Circuit Court for Baltimore City
Case No. 116042017-19

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2549

September Term, 2016

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TRACE HANSE

v.

STATE OF MARYLAND

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Meredith,
Leahy,
Sharer.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: February 25, 2019

Trace Hanse ("Appellant") was convicted by a jury in the Circuit Court for Baltimore City of six charges, including first-degree felony murder and first-degree burglary, stemming from a home invasion during which Sierra Burley and her roommate, Marvin Jeffers, were shot in the head and body. Sierra Burley passed away within minutes of being shot. Marvin Jeffers managed to drive himself to the hospital where he received lifesaving treatment. He testified at Hanse's trial as the only surviving eyewitness to the robbery and murder that occurred in his home that evening.

Hanse timely appealed his convictions to this Court on January 13, 2017, and presents two questions for our review:

(1) "Did the trial court err in denying Appellant's motion for a new trial?"

(2) "Did the trial court err in failing to merge Appellant's convictions for burglary and felony murder?"

The first issue concerns Hanse's "Amended Motion for a New Trial," filed on November 22, 2016 (following his conviction on September 22, 2016), in which he asserted that certain medical records introduced at trial by the State from Sinai hospital ("Sinai Records") were newly discovered evidence because the State failed to produce the records during discovery. The circuit court heard arguments and denied the motion at Hanse's January 9, 2017 sentencing hearing. For the reasons stated in the discussion below, we find no error in the court's denial of Hanse's motion. Regarding Hanse's second issue on appeal, however, we hold that the court's failure to merge Hanse's convictions for felony murder and the underlying felony of first degree burglary resulted in multiple

punishments for the same offense and was, therefore, in error. We remand to the circuit court to adjust Hanse's sentence accordingly.

## BACKGROUND[1]

On January 12, 2016, three armed men stormed an apartment located at 5610 Haddon Avenue. One man held Burley and Jeffers at bay while the other two ransacked the apartment. The man ultimately opened fire, causing Burley to suffer six bullet wounds to her head, neck, and chest. The mortal wound was caused by a bullet severing her carotid artery, resulting in rapid blood loss. The man also shot Jeffers in the head (twice) and hand, but Jeffers survived. He implicated his friend, Hanse, as the shooter.

### Home Invasion and Indictment

At the time of her murder, Burley shared an apartment with Jeffers, Cokey Borne, and her boyfriend, Kaemarr Cox. Borne and Cox sold marijuana out of the apartment. They stored some of the marijuana in a large Footlocker bag in the back of a bedroom closet, and the rest in a box.

At about 9:00 p.m. on January 12, Burley and Jeffers, the only roommates at home, heard a knock at the door. Jeffers went do the door and looked through the peephole. He saw a familiar face, opened the door slightly, and recognized Hanse. Then, Hanse and two other men forced their way into the apartment. All three carried guns and wore gloves. Hanse repeatedly asked "[w]here['s] the stuff [] at" and "[w]here is it at or we're gonna

[1] The following factual background is derived from testimony and evidence presented at Hanse's trial on September 21 and 22, 2016, before a jury in the Circuit Court for Baltimore City, the Honorable Martin P. Welch presiding.

kill ya'll." Burley and Jeffers were instructed to get down on the ground, face-down. The three men started kicking and stomping on Burley and Jeffers. Jeffers fought back, to no avail. Then, two men ransacked the house while Hanse stood on Jeffers's head, holding both Jeffers and Burley at bay.

After some time, one of the three men said "[i]t took too long and it's time to leave." Jeffers testified at trial that at that point he was shot in the arm and the head. His hands were behind his head, so the bullet struck his hand, as well. He blacked out for what he believed to be a few minutes and, when he regained consciousness, he observed Burley next to him, "bleeding out." He stumbled around until he reached the phone in the kitchen to dial 9-1-1. Jeffers decided to drive himself to Northwest Hospital instead of waiting for the ambulance to arrive. He was transferred to Sinai Hospital the next day.

Jeffers did not recall calling Cox after calling the police, but Cox testified that he received a call from Jeffers who told him that their apartment was invaded by "Parre," a nickname for Hanse, and that "[y]ou can't trust people." The responding officers first encountered Cox outside the apartment, screaming and "crying hysterically." The police eventually seized the five pounds of marijuana in the Footlocker bag in the closet of the apartment; the box was never recovered.

After his release from Sinai, Jeffers went to the homicide division of the Baltimore City Police Department, where he learned that Burley had passed. Not wanting to "snitch," which he believed caused "people [to] threaten you and stuff like that," Jeffers told the police that all three men wore masks, that he couldn't identify any of them, and that they all had American accents.

About a week later, Jeffers returned to the homicide division to tell the police what really happened, because he wanted to do "the right thing" "for [his] friend." He picked Hanse out of a photo array, and wrote at the bottom "Trace Hanse knocked at the door. I opened it. He pointed a gun at me and that's when he started assaulting me and [Burley]." He also implicated someone named "LeeLee" as the second gunman, whose name he learned on the streets. Jeffers was later shown a second and third photo array, but he was unable to identify LeeLee or the third assailant.

The police arrested and charged Hanse, who was subsequently indicted by a grand jury on February 11, 2016, on a total of nine counts associated with the incident. For crimes against Burley, Hanse was indicted for (1) murder, (2) the use of a firearm in a crime of violence, and (3) carrying a handgun. For crimes against Jeffers, Hanse was indicted for (4) attempted first degree murder, (5) attempted second-degree murder, (6) the use of a firearm in a crime of violence, and (7) carrying a handgun. The final charges associated with the incident were for (8) breaking and entering a dwelling with the intent to commit theft and a crime of violence, and (9) possession of a firearm after a previous conviction of a crime of violence.

**The Sinai Records and the Jury Question**

During discovery, the State provided defense counsel with 34 CDs of evidence which included Jeffers's medical records. Unbeknownst to the Assistant State's Attorney, the State had accidentally provided duplicate copies of his records from Northwest Hospital and omitted the Sinai Records. At issue is the following passage contained in Jeffers's

Sinai Records: "INDICATIONS FOR PROCEDURE: The patient is a male born in 1986 who suffered multiple gunshot wounds and also had fired [] his firearm at someone else."

The topic of the Sinai Records came up during the direct and cross-examination of Jeffers. When eliciting testimony from Jeffers about the extent of his injuries, the Assistant State's Attorney asked, "[a]nd did you stay at Northwest[,]" to which Jeffers responded "[n]o, they transferred me to Sinai." The State then moved into evidence both the Northwest and Sinai Records. Defense counsel stated, "[n]o objection."

During cross-examination, defense counsel referenced Jeffers's stay at Sinai both directly and indirectly. Defense counsel's line of questioning alluded to the stay at Sinai, mentioning "two different hospitals," and the plural "hospital reports:"

> [DEFENSE COUNSEL]: Now after you were shot, you went to two different hospitals, correct?
>
> [ JEFFERS]: Yes ma'am.
>
> [DEFENSE COUNSEL]: Now in those hospital reports it shows clearly that you had cannabis or marijuana in your system. . . .

Defense counsel also specifically referenced Jeffers's stay at Sinai:

> [DEFENSE COUNSEL]: Now when you—after [] Cox got to the house, you drove yourself to the hospital?
>
> [JEFFERS]: Yes I did.
>
> [DEFENSE COUNSEL]: And then you were treated at the hospital, and you drove to Northwest and then you were taken to Sinai, correct?
>
> [JEFFERS]: Yes ma'am.
>
> [DEFENSE COUNSEL]: Now what time were you released from Sinai?
>
> [JEFFERS]: I don't know. Like the next day.

Eight witnesses testified on behalf of the state: the responding officer, the crime lab technician, the medical examiner, two homicide detectives, the firearms examiner, Jeffers, and Cox. Hanse waived his right to testify and the defense called no witnesses. The defense rested and renewed its motion for acquittal, which was denied. In closing argument, defense counsel argued that Hanse was not the shooter and that Jeffers's motive for driving himself to the hospital was to dispose of a gun.[2]

During their deliberation, the members of the jury sent a dozen notes with questions for the court, including one with a question about the Sinai Records:

> In Marvin Jeffers[']s medical report (Exhibit 7) there is a sentence that raises the issue of [] Jeffers firing "his firearm at someone else." Could you please clarify if this evidence establishes that
>
> a) he fired his own gun?
> b) at the same incident? ([the] Jan[uary] 12, 2016 event)

Judge Welch read the note aloud and proposed an answer, to which both counsel for Hanse and the prosecutor promptly signed off on:

> THE COURT: . . . My inclination is, ladies and gentlemen, you must rely upon your own review of the evidence. All the evidence is in and then I'm going to send them home. []. So, Counsel, if you'll come up—
>
> [PROSECUTOR]: Sure.
>
> THE COURT: --please? Let me look at the note first.

[2] The transcript reflects that defense counsel argued:

> So Mr. Jeffers, instead of—after calling 911 he gets in a car, he leaves the scene of the crime, he does not wait for the police to give them his explanation of what happens, but he drives himself to the hospital. We don't know what he did on the way to the hospital. There were no guns ever found in connection to this crime. We don't know whether Marvin Jeffers had a gun or two guns and threw them on the way to the hospital.

(Pause)

THE COURT: So my—let me write my response to the ladies and gentlemen of the jury. I'll put, all the evidence is in.

(Pause)

THE COURT: I was going to write a response, all the evidence is in. You must rely upon your own either recollection and/or review of that evidence. I'll put, recollection and/or review. So you want to—

[DEFENSE COUNSEL]: We already initialed.

THE COURT: You did. Just look at my response. All right. . . .

Judge Welch returned the note, writing on its back, "[a]ll the evidence is in. You must rely upon your own recollection and/or review of that evidence." After further deliberation, the jury convicted Hanse of first degree felony murder and use of a handgun in the commission of a crime of violence against Burley, first degree burglary and possession of a handgun after commission of a prohibited crime, and first-degree assault and use of a handgun in the commission of a crime of violence against Jeffers. He was acquitted of the attempted first and second-degree murder of Jeffers.

**Post-Trial Motions**

On September 30, 2016, Hanse moved for a new trial under Maryland Rule 4-331, citing no specific reason or issue. The motion was denied without a hearing by Judge Cynthia H. Jones on October 18, 2016. On November 22, 2016, Hanse filed a motion captioned "Amended Motion for a New Trial," in which he asserted that the Sinai Records were withheld improperly: the State "presented it[]s evidence to defense on 34 CD[]s in which there were medical records of the alleged victim Marvin Jeffers from Northwest

Hospital[,]" but at trial, the State "introduced into evidence medical records . . . from both Sinai Hospital and Northwest Hospital[.]" The motion stated further that defense counsel "was shocked" that the jury "asked a question about. . . records from Sinai Hospital show[ing] [] the alleged victim . . . 'had fired his firearm at someone else.'" "[C]ertainly [defense counsel] would have cross-examined [] Jeffers on this statement[,] but did not raise any objection because she thought that perhaps, with the large amount of discovery, she had overlooked the records from Sinai Hospital." She later confirmed with the State that the Sinai records were not provided.

The State filed a response on December 7, 2017, in which it conceded that the Sinai Records had been omitted, but asserted that the omission was inadvertent. Regardless**,** the State argued that the Sinai Records did not constitute newly discovered evidence meriting a new trial because they would have been discovered "had counsel conducted due diligence." The State reasoned that other documents submitted during discovery referred to the Sinai Records. For instance, the Northwest records contained a "Patient Transfer Form" on which a physician had written "Sinai E[mergency] D[epartment]" as the name of the "receiving facility" and, the homicide detectives' reports indicated that Jeffers was hospitalized a Sinai. The State also produced a document from the Baltimore City Police Department indicating that a technician was deployed to Sinai to photograph Jeffers, and, the State produced the photographs taken at Sinai.

The State pointed out that defense counsel cross-examined Jeffers regarding his hospitalizations and toxicology report. "Whether Jeffers had a gun that night was

irre[leva]nt[,]" because at most, the evidence could have been used to impeach Jeffers, and "impeachment evidence alone," the State claimed, "is not enough to grant a new trial."

**The Court's Oral Ruling on the Motion and Sentencing**

The sentencing judge, in this case the same judge who presided over the trial, began the sentencing hearing on January 9, 2017 by discussing the motion for a new trial. After the parties presented their arguments, largely reiterating the points made in their supporting memoranda, the court denied Hanse's motion. The court found that the evidence could have been discovered sooner, its use for impeachment would not be relevant to the issues in the case, and it was unlikely to have affected the outcome of the trial:

> THE COURT: . . . having reviewed and considered the defendant's, I guess, renewed or amended motion for new trial and . . . the State's response thereto and the applicable case law as well as the Court's review of its own trial notes from this two- or-three-day trial in September of 2016, the Court, in reviewing the appropriate case law and specifically the holding *Jones v. State* and looking at the five factors and recognizing the State's admission or the oversight in providing those [Sinai Records], so it's—I guess it is newly discovered by the defendant after the trial, but the Court, I guess, believes that based upon the cross examination that the defense had of Mr. Jeffers and those records [that] the . . . evidence could have been discovered then.
>
> But the Court does note that the [] evidence, though, [] would merely be used for impeachment purposes and I'm not certain if it is that material to the issues involved in this case based upon the other evidence in this case. And the Court is not certain that if that evidence even had been presented that it would produce an acquittal. And the Court, in the exercise of its discretion and now almost acting as a fact-finder, the Court . . . does not believe that even with that evidence it would have been a substantial possibility of a different result [] or that it would probably have produced an acquittal.
>
> So for those reasons the Court will respectfully deny the defendant's renewed motion for a new trial.

Defense counsel then asked the court permission to "just say one thing," to which the court responded affirmatively, and the following colloquy ensued:

> [DEFENSE COUNSEL]: I hope the Court did take into consideration the fact that one of the—at least one of the jurors thought it was important enough to ask—
>
> THE COURT: I understand.
>
> [DEFENSE COUNSEL]: —a question. That in my mind raises the clear possibility that it may have made a big difference in the verdict.
>
> THE COURT: The Court's taken that into consideration.
>
> [DEFENSE COUNSEL]: Thank you.

The court then imposed several sentences that Hanse must serve consecutively: life in prison for the felony murder of Burley; 15 years, without the possibility of parole for the first five years, for the use of a handgun in a crime of violence against Burley; 10 years for the first-degree assault of Jeffers; and 10 years, without the possibility of parole for the first five years, for the use of a gun in a crime of violence against Jeffers. The court also sentenced Hanse to 20 years for first-degree burglary and 5 years for possession of a regulated firearm after a previous conviction, both of which are to run concurrent to his other sentences.

On January 13, 2017, Hanse noted his timely appeal to this Court.

## DISCUSSION

### I.

### Motion for a New Trial

Hanse argues that the circuit court erred in denying his motion for a new trial because the Sinai Records constitute newly discovered evidence under Maryland Rule 4-331(c). He contends that his motion met all three elements necessary to obtain relief under

the rule: it established that (1) the evidence could not have been discovered within ten days of the verdict, (2) the evidence is material, and (3) the evidence is persuasive.

Specifically, Hanse argues that the evidence was *de facto* non-discoverable within 10 days after the trial because the trial court "dispos[ed] of the motion on persuasiveness grounds[.]" Additionally, it would be "fundamentally unfair" to hold him responsible for "divining" the evidence among the "34 CDs of discovery" the State provided.

The evidence is material, he argues, because it "did not involve a collateral matter" and, in its absence, there was no opportunity to "impeach[] [Jeffers's] version of events[.]" The evidence is persuasive, Hanse continues, because the jury sent a note seeking "'clarity' as to the possible implications of the medical report." "Had the defense been aware of the evidence and been able to use it at trial," Hanse concludes, "the result may well have been different." Hanse points out that Jeffers's version of events was the only one presented to the jury, and that the jury had no reason to question his account of the events "until it come to light that he had indicated to hospital personnel that he was in possession of a weapon at the time and that he had actually fired it."

The State counters that the evidence was not newly discovered because Hanse "learned of it *before* the jury reached a verdict," and further highlights that following the jury note, defense counsel "lodged no objection to the circuit court's proposed response[.]" Moreover, the State urges that there was "abundant evidence" that, with due diligence, the Sinai Records could have been discovered before trial, and certainly even after trial, defense counsel did not even mention the issue in the first motion for new trial.

The evidence was immaterial, the State argues, because it was "merely cumulative" of other evidence presented at trial. Furthermore, there was no basis for impeaching Jeffers with the Sinai Records because he testified that he "fought back" against his assailants, but he was never asked whether he had a weapon.

Finally, the State maintains that the Sinai Records were unpersuasive, as Hanse failed to establish the "substantial possibility" that the jury would have returned a different verdict had it had the evidence before it. The State emphasizes that the jury had the Sinai Records and considered them, as well as the possibility in light of Hanse's closing argument, that Jeffers drove himself to the hospital in order to dispose of a gun he had used.

We review a circuit court's denial of a motion for a new trial for abuse of discretion. *Campbell v. State*, 373 Md. 637, 665 (2003). The exercise of the judge's "sound discretion" must be reflected in the trial record. *Id.* An abuse of discretion occurs when a "trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Id.* at 665-66 (citation omitted). A trial judge "has wide latitude in considering a motion for new trial and may consider a number of factors, including credibility[.]" *Argyrou v. State*, 349 Md. 587, 599 (1998) (citation omitted). Accordingly, the trial court's ruling "will not be disturbed on appeal except under the most extraordinary and compelling reasons." *Jones v. State*, 16 Md. App. 472, 477 (1973).

Maryland courts have "long [] recognized that *a new trial may be granted by the judge in a criminal case tried*" before a jury. *Yonga v. State*, 446 Md. 183, 208 (2016) (internal quotations omitted) (emphasis in original). A new trial based on newly discovered evidence is governed by Maryland Rule 4-331, which provides, in relevant part:

> **(a) Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
>
> * * *
>
> **(c) Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.][3]

Maryland decisional law further delineates three factors the trial court must consider before granting a new trial under 4-331(c). *Cornish v. State*, 461 Md. 518, 529-30 (2018); *Argyrou*, 349 Md. at 601. "The evidence offered as newly discovered must be material to the result and that inquiry is a threshold question." *Argyrou*, 349 Md. at 601 (citation omitted). Materiality requires the proffered evidence "be more than 'merely cumulative or impeaching.'" *Id.* (quoting *Jones*, 16 Md. App. at 477). Additionally, "like materiality, whether the proffered evidence is, in fact, 'newly discovered evidence which could not have been discovered by due diligence' is a threshold question." *Id.* (quoting *Stevenson v. State*, 299 Md. 297, 302 (1984)); *accord Cornish*, 461 Md. at 529.

Accordingly, before broaching "the significance of the evidence[,]" we must cross two thresholds: we must determine whether the proffered evidence is "material and whether the evidence could have been discovered by due diligence[.]" *Campbell*, 373 Md.

[3] Section (c), on its face, requires that a motion for a new trial filed 10 days after the verdict be filed within one year *after sentencing*. Although Hanse filed his underlying motion for a new trial beyond the 10 days required by subsection (a) but before sentencing, as required by subsection (c), the Court of Appeals has held that a premature motion for a new trial is within the jurisdiction of the circuit court. *Campbell*, 373 Md. at 665.

at 669. "It is only when this definitional predicate has been established that the provisions of Rule 4-331(c) even become involved," or that we reach the other requirement prescribed by case law: that the "[t]he newly discovered evidence may well have produced a different result[.]" *Argyrou*, 349 Md. at 601 (citations omitted); *accord Cornish*, 461 Md. at 530.

In short, the evidence must pass the thresholds of materiality and due diligence, meet the requirements of the rule, and must also evince "a substantial or significant possibility that the verdict of the trier of fact would have been affected" by the evidence offered as newly discovered. *Argyrou*, 349 Md. at 601 (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)); *accord Cornish*, 461 Md. at 532-34.

**A. The Materiality Threshold**

In *Campbell v. State*, the Court of Appeals grappled with whether new evidence was materially sufficient to merit a new trial under Rule 4-331(c). 373 Md. at 670. The State's case in *Campbell* was like the instant case in that petitioner Campbell was charged with murder and other crimes stemming from his participation in a drug deal, supported by testimonial evidence alone. *Id.* at 641-42. Veal, a witness, testified that Campbell had disclosed to him his role in the murder. *Id.* at 642. On the stand, Veal also testified to a myriad of credibility-straining facts about himself, including that he killed seven people within an 18-month period as a "hit man," for which he was paid in either money or crack cocaine. *Id.* at 642, 670. He additionally testified that his participation in Campbell's trial was in a bid to avoid the death penalty. *Id.* Campbell was nevertheless convicted of various charges. *Id.* at 642. He subsequently moved for a new trial alleging the existence of newly

discovered evidence suggesting, *inter alia*, that Veal had falsely accused another person for murder in a different case. *Id.* at 642-44.

The circuit court heard Campbell's motion on the same day as sentencing, and concluded that because defense counsel was able to "challenge [Veal] on the fact that he had committed a number of murders[,] . . . [the evidence proffered as newly discovered] would just be one more line of impeachment." *Id.* at 644-45. The Court of Appeals affirmed, holding that materiality defeated Campbell's motion. *Id.* at 672. The Court weighed the "presentation of impeachment evidence at trial" against the "collateral nature of the newly discovered evidence," and concluded that the trial judge did not abuse his discretion "by deciding that the evidence was cumulative impeachment evidence." *Id.* The trial judge "'felt the pulse of the trial' and was entitled to rely on his own impressions to determine . . . that the new evidence bearing on [] Veal's trustworthiness was not substantially likely to tip the balance in favor of Campbell"—given the tremendous amount of evidence already submitted to the jury regarding Veal's lack of credibility. *Id.*

Applying the directives in *Campbell*, we discern no abuse of discretion by the trial judge regarding its determination concerning materiality. Although the judge stated that he was "not certain if [the evidence] is that material to the issues involved in this case[,]" he *did* conclude that the Sinai Records would "merely be used for impeachment purposes[.]" Like the defense in *Campbell*, defense counsel *was* able to challenge Jeffers's credibility. *Id.* Defense counsel questioned Jeffers on his drug use and the fact that his hospital medical records revealed marijuana in his bloodstream. And, defense counsel specifically asked Jeffers about his transfer to and hospitalization at Sinai. Moreover**,** even

though Jeffers testified that he fought back against his assailants, defense counsel failed to question him about whether he had a gun or any other weapon.

In light of the trial court's "wide latitude in considering a motion for a new trial[,]" *Argyrou*, 349 Md. at 599, and finding no "extraordinary and compelling reasons" to hold otherwise given defense counsel's cross-examination of Jeffers, *Jones*, 16 Md. App. at 477, we find no abuse of discretion.

**B. The Due Diligence Threshold**

Whether evidence is newly discovered under Rule 4-331(c) contemplates "two aspects, a temporal one, *i.e.*, when was the evidence discovered?, and a predictive one, *i.e.*, when should or could it have been discovered?" *Argyrou*, 349 Md. at 602. It is the latter question that pertains to due diligence. *Id.* The predicative aspect "has both a time component and a good faith component; the movant for a new trial must not only act in a timely fashion in gathering evidence in support of the motion, but he or she must act reasonably and in good faith as well." *Id.* at 604-05.

The good faith component contemplates whether "the defendant act[ed] reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Id.* at 605. There is some overlap with the time component, in that we assess whether the movant acted "in a timely fashion in gathering evidence in support of the motion[.]" *Id.* at 605.

The time component contemplates when, exactly, the evidence was discovered. *Id.* at 602. Rule 4-331(c) requires the proffered evidence "not have been discovered . . . in time to move for a new trial pursuant to section (a)." Namely, the evidence must not have

been discoverable "within ten days after the verdict." Md. Rule 4-331(a), (c); *see also Campbell*, 373 Md. at 656-57 (explaining that a motion for a new trial based on newly discovered evidence must be filed at least 10 days after the verdict, and before one year after the verdict); *see also Love*, 95 Md. at 426-27 (noting that under Rule 4-331(c), the time to file is broad—10 days to one year after the verdict—but the possible grounds are limited to newly discovered evidence).

Neither the good faith nor the time requirements can be circumvented through excuse: "[e]ven a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence." *Love*, 95 Md. App. at 436. The complainant must establish, to the trial court's satisfaction, not that he or she tried to act, or had a good reason not to act, but that he or she *did* act with due diligence. *Id.*

**1. Good Faith**

The *Love* case is instructive on the good faith requirement under the due diligence analysis. *Id.* at 439. Love was convicted of armed robbery and other charges related to the theft of clothing from a Sears department store. *Id.* at 424. He had taken several items of clothing into a dressing room, put them on under his own clothes, and "thus sartorially bloated and ballooned," walked out of the store. *Id.* at 424-25. Two security guards, Hubbert and Edgar, followed Love to the parking lot, where a scuffle ensued. *Id.* at 425. At trial, Edgar testified that Love elbowed Hubbert in the face, threw punches, wrestled with him to the ground, and flashed a "locked blade Buck-type knife"—the latter fact supporting the heightened charge of armed robbery. *Id.* Hubbert was never deposed and

did not testify at trial. *Id.* at 423-25, 435. Love was convicted of armed robbery and other charges.

Subsequently, Love moved for a new trial, claiming that Hubbert's version of events was that no knife was involved, and that her account constituted newly discovered evidence. *Id.* at 424. At a hearing on the motion, Hubbert testified that Love had never brandished a knife, that no one had been tackled to the ground, and that she had dodged Love's elbow. *Id.* at 425-26. Although the trial judge found that this evidence was material, he denied the motion based on a lack of due diligence: "'no one representing [Love] talked to [Hubbert] before the trial and I can't, and as much as I would like to, I can't make an inference of due diligence based on the facts alleged.'" *Id.* at 435. On appeal, Love argued that defense counsel omitted Hubbert's accounting of events as a matter of trial strategy, and that to deny Love a new trial would be a miscarriage of justice. *Id.* at 436-37.

We affirmed the trial court, opining that failed trial strategy can be an appropriate ground for a new trial under Rule 4-331(a), but not under the very narrow restrictions of 4-331(c), which mandates a demonstration of due diligence. *Id.* at 436-37, 439. And because no one from the defense had ever bothered to contact Hubbert, the trial court had not abused its discretion in denying Love's motion. *Id.* at 435. Love's miscarriage-of-justice argument did not excuse the failure, because, as noted *supra*, even a good excuse is not a "'trump' card available to a defendant to override his otherwise foreclosing failure, under section (c), to have exercised due diligence." *Id.* at 438. Due diligence, rather, must have actually been performed. *Id.*

Returning to the facts before us, the trial court in the instant case found that the Sinai Records "could have been discovered" based on the "cross examination that the defense had of [] Jeffers" on the very subject of Jeffers's stay at Sinai.[4] **S. 20.** Indeed, by exercising due diligence, Hanse could have also discovered the Sinai Records were omitted when the court admitted the State's exhibit 7.

Hanse's second argument—an appeal-to-justice claim that holding defense counsel responsible for "divining" the Sinai Records from "34 CDs of discovery" would be "fundamentally unfair"—is as unavailing as was the appeal to justice in *Love*. *Id.* at 436-37. If the sheer volume of discovery were a good reason in itself for an omission to go unnoticed—and we do not believe that it is—it would not matter, because "[e]ven a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence[.]" *Love*, 95 Md. App. at 436. Accordingly, we find no abuse of discretion in Judge Welch's finding that defense counsel did not exercise due diligence.

[4] We reject Hanse's argument that by "disposing of the motion on persuasiveness grounds[,] [] the trial court necessarily" found the exercise of due diligence. The trial court explicitly found that "the evidence could have been discovered." Further, even if the trial court had based its ruling solely on persuasiveness, that would not preclude us from affirming the trial court's decision on alternative grounds. *See Campbell v. State*, 373 Md. 637, 669-71 (2003) (affirming trial court's denial of motion for new trial because, in part, the evidence was not newly discovered, despite the fact that the trial court denied the motion on alternative grounds); s*ee also Unger v. State*, 427 Md. 383, 406 (2012) (noting that "an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally correct, the trial court's decision will be affirmed on such alternative ground.").

**2. Time**

The petitioner satisfied the time requirement of due diligence in the recent Court of Appeals' decision in *Cornish v. State.* 461 Md. at 538. A murder occurred in a drug deal gone wrong, and the killer was implicated by a single witness. *Id.* at 522. The witness, Pope, introduced a potential customer to Cornish, a marijuana dealer. *Id.* The three men met at an auto body repair shop for the transaction. *Id.* At trial, Pope testified that Cornish and the buyer left the car, he then heard two gunshots, and, "in shock," he helped Cornish move the customer's body. *Id.* at 522-23. A jury found Cornish guilty of murder and other crimes associated with the incident. *Id.* at 523.

Unbeknownst to Cornish, Pope had been under investigation for other crimes, and had given statements to investigators that were in direct contradiction with his trial testimony. *Id.* When Cornish became aware of Pope's statements, he moved for a new trial based on newly discovered evidence. *Id.* In one statement made to a federal investigator investigating a different matter, in a conversation occurring exactly a month after the verdict, Pope averred that a detective on the Cornish case had woken him at 4:30am on the day of the trial, asserted that cell phone data put him at the scene of the murder, and had threatened to charge him if he would not testify against Cornish. *Id.* The Court of Appeals held, *inter alia*, that the evidence was newly discovered because the evidence itself—the statement made to the federal investigator—"did not exist within 10 days of the verdict . . . and therefore fulfill[ed] the requirement of Rule 4-331(c)." *Id.* at 538.

In contrast with the evidence in *Cornish*, the evidence in the case before us existed since the day after the murder, and will continue to exist for the number of years medical records must be maintained under state and federal laws.[5] It is uncontested that defense counsel became alerted to the omission of the Sinai Records when the jury submitted a question about them: defense counsel "was shocked" that the jury asked a question about the Sinai Records; she thought that she had, "with the large amount of discovery, . . . overlooked the records," and she later confirmed with the State that they were not provided. Because defense counsel acknowledged that she learned of the Sinai Records during jury deliberation, the records were, *ipso facto*, discoverable within 10 days of the verdict, and thus are not grounds for a new trial under 4-331(c). *See Cornish*, 461 Md. at 538; s*ee also Argyrou*, 349 Md. at 598, 609 (upholding the circuit court's denial of a motion for a new trial under Rule 4-331(c) because the defendant failed to meet his burden of establishing that evidence was unknown to him at the time of trial).

**C. Persuasiveness**

Even if Hanse had met the threshold requirements of demonstrating due diligence and materiality, he was still required to show that the evidence proffered as newly discovered was persuasive enough to produce an alternative outcome. To produce a different result, the proponent must persuade the trial judge that "there was a substantial or

[5] *See, e.g.*, Maryland Code (1982, 2015 Repl. Vol.), Health–General, § 4-403 (requiring health care providers to keep medical records, absent notice to the patient, for five years).

significant possibility that the verdict of the trier of fact would have been affected." *Yorke*, 315 Md. at 588; *Cornish*, 461 Md. at 530.

In this case, the jury *had before it* the evidence proffered as newly discovered. We cannot reasonably conclude that submitting the Sinai Records to the jury again, after providing Hanse the benefit of a bit more cross-examination, suggests a "substantial or significant possibility" the jury would have reached a different result. *Yorke*, 315 Md. at 588. Judge Welch stated that he did "not believe that even with that evidence it would have been a substantial possibility of a different result—or that it would probably have produced an acquittal." The jury was clearly able and entitled to decide that, even if Jeffers had a gun, Jeffers did not shoot Sierra Burley or himself in hand and then twice in the head. Accordingly, the reintroduction of the Sinai Records was not "substantially likely to tip the balance in favor of" Hanse, and thus we find no abuse of discretion. *See Campbell*, 373 Md. at 672

We conclude that Hanse failed to demonstrate that the Sinai Records were material, or that defense counsel exercised due diligence to discover the fact that the State failed to produce the records during discovery—especially once the issue was raised by the jury note—prior to the expiration of the 10-day period under 4-331(a). Moreover, because the evidence in question was demonstrably known by Hanse before the verdict, and because the jury had the evidence before it, we find no abuse of discretion in the trial court's denial of Hanse's motion for a new trial.

## II.

## Merging Convictions

Hanse next argues, and the State concedes, that his sentence for first-degree burglary should have been merged with his sentence for felony murder because of the constitutional protection against double jeopardy.

The doctrine of merger preventing "multiple punishments for the same offense," *Coleman v. State*, 237 Md. App. 83, 99 (2018), is grounded upon the Fifth Amendment of the United States Constitution and Maryland common law prohibitions on multiple sentences for the same act. *Nicolas v. State*, 426 Md. 385, 400-01 (2012) (citing *Khalifa v. State*, 382 Md. 400, 431-33 (2004)). Sentences for two convictions must be merged when the convictions are based on the same act, or when "one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 689, 737 (2014) (citations omitted). A trial court's failure to merge a sentence when required to do so produces an "illegal sentence" under Maryland Rule 4-345(a). *Coleman*, 237 Md. App. at 99.

The Court of Appeals has previously held that burglary is a lesser-included offense of felony murder when "[b]urgarly [i]s the underlying felony." *State v. Rivenbark*, 311 Md. 147, 160-61 (1987). Accordingly, we agree with the parties that the circuit court erred by failing to merge Hanse's burglary conviction with his conviction for felony murder. When merger is appropriate, we typically "vacate[] the sentence that should be merged without ordering a new sentencing hearing." *Carroll v. State*, 202 Md. App. 487, 518-19 (2011), *aff'd*, 428 Md. 679 (2012). We shall do so here and vacate Hanse's 20-year sentence for burglary, leaving intact his separate life sentence for the felony murder of Sierra Burley.

**APPELLANT'S SENTENCE FOR FIRST-DEGREE BURGLARY VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. APPELLANT TO PAY 60% OF COSTS; MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY 40% OF COSTS.**