UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 184

September Term, 2014

ANDREW MARTIN CAMPOS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 8, 2015

In the Circuit Court for Washington County, Andrew Martin Campos, the appellant, was charged with crimes committed against Julian Hollins and Reniza Branche. A jury convicted the appellant of eleven counts. He was sentenced on eight of them as follows:

Count 1: Attempted second-degree murder of Hollins: 20 years, all but 10 suspended;

Count 2: Attempted second-degree murder of Branche: 20 years, all but 10 suspended, concurrent;

Count 3: First-degree assault of Hollins: 10 years, concurrent;

Count 5: Reckless endangerment: 5 years, concurrent;

Count 6: First-degree assault of Branche: 10 years, concurrent;

Count 9: Use of a handgun in the commission of a crime of violence: 10 years, all but 5 suspended, consecutive, with the first five to be served without possibility of parole;

Count 10: Wearing, carrying and transporting a handgun on his person: 18 months, concurrent;

Count 11: Wearing, carrying and transporting a handgun in a vehicle: 18 months concurrent.

The court merged the remaining counts for sentencing, granted the appellant credit for time served, and ordered three years' supervised probation upon release.[1]

[1]The docket entries and the commitment record inaccurately reflect the court's sentence as reproduced in the transcript. *See generally Turner v. State*, 181 Md. App. 477, 491 (2008) ("When there is . . . a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript, the transcript controls"). Although the docket entries and the commitment record state otherwise, as to Count 9, the court ordered that the first five years of the appellant's sentence for use of a handgun was to be served without possibility of parole. And, the commitment record does not include the conviction and sentence on Count 6, first-degree assault of Branche.

In this appeal, the appellant presents six questions for review, which we have reworded and reordered:

I. Did the circuit court err in denying his motion to suppress his statement to police?

II. Did the trial court err in refusing to propound certain requested *voir dire* questions?

III. Did the trial court err in admitting into evidence the extrajudicial statement of Reniza Branche?

IV. Did the trial court commit plain error in its jury instruction on attempted second-degree murder?

V. Was the evidence legally insufficient to sustain two convictions for attempted second-degree murder?

VI. Is the appellant entitled to reversal of one count of wear/carry a handgun, and several of his sentences, under the doctrines of unit of prosecution and merger of offenses?

For the following reasons, we shall vacate the sentences on several of the appellant's convictions and otherwise affirm the judgments.

FACTS AND PROCEEDINGS

The following evidence was adduced at trial.

On July 8, 2013, the appellant and Reniza Branche were staying at the Clarion Hotel in Hagerstown. They argued that evening and Branche decided she wanted to leave the hotel. Her belongings were locked inside the appellant's Ford Explorer and he would not give them to her, so she did not leave.

The next morning, Branche called Julian Hollins, a friend, to come pick her up at the hotel. She also asked the appellant to give back her things from the Explorer, but he again refused. When Hollins arrived, Branche once more asked the appellant to open the Explorer. According to Branche, "he told me I wasn't getting none of my stuff and then he told [Hollins] that he had a gun and he'll shoot him and all this other crazy stuff." To emphasize the point that he had a gun on his person, the appellant reached into his pocket and cocked the gun. Branche heard the sound of the gun being cocked.

After the appellant returned to the hotel room, Branche broke the passenger side window of the Explorer and retrieved some of her belongings. She then saw the appellant coming back toward the parking lot, so she and Hollins got into Hollins's Volkswagen and drove away.

The appellant got into the Explorer and started chasing Branche and Hollins. Branche noticed that Hollins's trunk was open, so they stopped to close it. As Branche was doing so, the appellant drove up, told her, "I'll shoot you," and pulled out a black handgun. The car chase resumed. The appellant aimed his gun and shot at the Volkswagen, hitting the rear windows on the driver's side and the passenger's side. Branche did not hear the shot; she "heard the window break more so than the shot." Branche and Hollins drove to the Hagerstown Police Station and ran inside for help. The appellant drove off.

Branche gave a statement to the police in which she identified the appellant as the person who shot at her. However, at trial, when asked to identify the appellant, Branche replied, "I'd like to plea [sic] the Fifth."

Detective Tammy Jurado, the lead investigator in the case, interviewed the appellant. In her trial testimony, Detective Jurado summarized what the appellant told her. (The interview was recorded, but the recording was not played at trial and was not moved into evidence.) The appellant's version of events was substantially similar to Branche's statement except it said nothing about a shooting. The appellant confirmed that he and Branche had gotten into an argument; that he would not give her her belongings from the Explorer; that she and Hollins broke a window of the Explorer to retrieve those belongings; and that Hollins and Branche drove off and he chased them in his Explorer until Hollins pulled into the Hagerstown Police Department parking lot. The appellant acknowledged that he had had a cell phone with him during the chase and that he must have left it inside the Explorer after he was arrested.

On the day in question, Detective Jesse Duffey heard a radio dispatch that a red Ford Explorer with a broken passenger window was wanted in connection with a shooting, and that the incident was thought to have started at the Clarion Hotel.[2] Detective Duffey drove to the hotel to investigate. There, he encountered hotel employees cleaning up broken glass in the parking lot. They told him that following an "altercation" a male and a female had left the parking lot in a Volkswagen and that a second male had left in a red Ford Explorer. They also told him that the male in the Explorer had been a guest at the hotel. Upon leaving the hotel, Detective Duffey heard a police broadcast identifying the appellant as the person

[2]The appellant's Explorer was red.

wanted in connection with the shooting. Detective Duffey retrieved a photograph of the appellant from a computer database. Soon thereafter, he saw the appellant standing on the curb with a female not far from the police station. Detective Duffey called out the appellant's name. When the appellant answered, the detective took him into custody. He was advised of his *Miranda* rights and then was turned over to Officer Chris Robinson for transport to the police station.

According to Detective Duffey, the female with the appellant left while the appellant was being arrested. After the appellant was transported, Detective Duffey returned to his vehicle and started to drive to the police station. As he was doing so, he spotted a red Ford Explorer with a broken window being driven by the female who had been walking with the appellant. She was identified as Kiara Branche, a relative of Branche. Detective Duffey stopped her and had the Explorer moved to a safe location so it could be searched pursuant to a warrant. A prepaid cell phone was found inside the Explorer, near the driver's seat. Another search warrant was obtained for that phone. The police recovered a photograph of a silver and black handgun that was stored in the cell phone's memory.

Detective Duffey participated in a search of the roadways and areas adjacent to where the appellant had driven during the chase. A .9 millimeter handgun was found in the weeds near a parking lot not far from the police station. The gun's magazine contained bullets. The gun originally had been purchased in Virginia but had been reported stolen.

The rear driver's side and passenger's side windows in Hollins's Volkswagen were broken, and glass was strewn about the floor of the car. A police forensic examiner found

a small hole in the rear passenger's side door panel. A portion of a copper-colored bullet jacket was recovered from inside that door panel. The forensic examiner tested the handgun found by Detective Duffey and determined that it was operational. Two cartridge casings were recovered during testing. Although the bullet jacket fragment recovered from the Volkswagen door panel was consistent with the handgun tested, it could not be determined whether the jacket fragment was fired from that gun. The gun and ammunition were tested for fingerprints, but no usable prints were recovered. A gunshot residue test of the appellant's hands was inconclusive.

We shall include additional details in our discussion of the issues.

DISCUSSION

I.

Motion to Suppress

Before trial, the appellant filed a motion to suppress the statement he gave to the police. A suppression hearing was held and the following evidence was adduced.

Detective Duffey placed the appellant under arrest at 3:42 p.m. on July 9, 2013. He read the appellant his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The appellant did not ask for an attorney or indicate that he did not want to speak with the police. Detective Duffey did not have any further conversation with the appellant at that time.

The appellant was transported to the police station by Officer Robinson and placed in an interview room. According to Detective Jurado, the appellant waited in the interview

room for approximately 20 to 25 minutes. She did not recall seeing anyone speak with the appellant while he was waiting in the interview room prior to the interview.

The appellant's interview began at 4:24 p.m. Detective Jurado entered the room, removed his handcuffs, and told him that the interview was going to be recorded. She was already seated when the recording equipment was turned on by someone in another room. Detective Duffey entered the room to participate in the interview. The appellant was re-advised of his *Miranda* rights and affirmatively waived them. According to Detective Jurado, at no time before or during the interview did the appellant request an attorney or make any other statement indicating that he did not want to talk to her.

On cross-examination, Detective Jurado denied saying to the appellant, "Why do you want an attorney? You're not being charged." She also denied telling him, "I know you didn't do anything wrong. They were the ones who broke into your truck."

The appellant testified. He stated that while he was waiting in the interview room, before Detectives Jurado and Duffey interviewed him, he spoke with Officer Robinson. He "asked [Officer Robinson] what [he] was being charged with. [Officer Robinson] told [the appellant] he did not know what was going on. [The appellant] said if [he was] being charged [he] would like a [sic] attorney." The appellant further testified that when he spoke to Detective Jurado in the interview room, before Detective Duffey entered, he "said the same thing." According to the appellant, Detective Jurado responded "why do [you] want an attorney? [Are you] guilty?" He replied, "no. I don't know what's going on." Detective Jurado then informed him that she knew he did not do anything wrong, that the other people

had broken into his vehicle, and said, "I just need to know your side of the story and you can go home." After this, the appellant was interviewed and "told [his] side of the story."

The State recalled Detective Jurado in rebuttal. She denied that the appellant ever asked for an attorney. She also denied telling him that he did not need an attorney or that he was not guilty.

The prosecutor then informed the court and defense counsel that Officer Robinson was on medical leave, awaiting surgery, and would not be returning to work until just before Christmas, around December 23, 2013. The prosecutor stated that this was the first the State had heard that the appellant was claiming he had asked Officer Robinson for an attorney, but, observing that trial was set for December 10, 2013, argued there was adequate evidence for the court to find that the appellant was not credible on this issue. The prosecutor pointed to Detective Jurado's testimony and emphasized that the appellant did not ask for an attorney during the interview, which, as noted, was recorded.

Counsel proceeded to present argument to the court. The argument centered on whether the appellant's statement had been obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), which holds that once an accused makes a clear request for counsel all questioning must cease. Defense counsel argued generally that the State had not met its burden. The court took the matter under advisement.

The court issued a written opinion denying the motion to suppress. Pertinent to the *Edwards* issue, the court found that,

> [After being placed under arrest t]he Defendant was then transported to the Hagerstown Police Department by Officer Robinson. The Defendant was brought into an interview room at the second floor detective division and left there alone for about twenty minute[s] to a half hour. At one point the Defendant opened the door and yelled out, "why am I still waiting." Detective Jurado yelled back just to wait.
>
> At 4:24 p.m. Detectives Jurado and Duffey asked someone to activate the audio/video recording equipment in the interview room and began talking to the Defendant. A CD was introduced as State's Exhibit 1. That CD was reviewed by the Court and is the video and audio recording of the Defendant's interview on July 9, 2013. At the inception of the video, the Defendant and Detective Jurado are already seated in the room and Detective Duffey is arriving, closing the door and sitting down. Detective Jurado and the Defendant are in the middle of a conversation in which the Defendant is stating "the lady who's involved with all this." Detective Jurado responds "what's her name." The Defendant does not respond. At that point Detective Jurado immediately explains to the Defendant that they are being recorded. At 1:45 Detective Jurado informs the Defendant "you are obviously in custody, you understand that." Detective Jurado immediately begins to instruct the Defendant from a form of his Miranda Rights, *including his right to be represented by an attorney*, and separately presents him with his rights of prompt presentment before a District Court Commissioner. *At 2:43 the Defendant signed the Miranda form. At no time in the interview does the Defendant request an attorney or indicate an invocation of his rights to remain silent*.[3]

(Emphasis added.)

The court continued:

> At the suppression hearing, the Defendant testified that he invoked his right to an attorney both with Officer Chris Robinson, who transported him to the Detention Center, and with Detective Jurado before the recording of the interview began. The Defendant testified that both Officer Robinson and Detective Jurado assured him that he did not need an attorney.

[3] The times quoted that are not followed by "p.m." are the number of minutes into the interview.

> In rebuttal testimony, Detective Jurado adamantly denied that she made any such statement or assurance to the Defendant. The State attempted to locate Officer Robinson to also be a rebuttal witness, but it was proffered by the State after the lunch recess that Officer Robinson was on sick leave until the end of December.
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> * * *
>
> Initially this Court finds credible the testimony of Detective Jurado that she did not hear the Defendant make any request for an attorney and that she never advised the Defendant that he did not need an attorney. Detective Jurado's testimony is further corroborated by the video presented as State's Exhibit 1. During that entire interview the Defendant does not mention an attorney or remind Detective Jurado that she informed him that he did not need an attorney. This is particularly troubling when Detective Jurado advised the Defendant of his Miranda rights, including his right to an attorney, and the Defendant did not make any statement requesting an attorney. Had the Defendant requested an attorney and had been informed that he did not need one by either officer, it seems obvious that the Defendant would have brought this up again during the lengthy interview. The Court does not believe that the Defendant made any such statements or was given any such assurances by either officer.

The appellant contends the circuit court erred in denying the motion to suppress his statement because the record establishes that he invoked his right to counsel. Specifically, he argues that the State bore the burden of rebutting the evidence that he presented, and its failure to call Officer Robinson to testify that he (the appellant) did ***not*** tell him he wanted a lawyer was fatal. The State responds that this argument lacks merit and any error in not suppressing the appellant's statement was harmless beyond a reasonable doubt, as the statement only covered "basic facts [that] were not in dispute." (Alteration in original.)

On review of a circuit court's ruling on a motion to suppress, we consider only the facts developed at the suppression hearing. *Hill v. State*, 418 Md. 62, 67 n.1 (2011). We

view the evidence in the light most favorable to the prevailing party on the motion. *Robinson v. State*, 419 Md. 602, 611-12 (2011); *Gonzalez v. State*, 429 Md. 632, 647 (2012). We review the 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).

In *Edwards v. Arizona*, 451 U.S. 477, the Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85 (footnote omitted); *accord Phillips v. State*, 425 Md. 210, 217-18 (2012).

In arguing that by not calling Officer Robinson to testify the State failed to sufficiently rebut his claim that he invoked his right to counsel, the appellant cites *Gill v. State*, 265 Md. 350 (1972), *Streams v. State*, 238 Md. 278 (1965), and *Mercer v. State*, 237 Md. 479 (1965), all of which hold that, when a defendant directly accuses police officers of extracting an involuntary confession from him, the State will not meet its burden to prove that the confession was voluntary if it fails to call the accused officers to the stand to deny the defendant's accusations.

As the Court of Appeals has explained:

> [B]efore a suspect's statement can be received in evidence the State has the affirmative duty of showing it was freely made and not the product of promises or threats. This does not require that each person who had casual contact with the accused, once he was in police custody or being interrogated, must testify to the voluntariness of the confession in order for the prosecution to satisfy its burden. *But when it is contended that someone employed coercive tactics to obtain inculpatory statements, the charge must be rebutted.*

Gill, 265 Md. at 353 (emphasis added). *See also Streams*, 238 Md. at 282-83 (State's failure, after defendant testified, to present testimony of police officers to "refute his claim of promises and threats and to show the conduct of the police during the period he was in custody of the arresting officers" meant the State "did not meet its burden of establishing the voluntariness of the confessions as a prerequisite to their admission in evidence."); *Mercer*, 237 Md. at 483-84 (holding that State did not satisfy its burden of showing that defendant's confession was voluntary when it did not call the two officers the defendant testified physically mistreated him to induce his statement).

In *Henry v. State*, 204 Md. App. 509, 517 (2012), Henry was transported by police to the station house for questioning about an alleged rape. When he invoked his right to counsel during an interview, his police interrogator ended the interview and left him alone in the interview room. Thereafter, Henry, accompanied by a sergeant and a lieutenant, went to the bathroom. "[B]y the time [the sergeant and lieutenant] returned [Henry] to the interview room, [Henry] was saying that he wanted to talk." *Id.* at 520.

As the two officers and Henry were returning to the interview room, the audio recorder in that room picked up parts of a conversation between the sergeant and Henry. It recorded the sergeant saying, "it's better that you don't give us your statement because all

the evidence points to" and then the recording trailed off. *Id.* at 521 (internal quotation marks omitted). The recorder further picked up Henry saying in response, "but I want to tell you my side of the story." *Id.* (internal quotation marks omitted). Eventually, after Henry was re-read, and then waived, his *Miranda* rights, he gave a written statement. *Id.* at 522.

Henry moved to suppress his written statement. At the suppression hearing, he testified that, on the way back from the bathroom, the sergeant told him it would be "best for me to tell my side of the story, and the officer was letting me know that all the evidence pointing [sic] to me, that they have the witness statement placing me at the scene." *Id.* at 523. He said that the sergeant's words made him feel "fear and intimidated," and that that fear had caused him to withdraw his request for counsel, and give a written statement. *Id.* at 524.

The State called the lieutenant to testify. She said she could not remember what the sergeant had said to Henry but did recall that "the whole way down and back from the bathroom, [Henry] was begging to give us that story." *Id.* at 520-21 (internal quotation marks omitted). The prosecutor asked for a continuance so he could call the sergeant, who, the prosecutor stated, was in Las Vegas and would not return for about five days. The defense objected, complaining that the sergeant had been present at a recent hearing and the State should have known that his testimony would be needed at the suppression hearing. Remarking, "I think I probably have enough evidence in front of me at this point to make a determination," the presiding judge denied the State's motion. *Id.* at 525-26. Concluding

that Henry's testimony was not credible, the court declined to suppress the statement Henry made after he returned from the bathroom.

On appellate review of the voluntariness of Henry's statement under Maryland common law, we applied the principles of proof in *Streams* and *Gill*. "It is implicit in the opinions in these cases that the credibility of the defendant's testimony at the suppression hearing is not an issue unless the State has met its initial burden of putting on evidence to rebut what the defendant testified to." *Henry*, 204 Md. App. at 537. In other words, the "*Streams* rebuttal rule" begins with

> a presumption of involuntariness that arises when evidence is adduced that a confession was obtained by improper threats, promises, or inducements. For the State to introduce the confession in evidence, it must adduce specifically contrary evidence, thus rebutting the presumption of involuntariness. If it fails to do so, the presumption remains that the confession is involuntary.

Id. at 539.

We observed that "the principles of proof adopted in *Streams* and *Gill*, although in the context of Maryland non-constitutional law of voluntariness of confessions, apply with equal force to confessions elicited after the invocation of the right to counsel." *Id.* at 537. We concluded that the statement Henry made after he returned from the bathroom should have been suppressed because the State submitted "no evidence" at the hearing to rebut Henry's testimony with respect to what the sergeant had said. *Id.* at 540-41.

In the case at bar, the State attempts to distinguish the *Streams* line of cases by asserting that the suppression court did not find the appellant's testimony credible. As *Henry* makes clear, this does not relieve the State of its burden to directly refute the

appellant's allegations. *See Henry*, 204 Md. app. at 535-36. *See also Jarrell v. State*, 36 Md. App. 371, 379 (1977) ("The fact that the court below did not believe Jarrell consented to the search because of his concern for Reynolds did not relieve the State of its obligation to refute, if it could, Jarrell's allegations.").

We conclude, however, that there is an important distinction between *Henry* and this case. In *Henry* the defendant clearly invoked his right to counsel. The Supreme Court has explained that, for the *Edwards* rule to be triggered, "the suspect must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994); *accord Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). This is an objective inquiry and requires that:

> [The suspect] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Davis, 512 U.S. at 459 (holding that statement "Maybe I should talk to a lawyer," was not an unequivocal invocation of right to counsel, *id.* at 462). *See also Wimbish v. State*, 201 Md. App. 239, 257-59 (2011) (concluding that defendant's question "can I get a lawyer" was not an unequivocal request for counsel); *Minehan v. State*, 147 Md. App. 432, 443-44 (2002) (commenting in dicta that defendant's question "Should I get a lawyer?" did not invoke right to counsel); *Braboy v. State*, 130 Md. App. 220, 234-35 (2000) (holding that defendant's statement that he "wanted a lawyer, *but* couldn't afford one" was not an unequivocal or unambiguous request for counsel); *Matthews v. State*, 106 Md. App. 725,

737 (1995) (concluding that defendant's statement "'Where's my lawyer?' was not tantamount to a request for counsel").

In this case, the appellant testified that when he and Officer Robinson were alone in the interview room, he asked Officer Robinson "what [he] was being charged with," and Officer Robinson told him "he did not know what was going on." The appellant said, "*Umm, . . . if I'm being charged I would like a* [sic] *attorney*."[4] (Emphasis added.) This equivocal statement by the appellant was not an unambiguous request for an attorney. A reasonable police officer in the circumstances would not have understood the statement to be a request for an attorney. Rather, it reasonably would have been taken to mean that if charges were brought against the appellant *then* he would want an attorney. The appellant had not been charged at that time, and Officer Robinson did not know whether he was going to be charged. Because the appellant did not make an unambiguous request for counsel to Officer Robinson, the State had nothing it had to call Officer Robinson to rebut. We hold that the suppression court properly denied the motion to suppress the appellant's statement.

Moreover, we agree with the State that if there was error, it was harmless beyond a reasonable doubt. The standard is as follows:

> [W]hen [a defendant], in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable

[4] As explained, Detective Jurado rebutted the appellant's accusation against her; Officer Robinson did not.

> possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Henry, 204 Md. App. at 542 (first alteration in original) (quoting *Morris v. State*, 418 Md. 194, 221-22 (2011), in turn quoting *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted)).

As noted, the recording of the appellant's interview was not admitted into evidence at trial. Instead, it was summarized by Detective Jurado in her testimony. That testimony shows that at most the appellant's statement corroborated cumulative evidence of the underlying and undisputed facts about the confrontation in the hotel parking lot and the car chase. The statement included nothing in the way of an admission to shooting at Hollins and Branche. It does not mention a shooting. We can readily conclude that the statement made no difference in the outcome of the case, beyond a reasonable doubt.

II.

The appellant contends the trial court erred by not propounding certain *voir dire* questions. The State responds that the court properly exercised its discretion to decline to pose the requested *voir dire* questions because they were instructions on the law.

The following questions were requested by the defense but not given:

> 10. Does any potential juror of [sic] the belief that a Defendant should testify at his own trial as to his innocence?
>
> 11. Does any member of the panel believe that if a Defendant does not testify that he is guilty or potentially guilty of the crime of which he is accused?

> 14. Does any prospective juror believe that because a Defendant is charged by law enforcement there is a presumption that he is guilty or, alternatively, does any prospective juror believe that "where there is smoke there is fire"?
>
> 15. Does any prospective juror have difficulty with the concept that a presumption of innocence is accorded to Mr. Campos throughout the entire trial?

The right to an impartial jury is guaranteed by the Sixth Amendment of the United States Constitution as made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *See Wright v. State*, 411 Md. 503, 507 (2009). And, "the 'overarching purpose of voir dire in a criminal case is to ensure a fair and impartial jury.'" *Id.* at 508 (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)); *see also Charles and Drake v. State*, 414 Md. 726, 733 (2010) ("The primary purpose of voir dire is to ensure a fair and impartial jury."). In fact, "the only purpose of *voir dire* in Maryland is to illuminate to the trial court any cause for juror disqualification." *Wright*, 411 Md. at 508; *accord Washington v. State*, 425 Md. 306, 312 (2012). "'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" *Stewart v. State*, 399 Md. 146, 158 (2007) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)).

"[T]he trial court has 'broad discretion in the conduct of voir dire . . . ." *Wright*, 411 Md. at 508 (quoting *Dingle*, 361 Md. at 13); *see also Moore v. State*, 412 Md. 635, 644 (2010) ("In the absence of a statute or rule prescribing the questions to be asked of the

venirepersons during the examination, 'the subject is left largely to the sound discretion of the court in each particular case.'" (citation omitted)); *Wagner v. State*, 213 Md. App. 419, 449-50 (2013) ("We review a trial court's refusal to propound a requested voir dire question under the abuse of discretion standard.") (citing *State v. Shim*, 418 Md. 37, 43-44 (2011))). "That discretion extends to both the form and the substance of questions posed to the venire." *Wright*, 411 Md. at 508; *see also* Md. Rule 4-312 (proscribing the manner of conducting *voir dire*).

Questions resembling jury instructions "do not achieve the purpose for which the *voir dire* process was designed." *Wilson v. State*, 148 Md. App. 601, 660 (2002).

> "It is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Twining v. State*, 234 Md. 97, 100 (1964), *quoted in Davis v. State*, 93 Md. App. 89, 112 (1992) ("It is our view that the question which appellant sought to have propounded to the jury did not relate to a cause for disqualification under the circumstances."); *Carter v. State*, 66 Md. App. 567, 577 (1986) ("The Court of Appeals held that the lower court had not abused its discretion in refusing the question for *voir dire*, recognizing and following the generally accepted rule 'that i[t] is inappropriate to instruct on the law at the *voir dire* stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law.'").

Id. at 660 (parallel citations omitted).

The appellant argues that the Court of Appeals decision in *Twining* (quoted above) should be overruled. In *Twining*, the defendant asked the court to *voir dire* jurors about whether they "would give the accused the benefit of the presumption of innocence and the burden of proof." 234 Md. at 100. The court declined. The Court of Appeals held that the

trial judge was not required to propound the question because it was a statement of law that would be "fully and fairly covered in subsequent instructions to the jury." *Id.*

In *Marquardt v. State*, 164 Md. App. 95 (2005), the defendant, like the appellant here, urged us to reject *Twining*. He had requested and been denied three *voir dire* questions that were statements of law. On appeal he argued that "*Twining* is outmoded because it 'was decided at a time when juries were genuinely the judges of the law in Maryland and the [circuit] court's instructions were not binding.'" *Id.* at 142 (alteration in original). We disagreed:

> We begin by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that voir dire need not include matters that will be dealt with in the jury instructions. As we have recently stated, "it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is 'now outmoded.'" *Baker* [*v. State*], 157 Md. App. [600,] at 618 [(2004)].

Marquardt, 164 Md. App. at 144 (additional citations and parallel citation omitted).

What we said in that paragraph holds true today. This Court cannot overrule a Court of Appeals decision; nor would we be inclined to overrule *Twining* even if we had the power to do so. The trial court in this case instructed the jury at the close of the evidence that the appellant was presumed innocent, that the State had the burden of proof beyond a reasonable doubt, that the appellant had a constitutional right not to testify, and that the jury was not to hold his decision not to testify against him in any way. These instructions adequately addressed defense counsel's proposed *voir dire* questions; and we "presum[e] that juries are able to follow the instructions given to them by the trial judge, particularly where the record

reveals no overt act on the jury's part to the contrary." *Spain v. State*, 386 Md. 145, 160 (2005). The trial court did not abuse its discretion in denying the appellant's requested *voir dire* questions.

III.

At trial, the State called Branche to testify. On direct examination, she stated that she was then incarcerated for distribution of narcotics. When asked whether she remembered where she was on July 9, 2013, she testified that she did not remember because she had been under the influence. At a bench conference, the prosecutor informed the court that Branche had given a recorded statement to the police on July 9, 2013. The following ensued:

> [PROSECUTOR]: Can I? She made a full statement by the end of the statement indicating that she was shot at by the person in another car and indicating that it was [the appellant].
>
> THE COURT: And that's recorded?
>
> [PROSECUTOR]: On audio digital.
>
> THE COURT: So that's a *Nance* statement. You want to *Nance* her.
>
> [PROSECUTOR]: I do want to *Nance* her.

Direct examination of Branche resumed. When asked whether she remembered giving a statement on July 9, 2013, Branche replied, "I was told I was," by detectives who visited her while she was incarcerated. She was then asked if seeing her statement would help refresh her recollection, to which she replied, "I mean it doesn't change the fact that I was under the influence when it happened and when I gave the statement."

Over objection, Branche's recorded statement was admitted into evidence and played for the jury in open court. Branche then testified that she was not then (at the time of trial) under the influence. On cross-examination, defense counsel asked Branche one question: "[W]hen you gave that statement to the police, you were under the influence of drugs?" Branche replied, "Yes sir."

Before this Court, the appellant contends the trial court erred in admitting Branche's recorded statement into evidence because the statement was hearsay that did not qualify under the hearsay exception the court applied.[5]

In *Bernadyn v. State*, 390 Md. 1, 8 (2005), the Court of Appeals explained:

> Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.' Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

Accord Thomas v. State, 429 Md. 85, 98 (2012).

The relevant exception in this case is Rule 5-802.1 (a), which provides:

> The following statements previously made by a witness who testifies at trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:

[5]The State argues this issue is not preserved for review. We disagree. Defense counsel asserted that "[i]f the witness maintains that she was under the influence of drugs at the time, the tape is not going to tell us whether she was on drugs or not" and "[t]he lady said she was under the influence." Although not a model of clarity, it is apparent that defense counsel was arguing that Branche had no memory of her prior statement, and therefore the prior statement was not inconsistent with her trial testimony.

> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

This exception is a codification of the Court of Appeals holding in *Nance v. State*, 331 Md. 549, 552 (1993), in which it confronted the "classic evidentiary problem of the turncoat witness." There, witnesses had given statements to the police and had testified before a grand jury, identifying Nance and two other men as the shooters in a Baltimore City murder. Yet, when called to testify at trial,

> [the witnesses] remembered some parts of these earlier events, did not remember others, and outright denied or repudiated other parts. Their lapses of memory conspicuously occurred whenever the questions at trial approached matters potentially implicating Nance and [a co-defendant] in the murder.

Id. at 572. The Court noted:

> The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized. When witnesses display such a selective loss of memory, a court may appropriately admit their prior statements. Witnesses who are not actually available for cross-examination despite their presence in court are, for example, those who refuse to testify by asserting the spousal privilege or the privilege against self-incrimination. That was not the case here.

Id. (citations omitted). The Court held:

> [T]he factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced.

Id. at 569 (footnote omitted); *accord Archer v. State*, 383 Md. 329, 346 (2004); *see also McClain v. State*, 425 Md. 238, 252 (2012) (observing that the trial court's finding of inconsistency may be implicit because "Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement").

In the case at bar, Branche maintains that her recorded statement to the police was not "inconsistent" with her trial testimony, which simply was that she did not recall making the statement because she had been under the influence of narcotics. The Court of Appeals has explained that "a witness's testimony that he or she *cannot remember* events about which the witness testified earlier may be inconsistent with the earlier testimony, and hence the earlier testimony may be admissible under *Nance* as a prior inconsistent statement." *Tyler v. State*, 342 Md. 766, 776 (1996); *see Belton v. State*, 152 Md. App. 623, 631 (2003) ("Maryland courts have recognized that witnesses can be victim to memory loss and outside pressures, which may later affect their testimony."); *see also Corbett v. State*, 130 Md. App. 408, 421-23 (2000) (suggesting that victims may change their prospective testimony because of loss of memory, selective amnesia, or untruthfulness). Moreover, "[w]hen determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain*, 425 Md. at 250 (citations omitted).

In *Nance*, the Court upheld admission of the prior inconsistent statement when the witnesses explained that their claimed lack of memory about what they had told the police

was due to heroin intoxication. *Nance*, 331 Md. at 549; *see also Marlin v. State*, 192 Md. App. 134, 147 (2010) ("The pretrial statements were also admissible, despite [the witness's] claim that he was under the influence of drugs when he made them."). Similarly, in *Makell v. State*, 104 Md. App. 334 (1995), we upheld the admission of a witness's prior inconsistent statement even though he was claiming that "his multi-year drug stupor had destroyed his ability to recall anything between 1988 and 1994 . . . ." *Id.* at 352.

In *Tyler v. State*, 342 Md. at 777, the Court of Appeals held that there was no inconsistency between a witness's refusal to answer questions at trial and the witness's prior statement about the crime. The Court drew a distinction between that situation and a claimed memory loss situation. It observed that when a "witness claims not to remember events about which he or she testified earlier [that situation] is far different from the situation in the instant case, where the witness effectively gave no testimony at all . . . ." *Id.* (emphasis omitted).

We return to the case at bar. At trial, Branche testified that she had no memory of the recorded statement she gave to the police because she was under the influence of narcotics when she gave it. It makes no difference that her claimed memory loss was nearly total, as opposed to only selective. As this Court has observed, "[i]n rejecting the claim that the loss of memory rendered the declarants unavailable for cross-examination, [the *Nance* Court] made no distinction between partial and total memory loss." *Makell*, 104 Md. App. at 350. We note that, unlike the witness in *Tyler*, Branche was subject to cross-examination, and, in fact, was cross-examined. Finally, although there was no express finding by the trial

court that Branche's recorded statement to the police was inconsistent with her trial testimony, the court's colloquy with counsel before the tape was played evidences an implicit finding of inconsistency. *See, e.g., Wilder v. State*, 191 Md. App. 319, 344 (2010) ("Although the trial court did not articulate the basis for its ruling, it overruled defense counsel's objection only after an extensive argument by the State in favor of admissibility. We presume that the trial judge knew the law and properly applied it in overruling the defense objection to [the] testimony."). Branche's recorded statement to the police properly was admitted under Rule 5-802.1(a).

IV.

The appellant contends the court erred by giving a legally incorrect jury instruction on attempted second-degree murder. He acknowledges that he failed to object to the instruction, as Rule 4-325(e) requires, and therefore this issue is not preserved for review. He asks this Court to engage in plain error review.

Appellate courts "'possess plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court.'" *Tetso v. State*, 205 Md. App. 334, 403 (2012) (quoting *Danna v. State*, 91 Md. App. 443, 450 (1992)). We exercise such discretion only when the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.'" *Tetso*, 205 Md. App. at 403-04 (quoting *Boulden v. State*, 414 Md. 284, 313 (2010)) (internal quotation marks omitted); *see also Morris v. State*, 153 Md. App. 480, 507 (2003) (explaining in dicta appellate invocation of plain error doctrine is a "rare, rare phenomenon"). And, "in the context of erroneous jury

instructions, the plain error doctrine has been used sparingly." *Conyers v. State*, 354 Md. 132, 171 (1999). "[T]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *Martin v. State*, 165 Md. App. 189, 198 (2005) (emphasis omitted) (quoting *United States v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004)) (internal quotation marks omitted).

The Court of Appeals has explained the crime of attempted second-degree murder as follows:

> To be guilty of the crime of attempt, one must possess "a specific intent to commit a particular offense" and carry out "some overt act in furtherance of the intent that goes beyond mere preparation." *State v. Earp*, 319 Md. 156, 162 (1990); *Bruce v. State*, 317 Md. 642, 646 (1989). *For attempted second-degree murder, the State has the burden to prove "a specific intent to kill – an intent to commit grievous bodily harm will not suffice.*" *Earp*, 319 Md. at 164. One has committed second-degree attempted murder when he or she harbors a specific intent to kill the victim and has taken a substantial step toward killing the victim.

Harrison v. State, 382 Md. 477, 488-89 (2004) (emphasis added) (additional citations and parallel citations omitted).

Here, the trial court gave the following instruction on attempted second-degree murder:

> In order to convict the defendant of attempted murder in the second degree, the State must prove that the defendant took a substantial step beyond mere preparation toward the commission of the crime of murder in the second degree and that the defendant intended to commit the crime of murder in the second degree.
>
> *Murder in the second degree is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death*

> *would be the likely result*. Second degree murder does not require premeditation or deliberation.
>
> *In order to convict the defendant of* [*attempted*] *second-degree murder,*[6] *the State must prove that the defendant attempted to cause the death of Julian Hollins and/or Reniza Branche and that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result*.

(Emphasis and footnote added.)

The trial court's attempted second-degree murder instruction was wrong, because it informed the jurors that they could find the appellant guilty of that crime if he had a specific intent to kill *or a specific intent to commit grievous bodily harm*. In *Austin v. State*, 90 Md. App. 254 (1992), the trial court gave a virtually identical erroneous attempted second-degree murder instruction, telling the jurors that the *mens rea* of that crime is the specific intent to kill *or* the intent to "*inflict such bodily harm that would be likely to cause death*." *Id.* at 90 Md. App. at 260. There was no objection. On appeal, the defendant sought plain error review.

We declined, explaining that even when an error is plain and, if not harmless, is material to the rights of the defendant, the appellate courts have *discretion* to engage in plain error review, *i.e.*, can elect not to review for plain error. We emphasized that with instructional errors, plain error review generally is not entertained because the rules expressly provide that an objection is required for an error to be subject to appellate review and, most

[6]The trial judge erroneously omitted the word attempted. The appellant does not contend this omission was plain error.

important, instructional errors can be corrected by the trial judge before they are submitted to the jury if a timely objection is made. *Id.* at 264-67. Although Rule 4-325(e) gives an appellate court discretion to exercise plain error review of an instructional error, material to the rights of the defendant, to which no objection was made, "'[i]t is *not* the purpose and design of the rule to provide an avenue for a party to lay away ammunition in the arsenal of appeal.'" *Id.* at 267 (quoting *Vernon v. State*, 12 Md. App. 157, 163 (1971)).

As "Guideposts for the Prudent Attorney," we pointed out in *Austin* "some of the more typical considerations that from time to time may influence our exercise of discretion": 1) egregiousness of the error; 2) impact upon the defendant; 3) lawyerly diligence or dereliction; and 4) "[t]he case as a vehicle," *i.e.*, the need to use the case to clarify an area of the law or a legal issue. 90 Md. App. at 267-71. None of them militated in favor of plain error review.

We return to the case at bar. Like the *Austin* Court, we do not find the instructional error here egregious. The court's instruction, in effect, blended the pattern instructions for attempt and second-degree murder, thereby inadvertently including intent to cause serious bodily injury as an alternative *mens rea* to intent to kill. It is not probable that the error had "a crucial bearing upon the verdict," *id.* at 269, because there was evidence that the appellant told both Hollins and Branche that he was going to shoot them and, when he did so, he aimed at the car windows at a level where they were seated, *i.e.*, at their heads.

Counsel for both parties requested a correct instruction that accurately stated the law of attempted second-degree murder. Yet, the appellant's counsel did not object when the court gave an incorrect instruction. (Neither did the prosecutor.) This Court has stated:

> One of the strong factors militating against the notice of plain error is the reluctance of courts to forgive the non-diligence of attorneys by pulling their neglected chestnuts out of the fire for them. . . . The appellant offers us no good reason why defense counsel should not have been expected to be just as current on the Maryland case law as defense counsel now suggests the trial judge should have been. It is our reliance on the professional expertise of lawyers, after all, that causes us to make such a fetish out of a defendant's right to the assistance of counsel. The defense attorney should be far better prepared on a case than the trial judge, who frequently sees it fresh on the morning of trial. With criminal defense attorneys, moreover, frequently being specialists in their field while trial judges are required to be generalists, one could argue that there is an even greater demand that counsel be alert to the latest nuances and oscillations in the law. There certainly should not be less demand.

Stockton v. State, 107 Md. App. 395, 397-98 (1995) (citation omitted).

Finally, we see no need to use this case as a vehicle to clarify the law, as the law already is clear.

V.

The appellant contends the evidence that he fired one gunshot at the two victims was legally insufficient to sustain two convictions (instead of just one conviction) for attempted second-degree murder. The State responds that the jury reasonably could infer from the evidence that the appellant had an intent to kill as to both victims. We agree.

The standard of review is well established:

> [The appellate court] reviews an issue regarding the sufficiency of the evidence in a criminal trial by determining "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." *Jackson v. Virginia*, 443 U.S. 307 (1979) (citation omitted). The purpose is not to "undertake a review of the record that would amount to, in essence, a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994). Rather, because the finder of fact has "'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.'" *State v. Mayers*, 417 Md. 449, 466 (2010) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)); *see Albrecht*, 336 Md. at 478 (holding that evidence is reviewed "in the light most favorable to the State, giving due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses") (internal citations omitted). We recognize that "the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation," *Smith*, 415 Md. at 183 (internal quotation omitted), and we therefore "defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence and need not decide whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Mayers*, 417 Md. at 466 (citing *State v. Smith*, 374 Md. 527, 557 (2003)).

Titus v. State, 423 Md. 548, 557-58 (2011) (second and third alterations in original) (additional citations and parallel citations omitted).

"One has committed second-degree attempted murder when he or she harbors a specific intent to kill the victim and has taken a substantial step toward killing the victim." *Harrison*, 382 Md. at 489. Intent may be inferred from the circumstances surrounding the defendant's acts:

> In determining the intent of the defendant, the trier of fact is permitted to infer the requisite intent from the surrounding circumstances. Intent is subjective, such that, without the cooperation of the accused, it cannot be directly and objectively proven. Consequently, without a statement from the accused, its presence must be shown by established facts that permit a proper inference of its existence.

Breakfield v State, 195 Md. App. 377, 393 (2010) (quoting *Graham v. State*, 117 Md. App. 280, 284 (1997)).

Regarding the intent to kill, it has also been stated:

> Because the specific intent to kill lies hidden in the killer's brain . . . its proof is sometimes problematic. It may be proved directly, if the killer proclaims his purpose even as he kills or if he acknowledges his purpose afterward. It may be proved indirectly, by evidence of bad blood between the killer and the victim, by an earlier expression of an intent to kill, by a strong motive, by profiting from the victim's death, by an elaborate murderous scheme or plan, or by infinite varieties and combinations of circumstantial evidence. First and foremost in the ranks of proof, however, is the permitted inference of an intent to kill from the directing of a deadly weapon at a vital part of the victim's anatomy.

Charles E. Moylan, Jr., *Criminal Homicide Law*, § 3.2 at 44 (2002).

For the reasons we have explained in the prior section, the evidence in this case supports a rational finding that the appellant had a specific intent to kill as to both Hollins and Branche. He told each of them that he was going to shoot them and then aimed his gun at the window level of the Volkswagen, where their heads were located, and shot.

Moreover, Maryland caselaw holds that the unit of prosecution for violent crimes committed against individuals is the number of individual victims. In *Albrecht v. State*, 105 Md. App. 45 (1995), we observed that

> [w]ith intentional homicide or any intentional crime of violence, the unit of prosecution is so self-evident that the issue seldom, if ever, arises. In *dicta*, however, we did note in *Albrecht v. State*, 97 Md. App. 630, 685-86 n.4:
>
> > With intentional crimes of violence, it is clear that the unit of prosecution is each separate victim. To explode a bomb on an airplane containing 300 passengers and crew constitutes 300 murders, not one.
>
> In *Blackwell v. State*, 278 Md. 466 (1976), the defendant committed one act of arson by throwing three bottles of gasoline into the window of a house with the intent to force a former girlfriend out of the house. Notwithstanding that single act, he was convicted on six charges of first-degree murder, one for each of the six persons who died in the fire.

Albrecht, 105 Md. App. at 59-60 (parallel citations omitted).

In *Albrecht*, we explained that a single shot fired in the direction of two police officers could constitute two offenses warranting separate convictions and sentences:

> In *Jackson v. State*, 63 Md. App. 149 (1985), *rev'd on other grounds sub nom. Cherry v. State*, 305 Md. 631 (1986), the defendant fired a single shot at two pursuing police officers. Notwithstanding his claim that this constituted but a single criminal act on his part, we affirmed the multiple convictions for two separate charges of assault with intent to murder. Judge Bishop observed:
>
> > Appellant argues that he cannot be convicted or sentenced for two counts of assault with intent to murder because, at best, the State proved that appellant fired only one shot at the two pursuing police officers. The essence of appellant's argument is that where one criminal incident results in multiple victims, it is necessarily but one offense. This contention is without merit.
>
> 63 Md. App. at 157.

105 Md. App. at 62-63 (parallel citations omitted). *See also Cousins v. State*, 277 Md. 383, 398 (1976) (when defendant wielded a knife against two store detectives, acquittal on charge of assaulting one detective did not bar subsequent prosecution for assault against the other detective because the two were separate offenses); *Savoy v. State*, 67 Md. App. 590, 594 (1986) ("[W]here a single criminal incident results in multiple victims, the number of victims can determine the number of violations."); *Harris v. State*, 42 Md. App. 248, 258 (1979) ("[A]ssaults against multiple victims arising out of the same criminal incident are separate and distinct crimes.").

The appellant relies upon *Ladner v. United States*, 358 U.S. 169 (1958), to support his argument that he only could be convicted of one count of attempted second-degree

murder. In that case, the Supreme Court applied the rule of lenity to hold that a single discharge of a shotgun against two federal officers supported only one conviction for assault upon a federal officer. The defendant was prosecuted for violating a statute that creates multiple units of prosecution for conduct occurring as a part of the same criminal transaction. The statute was ambiguous as to its unit of prosecution, which is why the rule of lenity was applied. *Id.* at 177-78. *See also United States v. Shrader*, 675 F.3d 300, 314 (4th Cir. 2012) (citing *Bell v. United States*, 349 U.S. 81, 83 (1955), and *Ladner, supra*). In the case at bar, there is no statutory ambiguity.

Both parties discuss California law on this issue. In *People v. Smith*, 124 P.3d 730 (Cal. 2005), a mother was driving a vehicle in which her baby was secured in a car seat directly behind her and the baby's father was sitting in the front passenger seat. They stopped at a certain location and, after the father got out, the defendant, who was known to the mother, approached the vehicle, looked inside, and confronted her. As the father attempted to reenter the vehicle, the defendant displayed a handgun, and began to beat him. Once the father got back into the car, the mother was able to start to drive away. The defendant fired a single gunshot that narrowly missed both the mother and the baby. He was convicted of two counts of attempted murder -- one of the mother and one of the baby.

On appeal, Smith challenged the sufficiency of the evidence to support convictions on two counts of attempted murder when he had fired only a single shot. The court rejected that argument. It observed that "evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with

each directly in his line of fire, can support an inference that he acted with intent to kill both." *Id.* at 737.

In *People v. Perez*, 234 P.3d 557 (Cal. 2010), the defendant fired a single shot at seven peace officers and one civilian. "There was evidence that defendant believed he was shooting at a group of rival gang members, but no evidence he was targeting any particular individual when he fired at the group." *Id.* at 559. He was convicted of, among other crimes, seven counts of premeditated attempted murder of a peace officer and one count of premeditated attempted murder of the civilian victim.

On appeal, the court reversed all the attempted murder convictions except one conviction of premeditated attempted murder of a peace officer. It observed:

> "The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*People v. Stone* (2009) 46 Cal.4th 131, 140, 92 Cal. Rptr.3d 362, 205 P.3d 272 (Stone) [indiscriminate firing of a single shot into a group of 10 to 25 youths supported one generic count of attempted murder].) Here, defendant fired the single shot at the group intending to kill *someone*, but without targeting any particular individual, and without using a means of force calculated to kill everyone in the group. The prosecutor argued to the jury that the evidence established defendant did not have "a specific target in mind" when he fired the single shot at the group and did not intend to "kill everybody" in the group, but rather intended to "kill anybody, wherever that bullet hit." On facts such as these, where the shooter indiscriminately fires a single shot at a group of persons with specific intent to kill *someone*, but without targeting any particular individual or individuals, he is guilty of a single count of attempted murder.

Perez, 234 P.3d at 559.

Perez can be distinguished on its facts because here, the appellant threatened Hollins in the parking lot before the chase and threatened Branche during the chase. Moreover,

Perez has been criticized for exalting the spatial relationship of victims over the moral culpability of the shooter:

> [I]t is illogical to determine a defendant's guilt based solely on the positioning of intended victims. The crime of attempt recognizes that a would-be murderer who fires and misses is as morally culpable as the murderer who does not miss. If the purpose of attempt law is to punish those "who have sufficiently manifested their dangerousness," regardless of success the positioning of potential victims does not change the dangerousness inherent in firing a shot at a group of people with the intent to kill.
>
> A defendant who risks the lives of more than one person or of innocent bystanders is more morally culpable than one who fires at an isolated individual.

Andrew P. Garza, *The Magic Bullet in People v. Perez: Charging Attempts Based on Culpability and Deterrence Regardless of Apparent Ability*, 46 New Eng. L. Rev. 931, 947 (2012) (footnotes omitted).

The evidence was legally sufficient to sustain both of the appellant's convictions for attempted second-degree murder.

VI.

Finally, the appellant contends that 1) his sentence for reckless endangerment merges under the rule of lenity with his sentence for first-degree assault; 2) his sentences for first-degree assault merge with his sentences for attempted second-degree murder; and 3) both of his sentences for wearing, carrying, and transporting a handgun merge with his sentence for use of a handgun in the commission of a crime of violence. The State concedes these issues.

Merger of convictions for sentencing purposes can be based on three grounds: "(1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Carroll v. State*, 428 Md. 679, 693-94 (2012) (internal quotation marks and citations omitted).

"Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining the identity of offenses is the required evidence test.' The required evidence test prohibits separate sentences for each offense if only one offense requires proof of a fact which the other does not." *Christian v. State*, 405 Md. 306, 321 (2008) (citations omitted). The rule of lenity applies "only when the [sentencing] statute is ambiguous as to whether the Legislature intended to impose multiple punishments," for violations of two or more statutes, arising out of a single act or transaction. *Alexis v. State*, 437 Md. 457, 485 (2014). Finally, "[i]n deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are 'part and parcel' of one another, such that one crime is 'an integral component' of the other." *Carroll*, 428 Md. at 695 (citation omitted). "This inquiry is 'fact-driven' because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes." *Id.* (citation omitted).

Reckless endangerment does not merge with first-degree assault under the required evidence test. *See Marlin v. State*, 192 Md. App. 134, 166-67 (2010). However, the offenses may merge under the rule of lenity and/or fundamental fairness, especially when "the evidence at trial pertained solely to a single act of shooting a single victim." *Id.* at 171. Here, although there was a single act of shooting two victims, we are persuaded that, either

under the rule of lenity or fundamental fairness, the sentence for reckless endangerment should merge with the sentences for first-degree assault.

Continuing with first-degree assault, there are two modalities by which such an assault may be committed: (1) by "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another"; or (2) by "commit[ting] an assault with a firearm." Md. Code (2002, 2012 Repl. Vol.), § 3-202 (a) of the Criminal Law Article. In *Sifrit v. State*, 383 Md. 116 (2004), the Court of Appeals held that first-degree assault of the first modality merges with second-degree murder under the required evidence test, and that first-degree assault of the second modality may merge under the rule of lenity when the convictions arise from the same act. *Id.* at 138-39. We are persuaded that the rule of lenity also applies when the greater offense is an attempted second-degree murder. *See, e.g., Williams v. State*, 323 Md. 312, 322-23 (1991) ("There has never been any indication, in either statutory provisions or legislative history or this Court's opinions, that one of the purposes in establishing the offense of assault with intent to murder was to compound the punishment for attempted murder."); *Jenkins v. State*, 146 Md. App. 83, 134-35 (2002) (concluding that sentences for attempted first-degree murder and first-degree assault merge under rule of lenity when they "arose out of the [defendant's] same acts: his firing a handgun at [the victim] as [the victim] retreated from the scene"), *rev'd on other grounds*, 375 Md. 284 (2003). Thus, we conclude that the appellant's sentences for first-degree assault should be merged with his sentences for attempted second-degree murder.

Turning to the handgun offenses, this Court recently held that the separate offenses of wearing, carrying, or transporting a handgun on or about the person, and wearing, carrying, or knowingly transporting a handgun in a vehicle traveling on a road, do not merge under the required evidence test, but may merge under the rule of lenity. *Clark v. State*, 218 Md. App. 230, 254-55 (2014). Given that the facts in this case establish that the convictions arose from the same act, we agree that the sentences on these offenses merge. Moreover, in circumstances such as these, a sentence for wearing, carrying, or transporting a handgun merges into a sentence for the use of a handgun in the commission of a crime of violence. *See Colkley v. State*, 204 Md. App. 593, 646 (2012) (citing *Wilkins v. State*, 343 Md. 444, 445-47 (1996)), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013).

Thus, the appellant's sentence for reckless endangerment (Count 5), merges with his sentences for first-degree assault (Counts 3, 6). His sentences for first-degree assault (Counts 3, 6) merge with his sentences for attempted second-degree murder (Counts 1, 2). On the handgun offenses, the appellant's two sentences for wearing, carrying, and transporting a handgun (Counts 10, 11) merge, and that sentence merges with the sentence for use of a handgun in the commission of a crime of violence (Count 9). Accordingly, we shall vacate the sentences on Counts 3, 5, 6, 10, and 11.

SENTENCES ON COUNTS 3, 5, 6, 10, AND 11 VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY WASHINGTON COUNTY.