

Circuit Court for Baltimore City

Case No. 115320020-026

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 931

September Term, 2016

KEVIN TUSING

v.

STATE OF MARYLAND

Wright,
Shaw Geter,
Thieme, Raymond T., Jr.
(Senior Judge, Retired),

JJ.

Opinion by Wright, J.

Filed: October 11, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

BACKGROUND

A jury in the Circuit Court for Baltimore City convicted appellant, Kevin Tusing, of first-degree assault, second-degree assault, three counts of reckless endangerment, and three counts of carrying a dangerous weapon openly with intent to injure.

Tusing was convicted of charges related to four individual victims. As to three victims, Brandon Lamb, Ashford Rose, and Garret Hadel, the charges submitted to the jury were identical: attempted first-degree murder (with attempted second-degree murder and attempted voluntary manslaughter as lesser included offenses), first-degree assault, second-degree assault, reckless endangerment, and openly carrying a dangerous weapon with intent to injure. As to the fourth victim, Nathaniel Fields, Tusing was charged only with second-degree assault, reckless endangerment, and open carrying.

Tusing was sentenced to 25 years in prison for first-degree assault; 10 years for second-degree assault; 5 years for each count of reckless endangerment; and 3 years for each count of carrying a dangerous weapon openly with intent to injure. Tusing's aggregate sentence was 48 years in prison.

This appeal followed.

QUESTIONS PRESENTED

We have reworded and renumbered Tusing's questions for clarity, as follows:¹

¹ In his brief, Tusing asked:

1. Did the trial court improperly restrict the defense's cross-examination of State's witnesses?

1. Did the trial court improperly restrict the defense’s cross-examination of State’s witnesses?
2. Did the trial court issue an inaccurate verdict sheet?
3. Did the jury sheet allow a legally inconsistent verdict?
4. Did the trial court err in failing to merge carrying a dangerous weapon openly with intent to injure into assault and reckless endangerment?

For the reasons to follow, we answer Tusing’s questions in the negative and affirm the judgment of the circuit court.

FACTS

This case arose out of a fight at Jimmy’s Famous Seafood (“Jimmy’s Seafood”) in Baltimore City in the early morning hours of October 9, 2015. Jimmy’s Seafood includes an upstairs bar.

Tusing testified that he had gone to the bar with his nephew, Daniel Chavis, and his friend, Keith Cox. Surveillance video showed that at approximately 1:32 a.m., Chavis and Cox left the bar, and Tusing followed shortly thereafter. Tusing testified that bouncers had told him and Chavis to take Cox outside, and they did so. In the footage, Cox is holding a pool cue in a carrying case. Surveillance showed Tusing returning to the bar about a minute later, followed by Chavis. Cox followed shortly thereafter.

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2. Did the trial court issue a confusing and misleading verdict sheet, and did it lead to an inconsistent verdict?
 3. Did the trial court err in failing to merge carrying a dangerous weapon openly with intent to injure into assault and reckless endangerment?

Tusing testified that he returned to the bar to use the bathroom. He then spoke with some people he knew, including Chavis. He told Chavis he wanted to stay until closing time.

Tusing testified that as he exited the bar's bathroom, he saw a young woman whom he thought he knew. He reached over and touched her. However, she became upset, so Tusing threw up his hands and walked away. The woman, Alexandra Zacharko, testified that she had arrived at the bar at about 9:30 or 10:00 p.m. She had been drinking throughout the night and by 1:30 a.m., she was intoxicated. Zacharko thought that Tusing "groped" her. She "didn't realize what was going on [at] the time" and only noticed that she was "being like hit in the chest." Surveillance footage corroborates this testimony as it showed that Tusing and Chavis left the bathroom at approximately 1:34 a.m. Tusing then walked back toward the bar and appeared to touch a woman standing against the wall, although the contact occurred off screen. The woman began speaking to him in an animated fashion, and he raised his hands in a shrug as he walked past before dancing with someone else.

Tusing testified that "[t]he next thing I know," he was hit in the back of the head. He fell to the ground. Nathaniel Fields, a bouncer at the bar, testified that he saw a man leave the restroom, run across the bar, and "sucker punch" Tusing in the back of the head. Fields thought that the man was friends with Zacharko. Zacharko testified that she had gone to the bar with two friends and three more joined them as the night went on. Three of her friends were men. Surveillance footage showed that seconds after Tusing's encounter with Zacharko, as he walked away, a man ran from near where Zacharko was

standing, reached back, and punched Tusing in the back of the head. Tusing was knocked to the ground.

At that point, a fight broke out. Zacharko testified that there was “chaos” and people running “in all directions.” The bar’s owner testified that there were 50 or 60 people present, and there was a “panic.” The bartender added that a “huge group” of people were involved in the fight. It was a “chaotic” “brawl.” The bar owner said that he recognized everyone who was involved except Tusing, Chavis, and Cox.

Brandon Webster, who worked at the bar, did not see how the fight started. He initially testified that there were four or five people trying to break it up as well as those fighting at the center. However, after watching surveillance footage, he added that it was a “very crowded” area, and it was difficult to tell how many people were involved.

Tusing testified that after he was punched, Chavis hit the man who had hit Tusing. He said, “[t]he next thing I know, about five or six dudes were jumping on top of me, kicking me, beating me.” Tusing testified that he “was scared for [his] life.” Surveillance footage showed that after Tusing was punched in the back of the head, a large number of men gathered in a semicircle in the corner of the bar. They appeared to be swinging and stomping.

Patrick Cunningham, who was at the bar having drinks with friends, testified that he saw “somebody on the floor and there was, what looked like, a multiple-people fight.” Cunningham further testified that he grabbed someone and pulled him off the man on the floor “to try to stop the pummeling.” He continued that it “went from a normal fight” to

a “one on one” where it “looked like they were beating him to a pulp;” he was “just getting brutally beaten.” Cunningham added that “[t]here were so many hands being thrown.” A man wearing a blue polo shirt jumped off “the pile” and punched Cunningham, who suffered a black eye. Cunningham was not sure who hit him, and he did not identify Tusing.

The complaining witnesses were Hadel, Rose, Fields, and Lamb.

Hadel was tending bar. He testified that he saw bouncers trying to break up the fight, but it was “too much” for them to handle. Hadel intervened and pulled people away, but as he did so, more people kept joining. Hadel was stabbed twice in his side and once in his wrist. He suffered a lung injury and was hospitalized for three days. Hadel testified that Tusing was one of the people he had pulled away from the fight and, in court, he identified Tusing as the man who stabbed him. However, Hadel also testified that he did not see a knife and initially did not know that he had been stabbed. The morning after the incident, he was shown a photographic array and identified someone other than Tusing as the man who stabbed him.

Rose testified that he used to work for Jimmy’s Seafood and was there that night. He was on the opposite side of the bar when the fight started. Rose recognized some of the people who were involved, and he went across the room to “put myself in it.” He testified, “I remember kind of taking a stance, okay, break this up.” The “next thing [he] knew,” Tusing stabbed him. Rose testified that after he was stabbed, he announced to the bar that Tusing had a knife and that he wanted to get him out of the bar. He then walked

Tusing to the door. Rose suffered three knife wounds in his side, one in his leg, and he required emergency surgery.

Fields testified that the fight “spiral[ed]” as friends of the participants got involved. He said that Rose had acted as a “barrier” between Tusing and the men trying to get to him. Fields, who is 6’5, 272 pounds, was about to try to break up the fight, but Rose, who he described as an “off-duty” bouncer, warned him that Tusing had a knife and had stabbed him. Fields added that he had actually seen Tusing stab Rose. He stayed back and warned a third security guard to do the same. Fields told Tusing to leave the bar, but Tusing swung a knife at him. Fields then grabbed the knife and “pressed [it] against [Tusing’s] chest” while pushing Tusing to the door. Fields convinced Tusing to leave. He described the scene inside the bar as a “panic,” and shortly after the incident, he told police “I really couldn’t see much, it was so many people.”

Lamb testified that he arrived at the bar at approximately 11:30 p.m. He was drinking. Lamb saw Tusing “wrestling” with his friend Dave, as if they were “about to fight.” Other people started getting involved, and the fight soon had five or more people. Lamb testified that it was “mostly people helping out,” and denied that people were “[j]umping on” Tusing. Lamb, who is a 6’2, 200-pound longshoreman, “[g]rabbed” Tusing and “pulled him towards the door.” He claimed that he never intended to fight Tusing, just to remove him from the bar. He also denied that he personally punched, kicked, or stabbed Tusing. According to Lamb, there were other people around them, but he did not say that anyone else was hitting or grabbing Tusing at that moment. As Lamb

grabbed Tusing and pulled him to the door, within the “seconds” that passed, Tusing stabbed him in the stomach three times. Lamb did not see a knife, but immediately saw that he was injured. Lamb fell into a coma for two days and was hospitalized for ten.

Tusing testified that when the group of men who had been beating him “finally let off,” he stood up. He was dizzy. Then another man “jumped off the bar” and “sucker punched” him. Tusing held up his arms to block the punches, and someone stabbed him in the arm. Then someone stabbed him in the head. He “guess[ed] it was the same person, could have been somebody else, there were so many people.” A bouncer came over to break up the fight and grabbed Tusing, but people were still attacking him.

Tusing further testified that he carried a pocket knife because of the danger of robberies in Baltimore. He pulled the knife out, hoping that the people attacking him would back up, but they “just kept coming at” him, and he used the knife to defend himself and get them “off of me.” He knew he had stabbed some people in the melee, but was not sure who; he did not know if he had stabbed Hadel, Lamb, Rose, or Fields. He testified that “it was so many people on top of me and was grabbing me up, you know, and then somebody was stabbing me as well.” When asked how many people he had stabbed, Tusing responded “I mean, I couldn’t say. I mean, I was just trying to get away from the confusion and people was just attacking me from all corners. I can’t really say how many people did I actually assault or assaulted me.”

Surveillance video showed the participants in the fight surge from the back of the bar towards the door, and Tusing being carried out. Chavis was then carried out in a

chokehold. Tusing testified that after he was removed from the bar, he went straight home, and that his house was less than a block away.

However, Fields testified that after Tusing left the bar, he came back, and got into a second fight with Lamb, who was standing near the door. Tusing stabbed him, and a fight spilled into the street. Fields said that Tusing stabbed Lamb at “the top of the steps, on the way down the steps, and at the bottom of the steps.” Fields testified that two more people were stabbed on the street.

By contrast, Lamb testified that he had just one fight with Tusing, and it was before Tusing was ejected from the bar. Lamb recalled that after that, he went downstairs and waited for an ambulance.

Webster testified that when he went outside, he saw three men, including Tusing, “backing up.” Bouncers were following them, and one of the bouncers was bleeding. Webster convinced the bouncers not to “chas[e] after” the three men, who ran away.

Brandon Posluszny, another bar employee, was standing outside the bar when he saw Tusing run down the stairs and down the street. He stated that Tusing was holding a bloody knife and was bleeding from a cut on his arm. Posluszny testified that multiple fights broke out outside the bar after “one of the stabbing victims came down and was chasing after” Tusing.

Surveillance footage from outside the bar showed that at approximately 1:35 a.m., Tusing left the bar and walked down the street. He was carrying a knife. Another man exited in a fighting stance and then backed up to avoid Cox, who swung his pool cue.

Cox then left in the same direction that Tusing had gone. Shortly thereafter, two large men left the bar and walked in the direction that Tusing and Cox had gone. One had blood on his shirt and pants. Moments later, Chavis also left, again in the same direction. Finally, at the end of the clip at 1:37 a.m., two other men exited the bar and ran in the same direction. The video clip did not record Tusing coming back.

Tusing suffered stab wounds to his left arm and right leg. He also had several head injuries; he was not sure if he was stabbed or “busted in the head with something,” like a bottle. Finally, he had multiple bruises on his back. The police took pictures of his injuries a week after the incident. The pictures were introduced into evidence. The police also took Tusing to receive medical treatment. A detective who interviewed Tusing after the incident testified that Tusing told him that he was a “victim.” The detective added that Tusing told him that he was “hit” or stabbed, and he showed the detective an injury to his head and a stab wound to his arm.

The jury convicted Tusing of second-degree assault, reckless endangerment, and open carrying as to Lamb; first-degree assault and open carrying as to Rose; reckless endangerment and open carrying with respect to Hadel; and reckless endangerment as to Fields.

The circuit court sentenced Tusing to 10 years for the second-degree assault of Lamb; 25 years for the first-degree assault of Rose, consecutive to the sentence for assaulting Lamb; and 5 years each for reckless endangerment of Hadel and Fields, both also consecutive to the sentence for assaulting Lamb. The court sentenced him to 5 years

for recklessly endangering Lamb as well but directed that the sentence be concurrent with the sentence for assaulting Lamb. For each of the three open carrying convictions, Tusing was sentenced to 3 years, concurrent with each other and consecutive to the sentence for assaulting Lamb. Tusing's aggregate sentence was 48 years in prison.

DISCUSSION

I. Court's Restriction of Defense's Cross-Examination

Tusing avers the circuit court infringed on his right to confrontation by restricting his use of the surveillance video from Jimmy's Seafood during his cross-examination of four witnesses (Zacharko, Hadel, Webster, and Lamb). The court limited Tusing to using the video, which was already in evidence for the purpose of refreshing the witnesses' recollection. *See* Md. Rule 5-612. The court ruled that the defense could only use surveillance footage to refresh witnesses' recollections, not to impeach the witnesses' credibility. Tusing claims that the circuit court should have permitted him to use the video for impeachment, and that the court's ruling was an error that prevented the defense from adequately cross-examining Zacharko, Hadel, Webster, and Lamb. Tusing claims that this error was not harmless and requires reversal.

Tusing asserts that the standard of review for the circuit court's restriction of the defense's cross-examination should be *de novo* because the trial court made its ruling based upon a misinterpretation of the applicable law. *Brooks v. State*, 439 Md. 698, 708-09 (2014). However, we agree with the State that the correct standard of review is an abuse of discretion: “[J]udges have a ‘wide latitude to establish reasonable limits on

cross-examination,’ and [appellate courts] review these limits under an abuse of discretion standard.” *Gupta v. State*, 227 Md. App. 718, 745 (2016) (quoting *Pantazes v. State*, 376 Md. 661, 680-81 (2003)). “A trial court may impose reasonable limits on cross-examination when necessary . . . to prevent . . . confusion of the issues, and inquiry that is repetitive or only marginally relevant.” *Martinez v. State*, 416 Md. 418, 428 (2010) (citation omitted). An abuse of discretion occurs when the trial judge limits cross-examination in a way that “inhibit[s] the ability of the defendant to receive a fair trial.” *Pantazes*, 376 Md. at 681-82 (citations omitted). Even if the appellate court “conclude[s] that the examination was ‘erroneously restricted, [it] then appl[ies] a harmless error standard of review.’” *Savage v. State*, 212 Md. App. 1, 35-36 (2013) (citation omitted).

The State contends that Tusing only preserved an objection regarding his cross-examination of some of the witnesses at issue, and to the extent that he did preserve his objection, the circuit court’s limitation of cross-examination was within its wide discretion. The State further avers that if error occurred, it was harmless, given the extensive use of the video that was permitted and the video’s limited clarity.

Based on the record, we agree with the State that, to the extent Tusing preserved an objection regarding his cross-examination of some of the witnesses at issue, the circuit court’s limitation of cross-examination was within its discretion and even if the court abused its discretion, the error was harmless.

In order to preserve an objection to a limitation of cross-examination, a party must proffer what the witness’s testimony would have been. *Grandison v. State*, 341 Md. 175,

207 (1995) (“A trial judge’s refusal to allow a line of questioning on cross-examination amounts to exclusion generally requires a formal proffer of the contents and relevancy of the excluded evidence.”) (footnote and citations omitted). Because the cross-examiner cannot know exactly how the witness will respond, the proffer need not be specific. *Id.* at 208. But failure to offer even a minimal proffer “[a]bsolutely foreclos[es]” appellate review. *Ratchford v. State*, 141 Md. App. 354, 368 (2001).

First, there is no evidence that Zacharko’s cross-examination was restricted at all. During Zacharko’s testimony, when the defense asked to play the video, the circuit court inquired whether the defense was “using it to refresh her memory about something,” and counsel responded, “Yes. Yes. Absolutely.” Defense counsel was permitted to play the video to refresh Zacharko’s recollection, and he did not indicate that he wished to use it for impeachment. When both the judge and defense counsel asked Zacharko if she “want[ed] to see [the video] again,” Zacharko declined. The court did not rule on any question related to a limit of her testimony in cross-examination.

Next, Tusing made no objection regarding the cross-examination of Webster. When defense counsel’s follow-up questions did not pertain to the number of people involved in the fight, the circuit court interjected, and counsel asserted at the bench that he had a right to question “each and every witness about the video, not for recollection but for probative value.” However, no proffer was made of what Webster’s testimony about the video would have been, and it is impossible to discern how Tusing may have been prejudiced.

As to Hadel and Lamb, Tusing preserved the restriction on cross-examination, but the trial judge did not abuse her discretion in limiting this line of questioning. The trial judge limited the defense’s line of cross-examination based on legal principles regarding video evidence and the permissible scope of witness testimony. Md. Rule 5-701 provides that the court can prohibit lay opinion testimony unless rationally based and helpful to the trier of fact. Maryland evidentiary rules, “. . . permits only lay opinion testimony that is helpful to the trier of fact Having heard [the underlying] facts, the judge or jury is in just as good a position as is the witness to form an opinion.” Maryland Evidence § 701:1, at 844-49 (3d ed. 2013); *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995). (“It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness.”)

Here, the judge’s complete explanation at the time of the ruling indicates that she did not act “without reference to any guiding principles or rules,” or that “no reasonable person would take the view adopted by the [circuit] court.” *Weathers v. State*, 231 Md. App. 112, 131-32 (2016) (citation omitted). Therefore, the court’s restriction of the defense counsel’s cross-examination was not an abuse of discretion.

Further, assuming *arguendo* that the circuit court abused its discretion, the restriction on cross-examination was harmless. The video was played for the jury many times during trial, and witnesses were questioned extensively about it. To the extent that it contradicted any of the witnesses’ accounts of the fight, the jurors were capable of recognizing and resolving such a contradiction on their own assessment of the evidence.

Finally, the video evidence does not have the clarity to conclusively impeach any witness accounts of the fight or resolve the core disputed issue of whether Tusing acted in self-defense.

For these reasons, the limitation of Tusing’s cross-examination as to Hadel and Lamb was not reversible error.

II. Legal Accuracy of Verdict Sheet

Next, Tusing avers that the verdict sheet was likely to confuse the jury because it required the jury to make a separate self-defense finding on each charge for which self-defense was available. According to Tusing, the verdict sheet led to a legally inconsistent verdict. Although the State admits that, “the verdict sheet was admittedly not a model of clarity,” the State avers that the verdict was legally accurate and the judge acted within her discretion in using the verdict sheet at issue.

“[T]he decision to use a particular verdict sheet will not be reversed absent abuse of discretion.” *Consol. Waste Indus., Inc. v. Std. Equip. Co.*, 421 Md. 210, 220 (2011) (citation and footnote omitted). Based on this record, we agree with the State that although the verdict sheet was complex, it was legally accurate, and the circuit court did not abuse its discretion by giving the jury the verdict sheet.

Verdict sheets should be considered “not in isolation, but in light of the instructions given to the jury.” *Davis v. State*, 196 Md. App. 81, 113 (2010) (citation

omitted). The verdict sheet contained language about perfect and imperfect self-defense from pattern jury instructions.²

“Appellate courts in Maryland strongly favor the use of pattern jury instructions.” *Minger v. State*, 157 Md. App. 157, 161n.1 (2004). “Although the use of a pattern jury instruction does not insulate a conviction against review, it is a factor in [an appellate court’s] analysis.” *Wiredu v. State*, 222 Md. App. 212, 224 (2015) (citation omitted). Where a trial court follows “the wise course of action,” giving legally accurate “instructions in the form . . . of our Maryland Pattern Jury Instructions,” it does not abuse its discretion. *Johnson v. State*, 223 Md. App. 128, 152 (citation omitted), *cert. denied*, 445 Md. 6 (2015).

Therefore, since the circuit court used a verdict sheet with the language directly from the Maryland Pattern Jury Instructions, the court did not abuse its discretion in using the verdict sheet at issue.

III. Legal Consistency of Verdict

Tusing next avers that the jury’s verdicts regarding three of the victims, Lamb, Rose, and Hadel, were legally inconsistent because in each of those victims’ cases, the

² Instructions on self-defense state: “[Y]ou are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.”). Maryland Criminal Pattern Jury Instruction 5:07 (2d ed., 2016 Supp.). Instructions on imperfect self-defense, contain the same quoted language, and also state: “In order to convict the defendant of attempted murder, the State must prove that the defendant did not act in complete self-defense or partial self-defense.” *Id.* at 4.17.14.

jury found, for the same victim, self-defense or imperfect self-defense on some charges but not others.

First, the State responds that Tusing did not preserve his appeal because he raised a different claim of verdict inconsistency in the circuit court. At trial, Tusing asserted that his verdicts were inconsistent because the jury reached different conclusions on self-defense as to the different victims. Second, the State responds that even if Tusing's argument is preserved, it is meritless because the inconsistencies are at most factual inconsistencies, not legal inconsistencies, and therefore do not require reversal.

In order to address the question, we briefly define self-defense and imperfect self-defense. Imperfect self-defense is a defense to murder. *State v. Faulkner*, 301 Md. 482, 500 (1984). First recognized in *Faulkner*, we characterized “perfect self-defense” and “imperfect self-defense” as a “mitigation defense,” and we explained the defense effect in the murder context as follows:

“Perfect self-defense requires not only that the killer subjectively believed that his actions were necessary for his safety, but, objectively, that a reasonable man would so consider them. Imperfect self-defense, however, requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so. If established, the killer remains culpable and his actions are excused only to the extent that mitigation is invoked.”

Id. (quoting *Faulkner v. State*, 54 Md. App. 113, 115 (1983)).

Turning to the merits, we agree with the State that Tusing did not properly preserve his appeal on this issue, and even if he did, the verdict inconsistencies are at

most factual inconsistencies, not legal inconsistencies, which do not warrant reversal.

We explain.

A. Preservation

Legally inconsistent verdicts are prohibited in criminal cases. *McNeal v. State*, 426 Md. 455, 458 (2012). However, there is a requirement to preserve the issue of legal inconsistency in the trial court, before the jury is discharged. *Givens v. State*, 449 Md. 433, 472-73 (2016); *Travis v. State*, 218 Md. App. 410, 452 (2014).

The reason to enforce a preservation requirement in this context is because the jury “may render a legally inconsistent verdict to show lenity to the defendant.” *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring) (citations omitted). “[I]f the defendant objects to the inconsistent verdicts, the jury, given a second chance, may choose to remedy the error in a manner not in the defendant’s favor.” *Travis*, 218 Md. App. at 453 (citation and emphasis omitted). Objecting contemporaneously, at a time when the inconsistency can be resolved, “is the equivalent of the defendant’s saying ‘roll the dice, double or nothing.’” *Givens*, 449 Md. at 476 (citation omitted). Without a strict preservation requirement, defendants would have an incentive to sandbag the trial court and “accept the benefit of a jury’s incongruous acquittal even while condemning the incongruous conviction” on appeal. *Travis*, 218 Md. App. at 452. Moreover, “[I]legally inconsistent verdicts are, more often than not immediately recognizable. Thus, it is entirely reasonable to expect a defendant to object to inconsistent verdicts before the verdicts are final and the trial court discharges the jury.” *Givens*, 449 Md. at 474.

Although Tusing raised a timely objection to the consistency of the verdict, the supposed inconsistency that he argued to the circuit court is not the inconsistency he now identifies on appeal. Tusing’s claim on appeal is that the verdict, as to each of the three victims at issue (Lamb, Rose, and Hadel), is internally inconsistent. Regarding Lamb, Tusing avers an inconsistency in that the jury found perfect self-defense with respect to the attempted murder charge, but found no perfect self-defense with respect to the assault charges. As to Rose,³ the alleged inconsistency is that the jury found imperfect self-defense as to both the attempted murder charges and the first-degree assault charge, but found no self-defense as to second-degree assault and reckless endangerment. As to Hadel, the alleged inconsistency is that the jury found perfect self-defense as to both the attempted murder charges and the first-degree assault charge, but not self-defense as to second-degree assault and reckless endangerment.

These inconsistencies are not what Tusing raised below. At trial, Tusing objected that the verdicts as to the three victims were inconsistent with *each other*. By now arguing a different alleged inconsistency to the circuit court, Tusing failed to preserve for review the inconsistencies he posits on appeal. It is “well settled that where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified.” *Perry v. State*, 229 Md. App. 687, 709 (2016) (citations and internal quotation marks omitted). The need for particularity in objections at trial is especially acute as it pertains to inconsistent verdict

³ The jury found perfect self-defense disproven across the board as to Rose.

context—without knowing what aspect of the verdict the defendant contends is inconsistent, the judge cannot appropriately reinstruct the jury to resolve the inconsistency, and it is impossible to fix an inconsistency after the jury has dispersed.

The reasons for the strict requirement regarding preservation of verdict inconsistencies at trial were present here. The internal inconsistencies regarding the three victims were “immediately recognizable.” *Givens*, 449 Md. at 474. At trial, Tusing faced the choice either of having the jury resolve the inconsistency or of standing pat and enjoying the inconsistency. *Tate v. State*, 182 Md. App. 114, 134-36 (2008). Tusing “may not seek to exploit alleged inconsistency without taking the necessary step to cure or resolve the inconsistency while it is still possible to do so.” *Id.* at 136.

Tusing failed to raise these asserted inconsistencies in the circuit court, where doing so may have resulted in a harsher sentence, but thereby preserved his appeal. Although this issue is not properly before us, we briefly address the merits of Tusing’s claim.

B. Legal Consistency of Verdict

Assuming *arguendo* that Tusing’s claim of verdict inconsistency was preserved, the inconsistency is merely factually inconsistent, not legally inconsistent. Tusing’s inconsistency claim is in regard to the jury’s findings on affirmative defenses of perfect and imperfect self-defense, rather than on the jury’s conviction or acquittal on a charge.

As the trial judge recognized, there was no legal inconsistency in the jury’s rendering different findings on self-defense with respect to different victims. Rather, this

was, at most, an example of a mere factual or logical inconsistency, if it was an inconsistency at all.

In *McNeal, supra*, the Court of Appeals distinguished between impermissible “legally inconsistent” verdicts and permissible “factually inconsistent” verdicts. 426 Md. at 459. (“[W]e adopt as our holding here the thrust of [Judge Harrell’s] concurring opinion in *Price*, that jury verdicts which are illogical or factually inconsistent are permitted in criminal trials[.]”); *Price*, 405 Md. at 35-38 (Harrell, J., concurring) (distinguishing “legally inconsistent” verdicts from merely “factually or ‘logically’ inconsistent” verdicts, and providing a hypothetical example of merely factually inconsistent verdict where single criminal act kills two victims, and defendant is convicted as to one victim and not the other).

The Court went on to describe legally inconsistent verdicts as ones “where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge,” or where “a defendant is acquitted of a lesser ‘included’ crime embraced within a conviction for a greater offense.” *McNeal*, 426 Md. at 458. *McNeal* described mere factually or logically inconsistent verdicts, in contrast, as ones where “the charges have common facts but distinct legal elements,” *id.*, such that the crime of conviction “contains legal elements that are distinct” from the elements in the crime of which the defendant was acquitted. *Id.* at 472. Factual inconsistency encompasses verdicts that are “confusing,” “curious,” or “illogical,” but that do not

involve acquittal on charges that are lesser included offenses of the crimes of conviction.

Id. at 458n.2.

None of the crimes for which Tusing was acquitted is a lesser included offense of another crime for which he was convicted of committing against the same victim. Rather, Tusing was convicted of crimes that are lesser included offenses of charges on which he was acquitted. As to Hadel, for instance, Tusing was acquitted of attempted first- and second-degree murder, first-degree assault, and second-degree assault. He was convicted of reckless endangerment and openly carrying a dangerous weapon with intent to injure. That verdict contains no apparent inconsistency at all. The same is true as to the Lamb verdict (where Tusing was acquitted of attempted first- and second-degree assault and reckless endangerment), and the Rose verdict (where Tusing was acquitted of attempted voluntary manslaughter, and he was convicted of first-degree assault). None of these are situations in which the crimes of conviction “cannot, as a matter of law, take place without the commission of the lesser crime[s]” of acquittal. *Tate*, 182 Md. App. at 131.

Even if self-defense is considered an “element,” the incongruity in the jury’s findings on that element may make the verdicts “illogical” or “curious.” *McNeal*, 426 Md. at 458. “Juries may engage in internal negotiations, compromise, or even make mistakes; however [in the case of a factual inconsistency], we cannot divine whether the inconsistency is the product of lenity.” *Id.* at 472. The decision of the jury to acquit Tusing of the most serious charges he faced while convicting him of lesser offenses

displays the hallmarks of a decision that, while seemingly illogical, could readily be based on jury lenity - *unlike* a conviction on a greater inclusive offense coupled with an acquittal on the lesser included offense, which is hard to explain as anything other than legal error.

For these reasons, the verdicts may be factually or logically inconsistent, but they are not legally inconsistent, and thus are not a basis for reversal. “The jury’s choices in this regard, while a source of wonder, are beyond appellate scrutiny.” *Teixeira v. State*, 213 Md. App. 664, 683 (2013).⁴

IV. Merger

Tusing’s final claim of error is that his convictions under Md. Code (1973, Repl. Vol.), Criminal Law Article (“CL”) § 4-101(c)(2) for openly carrying a dangerous weapon with intent to injure should merge with his convictions for assault and reckless endangerment. Tusing’s merger claim relies primarily on the rule of lenity and on principles of fundamental fairness. Relying on *Biggus v. State*, 323 Md. 339 (1991), the State responds that Tusing’s convictions do not merge under either doctrine, because convictions for openly carrying a dangerous weapon with intent to injure do not merge “into convictions for other offenses where such merger [is] not mandated by the required evidence test.” *Id.* at 357 (citations omitted).

⁴ This holding relates back to the issue of the legally correct but confusing verdict sheet that we discern caused no error.

We agree with the State that per *Biggus*, Tusing’s merger claim is incorrect here. *Biggus* considered merger of open carrying convictions under the rule of lenity. In the context of merger, the rule of lenity, which is “applicable to statutory offenses only,” provides that “where there is no indication the [General Assembly] intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other.” *Garner v. State*, 442 Md. 226, 248 (2015) (citation omitted). An appellate court “undertake[s] a two-step analysis to determine whether to merge two offenses under the rule of lenity: (1) first, we ask whether the two offenses arise out of the same criminal conduct; and (2) second, we ask whether the Legislature has expressed an intention to impose multiple punishments.” *Wiredu*, 222 Md. App. at 220.

In *Biggus*, the Court of Appeals pointed to the language in the open carrying statute that is now codified as CL § 4-101(d)(2), which provides that: “For a person convicted under subsection (c)(1) or (2) of this section, if it appears from the evidence that the weapon was carried, concealed or openly, with the deliberate purpose of injuring or killing another, the court shall impose the highest sentence of imprisonment prescribed.” This provision “expresses a sentiment somewhat inconsistent with merger under the rule of lenity.” *Biggus*, 323 Md. at 357 (citation omitted). Further, the Court noted four prior decisions in which Maryland appellate courts had refused to merge open carrying convictions with convictions for other crimes, and the Court observed that the

“General Assembly has taken no action to change the result of those decisions.” *Id.* The Court of Appeals concluded:

A primary purpose of statutes proscribing the carrying or employment of dangerous or deadly weapons is to discourage their use in criminal activity. Where the underlying criminal activity does not itself necessarily involve the carrying or use of a dangerous or deadly weapon, in violation of a statute like [now CL § 4-101(c)], is an aggravating factor warranting punishment in addition to the punishment imposed for the underlying criminal activity.

Id.

As this Court later recognized: “With respect to any applicability the rule of lenity might have when dealing with a weapons offense under [now CL § 4-101(c)], the Court of Appeals . . . laid that ghost to rest in the *Biggus* case.” *Burkett v. State*, 98 Md. App. 459, 479 (1993) (rejecting merger of open carrying offense with second-degree sexual offense). No subsequent case or legislative enactment has undermined the holding in *Biggus*. Therefore, the Court of Appeals’s, holding in *Biggus* applies, and Tusing’s open carrying convictions do not necessarily merge with other crimes under the rule of lenity.

Unlike merger claims based on the required evidence test or the rule of lenity, merger claims based on fundamental fairness must be preserved for review. *Potts v. State*, 231 Md. App. 398, 414 (2016) (“Although a defendant may attack an illegal sentence by way of direct appeal, the fundamental fairness test does not enjoy the same procedural dispensation of [Md.] Rule 4-345(a) that permits correction of an illegal sentence without contemporaneous objection.”) (Quoting *Pair v. State*, 202 Md. App. 617, 649 (2011)) (footnote omitted).

Tusing did not contemporaneously object to his sentences on any ground including fundamental fairness. Because he “did not make a contemporaneous objection as to the lack of fundamental fairness of his sentences,” the “issue was not preserved for [appellate] consideration.” *Potts*, 231 Md. App. at 414.

Even if Tusing’s claims were preserved, they are meritless. *Biggus* again dictates that “there is no unfairness associated with the imposition of separate sentences for each offense” when a defendant is convicted of open carrying under CL § 4-1019(c)(2) and another crime that does not merge under the required evidence test. *Biggus*, 323 Md. at 357. Thus, fundamental fairness does not require a merger here.

For these reasons, Tusing’s convictions for openly carrying a dangerous weapon with intent to injure were not required to merge with his convictions for assault or reckless endangerment.

CONCLUSION

The circuit court was within its discretion to limit defense’s cross-examination of the witnesses, the verdict sheet was legally accurate, the verdict was legally consistent, and the crime of openly carrying a deadly weapon does not necessarily merge with Tusing’s other crimes. Therefore, for the above discussed reasons, we affirm its judgment.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**