Circuit Court for Montgomery County
Case No. 137056C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 856

September Term, 2022

JOSHUA LAMINE TOURE

v.

STATE OF MARYLAND

Nazarian,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: September 14, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In February of 2020, Appellant, Joshua Lamine Toure ("Toure"), was indicted in the Circuit Court for Montgomery County for murder, felony murder – first-degree, firearm use/felony/violent crime, and armed robbery. The victim was Joseph Davis ("Davis"). Following a seven-day trial, a jury found Toure guilty of second-degree murder, first-degree felony murder, armed robbery, and use of a firearm in the commission of a felony/violent crime. The jury found Toure not guilty of first-degree premeditated murder. Having found Toure guilty of second-degree murder, the jury did not return a verdict as to manslaughter, per the court's instruction on the verdict sheet.

Toure was subsequently sentenced to life incarceration for first-degree felony murder, with all but 35 years suspended, and a consecutive 20 years' incarceration for use of a firearm in the commission of a felony/violent crime, with all but five years suspended, to be followed by three years' probation. The cumulative effect was a life sentence with all but 40 years suspended**.** The court merged the remaining counts, second-degree murder and armed robbery; hence, no sentences were imposed on those counts. Toure noted this timely appeal.

For the reasons to follow, we shall affirm the judgments of the circuit court.

ISSUES PRESENTED FOR REVIEW

Toure presents two issues for our review, which have been rephrased as follows:[1]

[1] Rephrased from:

1. Did the trial court err in refusing to instruct the jury on gross negligence involuntary manslaughter where the defendant testified that he fired "warning shots" "toward the ground" without intending to shoot the decedent?

I. Whether the circuit court erred in declining to instruct the jury on gross negligence involuntary manslaughter.

II. Whether the circuit court erred in admitting the statement, "[g]ive me my money, son," under the excited utterance hearsay exception.

FACTUAL AND PROCEDURAL BACKGROUND

The convictions in this case stem from an encounter that took place on December 22, 2019, at a pre-arranged marijuana sale in which Toure was the seller and Davis was the buyer. During the altercation, Davis suffered three gunshot wounds, and he died in the hospital three days later. That Toure shot Davis was undisputed. In bodycam footage admitted into evidence, Davis told officers that "Son Son" had shot him, and the parties stipulated that "Son Son" was Toure's nickname. However, the parties disagreed on many of the details surrounding the shooting. Namely, the State argued that Toure shot Davis while Toure was attempting to rob Davis during the drug sale. Whereas Toure argued that he was the victim of Davis attempting to rob him during the sale and that he had unintentionally shot Davis while attempting to escape.

We note only those facts supported by the record and relevant to the issues raised on appeal.

A. The State's Case

The State moved to admit, and the court did admit, a series of text exchanges between Toure and Davis on December 22, 2019, the day of the incident, wherein Davis

2. Did the trial court err in admitting inadmissible hearsay within hearsay from an unidentified declarant that was relayed by a non-testifying 911 caller?

arranged to purchase two pounds of marijuana from Toure for $4,000:[2]

> [Davis]: Ur folks got gas[3] [4:30 p.m.]
>
> [Toure]: Yeah what you need [4:31 p.m.]
>
> [Davis]: They can do 2 for 4?[4] [4:31 p.m.]
>
> [Toure]: Yea can you meet me? [4:48 p.m.]
>
> ***
>
> [Davis]: Where at [5:25 p.m.]
>
> [Toure]: By fairland gardens I'm about to meet [my supplier] then come meet you [5:25 p.m.]
>
> ***
>
> [Davis]: How long that's gone take [5:28 p.m.]
>
> [Toure]: Ima be there in 15 min start making your way in like 10 min [5:29 p.m.]
>
> [Toure]: 2009 treetop dr [5:47 p.m.]

Per Davis' cell phone records, Davis received phone calls from Toure's cell phone number at 5:56 p.m. and 6:12 p.m. Davis' cell phone location data indicated that Davis arrived at Treetop Lane at approximately 6:16 p.m.

[2] Davis' phone records indicate that the incoming texts were from a number associated with "Sonson" in his contacts. We label the incoming text messages from "Sonson" as coming from "Toure," for continuity and clarity.

[3] Sergeant Chad Bleggi ("Sergeant Bleggi"), the State's expert in "street slang, verbiage, and colloquialisms specifically in the area of drug trafficking," testified that "gas" is "common slang for . . . high grade marijuana[.]"

[4] Sergeant Bleggi testified that "2 for 4" indicated that Toure was going to sell Davis "two pounds [of marijuana] for $4,000."

The State called Laura Graham ("Graham"), who lived in the ground floor apartment at 2009 Treetop Lane, as a witness. Graham testified that, in the evening of December 22, she was in her kitchen when she "heard an accelerated vehicle" and someone "screaming." Graham stated that, at that point, she looked out her window and "saw the front end of a black SUV and a gentleman . . . facing the driver[,] holding on to where your windshield wipers are[,] on his stomach on the front of the vehicle." Graham recalled that the vehicle stopped, and she saw the man who had been on the hood of the SUV jump off, "throw his hands up and say[,] ['W]hat's up, man? What's up?[']" to someone Graham could not see. Graham testified that she then saw a man approach on the passenger side of the car with a gun drawn, and she dropped to the floor. She stated that, as she "was crawling to get [her] phone" to call 911, she heard three gunshots. An audio recording of Graham's 911 call, at 6:24 p.m., was introduced at trial. The 911 call was transcribed, in part, as follows:

> [Graham]: I heard screaming and I then saw the black SUV and the guy was screaming. He was driving crazy with the person driving I couldn't see because it was dark and there was a man on the hood of the car holding onto the hood of the car screaming stop, stop, stop, stop. He stopped. He jumped off and then some guy got out or came around. I don't know where he came from but he had a gun, pointed at him, and then he shot.
>
> [Dispatcher]: When did this happen?
>
> [Graham]: Just now. Just now. Just now.
>
> [Dispatcher]: How many suspects are involved?
>
> [Graham]: I saw two. I don't know. There must have been a driver.
>
> ***

> [Dispatcher]: Did they leave in that vehicle?
>
> [Graham]: Yes. The vehicle left and it went straight down like it was going out onto old Columbia Pike. . . . And then I heard more shots down there.

Graham additionally told the 911 dispatcher that she heard someone calling for help after she heard the gun shots; however, she was unable to identify the person.

Glen Gordon ("Gordon"), who was driving in the area that evening, described witnessing "two guys horseplaying" in the road near the entrance of the apartment complex parking lot. Gordon testified that there was one "small guy" and one "big guy," and he thought it looked like "they were tussling between a jacket or something like that." Gordon indicated that he saw "one [guy] was going one way and the other guy was down on the ground trying to hold the other guy on the jacket."

The State offered an audio recording of another 911 call made at 6:25 p.m. by an individual who identified as "Regis Ford" ("Ford"). Ford did not testify at trial; however, the court admitted the call into evidence, and it was transcribed as follows:[5]

> [Ford]: Man, y'all take forever. . . . I think there's somebody getting robbed or something over here [at] 17 Featherwood Court.
>
> ***
>
> [Ford]: I don't know what happened. I was driving and I see, like, the car parked. I see somebody screaming. It looked like somebody was fighting. One dude was holding onto another dude's leg, and I just heard (indiscernible), "Give me my money, son, give me my money, son." And then I guess they were trying to get in the car or whatever, but I just kept driving by because it's (indiscernible) and I ain't trying get nothing to do with that, but I'm doing my good deed.

[5] On January 19, 2023, this Court granted Toure's motion to supplement the appellate record with the transcript of Ford's 911 call.

***

[Dispatcher]: Okay, how many minutes ago did this happen, sir?

[Ford]: I think it's still happening now, but like two minutes ago.

[Dispatcher]: Okay. All right. And were weapons involved or mentioned?

[Ford]: No, I don't know. I just drove by.

***

[Dispatcher]: . . . And do you know how much money was taken? . . .

[Ford]: I don't know. I just rolled by, sir. . . . Maybe if y'all would answer the phone on the first ring –

***

[Ford]: I'm just doing my good deed.

Toure objected to the 911 call in its entirety on hearsay grounds and, specifically, to the relayed statement, "[g]ive me my money, son," as hearsay within hearsay. The State conceded that the evidence was hearsay; however, the State offered the 911 call pursuant to the present sense impression exception to the rule against hearsay. The State contended the declarant in the 911 call made the statements "contemporaneous[ly]" to "perceiving the event or condition or immediately thereafter." After hearing argument from both parties, the court ruled that Ford's 911 call was admissible as a present sense impression, and the statement within, "[g]ive me my money, son," was admissible pursuant to the excited utterance hearsay exception.

Officer Anthony Jones ("Officer Jones") was one of the first responders to the scene following the report of the incident to 911. Officer Jones testified that, upon arrival, he

"observed a male laying in the roadway on his back bleeding from his leg," who he believed had been shot, and he "immediately began to render medical aid." Officer Jones' body worn camera footage was admitted into evidence. In the footage, the male victim identified himself to Officer Jones as Joseph Davis and told him that "Son Son" had shot him three times. It was later determined that Davis had been shot three times, in the leg/groin, ankle, and torso.

The medical examiner who conducted Davis' autopsy testified that the shot to Davis' groin area was "the most devastating injur[y]" because it severed Davis' femoral artery, causing him to lose a fatal amount of blood. The medical examiner noted that, while the wounds were "indicative of movement," there were "too many variables" to say whether the shooter or the decedent was moving at the time of the shooting, how their bodies were positioned, the sequence in which Davis received the injuries, and the range of fire. When asked whether "it [was] possible that any . . . of [Davis'] wounds could have been made by a ricochet bullet[,]" the medical examiner responded that it was "[d]efinitely possible, but . . . unlikely."

B. Toure's Testimony

Toure testified in his own defense. Toure indicated that he had met Davis through a mutual friend in 2010, when they both were teenagers. According to Toure, the pair would "hang out, . . . play video games, and smoke marijuana" together. Throughout the course of their relationship, Toure sold marijuana to Davis "[a]ll the time," at first in smaller amounts and eventually in larger amounts—"anywhere from a quarter pound to . . . a pound." Toure indicated that, when Davis asked to purchase two pounds of marijuana, he

was initially "hesitant" "because [he had] never sold him that much marijuana" before. Nevertheless, Toure said he agreed to the sale and told Davis to meet him at 2009 Treetop Lane in the Spring Parc Apartments complex, a location that was "convenient for both of [them]," where Toure had previously conducted "a lot of business," including with Davis.

Toure testified that he arrived at Treetop Lane "about 5:50, 5:55 [p.m.]" with his friend, Damontae Garner ("Garner"), who drove them to the location in a Buick SUV. After calling Davis twice to let him know he had arrived, Toure stated that he exited Garner's vehicle, unarmed, and walked to the meeting location carrying the two pounds of marijuana he intended to sell to Davis.

Toure testified that, while waiting for Davis to arrive, he noticed "two people com[ing] from [his] left." He recognized one of the individuals as Davis but did not recognize the other man. Toure explained that he "immediately" got "scared" because the transaction was only supposed to involve him and Davis, and there was a large amount of marijuana and money at stake. Toure said that Davis told him to "stop acting like a bitch" because the other man "ha[d] the money." Toure decided he no longer wanted to make the sale and that he had to "get out of [t]here." Toure testified that the other man then "pulled out a gun" and said, "you're not going nowhere," prompting Toure to run to Garner's vehicle, which was parked nearby. Toure said that he "jump[ed] inside the car," still possessing the marijuana, and that, as Garner was driving "toward[] the entrance" of the complex, Davis "jump[ed] on top [of] the hood of the car," saying, "stop, stop," in an effort to prevent them from leaving. According to Toure, Garner then "accelerat[ed] to try to shake [Davis] off the car." Toure testified that Davis "slip[ed] off" the hood, and he saw

"the gun fall[] off the hood of the car" from Davis' sweatshirt pocket onto the ground on the passenger side of the vehicle. Toure testified that Garner stopped the vehicle and then, Toure acted on "instinct" and got out of the car, "grabbed the gun[,] and . . . pointed it at [Davis]," at which time Davis "lunged at [him]." In response, Toure said that he "stepped to the side and . . . shot towards the ground for . . . warning shots," to get Davis to "back up."

Toure indicated that, after he shot the "warning shots," Garner drove off, and Toure ran after him yelling, "Help me. Help me." Toure testified that, as he was running after Garner's vehicle, he heard Davis coming up behind him so he "turn[ed] around and . . . [shot] one more time towards the ground, and [Davis] tackl[ed] [him]." According to Toure, they began to tussle, fighting for control of the gun, and "the gun just start[ed] going off." Toure testified that he was wearing a jacket the night of the incident and that, while he and Davis were "tussling," Davis was "dragging [him]" and "pulled [him] out [his] jacket." Per Toure, he was then able to get up, grab the gun, and "hobbl[e]" away. Toure testified that he threw the gun as he left the scene and did not call the police because, as a "a young black male" who was "selling weed," he was "scared" and "[did not] want to go to jail."

C. Jury Instructions

At the close of evidence, among the requested jury instructions Toure's counsel requested the court to instruct the jury on second-degree depraved heart murder and gross negligence involuntary manslaughter under Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:17.8 based on Toure's testimony that "essentially this was an accidental

shooting to create distance." The State responded that the jury instructions relating to the intentional homicides under MPJI-Cr 4:17.2, first-degree premeditated murder, second-degree specific intent murder, and voluntary manslaughter, fairly covered the evidence. The trial court denied Toure's requested instructions.

The trial court thereafter instructed the jury on the intentional homicides, including instructions on partial and complete self-defense, as well as on first-degree felony murder, robbery, armed robbery, and use of a firearm in the commission of a felony/violent crime. Specifically concerning first-degree felony murder, the court instructed the jury that "[i]t is not necessary for the State to prove that the defendant intended to kill Joseph Davis."

D. Verdict and Sentencing

The jury returned a verdict, finding Toure guilty of first-degree felony murder, second-degree murder, armed robbery, and use of a firearm in the commission of a felony/violent crime, and not guilty of first-degree premeditated murder. As to these convictions, Toure's counsel requested the sentencing court to sentence Toure to life imprisonment, with all but 25 years suspended, and an assigned period of probation. Under principles of merger and lenity, the court sentenced Toure on first-degree felony murder and use of the firearm in the commission of a felony/violent crime, the cumulative effect being life imprisonment with all but 40 years suspended. In imposing Toure's sentence, the court explained the downward departure from the Maryland sentencing guidelines in stating:

> I do look to the sentencing guidelines and the sentencing guidelines do say, life to life, but I think the more just way to sentence the defendant in this case is to use the second degree murder conviction as a default, I know I

> can't sentence him on that, but that's a 40-year term, and that's my departure point here.
>
> I do agree with [defense counsel] that while I do have to impose a life sentence, I can suspend a portion of it, and my benchmark for doing that, really, is the second degree murder for which, if he were charged solely with that, he would be subject to a . . . 40-year . . . sentence.

Additional facts will be incorporated as they become relevant to the issues.

DISCUSSION

I. THE CIRCUIT COURT'S ERROR IN DECLINING TO INSTRUCT THE JURY ON GROSS NEGLIGENCE INVOLUNTARY MANSLAUGHTER WAS HARMLESS.

Maryland Rule 4-325(c) "imposes a duty on the court to instruct [the jury] on any crime 'so long as it is a permissible verdict generated by the evidence.'" *Tharp v. State*, 129 Md. App. 319, 330 (1999) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)); Md. Rule 4-325(c) ("The court may, and at the request of any party shall, instruct the jury as to the applicable law[.]"). The rule applies to requests for instruction on any of the charged offenses for which the State has not entered a *nolle prosequi*. *C.f. Ball v. State*, 347 Md. 156, 190 (1997) (explaining that a trial judge need not grant a request for jury instruction on "a particular charge . . . not before the court"). Where a defendant is charged with murder via short-form statutory indictment,[6] he is effectively charged with "all forms of homicide." *Wright v. State*, 255 Md. App. 407, 415 (2022); *see Dishman*, 352 Md. at 288–89 ("[U]nder an indictment pursuant to the statutory formula, even though it spells out murder in the first degree, the accused may be convicted of murder in the first degree,

[6] "An indictment for murder or manslaughter is sufficient if it substantially states: '(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and murdered) (name of victim) against the peace, government, and dignity of the State.'" Md. Code Ann., Crim. Law § 2-208.

murder in the second degree, or of manslaughter." (quoting *State v. Ward*, 284 Md. 189, 200 (1978))).

We review "a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). However, "[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Dishman*, 352 Md. at 292. The evidence "need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance'[,]" and "it may emanate solely from the defendant." *Id.* at 293 (quoting *Dykes v. State*, 319 Md. 206, 217 (1990)). Regardless of whether the defendant's claim is "overwhelmed by evidence to the contrary," the court must only determine "whether there is *any* evidence in the case that supports the instruction." *Id.* at 292–93 (emphasis added). "[T]his standard is a fairly low hurdle for a defendant." *Arthur v. State*, 420 Md. 512, 526 (2011).

Toure argues that his testimony that he fired "warning shots" "towards the ground" and never intended to shoot Davis was sufficient to generate a gross negligence involuntary manslaughter instruction under Rule 4-325(c), as interpreted by *Dishman*.[7] The State

[7] In *Dishman*, the petitioner was indicted for first-degree murder under a short-form indictment, similar to the short-form indictment used in Toure's case. 352 Md. at 285. The Supreme Court of Maryland reversed the petitioner's first-degree murder conviction because it found that the trial court erroneously refused to instruct the jury on gross negligence involuntary manslaughter. 352 Md. at 283–84. As the Court explained, because "the prosecution . . . had not entered a *nolle prosequi* of the charged offense of manslaughter," which was a charge included in the short-form murder indictment, "the trial court was required to give the manslaughter instruction so long as it was a permissible verdict generated by the evidence." *Id.* at 292. The Court determined that there was "ample

disagrees, maintaining that gross negligence involuntary manslaughter was not a permissible verdict generated by the evidence because no reasonable juror could "rationally infer that Toure unintentionally caused Davis's death by engaging in conduct that amounted merely to gross-negligence." Alternatively, the State argues that, even if the circuit court erred by declining to give the gross negligence involuntary manslaughter instruction, the error was harmless.

While we agree with Toure that the circuit court erred in declining to instruct the jury on gross negligence involuntary manslaughter, we conclude that this error was harmless beyond a reasonable doubt.

A. The Evidence Generated a Gross Negligence Involuntary Manslaughter Instruction.

Gross negligence involuntary manslaughter "means that the defendant, while aware of the risk," caused the death of another while "act[ing] in a matter that created a high risk to, and showed a reckless disregard for, human life." MPJI-Cr 4:17.8(B); *see State v. Thomas*, 464 Md. 133, 152–53 (2019) (defining gross negligence involuntary manslaughter as the "unintentional killing of a human being" by conduct amounting to a "wanton and reckless disregard for human life"). Conversely, voluntary manslaughter, as the court instructed in Toure's case,

> is an intentional killing which is not murder because the defendant acted in partial self-defense. Partial self-defense . . . does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter. *You should only consider voluntary manslaughter if you find that the defendant had the intent to kill.*

evidence upon which the jury could have rationally concluded that Petitioner caused the victim's death without intending to kill her or cause her serious bodily injury." *Id.* at 300.

MPJI-Cr 4:17.2(C) (emphasis added).

At the outset, we note that whether Toure intended to shoot Davis or whether he did so recklessly was disputed by the parties, and evidence was presented to support both narratives. It was a central question posed to the jury—do you believe Toure's testimony or not?[8] This was a factual inquiry best suited for the jury. *Dykes*, 319 Md. at 224 ("[W]hat evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury, not the judge, to determine."); *see also Beckwitt v. State*, 477 Md. 398, 433 (2022) ("Whether a defendant's conduct rises to the level of gross negligence is a fact-specific inquiry[.]"). "When the trial judge resolves conflicts in the evidence, in the face of the 'some' evidence requirement, and refuses to instruct because he believes that the evidence supporting the request is incredible or too weak or overwhelmed by other evidence, he improperly assumes the jury's role as fact-finder." *Dykes,* 319 Md. at 224.

Here, it was undisputed that Toure fired the gun that caused the wounds from which Davis eventually died. However, Toure testified that "[he] didn't try to shoot him." Rather, Toure said that he "shot towards the ground" as a "warning," to get Davis to "back up" because "[he] was scared." Toure further testified that he had no experience with guns. In its brief, the State recognizes that the evidence of Toure's conduct established, "at minimum, a 'very high degree of risk' to Davis' life (*i.e.*, depraved heart murder)[.]" To concede that the evidence gave rise to a second-degree depraved heart murder instruction

[8] This is evidenced by the State's closing argument, in which the State told the jury, "[Toure] said it was an accident, and if you believe it was an accident, we have big problems and he's not guilty of everything."

is essentially to concede that the evidence gave rise to an instruction on the lesser included crime, gross negligence involuntary manslaughter, under MPJI-Cr 4:17.8. *See Ashe v. State*, 125 Md. App. 537, 546 (1999) (explaining that "depraved heart murder is virtually identical to gross negligence involuntary manslaughter").

Additionally, although the court's instructions did provide the jury with the option of convicting Toure of first-degree premeditated murder, of one of the two lesser-included intentional homicide offenses, or of acquitting Toure of homicide outright, a gross negligence involuntary manslaughter instruction remains distinct because it instructs the jury that the State need not prove an intent to kill. As intent was the primary element of the crime that was in dispute, we conclude that Toure's requested gross negligence involuntary manslaughter instruction was not "fairly covered in the instructions actually given" under MPJI-Cr 4:17.2. *See Stabb v. State*, 423 Md. 454, 465 (2011).

Because Toure met the threshold "some evidence" standard, which compels the court to give the involuntary manslaughter jury instruction he requested, the court erred by failing to provide this instruction under Maryland Rule 4-325. Toure's convictions are thus subject to a harmless error analysis.

B. The Instructional Error Was Harmless.

Relying on *Hook v. State*, 315 Md. 25, 40–41 (1989), Toure argues that "[b]y taking involuntary manslaughter off the table, the trial court 'distort[ed] . . . the factfinding process' and 'forced' the jurors into an 'all-or-nothing choice' between convicting [him] of the more serious offenses and acquitting him outright." However, this assertion is misguided.

In *Hook*, the defendant was charged with murder, first-degree felony murder, armed robbery, and use of a firearm in the commission of a felony/violent crime. 315 Md. at 32–33, 41. Hook confessed that he had shot and robbed the two victims, but he argued that he was severely intoxicated at the time of the crime and so did not have the requisite specific intent to support a conviction of premeditated murder, armed robbery, or felony murder.[9] *Id.* at 41–42. At the close of the State's case, the State entered a *nolle prosequi* as to the second-degree murder charge. *Id.* at 35. Regarding Hook's homicide charges, the State requested the court to instruct the jury only on the crime of "murder in the first degree under the theory of premeditated murder and also under the theory of felony murder." *Id.* at 35, 35 n.13. Defense counsel objected, and the court overruled, noting,

> Certainly, if the Jury is not convinced that the Defendant is guilty of first degree murder but is in their minds convinced he's guilty of second degree murder, the only verdict the Jury can return under this circumstances is a not guilty verdict, by virtue of the fact that the State has specifically not submitted any charge other than first degree murder to the Jury.

Id. at 35. Defense counsel was thus precluded from arguing second-degree murder to the jury. *Id.* at 37.

The Supreme Court of Maryland held that the trial court erred by refusing to give a second-degree murder instruction. *Id.* at 42. The Court reversed Hook's convictions and remanded for a new trial, explaining that, by entering a *nolle prosequi* on second-degree murder and thereby precluding the jury from hearing instruction and argument on the same, the defendant had been prejudiced. *Id.* at 42, 45. The Court noted, "[w]here one of the

[9] In Hook's case, armed robbery was the predicate offense to a felony murder conviction. *See Hook*, 315 Md. at 35 n.13.

elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 38 (quoting *Keeble v. United States*, 412 U.S. 205, 213 (1973)). As such, the Court held that the trial court had committed reversible error by forcing the jury to "render judgment on an admitted murderer and thief with no alternative but to find him guilty or not guilty of murder in the first degree and guilty or not guilty of armed robbery."[10] *Id.* at 42.

In other words, Hook's voluntary intoxication defense, if credited, would have permitted the jury to convict him of second-degree murder rather than first-degree premeditated murder had the option been presented. *See id.* at 30 ("If, because of his intoxication, the accused did not have the capacity to be motivated by [willfulness, deliberation, and premeditation], the murder is murder in the second degree."). Similarly, Hook's voluntary intoxication defense could have undermined the specific intent *mens rea* required to convict him of armed robbery.[11] Therefore, the court's failure to give a second-degree murder instruction could have impacted the conviction of the felony underlying Hook's first-degree felony murder conviction. In this way, the *Hook* court's failure to give a second-degree murder instruction tainted all of his convictions by

[10] The Supreme Court reversed all of Hook's convictions, "convinced that there [was] a reasonable possibility that the errors may have contributed to the rendition of all of the guilty verdicts[,]" and not merely his first-degree murder conviction, based on "the particular circumstances of [that] case." *Hook*, 315 Md. at 42, 45 n.21.

[11] *See id.* at 31–32 ("[W]hen the underlying felony is the specific intent crime of robbery, voluntary intoxication is relevant to show that the perpetrator did not have the capacity to entertain the deliberate purpose of depriving the owner permanently of the stolen goods." (footnote omitted)).

removing the jury's option to simultaneously credit his defense *and* find him guilty of a homicide offense.

Here, the jury was not presented with a comparable "Hobson's choice."[12] By contrast, even if the court had given Toure's requested gross negligence involuntary manslaughter instruction based on his testimony that the shooting was an accident, that instruction would have had no bearing on Toure's separate defense to the armed robbery charge—that he was the victim of the robbery rather than the perpetrator. As the State aptly argues, the jury's conclusion as to whether Toure intended to shoot and kill Davis was of no import to the jury's determination that Toure was guilty of armed robbery, the use of a firearm in the commission of a felony/violent crime, and first-degree felony murder, none of which required the State to prove an intent to kill. As such, regardless of whether the court's ruling deprived Toure of the opportunity to have the jury decide whether his conduct showed an extreme or reckless disregard for human life rather than an intent to kill, the jury was nonetheless persuaded that Toure had the requisite specific intent to commit armed robbery. It was on this independent basis that the jury convicted Toure of first-degree felony murder.

Therefore, because the jury in Toure's case was not faced with the type of all-or-nothing choice that the Supreme Court repudiated in *Hook*, we conclude that the court's instructional error was harmless beyond a reasonable doubt as to each of Toure's

[12] *Hook*, 315 Md. at 38 n.18 (referring to the dilemma of being faced with "the necessity of accepting something objectionable through the fact that one would otherwise get nothing at all").

convictions. *See id.* at 41–42.

Additionally, although Toure argues the second-degree murder count is tainted, the sentencing court did not impose a sentence on that count. The court only imposed sentences on Toure's convictions for first-degree felony murder and use of a firearm in the commission of a felony/violent crime. As such, Toure's sentencing is of no import to our determination that the instructional error was harmless.[13]

II. THE CIRCUIT COURT DID NOT ERR IN ADMITTING THE STATEMENT, "GIVE ME MY MONEY, SON," AS AN EXCITED UTTERANCE.

Ordinarily, this Court reviews a circuit court's rulings on the admissibility of evidence for abuse of discretion. *Gordon v. State*, 431 Md. 527, 535 (2013). Hearsay evidence, however, "*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.'" *Bernadyn v. State*, 390 Md. 1, 8 (2005) (quoting Md. Rule 5-802). Consequently, we "review a trial court's legal conclusions on hearsay evidence without deference" under a *de novo* standard. *Gordon*, 431 Md. at 535–36 (quoting *Bernadyn*, 390 Md. at 7–8). However, where, as here, the "subsidiary

[13] Toure argues that, although he did not receive a sentence for his second-degree murder conviction, "the record *affirmatively* shows" that Toure's "erroneous conviction influenced the sentences that were imposed" because "the trial judge *expressly* used the maximum sentence for second degree murder—40 years—as his 'default' and 'departure point' in sentencing [Toure] to a total unsuspended term of 40 years' imprisonment." Notably, the sentencing guidelines for first-degree felony murder are life to life. Hence, in its discretion, the court could have chosen not to deviate from the sentencing guidelines by imposing a life sentence with no portion suspended. Therefore, we cannot say that the court's exercise of discretion in imposing a sentence of life incarceration with all but 40 years suspended was prejudicial to Toure.

determinations made by a trial court in arriving at its findings and conclusions" are "purely factual or discretionary," we will not disturb the rulings of the circuit court absent clear error. *State v. Walker*, 345 Md. 293, 325 (1997).

"If one of more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order to not be excluded by that rule." Md. Rule 5-805. Both parties and the court agreed that the admission of Ford's 911 call involved two levels of hearsay: first, Ford's statements to the 911 dispatcher; and second, the statement of a third-party declarant, "[g]ive me my money, son," as relayed by Ford during the 911 call. On appeal, Toure does not contest the court's admission of Ford's 911 call as a present sense impression under Maryland Rule 5-803(b)(1). Therefore, we are only tasked with determining whether the hearsay statement "[g]ive me my money, son," was properly admitted under the excited utterance exception provided in Maryland Rule 5-803(b)(2). This is a factual inquiry that we review for clear error. *See Gordon*, 431 Md. at 536 (explaining that the party attempting to admit hearsay evidence under the excited utterance exception must lay the proper factual foundation).

Toure argues that the State "failed to meet its heavy burden" of proving that the "unidentified declarant" who stated, "[g]ive me my money, son," was under sufficient "stress of excitement" to qualify the statement as an excited utterance. Specifically, Toure noted that Ford "did not specify (1) who was 'screaming,' (2) who was 'fighting,' (3) who said '[g]ive me my money, son,' or (4) what that person's level of excitement appeared to be." The State disagrees that the statement was made by an "unidentified declarant" because the "record is . . . plain that the trial court found that the statement was admissible

[as] an excited utterance made by Davis[.]" Additionally, the State maintains that the court's ruling that the statement was admissible as an excited utterance was proper based on the totality of the circumstances.

Regardless of the court's factual findings as to the declarant's identity,[14] we agree with the State that the court did not err in admitting the statement as an excited utterance.

A. Excited Utterance Exception

While hearsay evidence "is generally inadmissible at trial because of its inherent untrustworthiness," there are exceptions to that rule "where circumstances lend credibility to the statement[.]" *Parker v. State*, 365 Md. 299, 312–13 (2001) (quoting *Mouzone v. State*, 294 Md. 692, 696 (1982), *overruled on other grounds by Nance v. State*, 331 Md. 549 (1993)). Maryland Rule 5-803(b)(2) establishes one such exception where the hearsay evidence is an "excited utterance" or "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or

[14] The State offered the statement "[g]ive me my money, son," as proof that "Son Son" (Toure) robbed Davis. In making its findings regarding the statement's admissibility, the court initially referred to the declarant as "the person that the State says was the decedent[.]" However, shortly thereafter, the court indicated that it was "satisfied with regard to the first level [of hearsay] that *what the victim uttered to purportedly Mr. Toure* was an excited utterance." (Emphasis added.) The court later repeated this assertion in its dialogue with the parties: "[T]he first level was an excited utterance that was uttered *by the decedent*." (Emphasis added.) Toure's counsel then requested the court to redact "son" to prevent the jury from drawing any conclusions about the declarant's identity:

> [Defense]: But the jury is going to believe that son – when he's saying son, that is a colloquialism like man, or bro. They're going to believe that son –
> [Court]: Those are the words that were uttered. It's for, you know, the parties to argue the significance of that. But those were the words that were uttered.

As the State indicates, the court's factual findings regarding the statement's admissibility did not prevent Toure from challenging, as he did, the reliability of the statement and the identity of the declarant.

condition." The rationale behind this exception is that "the inherent untrustworthiness of hearsay is overcome when the circumstances are such that they render the declarant's reflective capabilities inoperative." *Cooper v. State*, 163 Md. App. 70, 97 (2005) (citing *Parker*, 365 Md. at 313).

To be admitted as an excited utterance, the proffered statement must be "made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation." *State v. Harrell*, 348 Md. 69, 77 (1997) (quoting *Deloso v. State*, 37 App. 101, 106 (1977)). This requires a totality of the circumstances analysis, in which a court assesses whether the foundation for admissibility has been met, "namely personal knowledge and spontaneity." *DeLeon v. State*, 407 Md. 16, 29 (2008) (quoting *Parker*, 365 Md. at 313); *see also Harrell*, 348 Md. at 77 (considering also "the time between the startling event and the declarant's statement" and whether "the statement was made in response to an inquiry" to determine "whether a declarant was under the stress of a startling event while making a statement"). "[T]he trial court looks into 'the declarant's subjective state of mind' to determine whether 'under all the circumstances, [he is] still excited or upset to that degree.'" *Gordon*, 431 Md. at 536 (quoting 6A LYNN MCLAIN, MARYLAND PRACTICE: MARYLAND EVIDENCE STATE & FEDERAL § 803(2):1(c) (2d ed. 2001)).

B. Admission of the Statement Was Not Clearly Erroneous.

It is not the role of this Court to substitute our judgment for that of the circuit court but, rather, to determine whether the circuit court's factual findings were clearly erroneous.

See State v. Walker, 345 Md. 293, 325 (1997). Here, the circuit court was satisfied that the third-party declarant was in the throes of a startling event when stating, "[g]ive me my money, son." Based on Ford's 911 call, which was admitted as a present sense impression, there was evidence "that there was fighting going on, screaming, and tussling" just moments before Ford relayed the statement at issue to the 911 dispatcher. Furthermore, this evidence was corroborated by Graham's testimony and 911 call, made one minute prior to Ford's call, in which Graham stated that she had heard "an accelerated vehicle," "screaming," and someone yelling for help. Gordon also testified that he "saw two guys horseplaying in the middle of the parking lot," "tussling between a jacket," further supporting the reasonable possibility that the statement was made during the course of a physical altercation. The circuit court found that "fighting" and "tussling between the parties" was indicative of excitement because "[w]hen you're in a fight, you get excited." We do not perceive clear error in this conclusion.

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