Circuit Court for Prince George's County
Case No. CT141637X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 147 and 2246

September Term, 2016

ARNOLD JOHNSON, JR.

v.

STATE OF MARYLAND

Kehoe,
Berger,
Reed,

JJ.

Opinion by Kehoe, J.

Filed: January 3, 2019

*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. *See* Md. Rule 1-104.

After a jury trial in the Circuit Court for Prince George's County, Arnold Johnson, Jr. was convicted of first-degree felony murder, attempted robbery with a deadly weapon, first-degree burglary, and use of a firearm in the commission of a crime of violence. He raises four issues on appeal, which we have reworded and reordered:

> (1) Did the trial court err by: (a) denying Johnson's motion for a mistrial after a police witness alluded to a previous arrest of Johnson, or (b) giving the jury an inadequate and prejudicial instruction?
>
> (2) Did the trial court err by refusing to treat Johnson's *pro se* motion for a new trial as timely filed within the purview of Md. Rule 4-331(a)?
>
> (3) Did the trial court err in denying Johnson's motion for a new trial based upon defense counsel's discovery that the victim has been the subject of a Drug Enforcement Agency investigation at the time of his death?
>
> (4) Did the lower court err in declining to merge the convictions for felony murder and both potential predicate felony convictions of attempted armed robbery with a dangerous weapon and first-degree burglary for sentencing purposes?

We conclude that either the attempted armed robbery with a dangerous weapon or first-degree burglary should merge with the murder conviction, but we will otherwise affirm the convictions. We remand to the circuit court for re-sentencing on the merger of the potential predicate felonies.

Background

Because appellant does not challenge the sufficiency of the evidence, we recount the facts (in the light most favorable to the State) insofar as it is necessary to provide context to appellant's contentions.

The Murder of Amir Ali

In the early morning hours of July 31, 2014, two men broke into the home of Amir Ali and shot him to death. Present in the Ali home at the time were Mr. Ali, his spouse, Tekita Ali, their 17-year-old son Amir Ali, III, and their son's girlfriend.

Ms. Ali testified that Mr. Ali left the house for work at around 5:30 a.m. A few minutes later, she saw him reenter their bedroom, accompanied by two men. One of these individuals was a man who had a "towel or something on his face" and was wearing a shirt with black and white stripes. Ms. Ali described him as about five feet nine, a little bigger than her husband (who weighed 175 pounds), and "maybe" weighing 200 pounds. She could only see the shadow of the other person behind the man and did not describe his appearance.

Ms. Ali hid under the covers of her bed, and then heard sounds of a tussle, followed by two or three gunshots, and somebody—it turned out to be Mr. Ali—falling to the floor. The two intruders then ran out of her room. Shortly thereafter, Ms. Ali got up, grabbed her own handgun and cell phone and went out into the hallway. When she went into the hallway, her son appeared and told her that the two individuals ran downstairs.

Amir Ali, III testified that he was awakened by the sound of gunshots and went into the hall. He saw two individuals coming out of his parents' bedroom. One man was "fatter than him" and was wearing a black rag on his face. He was carrying what appeared to be an assault rifle. The other man was carrying a pistol that looked like a Glock. He testified

that before the men went downstairs, Amir Ali, III got down on the floor. The men then pointed their guns at him and asked for a "combination."

The Ali residence had a video security system with cameras in the kitchen, at the top of the steps facing the front door, and in the basement. The police recovered footage from those cameras on the night of the murder, and the State played a portion of them to the jury. Ms. Ali identified video footage taken by the camera in her kitchen, and recognized the man in the video as wearing the same shirt as the man in her bedroom on the night her husband was murdered. The video depicted a shadowy figure wearing the same shirt and face rag handling a couple of items next to the kitchen counter. The kitchen contained a box of gloves used by Mr. Ali to clean his grill. The security video footage showed this shadowy figure handle several items in the kitchen, including this same box of gloves.

One of the State's witnesses was Mertina Davis, the unit supervisor of the Regional Automated Fingerprint Identification System ("RAFIS") for the Prince George's County Police Department. The court admitted Ms. Davis as an expert witness in the field of latent fingerprint examination. She testified that she recovered a number of prints from the box containing the gloves. Some of these prints matched Mr. Ali's, and others she could not identify. However, and, critically to the State's case, she recovered five single prints or sets of multiple prints that matched Johnson's. She also identified a palm print on the box from Mr. Johnson.

Detective Harris's Testimony and Appellant's Motion for a Mistrial

Another witness in the State's case was Spencer Harris, the lead detective in the investigation. Harris testified that he reviewed the footage from the security cameras. He related that the recording depicted the Ali kitchen and, more specifically, a cardboard box on top of a cooler sitting on the floor. A person entered the kitchen, and, in sequence, placed a long rifle onto the counter, picked up the box, opened the cooler, looked inside, closed the cooler, and replaced the cardboard box on the cooler. The person than picked up the long rifle and left the kitchen. Harris testified that he directed the evidence technician to check the box on top of the cooler for fingerprints. About eight or nine days later, he learned that the County's RAFIS unit developed Johnson as the person who put his fingerprints on the box.

Detective Harris related that he attempted to find a link between Johnson and Mr. Ali but had failed to do so. He then presented Ms. Ali a photograph of Johnson in October of 2014. Ms. Ali told him she had never seen the man in the photograph and there would be no reason why his fingerprint would be inside of her home. He arrested Johnson on October 9, 2014, and he testified that, at that time, Johnson was approximately 5'9'' and 200 pounds.

The testimony that incited the motion for a mistrial occurred while Detective Harris was testifying about the photograph of Johnson that he showed to Ms. Ali. Detective Harris testified that he had printed the photo "from the computer database," without identifying the database. When asked if Johnson "look[ed] like he did in th[e] picture," the detective

answered that Johnson's "beard was thicker and he did not have a ponytail or whatever that is." The following exchange then occurred:

> [THE STATE:] This picture is from -
>
> [DET. HARRIS:] A previous arrest.
>
> [DEFENSE COUNSEL:] Objection. Approach.
>
> [THE COURT:] Sustained.
>
> [DEFENSE COUNSEL:] May we approach?
>
> [THE COURT:] Yes.

After approaching the bench, defense counsel moved for a mistrial, stating "[Detective Harris] knows, and the State knows, that they cannot ask that kind of question or get that kind of information." The State's response was:

> [T]his officer previously testified as to the date of the picture that is on the screen. My question to him was on the line of date, not say from a prior arrest. Under no circumstances do I believe that this officer intentionally put that information out there.
>
> I have had many conversations with [Detective Harris] with regards to this photograph that he has come upon, and other things of criminal things with regards to the defendant's background that have come up with the case. [Detective Harris] knows full well not to say anything like that. He is seasoned enough to know that.
>
> However, the State would argue that I think that — I will honestly say it was [an] unintentional blurt.

The trial judge told counsel that they:

> have worked so diligently and assiduously to keep this kind of information from [the jury]. It just poisons the well. . . . I will say, ladies and gentlemen, please disregard what this witness just said [but] it is said. He is a detective. I can't erase that out of the jury's mind. How can I do that?

The court then excused the jury. After admonishing the police officer, the court took a recess to permit counsel and the court to perform legal research as to best way to handle the officer's statement. After returning from the recess, which lasted approximately one hour, the court heard Johnson's motion for a mistrial (during which counsel advanced arguments substantively identical to those presented to us), discussed the issue with counsel, and ultimately denied the motion. The court stated:

> The court thinks . . . in 2016, as we are now, the jury that we have of registered voters is familiar enough with the difference between an arrest and let's say a conviction, and the court will fashion an instruction which does not tell them to ignore what they heard. I don't think that's realistic.
>
> The court can refer to the inadvertent mention that Mr. Arnold Johnson's picture was taken at an arrest, and the court will actually use some of the same language that [defense counsel was] are quoting from *Braxton*.[1] Arrests occur often and frequently in our society. I have even been arrested.
>
> When you are arrested they take a photo. They are not to speculate as to what the reasons were, or what the circumstances were, and no further mention will be made of anyone's arrest in this case. That is more likely what I will

[1] A reference to *Braxton v. State*, 123 Md. App. 599 (1998). However, both parties agree that the court misspoke; the instruction actually read to the court by defense counsel was from *Carter v. State*, 366 Md. 574, 580 (2001). What the counsel read to the court was:

> I will instruct you here this morning not to speculate regarding what you heard there about an arrest. You are not going to be told anything more about any arrest. You are not going to be told what the arrest was for, where it happened. You are not going to be told what the results were if there was a charge or whether there was a charge, because it is irrelevant to the issues in this case, and I instruct you to ignore the tidbit of information you were given concerning the fact of an arrest. It has absolutely no bearing on the issues before you in this trial or on the guilt or innocence of Mr. Carter of the charges before you, at this time.

We will discuss *Carter* in more detail later in this opinion.

> do. I might even mention that the chief judge, former chief judge of the state of Maryland has been arrested.
>
> There are many circumstances, some—many of which are consistent with totally—I don't know if I will go that far, totally innocent circumstances. I will try to couch this inasmuch neutral language, or at least curative language as I can.
>
> For that reason, I will deny the motion for a mistrial. . . .

The jury was then called back into the courtroom. The court then gave the following instruction to the jury (emphasis added):

> Ladies and gentlemen of the jury, we have been having some discussions since we sent you out. The last thing that you may have heard was that the [sic] Detective Harris said he recognized the photo of Mr. Johnson from quote, unquote, *a previous arrest*.
>
> That was [a] very sensitive disclosure. The court feels that you are mature enough to distinguish between an *arrest* and anything else. *I have been arrested* a long time ago back in D.C. on what I felt was a trumped up traffic ticket, but *when I was arrested* my photo was taken, and *when you get arrested* you get booked, fingerprints, photos, and the works.
>
> The former chief judge of this court, the Honorable Robert M. Bell, *the Honorable Robert M. Bell*[2] *was arrested* for a demonstration sitting in in a restaurant in the '60s trying to get service downtown**.**
>
> *Many, many people have been arrested, maybe some of you.* We don't even ask you when -- about the jury, we ask you if you have ever been *arrested*, charged with, so forth, with a crime. If you have merely been *arrested* it is certainly not a disabling event.
>
> So you are instructed as a matter of law to disregard any indication of guilt or culpability because you have heard inadvertently that Mr. Arnold Johnson had a picture taken *during an arrest*. I'm not ordering you to strike what you heard, I'm just putting it in context.

[2] The trial court misspoke. The Honorable Robert M. Bell was Chief Judge of the Court of Appeals from 1996 until 2013. Prior to that, he was an associate judge of that Court, an associate judge of this Court, an associate judge of the Circuit Court for Baltimore City, and an associate judge of the District Court of Maryland for Baltimore City.

> You are not permitted to speculate on the circumstances of that photo, and you will hear nothing further regarding *Mr. Johnson's arrest* on previous or any other occasions other than in this case, which you heard about with respect to the lead detective's natural testimony.
>
> All right, would the parties approach [the bench]?
>
> (At the bench. Defendant present.)
>
> The Court: That is the best I can do. We will proceed. [Defense counsel] make sure you preserve your —
>
> [Defense Counsel]: We will renew our motion, renew our objection. We would object also to the curative instruction as well.
>
> The Court: Very well.
>
> [Prosecutor]: The State is fine with Your Honor's curative instruction.
>
> The Court: Okay. Let's proceed.

Analysis

1. The Motion for a Mistrial and the Court's Corrective Instruction

In his brief, Johnson asserts that:

> The trial court abused its discretion by failing to grant a mistrial after the lead detective in the case said that Mr. Johnson had a prior arrest. Instead, the court gave the jury a lengthy instruction that mentioned "arrest" eleven times and told jurors that it was not asking them to disregard what they had heard, but rather simply putting it in context.

Johnson asserts that the prejudicial effect of the reference to Johnson's prior arrest was particularly prejudicial to him because the jury knew absolutely nothing about him except that the police had recovered his fingerprints from the carboard box in the Ali's kitchen, and that there was no other evidence linking him to the murder.

Citing *Carter v. State*, 366 Md. 574, 591 (2001), Johnson contends that, notwithstanding the trial court's refusal to grant a mistrial, its remedial instruction to the jury was

irredeemably flawed because it "highlighted the inadmissible evidence rather than curing it." Johnson points to two particular aspects of the instruction that he asserts are egregiously wrong: first, even though the trial court instructed the jurors that they could not "as a matter of law" presume guilt from an arrest, the court also explicitly told them it was not instructing them to disregard the comment, only to put it "in context"; second, the instruction included the word "arrest" no less than eleven times, thus exacerbating the prejudicial impact of Detective Harris's statement.

For its part, the State asserts that the trial court did not abuse its discretion when it denied Johnson's request for a mistrial. The State further argues that Johnson's contentions as to the substance of the trial court's instruction are not preserved for appellate review because defense counsel failed to state any ground to support her objection. Whether a trial court abused its discretion in denying a motion for a mistrial depends in part upon the substance and timing of any cautionary instruction by the trial court. Therefore, we will address the State's preservation argument first.

Rule 4-325(e) states in relevant part:

> No party may assign as error the giving or the 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 grounds of the objection. . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

From this premise, the State argues that, because trial counsel did not object to the content of the court's instruction, Johnson's contentions as to specific parts of the instruction are not preserved for appellate review. Johnson does not contend that the State's preservation argument is wrong, nor does he ask us to exercise plain error review. We are not bound, however, by his appellate legal strategy. *See, e.g.*, *Spencer v. Maryland State Board of Pharmacy*, 380 Md. 515, 523, 846 A.2d 341, 345–46 (2004).

We recently summarized the state of the law of plain error review in *Winston v. State*, 235 Md. App. 540, 567–68, *cert. denied sub nom. Mayhew v. State*, 458 Md. 593 (2018), *and cert. dismissed*, ____ Md. ___, No. 306, Sept. Term, 2018, 2018 WL 5920431 (October 26, 2018):

> The Court of Appeals has articulated the following four conditions that must be met before an appellate court will reverse for plain error:
>
> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.
>
> Meeting all four conditions is, and should be, difficult.
>
> Because each one of the four conditions is, in itself, a necessary condition for plain error review, the appellate court may not review the unpreserved error if any one of the four has not been met. For the same reason, the court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met.

(Quotation marks, citations, and brackets omitted.)

We will exercise plain error review in this case because, as we will explain, assessing the efficacy of the trial court's corrective instruction is necessary in deciding whether the court erred in denying Johnson's motion for a mistrial. We turn to that issue.

Detective Harris's testimony about Johnson's prior arrest was a "blurt," which is "an abrupt and inadvertent nonresponsive statement made by a witness during his or her testimony." *Washington v. State*, 191 Md. App. 48, 100 (2010) (citing *State v. Hawkins*, 326 Md. 270, 277 (1992)). The parties agree, as do we, that Harris's testimony that appellant had been previously arrested was irrelevant and prejudicial.

When, as occurred in this case, the defendant objects to the statement and moves for a mistrial, "[t]he trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted." *Carter*, 366 Md. at 583, 589. This Court has characterized a mistrial as "an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (bracket, citations and quotation marks omitted).

When this Court reviews "a denial of a motion for mistrial, we will reverse the trial court only when it is shown that 'the defendant was so clearly prejudiced that the denial constituted an abuse of discretion.'" *Id*. at 524 (2006) (citing *Garner v. State*, 142 Md. App. 94, 102 n. 4 (2002)).

In *Guesfeird v. State*, 300 Md. 653 (1984), the Court of Appeals was confronted with a child witness's blurted testimony that she had taken a lie detector test before the defendant

was charged with sexually abusing her. After surveying decisions from other jurisdictions, the Court of Appeals concluded that:

> In determining whether evidence of a lie detector test was so prejudicial that it denied the defendant a fair trial, courts have looked at many factors. The factors that have been considered include:
>
> [1] whether the reference to a lie detector was repeated or whether it was a single, isolated statement;
>
> [2] whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement;
>
> [3] whether the witness making the reference is the principal witness upon whom the entire prosecution depends;
>
> [4] whether credibility is a crucial issue;
>
> [5] whether a great deal of other evidence exists; and,
>
> [6] whether an inference as to the result of the test can be drawn.
>
> No single factor is determinative in any case. The factors themselves are not the test, but rather, they help to evaluate whether the defendant was prejudiced.
>
> * * *
>
> Further, the fact that the reference was not solicited by the prosecutor is not determinative. Although the situation of a solicited reference certainly is more egregious, it is only one factor and is not the determinative test; the test is the resulting prejudice to the defendant.

300 Md. at 659-60 (formatting altered, citations omitted).

Maryland's appellate courts have applied the so-called *Guesfeird* factors in a variety of different contexts. *See, e.g., Kosmas v. State*, 316 Md. 587, 592 (1989) (testimony that the defendant refused to take a lie detector test); *State v. Hawkins*, 326 Md. 270, 279 (1992) (police officer's testimony implying that defendant had failed a polygraph examination); *Rainville v. State*, 328 Md. 398, 401 (1992) (mother of victim of alleged child abuse testified that defendant was incarcerated for "what he had done" to another child); and

Washington, 190 Md. App. at 104 (witness who did not know the defendant or the victim personally testified that defendant was "pretty hostile" towards the murder victim.).

As this Court observed in *Washington*, "the test articulated in *Guesfeird* is open-ended and fact-specific." Johnson suggests that his case most resembles *Carter v. State*, 366 Md. 574, 577-78 (2001). Carter was convicted of first-degree murder, robbery, and related charges arising out of the fatal shooting of the manager during the course of an armed robbery of a restaurant where Carter worked. *Id.* 578-79. The State's theory was that Carter planned to rob the restaurant with an accomplice but, when the accomplice failed to appear, Carter conducted the robbery himself, killing the manager because the manager would be able to identify him. *Id.* at 578. Bryant, a police officer, testified on the first day of trial that during an interview, Carter had been "confronted with the fact that he had a prior arrest, he admitted that the prior arrest included or was for –" at which point defense counsel objected. *Id.* at 580. The trial court denied Carter's motion for a mistrial and instead gave the following curative instruction (emphasis in original):

> Officer Bryant was on the stand and he was testifying concerning conversations he had, he and other police officers had with Mr. Carter, the defendant here, early in the morning of February 8 at the police station in Waldorf, and they were talking about guns, or a gun, and Mr. Bryant said that in the conversation something was said about an *arrest* of Mr. Carter. Things stopped at that point, as you recall....
>
> I instruct you here this morning not to speculate regarding what you heard there about an *arres*t. You are not going to be told anything more about any *arrest.* You are not going to be told what the *arrest* was for, where it happened. You are not going to be told what the results were if there was a charge or whether there was a charge, because it is irrelevant to the issues in this case, and I instruct you to ignore the tidbit of information you were given concerning the fact of an *arrest*. It has absolutely no bearing on the issues

> before you in this trial or on the guilt or innocence of Mr. Carter of the charges before you, at this time.

Id. at 580.

On the second day of trial, James Douglas testified that Carter had admitted to him that he had robbed the restaurant, but that the robbery had not gone as planned. The plan, according to Douglas, was that petitioner would leave the restaurant and a "crackhead who owed him [Carter] money" would take Pirner to the back of the store [but when] the other person failed to show up, . . . [Carter] shot Pirner because Pirner could identify him." *Id.*

On cross-examination, the following colloquy took place:

> Q. So it is your testimony you never told the police a name?
> A. I said a name but I never said specifically that the name I said was him.
> Q. What name did you say?
> A. I said, Benny.
> Q. Who is Benny?
> A. Some crackhead [Carter] sold crack to.

Id. at 580-81.

Defense counsel again moved for a mistrial, which the trial court denied, and instead gave the following instruction to the jury (emphasis in original):

> Ladies and gentlemen, you heard me caution the witness here about volunteering information, and the question regarding who is Benny provoked an answer that in the witness's mind may have been responsive, but in the mind of counsel and myself didn't necessarily require the response that was given. The response given characterized *Benny as a crackhead, as somebody the defendant had sold crack to before*. I instruct you at this point to disregard that characterization of Benny *as someone to whom the defendant has sold crack to befor*e. The defendant is not on trial here today for *selling crack*. There is no evidence the defendant has ever been charged with or convicted

> of selling crack, and there is no suggestion that someone who would be capable of that would necessarily be capable of the kind of crime that has been charged here, even if you had been told he had done it or were supposed to be told. So I instruct you again to disregard that comment from the witness by way of identifying Benny. It is absolutely immaterial, irrelevant, not connected to the subject matters of the case before you.

Id. at 581.

In reversing the convictions, the Court of Appeals first noted that, although a curative instruction to the jury can alleviate the prejudice caused by the jury's hearing inadmissible evidence, "if 'a curative instruction is given, the instruction must be timely, accurate, and effective.'" *Id.* at 589. The Court stated:

> In instructing the jury to disregard the testimony about a prior arrest, the court mentioned the arrest four times. The instruction as given, rather than being curative, highlighted the inadmissible evidence and emphasized to the jury that petitioner had been arrested previously. The purported curative instruction was inadequate to cure the prejudice.
>
> While the mere occurrence of improper remarks does not by itself require a mistrial, in this case, considering the cumulative effect of the inadmissible evidence and the curative instructions actually given, we conclude that prejudicial error occurred, and the trial judge abused his discretion in not granting a mistrial.

Id. at 591 (citation omitted).

Turning to the facts of the present case, we conclude that Detective Harris's statement that Johnson had been previously arrested did not generate the level of prejudice that could not have been alleviated by a timely and effective curative instruction. For example, Detective Harris's inadmissible statement did not link Johnson to the commission of a crime that was very similar to the one for which he was being tried. *See Rainville*, 328 Md. at 407 ("The mother's testimony that the defendant was 'in jail for what he had done to Michael'

. . . . was particularly prejudicial because [among other reasons] it is highly likely that the jury assumed that 'what [the defendant] had done to Michael' was a crime similar to the alleged crimes against Peggy."). In contrast to *Guesfeird* and *Kosmas*, Detective Harris's statement did not function as an explicit or implicit commentary on the credibility of any witness. Nor did the outcome turn on credibility—Johnson did not testify, and the video and fingerprint evidence presented a strong link between Johnson and the crime scene. There was only one mention of Johnson's prior arrest in the prosecution's case.[3] The trial

[3] Johnson argues that in *Parker v. State*, this Court found that a "single, isolated statement" was prejudicial enough to warrant a mistrial because credibility was central to the case and the party making the statement was an influential individual in the case. (citing *Parker v. State*, 189 Md. App. 474, 488-96 (2009)). *Parker* certainly stands for the proposition that a single isolated statement can be sufficiently prejudicial to warrant a mistrial but the facts in that case are different, because Parker was charged with retaliating against a witness by threatening the family of a police officer who testified against the mother of Parker's children in a narcotics trial. *Id.* 478–79. Before Parker took the stand, the trial court granted his motion in limine and ruled that the State could not cross-examine him as to prior convictions. Notwithstanding the court's ruling, the prosecutor did so on cross-examination. In reversing the conviction, we stated (emphasis added):

> Applying the *Kosmas–Guesfeird* factors to the present case, we note that the reference was a single, isolated statement; it was an intentional statement made by the prosecuting attorney despite the trial judge's instructions and rulings on Parker's motions in limine; the party making the reference was a person of significant influence in the case and the State's principal representative for the prosecution; although the court sustained Parker's objection, no curative instruction was requested; and no curative instruction was given. *Most important, credibility was the critical issue: if the jury believed Parker's version of the incident, there was no threat to support the conviction*.

Id. at 494–95.

As we explained in the main text, credibility was not the critical issue in the present case.

court did not appear to have viewed the statement as being solicited by the prosecutor, but this factor is less important in our eyes than possible prejudice to the defendant. Similarly, the fact that Detective Harris was not the principal witness upon whom the State's case depended is not as important as possible prejudice to Johnson. In conclusion, the one-time reference to the fact that Johnson had been arrested previously was not so irredeemably prejudicial as to require the trial court to grant the motion for a mistrial.

We now turn to the efficacy and timeliness of the court's instructions. The State admits that there was a delay of about an hour or more between the reference to Johnson's previous arrest and the curative instruction. This delay, however, permitted the court and counsel to conduct legal research, and then to discuss whether to grant the motion for a mistrial and the contents of any curative instruction. Johnson argues that the trial court did not explicitly and in so many words told the jurors to disregard Detective Harris's statement. Johnson also points to the fact that in the curative instruction, the trial court used the term "arrest" multiple times.

In a different context, these matters might be enough for us to conclude that the curative instruction was neither timely given nor effective. *See Carter*, 366 Md. at 591. But the context of this case is very different because the trial court put the fact of Johnson's prior arrest "in context," the context being that the arrest was meaningless. Moreover, the court did so in stark and dramatic terms by calling upon the trial judge's own experiences, as well as those of former Chief Judge Bell. While we recognize that the trial court's corrective instruction was unorthodox, we cannot say that it was ineffective. We hold that the

curative instruction was sufficient to address prejudice to Johnson caused by the detective's reference to his prior assert. The trial court did not abuse its discretion when it denied the request for a mistrial.

2. and 3. Johnson's Motion for a New Trial

Appellant was convicted on January 21, 2016. Even though he was represented by counsel, appellant prepared a motion for a new trial[4] and delivered it to authorities in the detention facility mailing. However, the motion was received by the clerk's office on February 2, 2016, one day after the ten day deadline for filing a Rule 4-331(a) motion had expired. When his lawyers learned about the motion, they filed a supplement to it. One of the issues raised in the supplemental filing concerned evidence of possible criminal misconduct by Mr. Ali.

By way of background, when the police arrived at the Ali residence on the morning that Mr. Ali was murdered, they noticed a safe in Ms. Ali's closet. She refused to permit them to open the safe. The police obtained a search warrant, opened the safe, discovered

[4] Md. Rule 4-331 states in pertinent 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[.]

$160,300 in cash, and took custody of the money. All of this this was revealed at trial through the testimony of Ms. Ali and various police witnesses.

After trial was over, one of Johnson's family members discovered a memorandum opinion filed in *United States v. $160,280.00*, 108 F. Supp. 3d 324 (D. Md. 2015), in which the court granted the government's motion to stay proceedings in a civil forfeiture action filed by the United States against the cash recovered from Ms. Ali's safe. The factual basis of the forfeiture action was that agents of the Drug Enforcement Administration had been investigating Mr. Ali before his murder and that "a cooperating source" had purchased crack cocaine from him on three occasions in the months prior to his death. The government argued that the cash was the proceeds of Ali's drug trafficking. *Id.* at 325. Ms. Ali contested the claim. The Assistant State's Attorney in charge of the criminal prosecution requested the DEA to file a motion to stay proceedings in the forfeiture action until the criminal case was completed. In deciding to grant the motion, the District Court concluded that the two cases were factually related and that discovery in the forfeiture case "would adversely affect the State's prosecution in the related criminal case." *Id.* at 326.

Although there were some procedural delays, the trial court eventually held a hearing on Johnson's pro se motion, as supplemented by his lawyers. The court first ruled that the pro se motion was not filed within the ten day deadline set out in Maryland Rule 4-331(a). The court therefore treated it as a motion for a new trial pursuant to Rule 4-331(c). The court denied the motion for two reasons. First, the court concluded that the evidence pointing to Mr. Ali's criminal activities:

> really was discoverable with due diligence. The fact that a family member discovered it post sentencing is one indication of its availability. The fact that it's on the public record, even though it's couched [as] United States versus $168,300 [sic] which was known to be the amount recovered from the safe is — a Google search could have revealed that.

The court was, however, concerned about "the amount of concealment of this information by the State [which] is where we get into the *Brady*[5] analogy."

The court also found the evidence was not material:

> Certainly the activities of Amir Ali and [Ms. Ali's knowledge of] her husband's activities might have resulted of her being impeached at trial and her credibility questioned. However her credibility was buttressed by . . . the fact that her husband was killed at the foot of her bed. And that was rather unassailable. [I]n this Court's opinion the case didn't turn on her credibility. . . .
>
> * * *
>
> But the main prong that this new evidence cannot satisfactorily hurdle, in my opinion, is . . . materiality,] that there's a reasonable probability that, had this evidence been disclosed, the outcome would have been different.. . . . Because whether it's a burglary or a hit is distinction without a difference. It was a murder. It didn't happen on the street or a drive by as many of these drug murders happen, but it was a hit. And what convicted Mr. Arnold was his fingerprint on that box of gloves underneath the counter on the island in the kitchen that was revealed by the grainy video. And the fact that it was the same morning, right before the murder and there was no other explanation given as to – no plausible explanation as to why that fingerprint was there. The jury just reached a conclusion beyond a reasonable doubt that it was he who was - - who had the SKS assault rifle and although the defendant may win an appeal on the grounds of insufficient evidence perhaps, you can't win

[5] A reference to *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The court rejected defense counsel's *Brady* argument at the motions hearing, and Johnson has not challenged that ruling on appeal. Appellant has not raised it on appeal.

> a trial, a new trial on the basis that some impeachment or collateral evidence regarding the origin of this $160,000 would have gotten him acquitted.
>
> So the Court feels that the defendant has not met his burden to prove that this evidence of collateral wrongdoing by the victim in this case would have gotten him off.

On appeal, Johnson points to what he asserts were procedural and substantive errors on the trial court's part.

(A)

We will deal first with his procedural argument, which is that the court should have applied the prison mailbox rule to his motion because it was delivered by him to detention center authorities before the ten day time limit for a motion under Md. Rule 4-331(a) had expired.

Johnson points to *Houston v. Lack*, in which the Supreme Court established that "a defendant incarcerated in a federal prison and acting *without the aid of counsel* files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court." 487 U.S. 266, 270 (1988) (emphasis added).

Johnson concedes that there is no reported Maryland opinion applying the prison mailbox rule to motions for a new trial, but that "the underpinnings of the rule were endorsed many years ago in decisions of the Court of Appeals."[6] (We believe that the law on this

[6] The State argues that this contention is not preserved for appellate review because it was not raised at the hearing. We read the record differently.

issue in Maryland was less settled that Johnson suggests.[7]) But on May 9, 2018, the Court of Appeals issued its decision in *Hackney v. State* in which the Court:

> adopt[ed] the prison mailbox rule in Maryland for *unrepresented prisoners* attempting to file post-conviction petitions. From now on, an *unrepresented prisoner* is deemed to have filed his or her post-conviction petition at the moment the prisoner formally delivers it to prison authorities for forwarding to the circuit court.

459 Md. 108, 127 (2018) (emphasis added).

The Court also suggested that the Rules Committee had "an important role in codifying the prison mailbox rule and defining its parameters." *Id.* at 132 n.11. In response, the Rules Committee proposed, and the Court adopted, revisions to Md. Rule 1-322, which pertains generally to the filing of pleadings, papers and other items with a court. Section (d) of the revised rule states in pertinent part (emphasis added):

> (1) Application of section. *This section applies only to self-represented individuals* who (A) are confined in a correctional or other detention facility pursuant to a court order in a criminal or juvenile delinquency case, . . . and (C) seek relief from a criminal conviction or their confinement by filing (i) a motion for new trial. . . .
>
> (2) Generally. A pleading or paper filed under this section shall be deemed to have been filed on the date that the pleading or paper, in mailable form and with proper postage affixed, was deposited by the individual into a receptacle designated by the facility for outgoing mail or personally delivered to an employee of the facility authorized by the facility to collect such mail. . . .

[7] The body of Maryland case law on the prison mailbox rule is rather sparse. Before the Court issued its decision in *Hackney*, it consisted of *Coates v. State*, 180 Md. 502 (1948); *Beard v. State*, 216 Md. 302, 304 (1985); and *In re Vy N.*, 131 Md. App. 479 (2000).

There is nothing in *Hackney* nor in the pending revisions to Rule 4-331 that suggests that Maryland's version of the prison mailbox rule applies to individuals who, like Johnson, are represented by counsel. The Supreme Court's decision in *Houston v. Lack* also involved a pro se prisoner, 487 U.S. at 268, and was not based upon constitutional considerations. *Id.* at 273–74. We hold that the prison mailbox rule does not apply to Johnson because he was represented by counsel at the time that he filed it, and the trial court did not err in treating his motion as one filed under Rule 4-331(c).

(B)

We turn to Johnson's substantive argument. He contends that the trial court erred when it decided that the memorandum opinion of the District Court in the forfeiture action could have been discovered by reasonable diligence. Johnson argues that the memorandum opinion could not have been discovered by due diligence at the time of trial and was material. Specifically, Johnson had no reason to believe that there was an ongoing federal drug investigation of Mr. Ali or that there was a federal cause of action related to the money taken out of the safe. The evidence was material because it could have provided alternative theories for the defense.

In order to constitute newly discovered evidence for purposes of Md. Rule 4-331(c), the evidence:

> must not have been discovered, or have been discoverable by the exercise of due diligence, within ten days after the jury has returned a verdict; . . . the newly discovered evidence must be material; and . . . the trial court must determine that "the newly discovered evidence may well have produced a

> different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected."

Campbell v. State, 373 Md. 637, 668-69 (2003) (citing *Argyrou v. State*, 349 Md. 587, 600-01 (1998); and *Yorke v. State*, 315 Md. 578, 580–81 (1989).

Moreover, however, "[w]hether the evidence is material and whether the evidence could have been discovered by due diligence are threshold questions that must be resolved before the significance of the evidence may be weighed." *Campbell*, 373 Md. at 669 (citations omitted). "[T]he concept of 'due diligence' has both a time component and a good faith component and thus 'contemplates that the defendant act 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 669 (quoting *Argyrou*, 349 Md. at 604-05). The concept of materiality means that "the evidence [must] be more than 'merely cumulative or impeaching.'" *Id.* at 669 (quoting *Argyrou*, 349 Md. at 602).

For the purposes of analysis, we will assume that Johnson, in the exercise of due diligence, would not have learned of the pending forfeiture action prior to Johnson's trial.[8] However, we agree with the circuit court judge that any evidence likely to derive from knowledge of the forfeiture action would not be material. As explained, "[m]ateriality requires that the evidence be more than 'merely cumulative or impeaching.'" *Campbell*, 373

[8] The assumption may well be counterfactual. At the motions hearing, the trial court indicated that a computer search would uncover the forfeiture action. The State repeats this in its brief. However, there doesn't appear to be any evidentiary basis in the record to support such a conclusion.

Md. at 669 (quoting *Argyrou*, 349 Md. at 602). This Court explained this difference in the context of a Rule 4-331(c) motion in *Jackson v. State*:

> The distinction between "impeaching" and "merely impeaching," albeit nuanced, is pivotally important. Newly discovered evidence that a State's witness had a number of convictions for crimes involving truth and veracity or had lied on a number of occasions about other matters might have a bearing on that witness's testimonial credibility, but would not have a direct bearing on the merits of the trial under review. Such evidence would constitute collateral impeachment and would, therefore, be "merely impeaching." If the newly discovered evidence was that the State's witness had been mistaken, or even deliberately false, about inconsequential details that did to [sic] go to the core question of guilt or innocence, such evidence would offer peripheral contradiction and would, therefore, be "merely impeaching." If the newly discovered evidence, on the other hand, was that the State's witness had actually testified falsely on the core merits of the case under review, that evidence, albeit coincidentally impeaching, would be directly exculpatory evidence on the merits and could not, therefore, be dismissed as "merely impeaching."

164 Md. App. 679, 697-98 (2005), *cert. denied*, 390 Md. 501 (2006).

As stated by Johnson, evidence of the DEA investigation of Mr. Ali could have provided alternative theories for the defense. But information about Mr. Ali's alleged criminal activities, or Ms. Ali's knowledge of them, does not alter the fact that the issue at trial was whether the jury believed that the fingerprints on the glove box belonged to Johnson. Johnson has not pointed to any fact that might have arisen out of an investigation into Mr. Ali's alleged criminal activities that would have influenced the jury on whether to believe that the fingerprint expert accurately matched Johnson's fingerprints to those on the glovebox.

Johnson also contends that the evidence could have impeached the testimony of Ms. Ali, which was critical because "she was the only witness to the shooting and the one who

was able to tie a masked man in a striped shirt to the video of the kitchen." But as the court correctly noted, the case "didn't turn on [Tekita Ali's] credibility" because "she didn't identify the defendant, Mr. Arnold Johnson." What ultimately convicted Johnson "was his fingerprint on that box of gloves underneath the counter on the island in the kitchen that was revealed by the grainy video." Additionally, there was nothing Johnson could have learned of the investigation that he could use to influence the jury to doubt the credibility of Ms. Ali's testimony. As the court explained, Tekita Ali's knowledge of her husband's drug activity "might have resulted of her being impeached at the trial and her credibility questioned, however her credibility was buttressed by collaborating evidence of the fact that her husband was killed at the foot of her bed[,] [a]nd that was rather unassailable."

4. Merger

After the hearing on Johnson's motion for a new trial, the court resentenced Johnson as follows:

Charge:	**Sentence:**
First Degree Felony Murder	Life, all but 40 years suspended
Use of a firearm in the Commission of a Felony	20 years consecutive, all but 5 years suspended
Attempted Armed Robbery	20 years concurrent
First Degree Burglary	10 years consecutive, all suspended

Johnson contends that the court's sentences for attempted armed robbery and first-degree burglary were illegal, because under the required evidence test one of these convictions should have merged with the felony murder conviction. *See State v. Johnson*, 442 Md. 211, 221-22 (2015) (The required evidence test requires a predicate felony to merge with a conviction for felony murder.). Johnson asks us to vacate his sentences and remand for resentencing consistent with the required evidence test.

The State agrees that one or the other of the predicate felonies should have merged with the felony murder conviction. According to the State, however, no remand is necessary because the trial court "effectively merged" the sentences for attempted robbery with a dangerous weapon and felony murder by making them concurrent. It asks us to vacate the sentence for attempted robbery with a dangerous weapon and allow the consecutive, 10-year sentence for first-degree burglary to stand.

We agree with the parties as to merger. A court cannot impose separate sentences for felony murder and a predicate offense. *Johnson*, 442 Md. at 21–22 ("[W]here a defendant is convicted of felony murder and multiple predicate felonies, only one predicate felony conviction merges for sentencing purposes with the felony murder conviction; and, absent an unambiguous designation that the trier of fact intended a specific felony to serve as the predicate felony, the conviction for the felony with the greatest maximum sentence merges for sentencing purposes.").

Returning to the case before us, both first-degree burglary and robbery with a dangerous weapon are predicate offenses to first-degreee felony murder. *See* Md. Code Crim. Law

§ 2-201(a)(4)(iii) and (ix). Each of these offenses has the same maximum penalty, *viz.*, incarceration for 20 years. *See* Crim. Law §§ 3-403(b) and 6-202(c) (setting maximum penalties for, respectively, robbery with a dangerous weapon and burglary in the first degree).

The trial court did not designate either the burglary conviction or the armed robbery conviction as the predicate felony for the felony murder conviction. Therefore, we will vacate the sentences for those two convictions only and remand the case to the circuit court for resentencing in accordance with *State v. Johnson*.

THE SENTENCES FOR FIRST-DEGREE BURGLARY AND ATTEMPTED ARMED ROBBERY ARE VACATED AND THIS CASE IS REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING ON THOSE CONVICTIONS CONSISTENT WITH THIS OPINION. THE JUDGMENTS ARE OTHERWISE AFFIRMED. APPELLANT TO PAY COSTS.