is a mere "tipster" – a person who did nothing more than supply information to a law enforcement officer, who did not participate in the criminal activity and may not even have been present when it occurred, and who has little or no direct knowledge of the defendant's guilt or innocence, and (2) tended to require disclosure in the first situation but not in the second.

Edwards, 350 Md. at 442.

The *Edwards* court noted the distinction between being a "mere tipster" and playing "a material part" in a criminal episode by citing the two Supreme Court cases of *Rovario, supra,* and *McCray v. Illinois*, 386 U.S. 300 (1967). In *Rovario*, "the informant 'had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged,' and thus, because the identity and possible testimony of the informant bore directly on the defendant's guilt or innocence, especially in light of his defense of entrapment, the Court held that non-disclosure constituted reversible error." *Edwards*, 350 Md. at 442-43. Contrast that scenario with *McCray*, where "the informant merely apprised the officers that the defendant was selling drugs on a certain corner." *Edwards*, 350 Md. at 443.

Based on the proffer in the motions court, it appears that the informant was just a mere tipster, who informed the police that the distribution of drugs occurred at the subject residence. There was no suggestion that the informant was part of the criminal enterprise or had information that bore directly on appellant's guilt or innocence of the charges in this

case. Moreover, as proffered by the State, any evidence from this informant of drug dealing from the residence was cumulative to the other evidence that was going to be, and ultimately was, elicited by the occupants of the residence themselves. We conclude that the motions court properly exercised its discretion in denying the motion to compel.

II.

Appellant next asserts that the trial court erred in not suppressing two statements he made to the police: (1) an interview at his home on March 12, 2014; and, (2) an interview at the police station after he was arrested on March 21, 2014. Appellant contends that the interview at his home occurred while he was in custody and subject to the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The State disagrees and responds that appellant was not subject to custodial interrogation when this brief interview occurred in his own home with his mother present the entire time.

With respect to the interview at the police station, appellant observes, and the State concedes, that his *Miranda* rights were violated when the detectives continued to interview him after he invoked his right to counsel. Nevertheless, the parties dispute whether appellant's statements during this interview were voluntarily, such that they could be used for purposes of impeachment when appellant testified at trial.

In reviewing the motions court's decision on a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party on the motion. *Robinson v. State*, 419 Md. 602, 611-12 (2011); *accord Gonzalez v. State*, 429 Md. 632, 647 (2012). We review the motions court's factual findings for clear error, but we make our own

independent constitutional appraisal, "reviewing the relevant law and applying it to the facts and circumstances of this case." *State v. Luckett*, 413 Md. 360, 375 n.3 (2010); *accord Moore v. State*, 422 Md. 516, 528 (2011).

The Court of Appeals has explained what the prosecution must establish to introduce a defendant's custodial statements into evidence:

> Only voluntary confessions are admissible as evidence under Maryland law. A confession is voluntary if it is "freely and voluntarily made" and the defendant making the confession "knew and understood what he [or she] was saying" at the time he or she said it. *Hoey v. State*, 311 Md. 473, 480-81, 536 A.2d 622, 625-26 (1998). In order to be deemed voluntary, a confession must satisfy the mandates of the U.S. Constitution, the Maryland Constitution and Declaration of Rights, the United States Supreme Court's decision in *Miranda*, and Maryland non-constitutional law. *See Ball v. State*, 347 Md. 156, 173-74, 699 A.2d 1170, 1178 (1997).

Knight v. State, 381 Md. 517, 531-32 (2004). *Accord Hill*, 418 Md. at 75; *see also Winder v. State*, 362 Md. 275, 310 (2001) ("The trial court's determination regarding whether a confession was made voluntarily is a mixed question of law and fact").

1. <u>Appellant Was Not In Custody When He Was Interviewed At Home</u>

The Supreme Court has acknowledged that "[a]ny police interview of an individual suspected of a crime has 'coercive aspects to it.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). However, "only those interrogations that occur while a suspect is in police custody, . . . 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice." *J.D.B. v. North Carolina*, 564 U.S. 261, 268-69 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)). Because of this risk, the Court in *Miranda* held that, prior to questioning, a suspect "must be warned that he has a right to

remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

The Supreme Court has held that "whether a suspect is 'in custody' is an objective inquiry." *J.D.B.*, 564 U.S. at 270. Further:

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

J.D.B., 564 U.S. at 270 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (internal quotation marks, alteration, and footnote omitted)).

These inquiries are considered under the totality of the circumstances. *See J.D.B.*, 564 U.S. at 270-71 ("[W]e have required police officers and courts to 'examine all of the circumstances surrounding the interrogation,' including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave'") (internal citation omitted); *see also Thomas v. State*, 429 Md. 246, 259-60 (2012) ("The 'totality of the circumstances test' requires a court to examine the events and circumstances before, during, and after the interrogation took place. A court, however, does not parse out individual aspects so that each circumstance is treated as its own totality in the application of the law") (internal citations omitted).

On March 12, 2014, at around 10:00 a.m., two plainclothes detectives went to appellant's house to interview him concerning the shooting that occurred nine days earlier on March 3rd. They were also there because appellant was treated for gunshot wounds at a local hospital on the same day as the home invasion. When they arrived at appellant's home, appellant was out back, smoking a cigarette. The interview occurred in appellant's dining room and living room, with his mother present the entire time. The interview was audio recorded, albeit without appellant's knowledge, and the transcript of that recording indicates that the entire encounter lasted approximately ten minutes or less. The detectives left appellant's residence without placing him under arrest.

Based on our review of the record, we concur with the motions court that appellant was not in custody on March 12th when he was first interviewed by the police at his home. He was never restrained or put in a position where a reasonable person would have believed he was not free to leave. *Cf. Bond v. State*, 142 Md. App. 219, 223-24, 233-34 (2002) (concluding that defendant was in custody when interrogated by the police, where a police deputy "and several other uniformed police officers" went to defendant's trailer late at night and questioned defendant in "the highly private location" of his bedroom while defendant was "in bed with his shirt off"). The court properly denied the motion to suppress these statements.

2. Appellant's Statements At The Police Station On March 21, 2014 Were Voluntary

There is no dispute that appellant's statements from the March 21st interview were inadmissible in the State's case-in-chief because appellant clearly invoked his right to an

attorney, and indeed, his right to silence, during the interview. *See Miranda*, 384 U.S. at 474 ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present"); *see also, id.,* at 473-74 ("Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"). Instead, the issue presented is whether that interview was admissible as impeachment evidence at trial should appellant choose to testify. [11]

If a defendant's statement is suppressed for a *Miranda* violation, then the State is precluded from using that statement in its case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). However, such statements are not barred for all purposes, including impeachment, "provided of course that the trustworthiness of the evidence satisfies legal standards." *Harris v. New York*, 401 U.S. 222, 224 (1971). The Court recognized that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225. Indeed, "the shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." *Oregon v. Hass*, 420 U.S. 714, 722 (1975); *see also State v. Kidd*, 281 Md. 32, 47-49 (1977) (recognizing the *Harris-Hass* impeachment exception to the

[11] Appellant testified at trial and portions of this interview were discussed and played for the jury. Appellant's defense counsel renewed the objection to the admissibility of this interview at the police station. The trial court maintained that, although appellant invoked his right to counsel, appellant's statements were made voluntarily, and were admissible to impeach appellant after he testified at trial.

Miranda exclusionary rule, but limiting it to issues "initiated by the accused on direct examination" and "on matters as to which there is a contradiction between [a defendant's] testimony and the impeaching statement"). Accordingly:

> Should Respondent testify on his own behalf at trial in a manner that contradicts that confession, the State may want to impeach Respondent with that confession. The State would be permitted to employ the statement for impeachment purposes if, and only if, the Circuit Court first rules the confession was voluntary as a matter of federal and state constitutional law and Maryland common law.

State v. Luckett, 413 Md. 360, 375 n. 4 (2010) (citations omitted); *see also Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction'").

In assessing voluntariness, the Court of Appeals has observed that confessions that are "the result of police conduct that overbears the will of the suspect and induces the suspect to confess" are prohibited. *Lee v. State*, 418 Md. 136, 159 (2011) (citing *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991)). In assessing the voluntariness of a statement, courts "must examine the totality of the circumstances affecting the interrogation and confession." *Hill,* 418 Md. at 75. Further, it is the State's ultimate burden to "establish the voluntariness of the statement by a preponderance of the evidence." *Winder*, 362 Md. at 306 (quoting *Hillard v. State*, 286 Md. 145, 151 (1979)).

In *Hillard*, the Court adopted a two-prong test to assess the voluntariness of a confession. Under that test, "[b]oth prongs must be satisfied before a confession is deemed

to be involuntary." *Winder*, 362 Md. at 310. The Court of Appeals reaffirmed the *Hillard* test as follows:

> Under that test, an inculpatory statement is involuntary under Maryland common law if (1) any officer or agent of the police promises or implies to the suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, *and* (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement. *Id.* at 153, 406 A.2d at 420.

Lee, 418 Md. at 161 (emphasis added).

Here, despite the fact that one of the officers misled appellant that he would not be "giving up anything" by signing the waiver of rights form, we note that Appellant did not confess to the crime in the March 21st interview.[12] Instead, appellant explained that he simply was shot while he was walking near Montgomery General Hospital by some unknown, unidentified actor. This factor weighs heavily against a determination that appellant's statement was involuntary. *See Stewart v. State*, 232 Md. 318, 324 (1963) ("The less incriminating the admission, the less the likelihood that it was obtained by coercion or inducement"); *Uzzle v. State*, 152 Md. App. 548, 578 (2003) ("In a multi-factored analysis, the fact that the appellant never confessed to murder is a factor").

Looking to the remaining circumstances, appellant was a 26-year-old high school graduate, who appeared in general good physical condition, was sober, and indicated, at the beginning of the interview, that he was willing to talk to the detectives. The interview

[12] As noted, the officer's statement was made after appellant asserted his *Miranda* rights and the form physically was withdrawn from a nearby table in the interview room.

took place in a small room, with appellant seated near a table, and the two detectives sitting nearby in plain clothes. Appellant was not handcuffed nor restrained during the interview itself. And, according to the tape, the conversation was brief, lasting only around 15 minutes.

Appellant asks us to consider that he was recovering from gunshot wounds, was on Percocet, and claimed his pain level was a "7" when assessing the voluntariness of the interview. Although these factors are important considerations, we are unable to conclude that the motions court was clearly erroneous when it found that "[t]here were no exclamations of pain" and that appellant's "statements themselves were lucid, logical, and intelligible."

Indeed, this interview is in no way comparable to the one in *Mincey, supra*. There, the Supreme Court observed:

> It is hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. He complained to Hust that the pain in his leg was "unbearable." He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation.

Mincey v. Arizona, 437 U.S. at 398-99 (footnotes omitted).

Instead of *Mincey*, we are persuaded that *Gorge v. State*, 386 Md. 600 (2005), is more instructive. There, after strangling his grandfather while attempting to obtain money to buy drugs, Gorge attempted to commit suicide by cutting his wrists and throat several times. *Gorge*, 386 Md. at 604-05. While recuperating from his injuries, police detectives spoke to Gorge and obtained a confession. *Id.* at 605-07. On appeal, Gorge challenged the voluntariness of that confession, arguing that he was "in severe pain, subject to various unknown medications, and emotionally distraught at the time he was interviewed by the officers . . ." *Id.* at 620. The Court of Appeals disagreed:

> Based upon our review of the record of the suppression hearing in the instant case and consideration of the totality of the circumstances, we do not think the trial court erred by finding Mr. Gorge's statement voluntary. Although the interrogation took place in Mr. Gorge's hospital room, while he was recovering from serious injuries, the detective's uncontroverted testimony regarding his discussion with Mr. Gorge supports a finding of voluntariness. Mr. Gorge's answers to Detective Wilhelm were lucid and accurate. Mr. Gorge signed a written statement, indicating that he understood what he was signing and that he gave his statement voluntarily. Moreover, Mr. Gorge did not testify at the suppression hearing and state anything to the contrary. In this case, there was no direct evidence of involuntariness and we cannot say that the trial court erred by finding that the State met its burden of proving the statement was freely and voluntarily given.

Gorge, 386 Md. at 621-22; *see Diallo v. State*, 186 Md. App. 22, 85 (2009) (holding that statement was made voluntarily where there was no indication that appellant was "emotionally distraught or cognitively impaired," and, while appellant had just been released from the hospital, where he was treated with morphine and other pain medication, this factor was not dispositive), *affirmed in part, vacated in part*, 413 Md. 678 (2010); *see also McDuffie v. State*, 12 Md. App. 264, 272 ("Nor would the fact that the appellant had

been in the hospital and may have still been in some pain vitiate an otherwise voluntary statement"), *cert. denied*, 263 Md. 717 (1971).

Numerous other courts have similarly held that pain is but a factor in considering voluntariness under the totality of the circumstances. *See United States v. Siddiqui*, 699 F.3d 690, 706 (2d Cir. 2012), *as amended* (Nov. 15, 2012) (concluding that un-Mirandized statements were made voluntarily and could be used for impeachment where, although defendant "was at times in pain and medicated, she was coherent, lucid, and able to carry on a conversation"), *cert. denied*, 133 S.Ct. 2371 (2013); *United States v. Scott*, 624 F. Supp. 2d 279, 287 (S.D.N.Y. 2008) (finding that defendant's statement was not involuntary, even though he claimed that he was injured during arrest and in pain, where the defendant's "characteristics at the time of the statement, the conditions of the interrogation and the conduct of the police show no evidence of coercion or involuntariness"); *United States v. Ellison*, 791 F.2d 821, 823 (10th Cir. Okla. 1986) (rejecting claim that defendant was mentally or physically impaired by use of pain medication such that it would have rendered statement involuntary); *see also United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. Va. 2002) ("Pain, on its own, will generally not suffice to render a waiver invalid. However, we recognize that there are situations where, after receiving certain painkillers and other narcotics, a person might be incapable of making a reasoned decision to abandon his or her rights"), *cert. denied*, 537 U.S. 963 (2002).

Based on our review of the record, we are not persuaded that appellant's pain was so great that it made his statements and denials to the detectives involuntary. Although the detectives did continue to question appellant after he invoked his *Miranda* rights, we

concur with the motions court that appellant's statement on March 21st was voluntary and could be used for purposes of impeachment at trial after appellant testified.

III.

Appellant next challenges the evidence of his criminal agency, contending that "the most the State proved was Mr. Miles's presence at the house." The State responds, in part, that reversal is required "only if no juror could reasonably conclude that Miles was a participant." We concur.

As is well settled:

> On appeal in a criminal case, we review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003) (citations omitted). When making this determination, the appellate court is not required to determine "whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 431 (2015) (emphasis in original) (quoting *Dawson v. State*, 329 Md. 275, 281 (1993)). Rather, it is the trier of fact's task to weigh the evidence, and the appellate court will not second guess the determination of the trier of fact "where there are competing rational inferences available." *Manion*, 442 Md. at 431 (quoting *Smith v. State*, 415 Md. 174, 183 (2015)). We nod with approval at the State's commentary that, when reviewing the legal sufficiency of the evidence, "this Court does not act like a thirteenth juror weighing the evidence[.]"

Perry v. State, 229 Md. App. 687, 696-97 (2016).

Appellant's theory is that he just happened to be present when he was shot during the home invasion in question and that mere presence is insufficient to support his convictions. *See Fleming v. State*, 373 Md. 426, 433 (2003) ("It is a universally accepted

rule of law that mere presence of a person at the scene of the crime is not of itself sufficient to prove the guilt of that person, even though it is an important element in the determination of the guilt of the accused"). Nevertheless, presence at the scene of a crime is "a very important factor to be considered in determining guilt." *Tasco v. State*, 223 Md. 503, 509 (1960), *cert. denied*, 365 U.S. 885 (1961).

The evidence at trial established that during the home invasion, and after gunshots were heard by multiple witnesses, the murder victim, St. Aubin, told Nosile "I shot one" or "I got one." Later that night, appellant showed up at the local hospital suffering from gunshot wounds. According to emergency room staff, appellant was the only one admitted for gunshot wounds that evening. As he was being undressed for pre-op, a bullet was found near appellant's clothes. That bullet matched projectiles and casings found at the crime scene. Additionally, blood from St. Aubin, the victim, was found on appellant's shoe. These facts, as well as appellant's inconsistent account provided to police detectives at the interview the day he was arrested, were available for the jury's consideration. A rational juror could have found that appellant was actually one of the home invaders and therefore, just as responsible as any of them for St. Aubin's murder. The evidence was sufficient to sustain appellant's convictions.

IV.

Finally, appellant asks us to vacate one of his sentences, either for armed robbery or first degree burglary, as one of these convictions formed the predicate for the felony murder conviction. The State agrees, as do we.

Prior to sentencing, the appellant asked that the court merge both the armed robbery and first degree burglary counts into the felony murder count. The court did not make any ruling on this request, and simply imposed consecutive sentences on the burglary and armed robbery counts.

Generally:

> In [*Newton v. State*, 280 Md. 260 (1977)], 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.

Lovelace v. State, 214 Md. App. 512, 542 (2013) (citation omitted).

In *State v. Johnson*, 442 Md. 211 (2015), the Court made clear that, where there are multiple predicate felonies that might support a felony murder conviction, the sentence on one of those convictions merges with the felony murder sentence:

> [W]here a defendant is convicted of felony murder and multiple predicate felonies, only one predicate felony conviction merges for sentencing purposes with the felony murder conviction; and, absent an unambiguous designation that the trier of fact intended a specific felony to serve as the predicate felony, the conviction for the felony with the greatest maximum sentence merges for sentencing purposes.

State v. Johnson, 442 Md. 211, 214 (2015). The Court explained:

> Because only one predicate felony is required to support a felony murder conviction, once the State proves a predicate felony and the death of the victim as a result of that felony, the crime of felony murder is complete, and, for the required evidence test's purposes, all of felony murder's elements have been satisfied such that the elements of any additional predicate felonies would be redundant. In other words, once

> one merger for sentencing purposes occurs, as to felony murder and one predicate felony, the elements of any additional predicate felonies are no longer required elements of felony murder.

State v. Johnson, 442 at 222-23 (footnotes omitted).

Here, there was no indication which of the two underlying felonies, either armed robbery of Roman or first degree burglary, formed the basis for the felony murder conviction. Thus, we are persuaded that one of these offenses must be vacated under *State v. Johnson*.[13] However, as the parties agree, the penalty for these two crimes, at the pertinent time, both provided a maximum sentence of twenty (20) years. *See* Md. Code (2002, 2012 Repl. Vol.) §§ 3-403 (b), 6-202 (c) of the Criminal Law Article.[14] Accordingly, we shall remand this case with directions for the circuit court to vacate either the armed robbery sentence or the first degree burglary sentence in light of the State's concession. *See* Md. Rule 8-604(d)(2) ("In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing").

CASE REMANDED IN ORDER TO VACATE EITHER THE SENTENCE FOR ARMED

[13] There is no dispute that the armed robbery of Roman could form the basis for the felony murder of St. Aubin. *See, e.g., Mumford v. State*, 19 Md. App. 640, 643 (1974) ("Each person engaged in the commission of the criminal act bears legal responsibility for all consequences which naturally and necessarily flow from the act of each and every participant").

[14] The maximum penalty for first degree burglary with intent to commit a crime of violence, such as the charge in this case, was increased to twenty-five (25) years after the crime was committed, but prior to conviction and sentencing. *See* 2014 Md. Laws, Ch. 238. That change in penalty did not apply to appellant. *See generally Waker v. State*, 431 Md. 1, 12 n.3 (2013) ("Of course, where the new law enacted after the offense is less favorable to the defendant, the *ex post facto* prohibition in Article 17 of the Maryland Declaration of Rights would require the application of the law at the time of the offense").

ROBBERY OR FIRST DEGREE BURGLARY. ALL OTHER JUDGMENTS OF CONVICTION ARE OTHERWISE AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT, ONE-THIRD BY MONTGOMERY COUNTY.