UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0098

September Term, 2016

BARRINGTON DEAN WATTS

.

v.

STATE OF MARYLAND

Wright,
Berger,
Nazarian,

JJ.

Opinion by Wright, J.

Filed: February 9, 2017

This appeal arises out of the criminal charges, jury trial, and guilty verdict that resulted from events which took place at the Peppertree Farm Apartments in Silver Spring, Maryland, on November 9, 2014.

On December 18, 2014, the grand jury indicted Barrington D. Watts, as well as co-defendants, Daniel Proctor and Kristian Gumbs, charging them with two counts of assault in the first degree, one count of armed robbery, one count of use of a firearm in the commission of a felony/crime of violence, and three counts of conspiracy to commit the named offenses. Proctor and Gumbs both pled guilty prior to Watts's trial, which began on July 14, 2015, in the Circuit Court for Montgomery County. At the conclusion of the trial, the jury found Watts guilty on all counts. The court later sentenced Watts to 12 years' imprisonment for each count,[1] to be served concurrently, with 360 days credit for time served.[2]

Watts filed a timely motion for a new trial on a number of grounds, including the two addressed below, regarding the suspected perjured testimony of a witness in the State's case, and jury instruction on the assault charges. The motion was denied without argument. This timely appeal followed.

[1] Watts was not sentenced on count 1 because it merged into count 3, nor was he sentenced on counts 5 or 7 because they merged into count 6.

[2] The first five years of the sentence Watts received for the use of a firearm in the commission of felony/crime of violence is to be served without the possibility of parole.

QUESTIONS PRESENTED

We have reworded Watts's questions for clarity, as follows:[3]

> I. Did the court err when it denied Watts's motion for a new trial, based on trial testimony from a witness for the State?
>
> II. Did the trial court commit reversal error when it included two varieties of second degree assault and did not propound a separate unanimity instruction regarding second-degree assault?

For the following reasons, we affirm the decision of the circuit court.

FACTS

This case arises from a robbery gone bad, with one of the perpetrators still at the scene when the police arrived suffering from a gunshot wound.

On November 9, 2014, Lavasha Harding lived in an apartment on Pear Tree Court in Silver Spring, Maryland, with her two young children, her mother, Kristie Thompson, her brother, and her sister. At the time of the incident Harding, Thompson, Andre French, Antonio Woods, and Harding's two children were present in the apartment. Woods, Thompson, and Harding's son were in the back bedroom, Harding's daughter was asleep on the couch, and Harding and French were in the kitchen.

Harding's trial testimony provides the following narrative. While Harding and French were in the kitchen, French was on the phone. Harding heard "a whole bunch of

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[3] In his brief, Watts asks:

> 1. Did the court err in denying Mr. Watt's motion for a new trial where the State knowingly presented false testimony from a key witness?
>
> 2. Did the court's jury instructions on the assault charge improperly permit the jury to find Mr. Watts guilty without reaching unanimity on the elements of the underlying offenses?

stomps and stuff." She then looked toward the front door and observed two men in the apartment who "were wearing masks" and "had a gun."

The men were later identified as Proctor and Watts. Harding testified that the man, who was later identified as Proctor, was wearing a black bandana across his face, and Watts was holding a gun. She testified that Watts told French to "get on the floor" and repeatedly asked, "Where the money at?" The two men passed the gun back and forth, and Watts took French's shoes and pants off while Proctor pointed the gun at Harding. Watts told Harding to take him to the back bedroom and continued to ask about "the money." French, Watts, and Proctor then struggled for control of the gun. Melee ensued, which resulted in Woods being shot, and Watts being badly beaten. When Harding returned from the back bedroom, she noticed that French or Woods had "gotten the gun" and slid it across the room to Thompson, who took then the gun and "put it up until the police had come." The police being called, responded, and arrested Watts.

On cross-examination, Harding was confronted with her statement to police that Proctor, not Watts, had the gun when they entered the apartment. Harding also admitted that she heard only two shots but believed she saw three shots.

Proctor was arrested one month later. He was interviewed by the police, and he gave "five different versions of how [his] gun got to Peartree Court." He agreed that he initially lied about many details of the events but eventually admitted his involvement and told the police that the gun was his. Proctor pled guilty to armed robbery and expected to receive an eight-year sentence. He agreed that, as part of his plea agreement

with the State, he "agreed to testify truthfully in any proceedings against any of [his] co-defendants," and that he hoped to receive a lesser sentence because of his cooperation.

Proctor testified that Watts, with whom he was friends, approached him about the robbery, telling him that it was "a move for $30,000[.00] in counterfeit money." He further testified that Watts told him to bring the pistol, referring to a 9mm Desert Eagle pistol which Watts knew Proctor owned. Proctor stated that he held the gun at times, as did Watts, but denied shooting Woods or ever firing the gun.

French testified that Harding was his girlfriend, and that on the night in question, two men entered the apartment – a tall one (Proctor) and a short one (Watts). Watts, who was not wearing a mask, kept saying "give it up" and "where is it at." Proctor testified that at some point, Watts got angry, took the gun from Proctor, and cocked it. French testified that the two men then put him on the ground, took his shoes and pants off, and continued to say "give it up" while threatening to kill him. French stated that he didn't know what they were referring to, but that he gave them "whatever money [he] had in [his] pocket" and "a gold chain."

On cross-examination, French denied selling counterfeit money, stating that he did not know how the counterfeit money recovered from the apartment got there. French told the police that he had $2,500.00 in his pocket but testified that it was not counterfeit, and that he had the money to help his sister pay for a trip.

Numerous officers responded to the call. Officer Michael Malfesi responded and testified that he encountered a chaotic scene, and that it was not immediately clear who was a victim and who was a suspect. His main focus was Watts, who was lying on the

floor asking for help and reported he'd been shot, although Officer Malfesi did not believe Watts had been shot. Officer Malfesi also encountered Woods, who had a gunshot wound to the shoulder. Officer Robert Dranzik also responded and was the first to locate the "silver handgun with a black grip" which was "on top of a black milk crate." Lashon Perkins, a forensic specialist with the Montgomery County Police Department, responded to process the scene. She took photos and collected several pieces of evidence, including casings from a 9mm handgun. Perkins also seized a "wad of cash." The cash was later determined to be $2,500.00 in counterfeit currency. Detective Daniel Krill, the primary detective, arrived at the scene about forty-five minutes to an hour after the incident. Detective Krill acknowledged that the $2,500.00 in counterfeit money was found in the apartment and that no further investigation into this money was conducted.

In her testimony, Harding agreed that $2,500.00 in counterfeit money was found in the apartment; however, she stated that the money was neither hers nor French's, that she had never seen the money before, that she did not know where it came from, and that French was not selling the money.

Additional facts will be provided as they become relevant to our discussion, below.

DISCUSSION

I. Motion for a New Trial

Watts avers that the State violated his constitutionally protected right to a fair trial when it "knowingly elicited false testimony from a key State witness and it was error for

the trial judge to deny [his] motion for a new trial on that ground." Watts specifically takes issue with the State's use of French's testimony regarding the $2,500.00.

Detective Krill testified that the police recovered $2,500.00 in counterfeit money from the apartment. Forensic specialist Perkins testified that the $2,500.00 in counterfeit money was the total amount of money found on the scene. French told the police on the day of the incident, that he "had like 2,500[.00] in [his] pocket."

Watts's defense was that he went to the apartment to purchase counterfeit money from French, not to commit robbery, and that things when awry because of Proctor's actions. Proctor's testimony was that he and Watts were going to the apartment to get counterfeit money. However, French's testimony was to the contrary.

Prior to the trial, there was some question as to whether French, who had been subpoenaed to testify, would do so, and if he did appear to testify, whether he would assert his Fifth Amendment privilege.[4] The State told the circuit court that French did potentially have a Fifth Amendment right, and there were assertions that French was in "possession, at minimum, of the counterfeit money."

French was called to the stand and denied any connection to or knowledge regarding the counterfeit money. Instead, he gave multiple and varied accounts of his connection to any cash found that day, including telling police that he had $2,500.00 in

[4] The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fourteenth Amendment applied the protection against self-incrimination to the states. *Smith v. State* 394 Md. 184, 210, (2006). Article 22 of the Maryland Declaration of Rights similarly provides that "no man ought to be compelled to give evidence against himself in a criminal case."

his pocket; and also claiming that he never told the police the exact amount of money he had, but instead told the police that he couldn't remember how much money he had; that his statement to the police was coerced; that the money came from a winning lottery ticket; and that he had the money to help his sister pay for a trip and some apartment expenses. It is Watts's contention that French's testimony was false, and that the State knowingly introduced it.

The State accepts the well-established rule that "the knowing and intentional use of false testimony by the prosecution is a violation of due process provid[ed] such testimony is material to the result of the case." *Stevenson v. State*, 299 Md. 297, 305 (1984). *Accord Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 154 (1972). However, the State argues that Watts fails to meet any of the three criteria required to support his claim that the State violated due process through French's testimony.

Maryland Rule 4-331(a) provides that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." The decision whether to hold a hearing on a motion filed under this Rule is reviewed for an abuse of discretion, as is the ultimate decision to deny such a motion. *Genies v. State*, 426 Md. 148, 161 (2012). "Abuse of discretion" has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). A ruling reviewed for an abuse of discretion will not be reversed "simply because the appellate court would not

have made the same ruling." *Norwood v. State*, 222 Md. App. 620, 643 (2015) (citations omitted). Rather, a trial court's "decision is an abuse of discretion when it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."' *Id.* (citations omitted).

Watts advocates for a different standard of review, as set forth in *Merritt v. State*, 367 Md. 17 (2001). In *Merritt*, the Court of Appeals held that when an alleged error occurs during trial and "when the losing party or that party's counsel, without fault, does not discover the alleged error during the trial," the denial of a new trial motion is reviewed for clear error, and if error is found, then for harmless error. *Id.* at 31. Watts requests that we review the circuit court's decision under the "error" standard, because Watts could not have known in advance that French was going to "testify falsely, thereby moving for relief prior to the testimony." However, Watts avers that the alleged error was based on French's statements prior to trial in contrast to those admitted during trial. The *Merritt* rule can only be invoked if Watts would not have had knowledge of French's changed testimony until after the trial itself. Since the changing of French's testimony during the trial was hotly debated, Watts was aware, and the alleged error was discovered during trial. Therefore, the standard of review is for an abuse of discretion.

What is known as a "*Napue* claim requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity. Perjury offered under these circumstances is material if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Basden v. Lee*, 290 F.3d 602, 614 (4th Cir. 2002) (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Stated another way,

a *Napue* claim requires proof of three elements: (1) that evidence is actually false, (2) that the prosecution knew it was false, and (3) that the evidence was material. *United States v. O'Keefe,* 128 F.3d 885, 893 (5th Cir. 1997) (citation omitted). Therefore, in order to demonstrate error, Watts must establish that (1) French's testimony about the counterfeit money was false; (2) the State knew, or should have known, that the testimony was false; and (3) the false testimony was material.

Watts avers that "French lied when he testified at trial that the $2,500[.00] in counterfeit money was not his" and further states that "[t]his lie is established clearly in the record." To support this conclusion, Watts notes that the police recovered $2,500.00 in counterfeit currency from the apartment, that French admits that he "had like 2,500[.00] in [his] pocket," and that Proctor's testimony that he and Watts were "going to get counterfeit money" supports the finding that French's testimony is false. Watts also states that the counterfeit money was found near where French acknowledged he gave up what money he had in his pocket, and that the police did not find any other money in the apartment. Watts concludes that "French's admission that he 'had like 2,500[.00] in [his] pocket' in the living room of Apartment 24, coupled with both the police testimony that the $2,500.00 in counterfeit money in the living room was the only 'cash' recovered from Apartment 24 and Proctor's testimony that he was going to Apartment 24 to get counterfeit money, easily establishes that French lied during his trial testimony on this topic." We disagree with this conclusion.

Witnesses regularly provide inconsistent testimony for a number of reasons – we do not find them all to be false merely because they are inconsistent. Rather, it is the role

of the trier or fact to evaluate inconsistencies when assigning weight to the testimony. *Jones v. State*, 343 Md. 448, 460 (1996) ("In performing its fact-finding role, the trier of fact decides which evidence to accept and which to reject. Therefore, in that regard, it is not required to assess the believability of a witness's testimony on an all or nothing basis; it may choose to believe only part . . . of a particular witness's testimony, and disbelieve the remainder. Moreover, it is the trier of fact that decides to what, if any, weight the evidence adduced is entitled.") (Internal citations omitted).

Here, Watts confuses false testimony with testimony that is inconsistent with testimony of other witnesses or prior statements, and asks us to definitively conclude that a statement was untrue based on inference. For the following reasons, we decline to do so.

First, French's proximity to the counterfeit money is not definitive evidence that he knew about or possessed it. *Rich v. State*, 205 Md. App. 227, 236 (2012) ("The mere presence of a person at the time and place of a crime is not sufficient to justify a conviction for the commission of that crime"). French was not the only person in the apartment at the time the counterfeit currency was located. Woods, Harding, and Thompson were also there. Moreover, the apartment was leased to Thompson, not French, and he was there only when visiting Harding. Even if French had been the only party in the apartment at the time, there was no evidence presented as to how long the currency had been in the apartment.

Next, although Proctor testified that he and Watts were going to go get counterfeit currency, Proctor's testimony does not impute knowledge of the money to French, nor

does this testimony provide grounds for us to determine that the only possible conclusion is that French was in possession of counterfeit currency which he intended to sell, as Watts now urges. Harding also provided testimony that contradicted Watts's theory of the case and the premise that French was selling counterfeit currency.

Finally, Watts asks us to infer that because no other money was found in the apartment, this cache must be the money French was referring to when he stated he had $2,500.00 in his pocket. Watts again fails to recognize the number of parties engaged in this event, fails to realize that only $2,500.00 of counterfeit currency was found when "the move [was] for $30,000[.00] in counterfeit," and fails to note that Proctor left the scene prior to the police arriving.

Although Watts creates a list of facts from which one could draw an inference of untruthfulness, none, by itself or taken as a whole, provide credible proof that French's trial testimony was untruthful. We, therefore, cannot conclude that French's testimony was perjured.

Watts's argument fails to meet the first required element required for a *Napue* claim, and therefore it is unnecessary to examine the remaining elements. Accordingly, we hold that the circuit court did not err in denying Watts's motion for a new trial based on suspected false testimony elicited by the State.

II. Jury Instruction

Next, Watts avers that the circuit court violated his right to a unanimous jury verdict when it gave instruction on "two different crimes," each of which could provide the predicated second degree assault for the convictions on first degree assault.

"On appeal, instructions are reviewed in their entirety to determine if reversal is required." *Fleming v. State*, 373 Md. 426, 433 (2003). If the jury instructions, when "taken as a whole . . . correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Id*. On appeal, we review "a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011) (citation omitted). Thus, the trial court's finding "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Gunning v. State*, 347 Md. 332, 351-52 (1997) (citation omitted).

"A criminal defendant in a Maryland court is guaranteed an 'impartial jury' by the Sixth Amendment, as applied to the States through the Fourteenth Amendment and by Article 21 of the Maryland Declaration of Rights." *Caldwell v. State*, 164 Md. App. 612, 630 (2005) (internal citations omitted). Article 21 provides that in a criminal prosecution, the accused has the constitutional right to a jury "without whose unanimous consent he ought not be found guilty." *Id.* Watts avers that this right was violated, and as a result, concludes that a new trial must be granted.

The State advanced two theories under which the jury could reach a guilty verdict on the assault charge: Watts may have used a gun to place the victims in a state of fear, or in the alternative, he used the gun to commit battery. Watts avers that, based on the instruction, the jury could reach a guilty verdict by some jurors finding under the first

theory, and some finding under the second, rather than unanimity for either theory, which he concludes violates his right to a unanimous jury verdict.

The purpose of jury instruction is to ensure that the jury understands the elements of the charges and to assist the jury in arriving at a correct verdict. *Chambers v. State*, 337 Md. 44, 48 (1994). Here, Watts avers that the jury instructions conflate two separate offenses, treating them as a single crime, and improperly permitted the jury to render a seemingly unanimous verdict without ensuring actual juror unanimity as to the elements of a single charged offense.

The jury instruction, on assault, in relevant part, was as follows:

> In order to convict the defendant of first degree assault, the State must prove all of the elements of second degree assault, and I'll read you that instruction in just a second, in addition [the State] must also prove that the defendant used a firearm to commit the assault.
>
> . . .
>
> There are two ways that you can commit a second degree assault. One is, intent to frighten. Assault is intentionally frightening another person with the threat of immediate offensive physical contact or physical harm . . . .
>
> Battery. Assault is also causing offensive physical contact to another person. In order to convict the defendant of assault under battery theory, the State must prove that the defendant caused offensive physical contact or physical harm . . . .

This instruction is an excerpt of the pattern jury instruction on second degree assault. Maryland Criminal Pattern Jury Instructions ("MPJI–CR") 4:01. MPJI–CR 4:01 provides, in relevant part:

> **A**
> **INTENT TO FRIGHTEN**
>
> Assault is intentionally frightening another person with the threat of immediate [offensive physical contact] [physical harm]. In order to convict the defendant of assault, the State must prove:

(1) that the defendant committed an act with the intent to place (name) in fear of immediate [offensive physical contact] [physical harm];

(2) that the defendant had the apparent ability, at that time, to bring about [offensive physical contact] [physical harm]; and

(3) that (name) reasonably feared immediate [offensive physical contact] [physical harm]; [and]

[(4) that the defendant's actions were not legally justified.]

. . .

C

BATTERY

Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:

(1) that the defendant caused [offensive physical contact with] [physical harm to] (name);

(2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and

(3) that the contact was [not consented to by (name)] [not legally justified].

Watts, at both trial and on appeal, maintains that the circuit court erred in its inclusion of two varieties of assault without additional instruction regarding unanimity. After the instructions were given, defense counsel objected, stating "the defense would now like to reiterate our previous objections and object to the alternative instruction on assault and that it's possible that six jurors could go with one theory, six could go with another, and there would not be a unanimous verdict for him." Although Watts objected to the instruction on assault, the objection was functionally also focused on the instruction regarding unanimity.

Prior to the instruction on assault, the circuit court provided general instructions, including the following instruction on unanimity: "Unanimous verdict. Your verdict must represent a considered judgment of each juror and must be unanimous. In other words, all twelve of you must agree." This instruction is a verbatim reading of the Maryland Pattern Jury Instruction on Unanimity. MPJI–CR 2.03.

The State asks that we note Watts's lack of request for a curative or supplemental instruction on jury unanimity and asserts that as a result, to the extent that Watts claims error in the court's failure to give a curative unanimity instruction, that claim is not preserved. 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"). Md. Rule 4-325(e) provides, in relevant part, that "[n]o party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the ground of the objection." *See also Bowman v. State*, 337 Md. 65, 67 (1994) ("review of a jury instruction will not ordinarily be permitted unless the appellant has objected seasonably so as to allow the trial judge an opportunity to correct the deficiency before the jury retires to deliberate."). Assuming *arguendo* that the objection was timely and the claim is preserved, we turn to the merits.

The parties, in their briefs, discuss the assault statute at length and conclude that the issue turns on whether the assault statute defines one crime that can be committed in a

variety of ways, or multiple distinct crimes.[5] We agree, and must answer that question in order to evaluate if the instructions "correctly state the law, are not misleading, and cover adequately the issues raised by the evidence[.]" *Fleming*, 373 Md. at 433.

A. Singularity of Assault Under the Statute

Whether the crime of assault calls for unanimity instruction not only as to the verdict, but also as to the means of commission, depends on whether assault is a single crime merely committable in multiple ways, in which case jury unanimity as to the verdict is sufficient, or, rather, an umbrella crime for multiple autonomous offenses, in which case jury unanimity must delve deeper than the verdict to encompass the form of the offense. *Rice v. State*, 311 Md. 116 (1987).

The Supreme Court addressed a similar question in *Schad v. Arizona*, 501 U.S. 624 (1991). The defendant in *Schad* was charged with first-degree murder under a state statute which defined the requisite *mens rea* as either premeditation or "the intent required for [less than first-degree] murder combined with the commission of an independently culpable felony." *Schad*, 501 U.S. at 632. At trial, the prosecution relied on both theories, and the defendant appealed, asserting that the Sixth Amendment required the jury to agree unanimously as to which one was established by the evidence. *Id.* at 630. The Supreme Court rejected the claim. S*ee id.* at 631-32 (plurality opinion) ("We have never suggested that in returning general verdicts . . . the jurors should be

[5] For a thorough discussion on the history and complexities of the "multiple *relationships* among various *assaults* and various *batteries*," we refer to Judge Moylan's opinion, *Lamb v. State*, 93 Md. App. 422 (1992).

required to agree upon a single means of commission, any more than the indictments were required to specify one alone . . . . We see no reason . . . why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea.*").

Both parties before us agree that "[u]nanimity is not required . . . 'when the jury is presented with alternative theories of criminal liability for a single incident.'" *Hargrove v. United States,* 55 A.3d 852, 857 (D.C. 2012) (quoting *Williams v. United States,* 981 A.2d 1124, 1228 (2009)). Put another way, so long as both of the State's theories as to assault are simply alternative theories of criminal liability for a single assault, jury unanimity as to liability under one theory is not required.

However, if instead the assault statute identifies individual crimes rather than varieties of a single crime, jury unanimity would be required. In *Rice*, 311 Md. at 118-19, the Court of Appeals addressed a question similar to the one raised here by Watts, but in the context of the consolidated theft statute. There, the Court recognized that jury unanimity constitutionally constrains the General Assembly's broad power to define potentially disparate criminal acts within a single piece of legislation. *Id.* at 126. The Court reasoned that unanimity on the means of commission is required only in those cases in which the charged crime compromises multiple autonomous offenses. *Id.* at 132. If however, the charged crime is a single offense merely committable in alternative ways, the verdict cannot be attacked by showing that jurors differed in the means of commission. *Id.* To determine if a charged crime is unitary or compound, a court should:

> [E]xamine all the elements, not merely the element of conduct, that give a crime its distinctive character. Thus mental state, attendant circumstances, and result must be considered in addition to conduct. If after comparing the statutory alternatives with response to these basic elements the differences that emerge are substantial, the alternatives may have to be regarded as separate crimes for jury unanimity purposes.

Id. at 135.

The State asserts that the assault statute should be seen as analogous to the consolidated theft statue; that it outlines multiple varieties of a single crime. Maryland's Criminal Law Article, outlines assault in three varieties, and defines that "assault" means the "crimes of assault, battery, and assault and battery." Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article § 3-201(b). The term connotes three concepts: (1) "a consummated battery of the combination of a consummated batter and its antecedent assault;" (2) "an attempted battery;" and (3) "a placing of a victim in reasonable apprehension of an imminent battery." *Lamb v. State*, 93 Md. App. 422, 42 (1992).[6]

Watts contends that the Maryland Code defines the term of assault as including the *distinct crimes* of assault, battery, and assault and battery. Watts further contends that the three statutory concepts require differences in intent, and he requests that we infer distinct crimes from that difference. Watts asks that we look to a sister state for guidance. The Supreme Court of Montana held that when assault is statutorily defined as causing (1) bodily injury with a weapon, (2) reasonable apprehension of bodily injury with a weapon,

[6] In *Lamb*, while discussing merger, we stated that "[a]s an abstract proposition, assault of the threatening variety is not 'the same offense' as the battery thus threatened, within the contemplation of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." 93 Md. App. at 468. As Watts was neither charged nor convicted of battery, we are not presented with a merger issue as we were in *Lamb*.

or (3) bodily injury to a peace officer, these are not alternative ways of committing one crime, but rather three separate offenses, should be charged as such, and an instruction including two of the three definitions violates the defendant's right to jury unanimity. *State v. Weldy*, 902 P.2d 1 (Mont. 1995).

In Maryland, the assault statute abrogates and codifies the common law definition of assault. *Jones v. State,* 213 Md. App. 208, 218 n.5 (2013) ("In 1996, the Maryland General Assembly enacted Art. 27 §§ 12, 12A and 12A-1, which abrogated the crimes and offenses of assault and battery. As indicated, however, the offenses retained their judicially determined meanings.") (Citations omitted)). At common law, the "crime of assault encompasses two definitions: (1) an attempt to commit a battery (2) an unlawful intentional act which placed another in reasonable apprehension of receiving an immediate battery. *See Harrod v. State*, 65 Md. App. 128, 131 (1985) (citing *Taylor v. State,* 52 Md. App. 500, (1982);[7] *Woods v. State,* 14 Md. App. 627 (1972)). *See also Snyder v. State,* 210 Md. App. 370, 383-84 (2013) ("An assault is (1) an attempt to commit a battery or (2) an intentional placing of another in apprehension of receiving as immediate battery.") (Quoting *Dixon v. State,* 302 Md. 447, 457 (1985); *Anderson v. State,* 61 Md. App, 436, 440 n.1 (1985) ("Just as 'assault' can mean an actual battery . . . it also embraces two other varieties of criminal conduct . . . 1) an attempted battery, and

[7] Although we in *Harrod* took the "excellent opportunity to explain the distinctions between these different types of assault," we state emphatically that the common law crime of assault encompasses two definitions: (1) an attempt to commit a battery or (2) an unlawful intentional act which places another in reasonable apprehension of receiving an immediate battery. 65 Md. App. at 131, 133.

2) an intentional placing of another in apprehension of receiving an immediate battery.") (Citation omitted).

Further, we have consistently referred to the variations of assault under the statute as "varieties" or "forms" rather than naming them as distinct crimes. *E.g. Jones,* 213 Md. App. at 217 ("appellant committed the intent to frighten form of assault . . . the intent to frighten variety of assault requires . . ."); *Synder,* 210 Md. App at 379 ("to convict appellant of the attempted battery variety of assault").

Watts fails to persuade us that we should now choose to see the varieties of assault as individual crimes. Rather, relying on decades of common law and the statute instead, we agree with the State that the statute provides two ways which a person may commit the singular crime of assault.

B. Jury Instruction

We now turn to review the instruction as a whole, with the above analysis in mind. Because the pattern jury instructions were given on both unanimity and assault, and with our above affirmation regarding the singularity of the crime of assault, it is clear that the instructions correctly stated the law. Similarly, the pattern jury instructions presumably adequately covered the issues raised by the evidence, and we agree that they did in this case.

In his brief, while arguing that it was error to include both varieties of assault in the instruction, Watts notes that it is an abuse of discretion for the court to instruct the jury "with aspects of the law that have absolutely nothing to do with the case *as presented to that jury . . . .*" *Brogden v. State,* 384 Md. 631, 644 (2005). Watts

seemingly concludes from this quote that he "must be given a new trial on the assault convictions."

However, just after Watts reaches this conclusion while relying on *Brogden*, he also states, "the State proffered evidence . . . aimed at showing that Mr. Watts intended to frighten two victims – French and Woods. The State also argued that the evidence showed that Mr. Watts may have battered French and Woods." With these two sentences, Watts, in his brief, demonstrates precisely why both portions of the assault instruction were applicable based on evidence presented to the jury.

The Notes and Uses for the Pattern Instructions on second degree assault are also instructive here. The Notes provide additional guidance to trial courts regarding which sections of the instruction should be given under certain conditions and advise that it is unlikely that the instruction on both Intent to Frighten Assault and Battery applicable.[8] MPJI-CR 4:01. Although it may be "unlikely" that these two instructions be given together, it is not impossible, or even discouraged. Here, both instructions are applicable

[8] The Notes and Uses language, in full, is as follows:

> Use this instruction if the defendant is charged with second degree assault, under Md. Code Ann., Crim. Law I § 3-203 (2012). Use version "A" when the only theory of assault is an intent to frighten type of assault. Use (4) only if the evidence generates justification, *e.g.*, self-defense, and give the instruction for that justification. Use version "B" when the only theory of assault is an attempted battery type of assault. Out of an abundance of caution, use (3) unless it is clear that there is neither justification nor consent. Use version "C" when the only theory of assault is a battery. Out of an abundance of caution, use (3) unless it is clear that there is neither justification nor consent. Although version "B" and version "C" may both be applicable, it is unlikely that both version "A" and version "B" are applicable or that both version "A" and version "C" are applicable.

because the State reasonably advanced two alternative theories, both of which were supported by testimony at trial.

We cannot conclude that the inclusion of both varieties of assault in the jury instruction had "absolutely nothing to do with the case" or that their inclusion was an abuse of discretion. Because both varieties of assault were applicable, the inclusion of both instructions was not an abuse of discretion.

We now turn to whether an additional instruction on unanimity was required.

Watts invokes *State v. Cooksey*, 128 Md. App. 331, 335 (1999), rev'd in part on other grounds, 359 Md. 1 (2000), for the proposition that where a jury is presented with different theories which could result in conviction, the court may cure a potential unanimity defect by giving a special instruction on jury unanimity which states that the jury must be unanimous as to a single theory. While it was certainly within the circuit court's discretion to include such an instruction, *Cooksey* cannot be read to *require* a special instruction. Further, in *Cooksey*, we discussed when "multiple culpable acts" could be adduced to prove a single charged offense. *Id.* ("When evidence of multiple culpable acts is adduced to prove a single charged offense, the defendant is entitled either to an election by the prosecution of the single act upon which it is relying for a conviction, or to a specific unanimity instruction.") Here, Watts is not asserting that the jury could have reached their verdict based on two distinct acts, but rather based on two theories of criminality regarding Watts's *one act* of using the gun. As such, we are addressing multiple theories regarding a single act and a single charge. This materially distinguishes *Cooksey* from the case before us.

We again look at the pattern instruction for guidance. Significant advising exists as to which instruction should be given, or when multiples should be given such as attempted battery and battery which are often both applicable. However, despite the recognition that multiple varieties will often be included in the instruction, no portion of the instruction, note, or comment, suggests that the trial judge give additional instruction on unanimity in the event that multiple subparts are applicable. Further, we find no law to support the conclusion that the general unanimity instruction was insufficient.

Evaluating the jury instruction as a whole, we find no reversible error in the circuit court's inclusion of two varieties of assault, or in the court's declining to give any additional unanimity instruction.

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