UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2348

September Term, 2013

JAMAAL M. JACKSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: February 18, 2016

Jamaal M. Jackson ("Jackson"), appellant, was indicted in the Circuit Court for Prince George's County, Maryland and charged with murder, first-degree assault, use of handgun in the commission of a crime of violence, conspiracy to commit murder, and conspiracy to commit first-degree assault. Jackson was tried by a jury and acquitted of first-degree murder, first-degree assault, use of a handgun in the commission of a crime of violence, and conspiracy to commit first-degree murder. He was convicted of first-degree felony murder, second-degree specific intent murder, and conspiracy to commit first-degree assault. After Jackson was sentenced to life imprisonment plus a consecutive twenty-five years, he timely appealed, presenting the following questions for review:

1. Whether the motions court erred by denying Jackson's motion to suppress the evidence.

2. Whether the circuit court erred by permitting the State to introduce evidence that the vehicle Jackson was traveling in when the handguns were recovered also contained body armor.

3. Whether the circuit court erred by declining to direct the jury to resume deliberations in order to resolve the inconsistent verdicts.

4. Whether the circuit court erred by failing to merge the felony murder conviction into the conviction for second-degree murder for purposes of sentencing.

For the following reasons, we shall affirm.

BACKGROUND

Motions hearing

On September 3, 2007, at approximately 10:15 p.m., Corporal Steven Durity of the Prince George's County Police was on patrol in his marked cruiser in Clinton, Maryland. At that time, Corporal Durity encountered a 1994 gold Toyota Camry in the area of Webster Lane, near Allentown Road. The Camry "came to a complete stop as if it didn't want to pass the cruiser." It then made a u-turn on a side street, maneuvering in a manner that suggested it did not want to pass Corporal Durity's vehicle. However, shortly thereafter, the Camry turned on to Allentown Road and Corporal Durity then began to follow that vehicle. Corporal Durity confirmed that he did so to try "to find a violation to pull the vehicle over."

The two vehicles continued down Allentown Road with Corporal Durity following approximately "a car length, may be a little bit more," behind the Camry. Corporal Durity agreed there was not "a lot of traffic on the road" at that time. As they crossed Allentown Way, the Camry activated a turn signal and got into the first of two left turn lanes, heading towards Branch Avenue. When the Camry got closer to the intersection, it then moved over one more lane further to the left, into the secondary turn lane, without using a turn signal. The officer maintained that "[t]he first time, he signaled. The second time, there was not [a] signal." Corporal Durity was still one car length behind the Camry, or approximately ten or fifteen feet away. The officer then initiated a traffic stop due to the Camry's failure to signal

its movement into the far left, secondary turn lane. The driver ultimately was cited for this traffic violation.

After the Camry was stopped, Corporal Durity exited his vehicle and approached the driver. He first noticed "the smell of burnt marijuana emanating from the vehicle." He also noticed that the driver was "extremely, extremely nervous," that the artery in his neck was "pounding profusely," and his hands were "real shaky." The driver, identified as Ronald Austin, consented to a search of the vehicle, and all of the occupants got out of the vehicle. One of the passengers, seated in the right rear passenger seat, was Jackson.

After the occupants were patted down for weapons, Corporal Durity began to search the Camry. Marijuana and rolling papers were first found in the center console. A further search of the trunk uncovered, in plain view, "sappy plates," or, as Durity testified, "a material that's used mainly for the vests of soldiers. It's designed to stop high-powered rifles." Additionally, two handguns were located "underneath the rear tire of the vehicle."

On cross-examination, Corporal Durity described the intersection where Allentown Road met Branch Avenue in more detail. In order to leave Allentown Road, a two-way road, the vehicle had to take an exit ramp to the left, across what would be oncoming traffic, in order to go northbound on Branch Avenue. There were two left turn lanes at that location, going from Allentown Road to the onramp, as well as a traffic light.

Corporal Durity explained that the traffic violation in this case occurred when the Camry pulled from the first left turn lane into the far left turn lane without using a turn

signal. He agreed that the Camry used its turn signal when it entered the first left turn lane from the main roadway of Allentown Road.

Corporal Durity initiated the traffic stop by activating his emergency equipment during the course of the turn across Allentown Road. The Camry was then stopped on the ramp from Allentown Road to northbound Branch Avenue.

After the officer testified, defense counsel for Jackson argued there was no reasonable articulable suspicion to stop the Camry for the traffic violation. Jackson argued that there was "no evidence that the driver of this car, by his actions, in any way was affecting another vehicle in moving from one left-hand turn lane to the other left-hand turn lane." Because this was ultimately a pretextual stop, Jackson argued that the stop violated the Fourth Amendment.

The motions court issued a written opinion and order, denying Jackson's motion to suppress. Relying on Section 21-604 of the Transportation Article, *see* Md. Code (1977, 2012 Repl. Vol.), § 21-604 of the Transportation Article ("T.A."), as well as this Court's opinion in *Best v. State*, 79 Md. App. 241, *cert. denied*, 317 Md. 70 (1989), the court found that the stop was lawful because "the Camry's failure to use a left turn signal in the two delineated instances 'affected' Corporal Durity's police car." Furthermore, addressing Jackson's argument that the traffic stop was a pretext, the court found as follows:

> The Court finds Corporal Durity to be an exceedingly credible and candid witness, who testified to the circumstances of the stop which involved the Camry moving from the middle to the left-most turn lane on Allentown Road without a signal,

> and then turning left on Branch Avenue without a left turn signal. Both settings violate Maryland Transportation Code § 21-604 for which the driver of the 1994 Toyota Camry was cited (State's Exhibit 5). This Court finds, based on a totality of the circumstances and evidence presented, that Corporal Durity had sufficient cause to stop the gold Toyota Camry, irrespective of any other pretextual motivations for making the stop.

Trial

The following evidence was adduced at trial. On the early morning hours of Saturday, June 9, 2007, near 3:00 a.m., the victim in this case, Eric Jones, visited his girlfriend, Clara Sabrina Steward-Rush, at her apartment building located in Suitland, Prince George's County, Maryland. Jones wanted to talk to Steward-Rush outside the building because he was angry she would not go out with him earlier that evening. While the two were talking, an African-American male, with a mustache and dreadlocks and beads in his hair, and wearing a white t-shirt and blue jeans, walked past them, opened the glass door to the apartment building, and then sat on the landing just inside the doors.[1] This man was drinking from a clear, plastic cup and talking on a cell phone.

Shortly thereafter, a friend of Steward-Rush's, Tracy Wright, opened the door to her apartment. Steward-Rush was with Wright earlier that evening, consoling Wright over the recent death of her husband. Wright told Steward-Rush that she was going to bed and that Wright should come back inside and retrieve her belongings. Steward-Rush did so, going

[1] There was other evidence at trial that, in 2007, Jackson styled his hair with dreadlocks.

back into the building and passing the man on the steps. Jones remained outside the front of the apartment building.

After Steward-Rush retrieved her personal items from Wright's apartment, she walked back down the steps to return to Jones. As she did so, she saw that Jones was being confronted outside by an armed man, wearing a mask. Steward-Rush then started for her apartment, in order to call 911, when the man in the white t-shirt and jeans, sitting on the steps inside the apartment building the entire time, asked her, "Is that your man?"

When Steward-Rush turned to answer, she saw Jones and the armed, masked man fighting outside the building. Jones was winning the fight at that time. However, that changed when the man in the white t-shirt ran outside and joined the armed, masked man in punching Jones. Steward-Rush ran screaming into Wright's apartment, and Wright called 911. Steward-Rush testified that she then heard gunshots. She agreed that she did not see what happened.

Tracy Wright corroborated Steward-Rush's testimony and testified that while Steward-Rush and Jones were talking, she saw a man in a white t-shirt, with dreads in his hair, sitting on the steps inside the apartment building while talking on a cellphone. After Steward-Rush came back to her apartment and retrieved her belongings, Wright closed her door.

Moments later, Wright heard screaming and opened her door again. Steward-Rush was near her door, exclaiming, "They're stabbing him. They're stabbing him." Wright

looked outside and saw the man in the white t-shirt, and another masked man in a black t-shirt, punching and possibly stabbing Jones. Wright pulled Steward-Rush back into her apartment and called the police. Wright then heard gunshots. However, she did not see anything else.

Meanwhile, Air Force Sergeant Phillip Taylor lived in a ground floor apartment in the apartment building next door. Taylor was watching television in his bedroom at around 3:00 a.m. when he heard a "scuffle" outside, coming from the apartment building next door. He looked out the window and saw three men, about thirty feet away, directly outside his bedroom window. Taylor stated it was "two on one," with the man in the white t-shirt, blue jeans, and dreads in his hair trying to pull the victim's shirt over his head in what Taylor agreed was "like a hockey move."

After moving to a closer vantage point in the kitchen, Taylor heard the man in the white t-shirt say, "Hey, I'm going to bust him." The man in the black t-shirt, who was holding a small, black, sawed-off shotgun, stepped back. Then, after the victim pleaded for his life, exclaiming, "Man, please don't bust me . . . please don't," Taylor saw the man in the white t-shirt shoot the victim four times in the torso with a small silver handgun. Taylor testified that the man in the black t-shirt did not shoot the victim. After Taylor momentarily moved away from the window, he heard a fifth gunshot.

He then went back to his window and, looking through the kitchen blinds, saw the two men leave the scene, running in different directions. Taylor went outside to try and help

the victim, but he soon realized that he was already dead. The victim, Eric Jones, died from a single gunshot wound to the chest, and the manner of death was ruled a homicide.

Prince George's County Police Officer Matthew Wofford testified that he first responded to the scene of the shooting, where he determined that the victim was deceased. Officer Wofford then briefly surveyed the scene and noticed a plastic cup, a cellphone, and a broken off plastic grip for a handgun in the grass nearby. The officer then went inside the apartment building and briefly spoke to a person he identified as "Sabrina Clara." According to Officer Wofford, this witness was crying and "very hysterical," and told him that the man wearing all black was the one who shot the victim.

Karimah Gooby lived in the same apartment complex at issue in this case. Gooby spoke to Ronald Austin, her boyfriend at the time, in the early morning hours of June 9, 2007. After Gooby went to bed, at approximately 2:00 to 3:00 a.m., she woke to the sound of gunshots. Thirty minutes later, Austin called Gooby, sounding "nervous," "[o]ut of breath," and he speaking "[f]ast." Following this brief phone call, Austin came to Gooby's apartment, and Gooby testified that he "looked like he had just got into a fight." He was "dirty" and looked like "he was on the ground or something." There was also "something brown on his shirt" which Gooby thought was "dirt or blood." Gooby had known Austin since elementary school and had never seen him looking this disheveled before. Austin left within thirty minutes, and Gooby never saw him again.

Approximately three months later, on September 3, 2007, Corporal Durity stopped a 1994 gold Toyota Camry on Allentown Road, approaching northbound Branch Avenue, for failure to use a turn signal. Ronald Austin was the driver and there were multiple passengers. Jackson was seated in the rear, driver's side seat.

During the course of the stop, Corporal Durity smelled burnt marijuana emanating from the passenger compartment. Assisting Corporal Durity was Officer Jesse Davis, and Davis confirmed that he also smelled a "strong odor of marijuana" as he approached the Camry. After the driver, Austin, consented to a search of the vehicle, a small quantity of marijuana was recovered from the center console, along with assorted paraphernalia.

When the officers opened the trunk to further the search, they saw two "sappy plates," or military-issue metal panels that are used in bulletproof vests. After moving the plates aside, the officers then lifted the nearby spare tire, where they found two loaded chrome .380 caliber handguns. One of the handguns was missing part of the plastic grip on its handle.

Kavell Thomas testified at trial that he was inside the Camry when it was stopped, along with Austin, Jackson, a person named "Tay," and another person named "Ern." Thomas confirmed that he had seen the guns the police recovered from the trunk before the date of the traffic stop. Thomas declared that the handguns, in fact, belonged to Jackson.

Thomas also testified that he and Jackson were together two days before this traffic stop. At that time, Thomas saw that one of the guns was missing a grip from its handle. Thomas testified that he had seen these guns on an even earlier occasion and neither

handgun was missing a grip. When he asked Jackson what happened to that gun, Jackson replied, "Just don't worry about it."

On that day, September 1, 2007, Thomas borrowed the handgun that was not missing its grip. Jackson kept the gun with the missing grip. Afterwards, Thomas returned the gun back to Jackson before the traffic stop on September 3, 2007.[2]

A variety of evidence was recovered and analyzed in connection with this case. Three .22 caliber shell casings, one .380 caliber shell casing, a cigarette lighter, a plastic cup, two cellphones, and the plastic grip for a missing handgun were found at the scene. A silver pendent, apparently belonging to the victim, Jones, was also recovered. One of the cellphones also belonged to Jones.

Detective Bernard Nelson, of the Prince George's County Police, obtained the other cellphone found at the crime scene, referred to at trial as the "recovered phone." Several witnesses offered evidence suggesting that the recovered phone belonged to Ronald Austin and that Jackson was listed, via his nicknames "Luck," "Luciano," and "Get Money," as a contact in that phone. There was also evidence from Karimah Gooby that Jackson and Austin sometimes shared the phone. Pamela Williams, Austin's aunt, testified that on the same day as the homicide, and at Austin's instructions, she reported that this phone was lost.

[2] Testimony on this topic was limited by the court because it concerned an unrelated incident in the District of Columbia.

Certified cell phone records were examined for the recovered phone for the period just before the murder. That day, between 2:00 a.m. and 3:23 a.m., the time 911 was first called in this case, five calls were made between the recovered phone and a second phone. There was evidence suggesting that this second phone was associated with the person identified as "Luciano" or "Get Money," on the contacts list of the recovered cellphone.

The jury also heard testimony concerning the ballistics evidence and handguns recovered in this case. Joseph Young, of the Prince George's County Police Department Firearms Examination Unit, examined the evidence recovered from the crime scene and the victim's autopsy and compared that to the handguns recovered from the trunk of the Camry. This included: a .380 caliber cartridge case, recovered from in front of the apartment building; a .380 caliber fired bullet, recovered from the victim's chest during the autopsy; a pistol grip, recovered from the crime scene; and two .380 caliber semiautomatic handguns, Davis Industries models P-380, along with ammunition, recovered from the trunk of the Camry.

Young testified that both handguns were the same caliber, color, and manufacturer. The only difference was that one of the handguns was missing a grip handle. Evidence suggested that the pistol grip found at the crime scene was the one missing from one of the handguns that was recovered from the Camry.

Young further testified that the .380 caliber ammunition for these handguns was of the same caliber as a cartridge case recovered from the crime scene. More importantly, that

.380 cartridge case from the crime scene had been "cycled through" and possibly fired, from the handgun with the missing pistol grip. Young further testified that the .380 caliber fired bullet, recovered from the victim's autopsy, was fired from this same handgun.

Finally, there was also DNA evidence connecting Jackson to the murder. Jessica Charak, accepted as an expert in the field of forensic serology and DNA analysis, testified that Jackson's DNA profile was consistent with a profile obtained from a plastic cup recovered from the crime scene. Charak testified that the chances of finding someone else at random matching this profile was approximately 1 in 104 quadrillion in the African-American population.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Jackson first contends that the motions court erred in denying the motion to suppress because the officer lacked reasonable articulable suspicion to believe that there was a violation of Section 21-604 (c) of the Transportation Article. *See* T.A. § 21-604 (c). The State responds that this case is controlled by *Best, supra*, and that the court properly denied the motion to suppress.

The Court of Appeals has described the standard of review to be applied in motions to suppress:

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention

> of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497-98 (2012) (citation and internal quotation omitted).

The Court of Appeals has explained what should be considered in evaluating a traffic stop under the Fourth Amendment of the United States Constitution:

> Where the police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention may be reasonable. *See Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996). A traffic stop may also be constitutionally permissible where the officer has a reasonable belief that "criminal activity is afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911 (1968). Whether probable cause or a reasonable articulable suspicion exists to justify a stop depends on the totality of the circumstances. *See United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Rowe v. State, 363 Md. 424, 433 (2001); *see also State v. Williams*, 401 Md. 676, 687 (2007) (a traffic stop may be justified under reasonable articulable suspicion standard).

And, the Supreme Court has recently reaffirmed:

> The Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690,

> 66 L.Ed.2d 621 (1981); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The standard takes into account "the totality of the circumstances – the whole picture." *Cortez, supra*, at 417, 101 S.Ct. 690. Although a mere "'hunch'" does not create reasonable suspicion, *Terry, supra*, at 27, 88 S.Ct. 1868, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

Navarette v. California, 572 U.S. __, 134 S. Ct. 1683, 1687 (2014); *see also Brendlin v. California*, 551 U.S. 249, 255-57 (2007) (holding that a passenger in an automobile is seized during a traffic stop).

The pertinent statute provides:

> A person may not, if any other vehicle might be affected by the movement, turn a vehicle until he gives an appropriate signal in the manner required by this subtitle.

T.A. § 21-604 (c).

Jackson's argument is that there was no reasonable articulable suspicion for a stop for a violation of 21-604 because the officer "failed to articulate that there were any other vehicles in the vicinity who could have been 'affected by the movement.'" We agree with the State that this case is governed by *Best, supra*, where the same issue was presented before this Court: whether the police officer lawfully stopped the vehicle for failing to signal pursuant to Section 21-604 (c). The underlying facts there were that "appellant made a right-

hand turn from 55th Avenue onto Quincy Street without giving any directional signal. There is, moreover, some evidence that the police car was traveling on 55th Avenue behind the appellant's vehicle at the time the appellant made the turn." *Best*, 79 Md. App. at 247. Best made the argument that the "State failed to show that the police car might have been affected by the movement," and that the State did not show that "another vehicle is actually following the turning vehicle and following closely enough to be adversely affected by the absence of the signal . . ." *Id*. This Court rejected Best's argument:

> Such is far too narrow a reading of the traffic law, which deals with left-hand turns and right-hand turns alike and which is intended to alert other vehicles in the vicinity coming in from all points of the compass. Judge Levin ruled, quite properly we hold, that the requirement to signal a turn is intended to benefit all other vehicles in the area, whether such vehicles are following the turning vehicle, approaching the turning vehicle from the front, or moving in upon the turning vehicle from an intersecting highway.

Id. See also Stokeling v. State, 189 Md. App. 653, 664 (2009) (noting that there was no dispute that there was probable cause to stop a vehicle for making a turn without using a turn signal), *cert. denied*, 414 Md. 332 (2010).

Here, Corporal Durity testified as follows:

> Q. What did you see next?
>
> A. Continued down Allentown Road. I probably stayed about a car length, may be little bit more, behind the vehicle. Continued down, I believe the next cross road is Allentown Way, I believe. Crossed Allentown Way. At that point, the vehicle used a signal. It went over one lane, which would be the left lane, heading towards Branch Avenue.

As we got closer to Branch Avenue, there is actually a second turn lane. At that point, the Camry didn't use the signal at all. It went into the left turn lane and proceeded to go on the onramp to Route 5.

Q. When you say a secondary turn lane, are you saying there are two left-turn lanes?

A. Yes, sir.

Q. Where was he original [sic] before he made to [sic] the turn?

A. He was in the right lane.

Q. Like the travel lane?

A. Correct.

Q. At some point, then he got into the left lane or the far left lane?

A. He did both in one consecutive (indicating).

Q. When he did this, at any point did he signal his left-hand turn into those lanes?

A. At that time, no, he did not.

Q. When you say "that time," you mean the first time –

A. The first time, he signaled. The second time, there was not [a] signal.

Q. Are you referring to that right turn you were talking about?

A. Correct.

Q. That's the signal he made?

A. Correct.

> Q. But these left turns, you're saying he did not make the signal?
>
> A. When he went from the right lane merging into the left lane, he did signal at that point in time. Then when he went from the left lane to the far left lane, there was no signal.
>
> Q. When this was happening, where were you?
>
> A. Again, probably about a car length to a car length and a half behind him.
>
> Q. Can you give us the approximate distance?
>
> A. Ten feet or fifteen feet, approximately.
>
> Q. After you saw this operation of the vehicle movement, what did you do next?
>
> A. At that point, I had my probable cause to make a traffic stop. I initiated my emergency equipment. I activated my red and blue lights and siren and pulled the vehicle over.

The officer was following the Camry and could have been affected by the failure of the driver to signal his intention to make another left hand turn. We are persuaded that there was, at minimum, reasonable articulable suspicion justifying a brief investigative stop of the Camry. *See Navarette*, 572 U.S. __, 134 S. Ct. at 1691 (2014) ("[W]e have consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct.") (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

We also conclude that Jackson's reliance on *Rowe, supra*, is misplaced. In that case, the Court of Appeals held that Rowe did not violate § 21-309(b) when Rowe's vehicle crossed, by eight inches, the line between the shoulder and the travel lane of a highway and,

a short time later, touched that same white line. The Court reached its conclusion, that more was needed to find a violation of § 21-309(b) than "a momentary crossing or touching of an edge or lane line," by emphasizing that the purpose of the statute is to "promote safety." The Court opined that the law permits some flexibility, allowing a driver to operate a vehicle "as nearly as practicable" within a single lane, and by reviewing cases from other jurisdictions interpreting similar statutes. *Rowe,* 363 Md. at 434, 438-41.

Rowe was fact specific, and has since been distinguished by several other cases. *See Blasi v. State*, 167 Md. App. 483, 499 (2006) (holding that police had probable cause to stop Blasi because he drove onto the shoulder, then crossed back from the slow lane into the passing lane, while speeding up to 65 m.p.h. and back down to 45 m.p.h.); *Dowdy v. State*, 144 Md. App. 325, 330 (2002) (holding that police had probable cause to stop Dowdy because he crossed the line between two travel lanes twice, for a tenth of a mile, first crossing it with his tires and, then, again with a quarter of his vehicle); *Edwards v. State*, 143 Md. App. 155, 171 (2002) (holding that police had probable cause to stop Edwards because he, at least once, crossed the center line of an undivided two-lane road by as much as a foot).

The slight deviations from the lane by the defendant in *Rowe* were de minimus and were not viewed by the Court as inherently unsafe. Here, the driver of the Camry did not deviate slightly from the dictates of the law – there was, at minimum, reasonable articulable suspicion to believe that he violated the law by executing a turn without using a signal when another car was nearby. Because we conclude the stop of the vehicle was lawful, it follows

that the evidence seized during the subsequent search, justified either by consent of the vehicle's driver, *see Varriale v. State*, 218 Md. App. 47, 53 (2014), *aff'd*, 444 Md. 400 (2015), *cert. denied*, 2016 WL 207276 (2016), or following the officer's detection of the odor of burnt marijuana, *see Wilson v. State*, 174 Md. App. 434, 454-56, *cert. denied*, 400 Md. 649 (2007), *cert. denied*, 128 S.Ct. 1228 (2008), was not the fruit of an illegal stop and was properly admissible. The court properly denied the motion to suppress.

II.

Jackson next asserts that the circuit court erred in admitting evidence at trial that ballistic vests were found in the trunk of the Camry. The State responds that this issue was waived due to Jackson's failure to object to all instances when the evidence was admitted. Further, the State also argues that, in any event, the court properly admitted the evidence, and that any error was harmless beyond a reasonable doubt. We agree.

Prior to jury selection, Jackson moved *in limine* to exclude the ballistic SAPI plates recovered from the trunk of the vehicle during the September 3, 2007 traffic stop.[3] Jackson argued the plates presented "no evidentiary link between my client and what else is in the trunk of the car" and that there was no evidence that Jackson had "knowledge or ownership or possession of the guns in the car." Jackson also contended the plates were evidence of

[3] Although sometimes transcribed as "sappy plates," "SAPI" stands for Small Arms Protective Insert. *See* https://en.wikipedia.org/wiki/Small_Arms_Protective_Insert.

other crimes and that the State had not shown that the evidence was more probative than prejudicial.

The State responded by citing Section 4-107 of the Criminal Law Article, regarding bulletproof body armor.[4] Because Jackson did not have any disqualifying conviction, the State argued that the possession of the SAPI plates did not constitute an "other crime." Jackson agreed that, although not technically a crime, the possession of the plates was arguably a "bad act," and that the evidence should be excluded. Jackson also pointed out that the officer could be heard on the videotape of the stop stating, with respect to the plates, "you're not allowed to have this, or something like that . . ."

The trial court disagreed that the plates were evidence of prior bad acts and, in fact, were relevant to the facts of this case:

> [THE COURT:] . . . [P]olice officers, when searching the trunk of the car as a result of having smelled the aroma of marijuana, noticed the position of the ballistic vests.
>
> And directly underneath the ballistic vest was the tire. And directly underneath the tire were two handguns later shown to be the murder weapon in this case, one, and later, the other shown by ballistic testing as well to be evidence of a murder that occurred in the District of Columbia.

[4] That section prohibits the following: "(a) Except for a person holding a valid permit issued under subsection (c) of this section, a person who was previously convicted of a crime of violence or a drug trafficking crime may not use, possess, or purchase bulletproof body armor." Md. Code (2002, 2012 Repl. Vol.), § 4-107 of the Criminal Law Article ("Crim. Law").

> And I believe that the evidence is inextricably intertwined. One can't be separated from another logically if the weapons are found directly beneath. Both.
>
> I also do not believe that the mere possession of ballistic vests is another crime, alone, without more of the prior distinguishing conviction necessary to trigger a violation of the act.
>
> And if the concern is what the jury may hear with regard to the tape that depicts the stop, I believe that portion of it, in all likelihood, could be exercised [sic] out, about the police officer's comment. And we will excise that out.
>
> So with all due respect, my earlier ruling on the earlier trial related to that, because in this case, there were, I believe, five young men in that car.
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Five young men in that car, including the driver and Mr. Jackson and three others. And so I believe that the indication of those ballistic vests, at least mentioned during the course of the search, et cetera, and their admission is – your motion to suppress that is denied

Thereafter, during trial, and before Officer Durity testified concerning the contents of the trunk, the prosecutor informed the court that it would be playing the videotape recording of the traffic stop. The court inquired if the prosecutor was going to play the portion of the recording where the officer commented concerning the SAPI plates:

> THE COURT: What I mean by that one part, you're not entitled to have those, or words to that effect.
>
> [PROSECUTOR]: Yes, Your Honor. The gist was –
>
> THE COURT: Just a second.

> [PROSECUTOR]: Okay. The gist of it was, one of the officers, not these officers, says something to the effect of, you guys aren't allowed to have this, or something like that.
>
> That is at 22:30:02 to 22:30:05. I will mute the – that section –
>
> THE COURT: Okay.
>
> [PROSECUTOR]: – so no one can hear that. I'd be happy to go through a dry run of that, as well, if you would like.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: One thing I wanted to – as [the Prosecutor] will be playing the tape, is the Court accepting my previous motion on the whole matter of the vests as sufficient objection? You heard the whole argument. You ruled that I don't have to interrupt the playing of the tape with objections?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Thank you.

Subsequently, when Corporal Durity testified concerning the search of the Camry, there was no objection when Durity stated that he found two SAPI plates inside the trunk of the vehicle. Durity also testified, again without a specific objection, that two handguns and ammunition were then found.

Later during trial, without any specific objection by Jackson, a different witness, Officer Davis, offered more detail about the observation of the SAPI plates, as follows:

> Q. So let's talk about the search of the trunk. When you opened the trunk, what did you see?
>
> A. You could see, there were some military-issue bulletproof plates. Anybody knows that was in the Marines, they call them

sappy plate. That's what they call them. What I would call them, I would call them military-issue bulletproof plates.

Q. How did you see them arranged in the trunk?

A. One was overlapping on top of the other, just like we saw it.

Q. When you saw those – when you saw – listen to my question. When you saw those, did it affect your suspicion of what possibly could be in the car?

A. Oh, definitely. Most definitely.

Q. Did the vehicle have a spare tire in the trunk?

A. Yes, it did.

Q. Did you – after you saw the plates, where was the spare tire?

A. The spare tire was right next to it. We lifted the spare tire up.

Q. You lifted the spare tire up?

A. Yeah.

Q. And when you lifted the spare tire up, what did you see?

A. Two chrome .380 handguns. They were facing each other. Like they were touching. I guess, like if you would show them off. Display them. They were just sitting there facing each other (indicating).

Q. When you saw that, did you make an announcement, or did you alert anyone, or anything like that?

A. Oh, yeah. I gave the rest of the officers on the scene the signal that, it's time to go to jail, put them in handcuffs.

Officer Davis testified that the handguns were loaded with bullets in the chambers when he removed them from the Camry. Davis also testified that a part of the handle to one of the guns was missing. A photograph of the two SAPI plates then was admitted at trial. Defense counsel affirmatively stated that he had no objection to the admission of this photograph. This photograph depicts the two SAPI plates, the two handguns, and their accompanying ammunition magazines. In addition to this evidence, another witness, Kavell Thomas also testified, without any objection at all, that the police found "two metal plates" in the trunk of the vehicle during the traffic stop.

Maryland Rule 4-323 (a) provides, in pertinent part, that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *See* Md. Rule 8-131 (a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ."); *accord Robinson v. State*, 404 Md. 208, 216 (2008).

That an objection was raised in a motion *in limine* does not obviate the need for a contemporaneous, and timely, objection when the evidence is elicited at trial. *See Reed v. State*, 353 Md. 628, 643 (1999) (when evidence that has been contested in a motion *in limine* is admitted at trial, a contemporaneous objection must be made pursuant to Md. Rule 4-323 (a) in order for that question of admissibility to be preserved for appellate review); *accord Klauenberg v. State*, 355 Md. 528, 539-40 (1999); *see also Lee v. State*, 193 Md. App. 45,

70 ("An unsuccessful motion *in limine* to exclude certain evidence does not absolve the moving party of his or her duty to object at the time the evidence sought to be excluded actually is admitted"), *cert. denied*, 415 Md. 339 (2010).

In *Yates v. State*, 429 Md. 112, 120-21 (2012), the Court of Appeals explained: "Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." (citation and internal quotation marks omitted); *see also DeLeon v. State*, 407 Md. 16, 30-31 (2008) (The Court of Appeals held that a defendant waived an objection to what he claimed was irrelevant and highly prejudicial testimony about his purported gang affiliation because "evidence on the same point [was] admitted without objection" elsewhere at trial).

Here, Jackson failed to object when evidence of the SAPI plates was elicited at various points during the trial. To the extent that Jackson offered any objection, it was at the time that the State played the recording of the traffic stop. However, we read this objection as being limited to the recording itself. Notably, Jackson never asked for a continuing objection to all evidence concerning the SAPI plates. A continuing objection "is without any effect unless the proposed continuing objection is expressly granted by the trial judge, and even then the objection is effective to preserve an issue for appeal only as to questions clearly within its scope." *Kang v. State*, 163 Md. App. 22, 44 (2005), *aff'd*, 393 Md. 97 (2006) (citation and internal quotations omitted). We conclude that this issue was not properly preserved for appellate review.

Furthermore, even if preserved, Jackson's claim lacks merit. "We review a circuit court's decisions to admit or exclude evidence applying an abuse of discretion standard" *Norwood v. State*, 222 Md. App. 620, 642 (citing *Kelly v. State*, 392 Md. 511, 530 (2006)) *cert. denied*, 444 Md. 640 (2015). Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Wagner v. State*, 213 Md. App. 419, 453 (2013) (internal quotations and citations omitted); *see also* Md. Rule 5-401. Evidence that is not relevant is not admissible. *Wagner*, 213 Md. App. at 453; *see also* Md. Rule 5-402. Even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Although "trial judges are vested with discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *State v. Simms*, 420 Md. 705, 724 (2011). "After determining whether the evidence in question is relevant, we look to whether the court 'abused its discretion by admitting relevant evidence which should have been excluded' as unfairly prejudicial." *Smith v. State*, 218 Md. App. 689, 704 (2014) (citations omitted)

Jackson's primary argument is that the SAPI plates were inadmissible evidence of prior bad acts. The Court of Appeals has defined a "bad act" as "an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg*, 355 Md. at 549.

We are not persuaded that possession of the SAPI plates under the circumstances of this case was evidence of a bad act. As the prosecutor noted during trial, illegal possession of such items appears to depend upon proof that the possessor had a pertinent predicate conviction. *See* Crim. Law § 4-107 (a). Although Jackson may have, in fact, been so prohibited, there was no showing made during trial to that effect. *See also Klauenberg*, 355 Md. at 551 (observing that guns were found on appellant's premises, without more, was not other crimes evidence); *Wheeler v. State*, 88 Md. App. 512, 527 n. 10 (1991) (noting that showing someone a gun is not other crimes evidence).

In addition, the SAPI plates were located in the trunk next to the two handguns. Considering that Jackson originally was indicted for use of a handgun in the commission of a crime of violence, the plates were part of the same episode and relevant as they related to establishing possession and knowledge. *See, e.g., Silver v. State*, 420 Md. 415, 435-46 (2011) (evidence that was "intertwined and part of the same criminal episode" did not "engage the gears of 'other crimes' evidence law," even though it may "'show some possible crime in addition to the one literally charged'") (quoting *Odum v. State*, 412 Md. 593, 611 (2010)), *cert. denied*, 132 S. Ct. 1039 (2012)); *see also United States v. Gutierrez*, 995 F.2d 169, 172-73 (9th Cir. 1993) (holding that trial court could properly find that bulletproof vest, ski mask, and watch cap was more probative than prejudicial).

Finally, we are also persuaded that admission of the SAPI plates was not unfairly prejudicial to Jackson. "It has been said that "[p]robative value is outweighed by the danger

of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum*, 412 Md. at 615 (citation omitted, emphasis in original). We are unable to conclude that the SAPI plates would have produced such an emotional response in this case. *See generally, United States v. McDowell*, 762 F.2d 1072, 1076 (D.C. Cir. 1985) ("McDowell views the violent overtones of the vest as seriously prejudicial. The vest, however, is a defensive device; it suggests fear of attack more than a willingness to attack others. We believe, in short, that the district court could reasonably have concluded that the vest had significant probative value and was not unduly prejudicial") (footnote omitted).

Finally, we agree with the State that admission of the SAPI plates was entirely harmless. *See State v. Stringfellow*, 425 Md. 461, 474 (2012) ("In a harmless error analysis in a criminal case, the State, as the prevailing party, must prove beyond a reasonable doubt that the error did not 'contribute[] to the rendition of the guilty verdict.'") (citations omitted). If anything provided proof of Jackson's criminal agency, it was the two handguns that were recovered in the trunk of the Camry, not the ballistic plates. Any error in their admission was harmless beyond a reasonable doubt.

III.

Jackson next claims the court erred in refusing to direct the jury to resolve inconsistent verdicts. Specifically, Jackson contends that his convictions for first-degree felony murder, second-degree specific intent murder, and conspiracy to commit first-degree assault were inconsistent with the jury's acquittals of first-degree assault and use of a handgun in the commission of a crime of violence. The State responds that whereas the verdicts were not legally inconsistent but only, at most, factually inconsistent, then this Court should affirm.

Here, the jury acquitted Jackson of first-degree murder, first-degree assault, use of a handgun in commission of a crime of violence, and conspiracy to commit first-degree murder. They convicted him of second-degree specific intent murder, first-degree felony murder, and conspiracy to commit first-degree assault. Following this, and referring to the verdict sheet, Jackson argued that the verdicts were inconsistent:

> [DEFENSE COUNSEL]: I object. I think that the verdict is inconsistent, and we would request the Court to send the jury back to deliberate on the inconsistencies in terms of the – to convict of a crime of violence in questions 2 and 3, and acquit on question 5 is inconsistent, as is acquitting of the question 4, first degree assault, and convicting of question 7, conspiracy to commit first degree assault.
>
> [PROSECUTOR]: Can I ask a question? What counts are you saying are inconsistent? You said 4?
>
> [DEFENSE COUNSEL]: The convictions of 2 and 3 are inconsistent with the acquittal of 5. And the conviction of – excuse me – acquittal of 4 is inconsistent with conviction of 7.
>
> For the record, 2 is specific intent murder; 3 is felony murder; and 5 is use of a handgun in a crime of violence. 4 is

> first degree assault, and 7 is conspiracy to commit first degree assault.

The court disagreed with defense counsel that a conviction for conspiracy to commit first-degree assault was inconsistent with an acquittal for first-degree assault. The court then heard from the State:

> [PROSECUTOR]: I don't agree with that as well. My argument for 2 and 3, if the Court wants to hear, is that it's possible that the jury – it's possible that the jury didn't necessarily attribute Mr. Jackson as being the man with dreads, but that he was somehow involved with this and was two of the men. And because accomplice liability was not given, they might not necessarily know legally that one person is just as legally culpable as the other one during the commission of the crime.
>
> It's possible that they did not think that Mr. Jackson necessarily was the person with the handgun or was one of the two that were there.
>
> If that's the case, then it is not inconsistent. This is not like they found him guilty of using the handgun, but not guilty of the underlying crimes, which would be a legal inconsistency versus a factual inconsistency, which is permissible.

After hearing further clarification of the State's argument, the court disagreed with Jackson's suggestion that the verdicts were inconsistent, as follows:

> THE COURT: So how did they come to the conclusion of first degree felony murder?
>
> [PROSECUTOR]: Because it specifically says felony murder. It says in the course of a robbery, there was a killing and either the defendant or someone participating in the crime committed the murder. That's what I read the instruction to be.
>
> THE COURT: Even though he's not charged with it?

[PROSECUTOR]: Charged with what?

THE COURT: Robbery.

[PROSECUTOR]: We know that – I don't have my books, but the underlying charge need not be charged.

THE COURT: I understand. I'm asking you to go through that again.

[PROSECUTOR]: On the record? Is that what you mean?

THE COURT: Yes. You are saying that the verdict is not inconsistent because of first degree felony murder.

[PROSECUTOR]: That they found him guilty of first degree felony murder because, during the course of a robbery, there was a killing. It's possible they didn't believe he was the one that actually used the gun or the one that actually committed the first degree assault.

The first degree felony murder specifically says either the defendant or someone participating with the defendant, but that is not legally inconsistent.

THE COURT: I agree, it's factually inconsistent, but not necessarily legally as a result of not charging robbery or attempted robbery.

The court elaborated on its reasoning at the sentencing hearing:

Earlier for purposes of the record before the allocutions continue, earlier this Court found that these verdicts were not legally inconsistent but factually inconsistent. Factually inconsistent verdicts are ones which a jury renders different verdicts in crimes with distinct elements when there was only one set of proof at a given trial which makes the verdict illegal.

Legally inconsistent verdicts occur where a jury acted contrary to a trial judge's proper instructions regarding the law and in

> circumstances where the greater crime cannot as a matter of law take place without the conviction of a lesser crime. That is not the case here.
>
> These verdicts arose from a common factual event in which the victim was initially confronted outside of an apartment building by a co-defendant with a gun and struggle ensued. The defendant later earlier [sic] entered that same building and was sitting on the stairs. Then, according to witnesses, he joined the co-defendant outside and fought the victim. He, too, had a handgun.
>
> At some point during the struggle, the victim was shot by the defendant. The jury could have easily concluded the outcome they did from the same physical events due to their evaluation of short duration of time involved in saying the immediacy of the chronology of the events, the surprise of the struggle by the victim against two armed men and other similar factors leading to their contemplating the defendant's premeditation or lack thereof, or the intent to kill vis-a-vis intent to seriously injury and a lot of different factors as well.

In *Price v. State*, 405 Md. 10 (2008), the Court of Appeals held that in "similarly situated cases on direct appeal where the issue was preserved, and verdicts in criminal jury trials rendered after the date of our opinion in this case, inconsistent verdicts shall no longer be allowed." *Id*. at 29. This holding applies "only to legally inconsistent jury verdicts, but not to factually inconsistent jury verdicts." *McNeal v. State*, 426 Md. 455, 458 (2012); *accord Wallace v. State,* 219 Md. App. 234, 251 n. 12 (2014). In distinguishing the two, the *McNeal* Court explained:

> A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law. Verdicts where a defendant is convicted of one charge, but acquitted of another charge that is an essential

> element of the first charge, are inconsistent as a matter of law. Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge. The latter verdicts are illogical, but not illegal.

McNeal, 426 Md. at 458 (citations and footnotes omitted); *see also Teixeira v. State*, 213 Md. App. 664, 668 (2013) (observing that appellate review of inconsistent verdicts is *de novo*).

We first dispense with Jackson's contention that his acquittal of first-degree assault was legally inconsistent with a conviction for conspiracy to commit first-degree assault. It is well settled that "[c]onspiracy to commit a crime is generally distinct from the underlying crime itself." *Carroll v. State*, 428 Md. 679, 697 (2012); *see also Townes v. State*, 314 Md. 71, 75 (1988) ("A conspiracy to commit a crime exists as an offense separate and distinct from the substantive crime that is the object of the conspiracy"). The acquittal of first-degree assault and the conviction for conspiracy to commit first-degree assault are not inconsistent, either legally or factually. This claim is entirely without merit.

Turning to Jackson's remaining argument, and as initially defined in the trial court, Jackson suggests that the jury's acquittal on the use of a handgun charge is inconsistent with the convictions for second-degree specific intent murder and first-degree felony murder. Jackson clarifies this argument in his brief in this Court, stating "[a]s the use of the handgun was an essential element of committing the murder of Eric Jones, the court should have directed the jury, as requested by defense counsel to resume deliberations in order to resolve the inconsistency."

Jackson was charged with use of a handgun in the commission of a crime of violence. Section 4-204 (b) of the Criminal Law provides that "[a] person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." Crim. Law § 4-204 (b).

Jackson was also charged generally with murder. In Maryland, "the crime of murder remains a common law crime, although first and second-degree murder have been delineated by statute." *Thornton v. State*, 397 Md. 704, 721 (2007) (citations omitted). Criminal Law Section 2-201 (a) provides that "[a] murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate" a certain number of enumerated felonies, including, but not limited to, robbery and robbery with a dangerous weapon. Crim. Law § 2-201 (a). Section 2-204 (a) then provides that "[a] murder that is not in the first degree under § 2-201 of this subtitle is in the second degree." Crim. Law § 2-204 (a).

The Court of Appeals has stated that "[t]here is no requirement . . . that a charging document must inform the accused of the specific theory on which the State will rely." *Ross v. State*, 308 Md. 337, 344 (1987). Pertinent to our discussion, Jackson was convicted of first-degree felony murder, and that offense "is defined under Maryland common law as a criminal homicide committed in the perpetration of or in the attempted perpetration of a

dangerous to life felony." *Yates v. State*, 429 Md. 112, 125 (2012) (internal citations and quotation marks omitted). Moreover, "a killing constitutes felony murder when the homicide and the felony are part of a continuous transaction and are closely related in time, place, and causal relation." *Yates*, 429 Md. at 128; *see also Mumford v. State*, 19 Md. App. 640, 644 (1974) ("[T]here must be direct causal connection between the homicide and the felony"). To obtain a conviction for felony murder, "the State is required to prove a specific intent to commit the underlying felony and that death occurred in the perpetration or attempt to perpetrate the felony; it is not necessary to prove a specific intent to kill or to demonstrate the existence of wilfulness, deliberation, or premeditation." *Bruce v. State*, 317 Md. 642, 645 (1989).

Jackson was also convicted of second-degree specific intent murder. There are four different modalities of second-degree murder, and the most common three alternatives are:

> killing another person (other than by poison or lying in wait) with the intent to kill, but without the deliberation and premeditation required for first degree murder; killing another person with the intent to inflict such serious bodily harm that death would be the likely result; and what has become known as depraved heart murder – a killing resulting from "the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not."

Burch v. State, 346 Md. 253, 274, *cert. denied*, 522 U.S. 1001 (1997) (citations omitted). There is also a fourth category of second-degree murder – "murder committed in the

perpetration of a felony other than those enumerated in the first-degree murder statutes." *Thornton*, 397 Md. at 721-22 n. 6.

This Court previously has held that use of a handgun in commission of a crime of violence does not merge with murder. In *Godwin v. State*, 41 Md. App. 233 (1979), this Court concluded that the handgun offense was not a lesser included offense of murder, stating that "the crime of using a handgun in the commission of a crime of violence contains an element the use of a handgun which is not a required element of either murder or kidnapping. They, in turn, each require obvious elements not required for the handgun convictions." *Godwin*, 41 Md. App. at 235; *see also Robeson v. State*, 39 Md. App. 365, 382 (1978) ("[I]t is obvious that each of the offenses [,first-degree murder and use of a handgun in commission of a crime of violence,] requires proof of a fact or circumstance not required by the other, thus precluding a merger"), *aff'd*, 285 Md. 498 (1979), *cert. denied*, 444 U.S. 1021 (1980).

Contrary to Jackson's argument, using a handgun is not a necessary element to either of the two murder convictions. That the jury acquitted Jackson on the handgun charge is merely a factual inconsistency, not a legal one. The jury could have found that Jackson had the requisite intent to commit second-degree murder, regardless of the outcome on the use of a handgun charge. Indeed, although there was testimony from Air Force Sergeant Taylor that the man wearing the white t-shirt was the shooter, there was also testimony from Prince George's County Officer Wofford that a witness saw the man wearing black shoot the victim.

In addition, as the prosecutor argued to the trial court, it is possible that the jury determined that the underlying felony forming the basis for felony murder was an uncharged offense, *i.e.*, robbery.[5] This Court has explained that, under the felony murder rule, "[t]here is no further requirement upon the State that it indict and convict upon that underlying felony in order to sustain a felony-murder prosecution." *Mumford*, 19 Md. App. at 643. Indeed, "[t]he State need only prove the facts that show a felony was committed by the accused which resulted in a killing in order to obtain a legal conviction." *Adams v. State*, 8 Md. App. 684, 691, *cert. denied*, 258 Md. 725, *cert. denied*, 400 U.S. 928 (1970). We conclude that the trial court properly denied Jackson's suggestion of a legally inconsistent verdict.

IV.

Finally, Jackson maintains that he should have been sentenced on the charge of second-degree specific intent murder on the theory that first-degree felony murder is a lesser included offense. Other than his argument that the jury's verdicts were inconsistent, as discussed above, Jackson does not challenge his consecutive sentence for 25 years for conspiracy to commit first-degree assault. The State responds that the court properly sentenced Jackson on the conviction for first-degree felony murder. We concur with the State.

[5] Notably, the court instructed the jury that the underlying felony on the felony murder charge was robbery.

Prior to sentencing, defense counsel argued that he could only be sentenced once for the two counts of murder, and that the second-degree specific intent conviction should be the one that controlled:

> [DEFENSE COUNSEL]: So, I don't think that the Court appropriately can sentence him on the two separate murder convictions. I think that the specific intent, specific intent to kill murder conviction is the one that controls. This Court should merge the murder committed during the commission of a felony into the specific intent, not premeditated murder, that would make the possible sentence for murder in this case 30 years. It is a little bit strange in terms of how merger works in these cases, because it is not a Blockburger analysis.
>
> A matter of the fact, if the Court just did a strict Blockburger analysis, the matching elements, the Court would be sentencing the two murder charges separately because each has elements the other doesn't. What it really is is really not a Blockburger analysis or Rule of Lenity analysis because they are both common law offenses.
>
> The Rule of Lenity as the Court knows is, a, statutory, applies where one of the events has to be statutory events. But the Court of Appeals has said that in the context of murder that those are not the only two analyses. What is going on here, there is only one crime committed. That crime is murder. I think, as a matter of fact, the State can remind me if I am wrong, there is only one murder count in the indictment, and they were split out for purposes of submitting to the jury alternative theories in this case. I think that was the case in this matter.
>
> That's why there really is only one sentencing that leaves the Court with the question of, well, which of the sentencings controls? Well, one of these sentences involve, one of these charges is actually an intent to kill murder. That would be the 30-year charge.

> The other one actually involves a lesser degree of intent, the intent to commit the robbery. Given that, it is the 30 year, intent to kill murder, which is the count that should be before the Court for sentencing. The intent, the commission during a felony murder, should merge into that.
>
> THE COURT: Why is that?
>
> [DEFENSE COUNSEL]: Well, when the Court – essentially what murder is, there is a lot of different possible definitions in this state. But when you deal with the two counts that are in front of the Court, the distinguishing factor between those two counts is the intent. And my client has been convicted of one crime that involves a higher level than that, that was the intent to kill, the second degree murder charge.
>
> Given that the one that doesn't require an intent to kill should be considered the lesser offense and should for the purposes of merger not be sentenced today, just fall into the –
>
> THE COURT: Do you have case law on that?
>
> [DEFENSE COUNSEL]: I have case law for some of the individual points. I will tell the Court no case I found either way in Maryland saying whether the felony murder merges into the intent to kill murder or vice versa. So, I do not have any authority directly on point for the Court.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Other than I do have the authority directly on point for the idea that no matter how many different counts the murder is, convicted of murder of one person is one sentencing. That would be Williams vs. State.

The State responded by citing cases from this Court noting that second-degree murder is not a lesser included offense of first-degree felony murder. *See Lee v. State*, 186 Md. App. 631, 662 (2009) *rev'd on other grounds*, 418 Md. 136 (2011); *Malik v. State*, 152 Md. App.

305, 331, *cert. denied*, 378 Md. 618 (2003). The State observed that it had not found any case law indicating that a felony murder with a life sentence would merge into second-degree specific intent murder, where the sentence was only 30 years.

After further argument, the court ruled that the two offenses would merge and that Jackson would receive only one sentence for the murder of Eric Jones. The court stated:

> As to the merger, I believe as the State does that, again, even though these two offenses do not merge under the required evidence test there, nevertheless, times when the offenses will not be punished separately, although the Rule of Lenity may not necessarily apply in this case because they are not a view toward statutory constructions. [sic] These crimes which are not, I think fundamental fairness plays a part in this setting, and it would be my belief that second degree specific intent murder would merge into felony murder because of what apparently the jury had concluded about the greater offense in this case.
>
> So, I think fundamental fairness applies in this matter and that second degree specific intent murder would merge into the felony murder.

The court was correct to sentence Jackson once for the murder of Eric Jones. As this Court has explained: "[h]aving killed only one person, [the defendant] committed only one murder . . . . In homicide cases, the units of prosecution are dead bodies, not theories of aggravation." *Burroughs v. State*, 88 Md. App. 229, 247 (1991), *cert. denied*, 326 Md. 365 (1992); *see also Williams v. State*, 323 Md. 312, 325 (1991) ("[I]f one willfully, with deliberation and premeditation, kills a person in the course of an armed robbery, he cannot receive both a sentence for deliberated murder under Art 27, § 407, and a separate sentence for felony murder under Art 27, § 410"); *Jeffries v. State*, 113 Md. App. 322, 335 ("[E]ven

lesser distinctions among the various theories, rationales, or *mentes reae* that may support a conviction for either second-degree or first-degree murder do not create separate crimes"), *cert. denied*, 345 Md. 457 (1997).

The issue then concerns the doctrine of merger. "Maryland recognizes three grounds for merging a defendant's convictions: (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) (quoting *Monoker v. State*, 321 Md. 214, 222 23 (1990)). "The required evidence test 'focuses upon the elements of each offense; if all the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.'" *Kyler v. State*, 218 Md. App. 196, 225-26 (citation omitted), *cert. denied*, 441 Md. 62 (2014). "'[I]f each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts.'" *Id.* at 226 (citation omitted).

As set forth in our discussion of the third issue, the second-degree murder conviction in this case includes an intent to kill as its essential element. In contrast, a first-degree felony murder does not require proof of intent to kill but requires the intent to perpetrate or attempt to perpetrate an enumerated felony, along with proof that the death occurred in the perpetration of that felony. Each crime contains an element absent from the other, and therefore, they do not merge under required evidence. *See, e.g., Malik v. State*, 152 Md. App.

305, 331 ("[S]econd degree murder is not a lesser included offense of first degree felony murder") (citation omitted), *cert. denied*, 378 Md. 618 (2003).

Turning to the rule of lenity, that rule "amounts to an alternative basis for merger in cases where the required evidence test is not satisfied, and is applied to resolve ambiguity as to whether the legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. 134, 167, *cert. denied*, 410 U.S. 339 (2010). However, "[a]s it is a principle of statutory construction, the rule of lenity applies where both offenses are statutory in nature or where one offense is statutory and the other is a derivative of common law." *Khalifa v. State*, 382 Md. 400, 434 (2004). Again, as set forth above, although both first-degree felony murder and second-degree specific intent murder are delineated by statute, they are common law offenses. The rule of lenity also does not apply.

That leaves only fundamental fairness. As this Court explained in *Pair v. State*, 202 Md. App. 617, *cert. denied*, 425 Md. 397 (2012),the doctrine of fundamental fairness is different from the other merger doctrines:

> It is immediately apparent that a merger dictated by fundamental fairness is a very different doctrinal phenomenon. Merger pursuant to the "required evidence" test and merger pursuant to the rule of lenity can both be decided as a matter of law, virtually on the basis of examination confined within the "four corners" of the charges. Merger by virtue of the fundamental

> fairness test, by dramatic contrast, is heavily and intensely fact-driven.

Id. at 645.

In asking that we reverse and remand for a new sentencing hearing, Jackson contends that the court sentenced him on the lesser offense, *i.e.*, first-degree felony murder. Jackson's argument is, whereas the *mens rea* required for second-degree murder is intent to kill and the *mens rea* for felony murder is only an intent to commit a felony, in this case, a robbery, he should have been sentenced on the crime with the greater intent. Considering that the maximum penalty for second-degree murder is only thirty years, *see* Crim. Law § 2-204 (b), as opposed to life or life without parole for felony murder, *see* Crim. Law § 2-201 (b), Jackson maintains that he was improperly sentenced to life imprisonment.

We do not agree that the *mens rea* for felony murder is simply the intent to commit the underlying felony. That oversimplification ignores that the crime is a form of murder and that "[m]urder is the killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation." *Harrison v. State*, 382 Md. 477, 488 (2004) (quoting *Ross*, 308 Md. at 340). Moreover, in the context of this malevolent state of mind, the commission or attempted commission of the underlying felony does not "simply *imply* malice; it is rather the case that they *are* malice by definition." *State v. Allen*, 387 Md. 389, 403 (2005) (quoting Moylan, *Criminal Homicide Law* § 5.1 at 105 (2002) (emphasis in Moylan)); *see also Commonwealth v. Matchett*, 436 N.E.2d 400, 409-10 (Mass.

1982) ("[T]he felony-murder rule is based on the theory that the intent to commit the felony is equivalent to the malice aforethought required for murder").

Furthermore, in determining what is the greater offense for purposes of sentencing, this Court has observed that, although "[t]he greater offense under the required evidence test is the one containing the additional element, regardless of the possible penalty. . . . [t]he greater offense for lenity and fundamental fairness is the one carrying the greatest possible penalty." *Moore v. State*, 198 Md. App. 655, 693 n. 10 (2011) (citations omitted). Even applying fundamental fairness then, the greater offense in this case was the one carrying the greater penalty, in other words, the first-degree felony murder conviction. The trial court properly sentenced Jackson to life imprisonment for this crime.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.