UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0653

September Term, 2014

SELWYN HARRINGTON

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: September 4, 2015

After a jury trial in the Circuit Court for Baltimore City, Selwyn Harrington, appellant, was convicted of first and second-degree assault and reckless endangerment. He was sentenced to incarceration for a term of thirteen years for first-degree assault and a concurrent term of three years for reckless endangerment. The remaining conviction was merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following four questions for our consideration:

> I. When the jury sent a note asking why the case was in court when the victim had no interest in pressing charges, did the trial court err by responding "The State of Maryland charged Mr. Harrington?"
>
> II. Did the trial court err in refusing to give the complete jury instruction on identification of the defendant?
>
> III. Was the evidence sufficient to support appellant's convictions for first and second degree assault?
>
> IV. Did the trial court err in failing to merge the sentence for reckless endangerment into the sentence for first degree assault?

For the reasons set forth below, we shall vacate appellant's sentence for reckless endangerment, and shall otherwise affirm all judgments.

FACTUAL BACKGROUND

In June 2013, Bruce Harrington lived at 1914 East 28th Street in Baltimore City with his aunt (Renee Harrington) and his grandmother (Aretha Harrington).[1] On June 24, 2013, Bruce was in the basement drinking alcohol with appellant (who is his cousin), along with

[1] Renee Harrington's first name is spelled both Rene and Renee in the record. For consistency, we shall refer to her as Renee. And because several of the persons mentioned in the transcript have the same surname, we shall refer to them by their first names to limit confusion.

two other cousins and two friends. According to Bruce, everyone was intoxicated. At some point in the evening, an argument that involved pushing and shoving ensued. According to Bruce, who was a reluctant witness at trial, an unnamed "family member" started waving a knife and "accidentally" stabbed Bruce in the chest within a couple inches of his heart.

After the stabbing, all of the guests left the basement, abandoning Bruce, who was bleeding profusely from the chest. Bruce called 9-1-1, and police arrived about 10 minutes later. Bruce was taken to Shock Trauma where he had surgery, after which he remained in the hospital for ten days.

At trial, Bruce would not identify the person who stabbed him, but Bruce testified that the "family member" was drunk and "didn't really mean to do it." Bruce acknowledged at trial that he told the police who responded to his 9-1-1 call that his "bitch ass cousin" stabbed him, but he would not identify that person. He also asserted that appellant left the house approximately 15 minutes before the stabbing occurred.

Baltimore City Police Detective Lawanda Willis and Officer Adam Storie each testified that, on the evening of the stabbing, Bruce told them: "My bitch ass cousin, J.J. stabbed me." Although Bruce testified that appellant does not have a nickname, appellant's Aunt Renee told the police that she called appellant "J.J." At trial, Renee similarly testified that she calls appellant "J.J."

Detective Willis testified that, when she spoke to Bruce at the hospital before his surgery, Bruce stated that "he believed his cousin was playing around and didn't mean to do it."

DISCUSSION

I.

Appellant contends that the trial court's response to a jury note constituted prejudicial error warranting reversal. During deliberations, the jury sent the court a note that stated: "It is obvious the victim is not interested in pressing charges. Why is this thing in court?" Initially, the appellant asked the court to provide "no answer." When the judge made clear that he intended to provide a response, defense counsel urged the court to respond: "This is not for your consideration." The court expressed concern that the response proposed by defense counsel was too ambiguous. Over objection, the judge gave the following response to the note: "The State of Maryland charged Mr. Harrington."

Appellant argues that the court's response was reversible error because it put the court's "imprimatur" or "stamp of approval" on the State's version of events. Appellant maintains that the instruction suggested that the State believed the police officers who testified that Bruce said his cousin J.J. stabbed him and did not believe Bruce's trial testimony to the contrary.

We note, preliminarily, that this argument is different from the argument offered by appellant during jury deliberations. At trial, defense counsel objected to the court's instruction on several grounds: (a) the question was outside the jury's purview, (b) the State did not often dismiss charges, and (c) defense counsel wanted a response that was "plain and clean and simple." At no time, however, did defense counsel argue — as appellant does on

appeal — that the court's chosen response placed a stamp of approval on the State's version of events.

Even if the argument had been articulated below, however, appellant would fare no better. Maryland Rule 4-325(a) provides that "[t]he court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." In *Appraicio v. State*, 431 Md. 42 (2013), the Court of Appeals commented on supplemental instructions as follows:

> Supplemental instructions can include an instruction given in response to a jury question. **When the jury asks such a question, "courts must respond with a clarifying instruction when presented with a question involving an issue central to the case."** *Cruz v. State*, 407 Md. 202, 211, 963 A.2d 1184 (2009). Trial courts must avoid giving answers that are "ambiguous, misleading, or confusing." *Battle v. State*, 287 Md. 675, 685, 414 A.2d 1266 (1980) (quoting *Midgett v. State*, 216 Md. 26, 41, 139 A.2d 209 (1958)).

431 Md. at 51 (emphasis added).

We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard. *Id.* The court's decision will not be disturbed absent "a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

In the case at hand, it was not manifestly unreasonable for the court to answer the jury's question about why the case was being prosecuted even though the victim obviously did not wish to press charges. The trial court's answer — that the case was in court because the State had charged appellant — was a correct response. The trial court considered defense counsel's proposed instruction and concluded that it did not provide enough information, was

ambiguous, and did not really answer the jury's question. Moreover, the instruction given did not exhibit any support for the State's version of events. The instruction was phrased in neutral language, and told the jury that the State, rather than the victim, had brought the charges.

In *Appraicio*, the Court of Appeals recognized that "[t]rial judges walk a fine line when answering questions posed by jurors during the course of their deliberations." *Id.* at 44. But the Court also recognized that "[a]ny answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Id.* The answer given by the trial court in the instant case accurately stated the legal status of the case, was responsive to the question posed by the jury, did not convey any partiality or opinion regarding the issues in the trial, and did not otherwise invade the province of the jury to decide the case. Accordingly, we find no merit in appellant's contention.

II.

Appellant's next argument is that the trial court erred in failing to give the complete pattern jury instruction regarding identification of the defendant. At trial, defense counsel asked the court to give Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:30, which provides:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence about the identification of the defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's

> state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> [You have heard evidence that prior to this trial, a witness identified the defendant by _____.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

MPJI-Cr 3:30.

In discussing the requested instructions with counsel prior to instructing the jury, the court advised defense counsel that he would not read the language in brackets because it was not pertinent to the evidence in this case. The following colloquy occurred:

> THE COURT: Identification of the Defendant. Now, there's no photo array, which is what this usually goes for and State – Defense, do you want 3-30 out?
>
> [DEFENSE COUNSEL]: No, I want it in.
>
> THE COURT: Well, tell me why you believe it's appropriate under the circumstances.
>
> [DEFENSE COUNSEL]: Because, essentially - the Defense argued that the identified [sic] is essentially is a link to Ms. Renee Harrington.
>
> THE COURT: Say that again, ma'am.
>
> [DEFENSE COUNSEL]: Ms. Renee Harrington is the individual that identifies Mr. Selwyn Harrington as J.J. **There's an important line in that instruction because her – in the identification that "You are to consider a person's opportunity to observe." And I think that's an important part in identifying** –

THE COURT: Well, she didn't observe anything.

[DEFENSE COUNSEL]: And I think that's relevant. So I think when it talks about identification of Mr. Selwyn Harrington at the time, the fact that she didn't observe anything is relevant and part of her identification. My argument is that so what that she knows Mr. Harrington and she calls him J.J.

THE COURT: All right. **Keep identification of Defendant in and then take out the bracketed language, under 3-30.** All right. State[,] you can be heard but I'll overrule your objection if you object.

[PROSECUTOR]: All right.

THE COURT: Okay. **I'll leave 3-30 in but I will not include the bracketed language since it, again, it refers to photo arrays and so forth. So I'm keeping the bracketed language out.**

(Emphasis added.)

Thereafter, the court again reviewed with counsel the instructions it intended to give, and reiterated that MPJI-Cr 3:30 would be given, but with the bracketed language excluded. When asked if counsel had any objections to the instructions, defense counsel responded: "No, Your Honor."

The trial court then instructed the jury, giving MPJI-Cr 3:30 with the bracketed material excluded. After the instructions were given, defense counsel objected, as follows:

THE COURT: Any objections from the Defense?

[DEFENSE COUNSEL]: Your Honor, I just object to the question that was deleted from identification of Defendant.

THE COURT: And that was the portion concerning a photo – usually a photo array. Are you talking about the bracketed language?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. I'll note your objection. Thank you.

Appellant contends that the refusal to give the second of the two bracketed paragraphs of the pattern jury instruction constitutes error. He maintains that the language in the second bracketed paragraph did not deal with photo arrays, as the trial judge suggested, but with the caution that must be exercised by the jury in evaluating the identification by a single witness of a defendant as the perpetrator of a crime. He argues that the omission of the second bracketed paragraph was error because there was only one witness, Bruce Harrington, who identified him (to police, but not at trial) as the perpetrator, and only one witness, Renee Harrington, who identified him as having the nickname J.J.

As a preliminary matter, the State contends that this issue was not properly preserved for our consideration. The State points out that defense counsel argued only that the second bracketed paragraph of the pattern jury instruction applied to Renee's testimony, but did not argue that it applied to Bruce's testimony. Further, the State asserts that, after the jury instructions had been read, defense counsel acquiesced in the court's statement that defense counsel's objection pertained to the first bracketed paragraph, which usually applied only to photo arrays. As a result, the State contends, appellant's claim was waived in its entirety. Although we agree with the State's assertion that the arguments made at trial did not adequately apprise the trial court that appellant objected on the grounds currently being argued, we need not resolve the preservation issue because, even if the issue had been preserved for our consideration, we would find no merit in appellant's contentions.

Instructions to the jury are governed by Maryland Rule 4-325, which provides, in part:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Maryland Rule 4-325(c). We review the decision of a trial court to provide or forego a requested jury instruction for abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). In cases such as this, where the trial court is alleged to have refused to give a requested instruction, "[t]he burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd on other grounds*, 362 Md. 77 (2000).

As a threshold matter, we question whether the omitted language constitutes an instruction on the law as opposed to an instruction on the facts in evidence. In *Patterson v. State*, 356 Md. 677 (1999), the Court of Appeals addressed the circumstances under which a trial court should give a negative or adverse inference instruction when faced with missing evidence. In that case, the trial court declined to give a "missing evidence" instruction to support defense counsel's argument that the State failed to produce certain evidence at trial. *Id.* at 680-82. The Court of Appeals summarized the law concerning missing evidence as follows: "If the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury." *Id.* at 682. Citing Rule 4-325(c), the *Patterson* Court emphasized that "a trial judge has a duty, upon request in a criminal case, to instruct the jury on the applicable law." *Id.* at 683 (emphasis in original). The Court observed, however, that Rule 4-325(c) "does not apply to factual matters or

inferences of fact. Instructions as to facts and inferences of fact are normally not required." *Id.* at 684. The Court explained:

> Because most evidentiary inferences are questions of fact, not questions of law, missing evidence instructions can be distinguished from instructions on the elements of the crime that a defendant is charged with, instructions on the affirmative defenses that a defendant may utilize, and from evidentiary presumptions that the law recognizes but, without an instruction, a jury would not recognize. Elements, affirmative defenses and certain presumptions relate to the requirement that a party meet a burden of proof that is set by a legal standard. A trial judge must give such an instruction if the evidence generates the right to it because it sets the legal guidelines for the jury to act effectively as the trier of fact. **An evidentiary inference, such as a missing evidence or missing witness inference, however, is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction. While supported instructions in respect to matters of law are required upon request, instructions as to evidentiary inferences normally are not.**

Id. at 684-85 (emphasis added).

Based upon its determination that a missing evidence instruction was factual in nature, the *Patterson* Court held that "a party generally is not entitled to a missing evidence instruction." *Patterson*, 356 Md. at 681. We have similarly held that certain instructions regarding eyewitness identification need not be given in every case. *Janey v. State*, 166 Md. App. 645, 666 (2006).

In *Carroll v. State*, 428 Md. 679 (2012), the Court of Appeals noted that, in assessing whether the trial court properly exercised its discretion in declining to give a requested instruction, we must consider whether:

> (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.

Id. at 689. The instructions given must also "sufficiently protect the defendant's rights and adequately cover[ ] the theory of the defense." *Id.*

In the case at hand, the instruction contained in the second bracketed paragraph was not an incorrect statement of law, but it was not applicable to the facts of this case. Appellant asserts that the instruction would have applied to both Renee, who testified that she knew appellant as J.J., and Bruce, who initially told police he was stabbed by his "cousin J.J." As for Renee's testimony, there was no evidence presented to indicate that she was an eyewitness to the crime. Defense counsel did not challenge Renee's claim that appellant was known as J.J., but rather focused on the fact that she did not witness the crime. Accordingly, the evidence did not support the instruction with regard to her.

Although there was evidence that Bruce identified his attacker as "J.J.," he never identified appellant as the person who stabbed him. In fact, Bruce testified at trial that appellant left the basement prior to the stabbing and that appellant was not known by any nickname. Defense counsel did not challenge Bruce's ability to identify appellant as the attacker, but focused on the fact that Bruce did not identify appellant as the person who stabbed him. As a result, the instruction was not generated with regard to Bruce.

In addition, we note that the principle of the specific language which appellant contends was omitted to his detriment — "you should examine the identification of the

defendant with great care" — was fairly and adequately covered in the instructions actually given. The court instructed the jury:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and the Defendant was the person who committed [sic]. You've heard evidence about the identification of the Defendant as a person who committed the crime. You should consider the witnesses[']' opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the witness committing the crime, the witnesses' state of mind and any other circumstances surrounding the event.
>
> You should also consider the witness[es]' certainty or lack of certainty, the accuracy of any prior description and the witness[es]' credibility or lack of credibility as well as any other factor surrounding the identification. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

The clear message in these instructions was that the jury should examine identification evidence with great care. These instructions fairly covered the language contained in the second bracketed paragraph of MPJI - Cr 3:30. The trial court did not abuse its discretion in omitting the second bracketed portion of the pattern jury instruction.

III.

Appellant next contends that the evidence was insufficient to support his convictions for first and second degree assault. Specifically, he asserts that, because Bruce told the police that his cousin did not intend to stab him, "there was no evidence to support the notion that appellant had the requisite intent for either first or second-degree assault.

Recognizing that he did not articulate this particular argument in his motion for judgment of acquittal, appellant asks us to exercise our discretion to review the unpreserved claim pursuant to Maryland Rule 8-131(a) and the doctrine of plain error review. Appellant

also argues that, to the extent the issue is not preserved for appellate review, we should consider whether trial counsel's failure to preserve the issue denied him his constitutional right to effective assistance of counsel. For the reasons set forth below, we decline to exercise our discretion to consider appellant's unpreserved claim, and we decline to consider his claim of ineffective assistance of counsel.

A. Consideration of the Unpreserved Contention

In support of his request that we consider his unpreserved challenge to the sufficiency of the evidence, appellant first argues that "the trial court was clearly aware of the intent requirement, which was included in the jury instructions, and thus . . . did effectively pass on the issue." But Maryland Rule 4-324(a) mandates that, when moving for judgment of acquittal, "[t]he defendant shall state with particularity all reasons why the motion should be granted." In support of his motion for judgment of acquittal, appellant argued only that the victim had not identified him as J.J. There was no mention of appellant's present contention that the State failed to prove he had the requisite intent to commit a criminal assault.

The Court of Appeals has explained that the principal purpose of the preservation requirement is "to prevent 'sandbagging' and to give the trial court the opportunity to correct possible mistakes in its rulings." *Fisher v. State*, 367 Md. 218, 240 (2001); *Williams v. State*, 173 Md. App. 161, 167-68 (2007). Similarly, with regard to plain error review, the Court of Appeals has explained:

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can

> be made with respect to the challenge, and (2) the other parties and the judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007). With regard to plain error review, we have repeatedly observed that appellate review under that doctrine "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Kelly v. State*, 195 Md. App. 403, 432 (2010)(and cases cited therein). Moreover, we commented in *McIntyre v. State*, 168 Md. App. 504, 528 (2006), that we knew of "no Maryland case [that] has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal" on grounds that were not advanced at trial. *Accord Claybourne v. State*, 209 Md. App. 706, 750, *cert. denied*, 432 Md. 212 (2013).

In support of his request that we consider his unpreserved argument, appellant directs our attention to *Bible v. State*, 411 Md. 138 (2009). In that case, the Court of Appeals considered an argument that was not specifically raised in or decided by the trial court. *Bible*, 411 Md. at 149-50. That case is distinguishable, however, because, although defense counsel in that case did not make the precise argument at trial that was raised on appeal, counsel did make the same general argument, such that consideration of the issue on appeal did not constitute "sandbagging" the trial court. *Id.* at 150.

That is not so in the case at hand. Here, defense counsel did not raise any issue regarding the intent requirement for the assault charges. As nothing in the record before us persuades us that we should exercise our discretion to address appellant's unpreserved claim, we decline to do so.

B. Ineffective Assistance of Counsel

Appellant asserts, in the alternative, that defense counsel's failure to preserve his claim of insufficient evidence denied him his constitutional right to effective assistance of counsel. Appellant relies on our opinion in *Testerman v. State*, 170 Md. App. 324 (2006), in support of his contention that no conceivable trial strategy could explain defense counsel's failure to preserve the sufficiency argument for appellate review, and, therefore, his convictions must be reversed because he was clearly denied effective assistance of counsel. We disagree.

In *Testerman*, the defendant was convicted of fleeing and eluding a police officer. The factual predicate of that conviction was that Testerman, who had been driving a car, switched seats with his passenger when he was pulled over by the police. *Testerman*, 170 Md. App. at 329-30. On appeal, Testerman argued that switching seats with his passenger did not constitute eluding under the applicable statute. *Id.* at 335. He asserted that his counsel's failure to raise that issue at trial, and thereby preserve it for appeal, constituted ineffective assistance of counsel. *Id.*

In addressing that issue, we recognized that, "generally, a post-conviction proceeding is the 'most appropriate' way to raise a claim of ineffective assistance of counsel . . . because 'ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel.'" *Id.* at 335 (internal citations omitted). In an extraordinary case such as *Testerman*, we may address the effectiveness of counsel on direct appeal if we are satisfied that "'the critical facts are not in dispute and the record is sufficiently developed to permit

a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.'" *Id.* (quoting *In re Parris W.*, 363 Md. 717, 726 (2001)).

In *Testerman*, we addressed the ineffective assistance of counsel claim on direct appeal because the critical facts of the case were not in dispute, the issue was "fully aired at trial," and the record was "sufficiently developed to permit a fair evaluation of" Testerman's claim. *Id.* at 336. Ultimately, we determined that Testerman's trial counsel failed to provide effective assistance as to the charge of eluding a police officer because he failed to raise the issue of insufficient evidence at trial. *Id.* at 343-44.

The instant case is distinguishable because the record regarding trial counsel's strategy and legal theories was not sufficiently developed to permit a fair evaluation of appellant's claim that defense counsel was ineffective. As a result, *Testerman* does not require us to consider appellant's claim on direct appeal. *See Mosley v. State*, 378 Md. 548, 558 (2003) ("We have explained on numerous occasions that a post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act, Maryland Code, § 7-102 of the Criminal Procedure Article (2001), is the most appropriate way to raise the claim of ineffective assistance of counsel.").

IV.

Appellant's final contention is that the trial court erred in failing to merge the sentence for reckless endangerment into the sentence for first-degree assault. He maintains that

because the same factual predicate supported the conviction for first-degree assault and the conviction for reckless endangerment, merger was required. We agree.

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject to the same offense to be twice put in jeopardy of life or limb." This constitutional guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Odum v. State*, 412 Md. 593, 603 (2010); *Robinson v. State*, 116 Md. App. 1, 4 (1997)(citing *Benton v. Maryland*, 395 U.S. 784 (1969)). Although the Maryland Constitution does not contain a double jeopardy clause, Maryland common law does provide "well-established protections" against double jeopardy. *State v. Long*, 405 Md. 527, 536 (2008). Double jeopardy protection prohibits multiple punishments for the same offense as well as multiple trials for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Purnell v. State*, 375 Md. 678, 690-92 (2003).

Double jeopardy analysis is a two-step process that requires us to determine first whether the charges arose out of the same act or transaction, and second, whether the crimes charged are the same offense. *Jones v. State*, 357 Md. 141, 157 (1999). The preferred test to determine whether offenses stemming from the same transaction merge for double jeopardy purposes is the required evidence test. *Anderson v. State*, 385 Md. 123, 131 (2005). The required evidence test provides that, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the

other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Thomas v. State*, 277 Md. 257, 265 (1976). If each offense requires proof of a fact which the other does not, then "neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode." *Cousins v. State*, 277 Md. 383, 388 (1976).

The State asserts that the first prong of the two-part test is not met here because the charges for reckless endangerment and assault arose out of two separate transactions. Specifically, the State maintains that appellant committed first-degree assault by stabbing Bruce and then committed reckless endangerment by abandoning Bruce, who was bleeding profusely, without calling 9-1-1. In support of this argument, the State points to the prosecutor's closing argument, in which he asserted that, "to stab somebody and then leave them there squirting blood, that's reckless endangerment."

A review of the record reveals the following information about the reckless endangerment charge: Appellant was first charged in the District Court of Maryland for Baltimore City. In the Statement of Charges, the State alleged that appellant "did recklessly engage in conduct, to wit: STABBING THE VICTIM IN THE CHEST that created a substantial risk of death or serious physical injury to BRUCE HARRINGTON[.]" Notably, that version of the charges made no mention of leaving the wounded victim alone.

Thereafter, appellant was indicted in the Circuit Court for Baltimore City. Count four of the indictment alleged only that appellant "did recklessly engage in conduct that created a substantial risk of death and serious physical injury[.]" Again, the charge did not mention

the separate act of abandoning the victim. During the prosecutor's opening statement, he advised the jury that the "allegations are that Mr. Selwyn Harrington stabbed his cousin, Mr. Bruce Harrington, in the chest," but the prosecutor did not make any mention of an allegation that appellant also recklessly endangered Bruce by abandoning him in the basement while he was bleeding profusely from the chest. After the close of the evidence, the judge, the prosecutor, and defense counsel discussed the jury instructions. The judge asked the prosecutor, "Are you going with the reckless endangerment?" The prosecutor replied, "Yes, Your Honor. Because of the [victim's] statement that he thought [the cousin who stabbed him] was playing around."

Thereafter, the judge instructed the jury on reckless endangerment, stating:

> In order to convict the Defendant of reckless endangerment the State must prove that the Defendant engaged in conduct that created the substantial risk of death or serious physical injury to another. That a reasonable person would not have engaged in that conduct. And that the Defendant acted recklessly. The Defendant acted recklessly if he was aware that his conduct created a risk of death or serious physical injury to another and then he consciously disregarded that risk.

The jury was not instructed that it needed to determine whether the reckless endangerment count was supported by conduct distinct from the acts which were alleged to constitute first degree assault. Nor did the verdict sheet require the jury to draw any distinction between the conduct supporting these two charges.

During closing argument, for the first time in the case, the prosecutor argued that different conduct could support the two different charges:

> I can't tell you what happened down there. Bruce Harrington and Mr. Selwyn Harrington were there. But if somebody stabs you in the chest, the

> State will contend two inches from your heart, and leaves, they didn't call 9-1-1. Bruce, who's squirting blood, called 9-1-1.
>
> If you left a man there with a stab wound to his chest squirting blood, there's only one consequence to that. But for the police, but for him being able to call, and the police arriving, and he bleeds out. That's attempted murder. The stab wounds are two inches from your heart. That's first degree assault. And to stab somebody and then leave them there squirting blood, that's reckless endangerment.

During the State's rebuttal argument, however, no mention was made of reckless endangerment or the fact that Bruce was abandoned in the basement. After the jury found appellant guilty of first and second degree assault and reckless endangerment, the court sentenced appellant to incarceration for a term of 13 years for the first degree assault and a concurrent term of 3 years for reckless endangerment.

When we consider the record as a whole, it is not at all clear that the factual basis for the jury's finding of guilty on the reckless endangerment charge was that appellant left Bruce in the basement while he was bleeding profusely from the chest. The prosecutor's closing argument linked the reckless endangerment charge to both the stabbing and the fact that Bruce was left in the basement "squirting blood." We conclude, therefore, that one possible view of the verdicts is that the jury believed that the charges for first-degree assault and reckless endangerment arose out of the same act, specifically, the stabbing of Bruce. As the Court of Appeals emphasized in *Nicolas v. State*, 426 Md. 385, 408 n.6:

> [T]he appropriate standard to apply when addressing a question of factual ambiguity in the context of merging convictions is to resolve the ambiguity in the defendant's favor in a situation where it is impossible to know for certain the rationale of the trier of fact for finding the convictions entered against the defendant. *See Snowden*, 321 Md. at 619, 583 A.2d at 1059-60; *Nightingale*, 312 Md. at 708, 542 A.2d at 377; *State v. Frye*, 283 Md. 709, 723-25, 393

> A.2d 1372, 1379-80 (1978); *Cortez v. State*, 104 Md. App. 358, 361, 656 A.2d 360, 361 (1995).

Resolving the factual ambiguity in favor of the defendant in *Nicolas* led the Court to conclude that merger of two convictions was compelled. *Id*. at 412.

Although the two offenses in this case do not always merge under the required evidence, we have held, under facts analogous to the present case, that merger is sometimes required. In *Marlin v. State*, 192 Md. App. 134, *cert. denied*, 415 Md. 339 (2010), the defendant was found guilty of first-degree assault, reckless endangerment and other crimes arising from the shooting of Derrick Williams. *Marlin*, 192 Md. App. at 140. Marlin was sentenced to ten years' incarceration for first-degree assault and a concurrent term of five years for reckless endangerment. *Id.* On appeal, Marlin argued that the conviction for reckless endangerment should have merged. *Id.* at 154. We concluded:

> [R]eckless endangerment under C.L. § 3-204 may merge with first degree assault under C.L. § 3-202(a)(1), involving the conduct of causing or attempting to cause serious physical injury to another, when the mens rea and the actus reus of reckless endangerment ripen into the specific intent to cause or attempt to cause serious physical injury. In that circumstance, reckless endangerment might be a lesser included offense under C.L. § 3-204(a)(1).

Id. at 165.

In *Marlin*, we went on to consider whether reckless endangerment merged into the crime of assault when the modality of assault involved is the use of a firearm. We concluded that, because each of those crimes required proof of an element that the other did not, they did not merge under the required evidence test. *Id.* at 166-67. Nevertheless, we held that, under the rule of lenity and principles of fundamental fairness, the two convictions warranted

only one sentence, and merger was required. *Id.* at 171. In reaching that conclusion, we stated:

> Here, the use of the firearm spawned multiple charges against appellant. Yet, the evidence at trial pertained solely to a single act of shooting a single victim. Marlin's conduct as to the reckless endangerment involved the same conduct that formed the basis for the first degree assault by firearm; no other conduct was involved in proving either offense.

Id.

For the reasons articulated in *Marlin*, we hold that merger was required in the instant case. The jury's finding of reckless endangerment may have been based on the same conduct that supported the first-degree assault charge. Consequently, even if merger was not required under the required evidence test, when we resolve the factual ambiguity in favor of appellant, we conclude that there was a single transaction for both charges, and merger is required, as it was in *Marlin*, under the rule of lenity. *Marlin*, 192 Md. App. at 171.

SENTENCE FOR RECKLESS ENDANGERMENT VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED; COSTS TO BE PAID THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.