Circuit Court for Wicomico County
Case No. C-22-CR-17-000553

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 492

September Term, 2018

EDWARD TYRONE WINDER

v.

STATE OF MARYLAND

Fader, C.J.,
Gould,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: July 17, 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. Md. Rule 1-104.

A jury sitting in the Circuit Court for Wicomico County convicted Edward Tyrone Winder, the appellant, of first-degree felony murder predicated on robbery, second-degree depraved heart murder, robbery, conspiracy to commit robbery, second-degree assault, two counts of conspiracy to commit second-degree assault, reckless endangerment, and theft of property valued at less than $1,000. The jury acquitted Mr. Winder of armed robbery, first-degree assault, and nine other conspiracy counts. The court sentenced Mr. Winder to life imprisonment for felony murder, with a concurrent 12-year sentence for conspiracy to commit robbery, and merged his remaining convictions.

Mr. Winder contends that the court erred in: (1) declining to instruct the jury on afterthought robbery; (2) denying his motion for judgment of acquittal on first-degree felony murder, second-degree depraved heart murder, and his three conspiracy convictions; and (3) merging, rather than vacating, his two conspiracy to commit second-degree assault convictions into his conspiracy to commit robbery conviction. We find no error in the court's denial of Mr. Winder's motion for judgment of acquittal. We, however, agree that the court erred in declining to instruct the jury on afterthought robbery and, as the State concedes, in failing to vacate the two conspiracy to commit second-degree assault convictions. We will therefore reverse the conviction for felony murder and vacate the two conspiracy convictions. To provide the court with maximum flexibility to fashion an appropriate sentence for Mr. Winder, we will also vacate the sentences for his other convictions and remand for resentencing.

BACKGROUND

The State's theory of prosecution was that (1) Mr. Winder participated with several others in assaulting the victim, Tavin Molock, while attempting to retrieve money that Mr. Molock had taken from Brandi Upshur, Mr. Winder's aunt, (2) someone else stabbed Mr. Molock during the assault, (3) Mr. Winder then followed Mr. Molock across the street, assaulted him again, and took the disputed money from Mr. Molock's pocket, and (4) Mr. Molock later died from the stab wounds. The State's flagship offense, first-degree felony murder predicated on robbery, was based on the theory that Mr. Winder intended to rob Mr. Molock of the disputed money before or contemporaneous with the stabbing. According to the defense, Mr. Winder never intended to rob or assault Mr. Molock and his only intent was to help his aunt retrieve money that was hers.

The events underlying the prosecution occurred on the morning of July 30, 2017, when a group of seven persons, five men and two women, gathered at Ms. Upshur's home in Salisbury before heading out to a barbeque. The group consisted of Ms. Upshur; her nephew and niece, Mr. Winder and Genequa Winder, who are siblings; and four others: Brandon Yarns, Hamond Taylor, Raymond Murray, and Eddie Smith. While Ms. Upshur was in her home changing, the rest of the group waited in the backyard.

Testimony of Brandon Yarns

Mr. Yarns testified that at some point while Ms. Upshur was inside the home, Mr. Molock, Ms. Upshur's live-in boyfriend of several years, walked briskly out of the home and then ran down the street. Ms. Upshur then came out the house yelling, "that mother fucker stole my money," while looking at Mr. Winder. The group, which had gotten into

two cars driven by Ms. Upshur and Ms. Winder, caught up with Mr. Molock a few blocks away. Ms. Upshur exited her car "screaming" at Mr. Molock that she wanted her money back. After the rest of the group exited their cars, Ms. Upshur and Mr. Molock started "swinging at each other."

According to Mr. Yarns, Ms. Upshur hit Mr. Molock, who then bumped into Mr. Yarns. After Mr. Yarns pushed Mr. Molock off him, Mr. Winder hit Mr. Molock in the face, causing Mr. Molock to fall to the ground. The group then began to kick and hit Mr. Molock, with Mr. Winder straddling Mr. Molock and hitting him. During the beating, Ms. Upshur kept saying, "[G]et my money." At some point, Mr. Murray took off his prosthetic leg and, while the others stood back, he started hitting Mr. Molock with it. When Mr. Molock "snatched" the prosthetic leg, Mr. Murray stabbed Mr. Molock three to four times with a knife. Mr. Molock, whose shirt was bloody, then ran across the street to the front porch of a nearby house. Messrs. Winder, Murray, Smith, and Taylor ran after him and "crowded" around him on the porch while Mr. Winder hit him several times. Mr. Winder grabbed Mr. Molock by his shirt and, with Ms. Upshur continuing to yell that she wanted her money, "yolked him up" against the house. Mr. Winder then pushed Mr. Molock off the porch and took the money from his pockets. Ms. Upshur called 911 and the group returned to Ms. Upshur's home in the two cars.

Once back at Ms. Upshur's home, the group stood around in the backyard. Mr. Yarns testified that he was "panicking." He wanted to leave but was not allowed. Mr. Murray took out the knife, showed it to Mr. Yarns, and, while laughing, said, "I stabbed

him." After a few minutes, the group left the area in the two cars and, after a couple of stops, proceeded to the barbeque.

Other Evidence Introduced by the State

The police, who arrived about 20 minutes after the 911 call, found "blood stains throughout the pavement and the street, going from one side of the road to the other" and up the lawn to the house where they found Mr. Molock. Mr. Molock died on the way to the hospital. The subsequent medical examiner's report states that he died from sharp force injuries that included: four-inch deep stab wounds to his chest and upper back; a stab wound to his eyelid; and a puncture/cutting wound to his nose. Forensic evidence suggested that Mr. Molock's back and eyelid injuries were caused by Mr. Murray's prosthetic leg. Mr. Molock also had abrasions to his forehead, torso, arms, and leg.

The State introduced two statements that Mr. Yarns made to the police. He made his first statement three days after the murder and the second three months later. Both were largely consistent with his trial testimony except that, as he admitted on cross-examination, in his first statement he (1) claimed that he did not see Mr. Murray stab Mr. Molock, (2) never mentioned that Mr. Taylor was present, and (3) asserted that Ms. Upshur's son was present. He explained to the police during his second statement, and again at trial, that he did so to protect Mr. Taylor. Mr. Yarns pleaded guilty to second-degree assault for pushing Mr. Molock and agreed to testify against the other participants in the assault.

The State also introduced a statement that Mr. Winder made to the police the day after the murder in which he stated that after he and the group arrived at Ms. Upshur's house, he had fallen asleep on the couch but was awakened when Ms. Upshur told him that

Mr. Molock had taken her money. He claimed that she then drove him to a corner several blocks away where Mr. Molock was standing, that he exited the car and asked Mr. Molock to return the money, and that Mr. Molock refused. Mr. Winder then punched Mr. Molock in the forehead, Mr. Molock ran to a nearby house, Mr. Winder ran after him and again told him to return the money, and Mr. Molock again refused. Mr. Winder then pushed Mr. Molock against the house, put his hand in Mr. Molock's pocket, and grabbed the money. Mr. Winder said that after taking the money from Mr. Molock, he noticed that Mr. Molock was having a seizure and saw blood around his mouth. Ms. Upshur called 911.

In his statement, Mr. Winder told the police that several people had assaulted Mr. Molock before he took the money but that he did not know the names of the others. Mr. Winder told the police that he never saw a knife; did not see any blood, other than around Mr. Molock's mouth; and did not know that Mr. Molock had been stabbed. He also told the police that Mr. Molock was not "supposed to get beat up," explaining that Mr. Molock "was scared of me. So I just thought he was going to give me the money."

Two neighbors also testified for the State. Darrel Lee, whose porch Mr. Molock had run onto, testified that he heard a disturbance outside his house and looked out the window. He saw an individual surrounded by a group arguing near his front yard. When he looked out his front door after calling 911, everyone was gone, but when he opened the front door, he saw the victim walk out between the cars in his driveway and collapse on his front lawn. Mr. Lee observed blood stains on the back of the victim's shirt.

Diamond Collins, who lived near the corner where the assault occurred, testified that she was on the porch when she saw seven people, two women and five men, "jumping"

another man. She testified that they were "beating him all at once" with their fists, feet, and weapons. She specifically identified Mr. Winder as one of the men who was "beating" the victim. The "jumping" lasted several minutes, during which one of the women was saying, "I want my money." The other woman was not involved in the fight but stood in the middle of the road and said, "[Why] would he take her money[?]" Ms. Collins also heard her say to one of the men, "[D]on't pull that out yet, there's people watching." At some point, the victim managed to run off. She heard Mr. Winder say, "[O]h, we coming back for you, don't worry[.]"

Testimony of Mr. Winder

Mr. Winder testified in his defense. Throughout his testimony, he referred to Mr. Molock as his "uncle." Consistent with his earlier statement to the police, Mr. Winder explained that he had fallen asleep on Ms. Upshur's couch but was awakened by her saying that Mr. Molock had taken her money. According to Mr. Winder, she "asked me, could I ask him to get her money back. I said yes, I'll talk to him." After a few minutes, Ms. Upshur drove him and Mr. Smith a few blocks away to where an altercation was in progress between Mr. Molock and the others. They got out of the car and walked over. According to Mr. Winder, Ms. Upshur asked Mr. Molock to return the money. Mr. Molock then hit Ms. Upshur, who hit him back. When Mr. Molock "cocked back" to hit Ms. Upshur again, Mr. Winder hit Mr. Molock. Mr. Winder testified that he had not intended to fight Mr. Molock and had engaged him only after Mr. Molock hit Ms. Upshur. According to Mr. Molock, Ms. Upshur had told him on prior occasions that Mr. Molock had beaten her up and inflicted "bruises and black eyes and things of that nature."

When Mr. Molock ran across the street to a house, Mr. Winder followed him and "asked him again . . . for him to give me my aunt's money." When Mr. Molock did not, Mr. Winder pushed him up against the house, and "I told him to give me the money." Mr. Winder reached into Mr. Molock's shorts pocket and "pulled the money out." Mr. Yarns then punched Mr. Molock, who fell into the bushes onto his face. Mr. Winder asked Mr. Molock if he was okay, Ms. Upshur called for an ambulance, and the group returned to Ms. Upshur's home before heading to the barbecue.

As to his intent in initially pursuing Mr. Molock, Mr. Winder testified that he went to protect Ms. Upshur, thinking he could stop the two from fighting. He thought he "could just ask him for the money back and he would just give me the money." When asked on cross-examination what he intended to do if Mr. Molock did not give the money back, he testified: "I never thought that far." He reiterated that because he and Mr. Molock were close, "I thought that maybe he would have just g[i]ve it to me." Mr. Winder testified that he did not remember saying in his statement to the police that he "thought [Mr. Molock] was going to give me the money" because Mr. Molock was "scared" of him. The State impeached Mr. Winder with that earlier statement.

DISCUSSION

I. MR. WINDER PRESENTED SUFFICIENT EVIDENCE TO GENERATE AN AFTERTHOUGHT MURDER INSTRUCTION.

Mr. Winder argues that we must reverse his conviction for felony murder predicated on robbery because the trial court erred in refusing to propound the portion of Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:17.7.1 addressing "afterthought

robbery." That instruction provides, among other things, that a person cannot be found guilty of first-degree felony murder predicated on robbery if the decision to rob the victim was made *after* the act that caused the victim's death. Mr. Winder argues that because he testified that he never intended to fight or rob Mr. Molock before or contemporaneous with the stabbing that caused his death, there was "some evidence" that the robbery was an afterthought to support giving the instruction. The State disagrees.

Rule 4-325(c), governing a trial court's instructions to a jury, provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Md. Rule 4-325(c). In sum, a trial court is required to give a requested instruction when: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Thompson v. State*, 393 Md. 291, 302-03 (2006) (quoting *Ware v. State*, 348 Md. 19, 58 (1997)). It is the second requirement that is at issue here.

We review a trial court's denial of a requested jury instruction under an abuse of discretion standard. *Hall v. State*, 437 Md. 534, 539 (2014). However, "[w]hether the evidence is sufficient to generate the desired instruction in the first instance is a question of law for the judge." *Roach v. State*, 358 Md. 418, 428 (2000). In such a case, "[o]ur review is limited to determining 'whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to

rationally conclude that the evidence supports the application of the legal theory desired.'" *Marquardt v. State*, 164 Md. App. 95, 131 (2005) (quoting *Roach*, 358 Md. at 428); *see also Malik v. State*, 152 Md. App. 305, 333 (2003) (noting that our task is to determine whether the defendant produced "some evidence" to support the requested jury instruction). The requirement of "some evidence" is:

> not strictured by the test of a specific standard. It calls for no more than what it says – 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.' The source of the evidence is immaterial; it may emanate solely from the defendant.

General v. State, 367 Md. 475, 487 n.8 (2002) (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). In determining whether competent evidence exists to generate the requested instruction, we examine the record "in the light most favorable to the accused." *Fleming v. State*, 373 Md. 426, 433 (2003).

At the close of all the evidence, Mr. Winder asked the trial court to give the "afterthought robbery" portion of the Maryland pattern jury instruction for first-degree felony murder. The relevant portion of the instruction is:

> When a person is charged with felony murder based on an alleged robbery, the sequence of events can be important.
>
> To convict the defendant of robbery, the State does not have to prove that the defendant decided to rob (name) before or at the same time as the commission of the act(s) that killed (name). For robbery, it is sufficient if the State proves that the act(s) of force and the robbery were parts of the same general event, even if the defendant made the decision to rob (name) as an afterthought, after the commission of the act(s) that caused the death of (name).
>
> The law as to felony murder is different. To find the defendant guilty of felony murder, the State must prove that the defendant had the intent to rob

> before or at the same time as the commission of the act(s) that killed (name). When the decision to rob the victim is an afterthought, made after the commission of the act(s) that caused the victim's death, a defendant may not be convicted of felony murder.

MPJI-Cr 4:17.7.1.[1] The trial court declined to give the full instruction, stating: "I agree [with the State that] it's not generated because at all times his intent was to remove the money, there was never anything other than the intent to remove the money."

The trial court instructed the jury on first-degree felony murder as follows:

> The first charge of the verdict sheet, the Defendant is charged with homicide first degree felony murder. It is not necessary for the State to prove that the Defendant intended to kill Tavin Molock. In order to convict the Defendant of first degree felony murder the State must prove, (1), that the Defendant or another participating in the crime with the Defendant committed a robbery or armed robbery; (2), that another participating in the crime killed Tavin Molock; and (3), that the act resulting in the death of Tavin Molock occurred during the commission of the robbery or armed robbery.

The trial court also gave the following robbery instruction:

> Robbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property. In order to convict the Defendant of robbery, the State must prove: (1[)], that the Defendant took the property from Tavin Molock; (2), that the Defendant

[1] In *State v. Allen*, 387 Md. 389 (2005), the Court of Appeals held that an afterthought felony could not be a predicate felony for felony murder. *Id.* at 396. The Court discussed the justification underlying the felony-murder rule, which is to deter the commission of certain felonies by dangerous and violent means. *Id*. at 398-400. The Court noted a split of authorities and sided with the majority view that holds that to sustain a conviction for felony murder, the defendant must have intended to commit the underlying felony prior to or concurrent with the act causing the death of the victim. *Id.* at 397-98, 402. The minority view adopts a *res gestae* theory and holds that "a killing may be a felony-murder where the intent to commit the underlying felony arises after the victim is dead, so long as there is a continuity of action to constitute one continuous transaction." *Id*. at 399. Therefore, in Maryland, "[a]n afterthought felony will not suffice as a predicate for felony-murder." *Id*. at 402.

> took the property by force or threat of force; and (3), that the Defendant intended to deprive Tavin Molock of the property.

See MPJI-Cr 4.28 (robbery).[2]

We are persuaded that there was "some evidence" that Mr. Winder did not form an intent to rob Mr. Molock until after the stabbing. Mr. Winder testified that upon approaching Mr. Molock on the street corner, he only "asked" Mr. Molock for the money. He testified that he did not think about what he would do if Mr. Molock did not give him the money, that he had no intent to fight Mr. Molock, and that he only hit Mr. Molock because Mr. Molock first hit Ms. Upshur. According to Mr. Winder, therefore, he did not develop the intent to take the money from Mr. Molock by force or threat of force until after the fight. That testimony, if believed, would support Mr. Molock's contention that his intent to rob Mr. Molock did not arise until Mr. Molock was on the porch, having already sustained the injuries that killed him.

The State's response focuses only on the evidence the State produced at Mr. Winder's trial. To be sure, the evidence that Mr. Winder intended to commit a robbery before or contemporaneous with the stabbing was strong. The relevant question, however, is not whether there was sufficient evidence to sustain the felony murder conviction, but whether there was "some evidence," viewed in the light most favorable to Mr. Winder, that

[2] Following the trial court's instructions, defense counsel renewed his objection to the court's decision not to give the afterthought robbery part of the felony murder instruction, thereby preserving Mr. Winder's argument for our review. *See* Md. Rule 4-325(e) ("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.").

the robbery was an afterthought to the stabbing. Based on Mr. Winder's testimony, we are persuaded that there was.

The State also argues that because Mr. Winder testified that he did not know that Mr. Molock had been stabbed, Mr. Winder was unable to prove that he did not form the intent to rob prior to or contemporaneous with the stabbing. Mr. Winder's awareness of the stabbing, however, has no relevance to whether he was entitled to an afterthought robbery instruction because the focus of the instruction, and the crime of felony murder, is on when Mr. Winder developed the intent to commit the felony relative to when the act causing the victim's death occurred, not his knowledge of that act.

In sum, because Mr. Winder testified to a version of events in which he had no intent to rob Mr. Molock of the disputed money—i.e., to take the money by force or intimidation—until after the stabbing, there was "some evidence" of an afterthought robbery. Accordingly, the trial court erred in not instructing the jury on afterthought robbery and we must reverse Mr. Winder's first-degree felony murder conviction. This holding does not affect Mr. Winder's conviction for second-degree depraved heart murder.

II. THE CIRCUIT COURT CORRECTLY DENIED MR. WINDER'S MOTION FOR JUDGMENT OF ACQUITTAL.

Mr. Winder argues that the trial court erred in denying his motion for judgment of acquittal on first-degree felony murder, second-degree depraved heart murder, and his three conspiracy convictions. The State disagrees, as do we.

The standard of review for evidentiary sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question 'is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence.'" *State v. Suddith*, 379 Md. 425, 447 (2004) (quoting *State v. Smith*, 374 Md. 527, 557 (2003)) (alterations in *Suddith*). "[W]e do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence." *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)) (alteration in *Morris*). A court, on appellate review of evidentiary sufficiency, will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. at 185. Thus, "the limited question before an appellate court 'is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Allen v. State*, 158 Md. App. 194, 249, *aff'd*, 387 Md. 389 (2005) (quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991)) (emphasis in *Fraidin*).

A. The Circuit Court Properly Denied the Motion for Judgment of Acquittal as to First-Degree Felony Murder.

Mr. Winder advances three arguments as to why the trial court erred in denying his motion for judgment of acquittal on first-degree felony murder. Although we will reverse his felony murder conviction based on the failure to give the afterthought robbery

instruction, we nonetheless address Mr. Winder's sufficiency argument. His first contention is that there was insufficient evidence of his intent to commit a robbery prior to or contemporaneous with the acts that resulted in the victim's death. Citing *Alexander v. State*, 52 Md. App. 171, 177, *aff'd*, 294 Md. 600 (1982), he also argues that he never had the intent to rob but only "in good faith, intervened in assisting his aunt in recovering money that had been taken from her." Lastly, he argues that we should reverse his conviction for felony-murder because he did not know that Mr. Molock had been stabbed.

Although there was "some evidence" to support a jury instruction on afterthought robbery, the evidence was also sufficient to permit the jury to conclude beyond a reasonable doubt that Mr. Winder intended to rob Mr. Molock from the moment he left Ms. Upshur's house. Robbery is "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear." *Metheny v. State*, 359 Md. 576, 605 (2000) (quoting *Williams v. State*, 302 Md. 787, 792 (1985)). Here, Mr. Yarns testified that Ms. Upshur came running out of the house yelling that Mr. Molock had taken her money and that he believed she was looking directly at Mr. Winder at the time. The group converged on Mr. Molock several blocks away while Ms. Upshur yelled at them to "get my money." Mr. Yarns testified that Mr. Winder repeatedly hit Mr. Molock during the ensuing melee and then pursued Mr. Molock across the street, pushed him against the house, demanded the disputed money, and then took it out of his pocket. And although Mr. Winder told the police the day after the murder that he had not intended to fight Mr. Molock for the money, he also told them that he thought Mr. Molock would give up the money out of fear. We are persuaded that a rational juror could conclude beyond a

reasonable doubt that Mr. Winder intended to rob Mr. Molock by intimidation or force before or contemporaneous with the stabbing.

Mr. Winder's remaining arguments are without merit. The jury was entitled to reject his contention that he was simply making a request for his aunt's money as well as his claim that he was unaware that Mr. Molock had been stabbed. The latter claim is also irrelevant to his felony murder conviction, as the State was required to prove that he intended to commit the predicate felony, not that he intended to commit murder. *State v. Allen*, 387 Md. at 398. Thus, although we will reverse Mr. Winder's felony murder conviction for the reasons discussed above, we do not agree with him that the evidence was insufficient to convict him of that crime.

B. The Circuit Court Properly Denied the Motion for Judgment of Acquittal as to Second-Degree Depraved Heart Murder.

Mr. Winder argues that the trial court erred in denying his motion for judgment of acquittal on second-degree depraved heart murder because the evidence failed to show that he acted with "extreme indifference" to Mr. Molock's life. The State responds that Mr. Winder failed to preserve this argument for our review and that even if preserved, it is without merit.

Rule 4-324(a) provides, in pertinent part, that "[a] defendant may move for judgment of acquittal . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." Md. Rule 4-324(a). Section 6-104(b) of the Criminal Procedure Article (Repl. 2018), provides:

> (b) (1) The defendant may move for judgment of acquittal at the close of all the evidence whether or not a motion for judgment of acquittal was made at the close of the evidence for the State.
>
> (2) If the court denies the motion for judgment of acquittal, the defendant may have review of the ruling on appeal.

Although Mr. Winder did not challenge the second-degree murder charge in his motion for judgment of acquittal at the close of the State's case, he did at the close of all the evidence, arguing that because there was no evidence that he knew a knife was present, there was no evidence that he was aware of the extreme risk of death or serious bodily injury to Mr. Molock. That was sufficient to preserve his challenge for our review. *Id.*

"The essential element of depraved heart murder is that the act in question be committed 'under circumstances manifesting extreme indifference to the value of human life.'" *In re Eric F.*, 116 Md. App. 509, 519 (1997) (quoting *Robinson v. State*, 307 Md. 738, 745 (1986)). The question as to whether an act evinces "extreme indifference" is whether "the defendant engaged in conduct that created a very high risk of death or serious bodily injury to others." *In re Eric F.*, 116 Md. App. at 519 (quoting *Alston v. State*, 101 Md. App. 47, 57, *aff'd*, 339 Md. 306 (1995)). The act "may be perpetrated without the slightest trace of personal ill-will." *In re Eric F.*, 116 Md. App. at 520 (quoting *Glenn v. State*, 68 Md. App. 379, 399 (1986)). Mr. Winder's sufficiency argument is based on a characterization of the evidence presented at trial in the light most favorable to him. Viewing the evidence in the light most favorable to the State, however, a rational juror could have found beyond a reasonable doubt that Mr. Winder acted with extreme indifference to Mr. Molock's life when he participated in a group that hit and kicked Mr.

Molock; watched as Mr. Murray beat Mr. Molock with his prosthetic leg and then stabbed him several times; chased Mr. Winder across the street, pushed him against a house, threw him off the porch, and left him there. Blood stains found on the pavement and the street belied Mr. Winder's claim that he was unaware that Mr. Molock had been stabbed. And the jury was free to reject Mr. Winder's contention that allowing Ms. Upshur to use his cell phone to call 911 demonstrated that he was not indifferent to Mr. Molock's survival, especially given that the call came from Ms. Upshur, not him, and that she told the 911 operator that Mr. Molock was drunk, not stabbed, and failed to provide the address where he was located.

C. The Circuit Court Properly Denied the Motion for Judgment of Acquittal as to Conspiracy to Commit Robbery and Conspiracy to Commit Second-Degree Assault.

Mr. Winder argues that the trial court erred in denying his motion for judgment of acquittal on the charge of conspiracy (with Ms. Upshur) to commit robbery and two counts of conspiracy (with Eddie Smith and a separate conspiracy with Ms. Upshur) to commit second-degree assault. Mr. Winder argues that there was no evidence of an agreement to sustain those convictions because the evidence showed "no discussion among the group before the fast-paced events ensued." The State disagrees, as do we.

Conspiracy, a common law crime, is "the combination of two or more people to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Monoker v. State*, 321 Md. 214, 221 (1990). "The gist of conspiracy is the unlawful agreement" rather than each of its criminal objectives. *Id.* "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of

purpose and design." *Khalifa v. State*, 382 Md. 400, 436 (2004) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)). The State is "only required to present facts that would allow [a] jury to infer that the parties entered into an unlawful agreement." *Acquah v. State*, 113 Md. App. 29, 50 (1996).

Here, based on the evidence already discussed, there was sufficient information from which a rational juror could conclude beyond a reasonable doubt that Mr. Winder conspired with Ms. Upshur to rob Mr. Molock and that he conspired with Mr. Smith and Ms. Upshur to commit a second-degree assault of Mr. Molock. We are mindful that "[t]he concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy." *Id.* at 50. In light of that, a rational juror could infer the existence of an agreement between Mr. Winder and Ms. Upshur to rob Mr. Molock and among Mr. Winder, Ms. Upshur, and Mr. Smith to assault Mr. Molock. The trial court therefore did not err in declining to grant Mr. Winder's motion for judgment of acquittal on the three conspiracy charges.

III. THE TRIAL COURT SHOULD HAVE VACATED MR. WINDER'S CONVICTIONS FOR CONSPIRACY TO ASSAULT MR. MOLOCK.

The jury convicted Mr. Winder of three conspiracy charges: conspiracy with Ms. Upshur to commit robbery, conspiracy with Ms. Upshur to commit second-degree assault, and conspiracy with Mr. Smith to commit second-degree assault. The court sentenced Mr. Winder to 12 years' imprisonment on the first conspiracy conviction and merged the two others into the first. Mr. Winder argues that the sentencing court should have vacated, not

merely merged, his two conspiracy to commit assault convictions. The State agrees, as do we.

Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." Md. Rule 4-345(a). Under that Rule, "[a] failure to merge a sentence is considered to be an 'illegal sentence[.]'" *Pair v. State*, 202 Md. App. 617, 624 (2011) (quoting Rule 4-345(a)). The illegality of not merging convictions derives from the double jeopardy prohibition of the Fifth Amendment to the United States Constitution and Maryland common law. *Brooks v. State*, 439 Md. 698, 737 (2014). Whether a sentence is illegal is a question of law subject to non-deferential, de novo appellate review. *State v. Crawley*, 455 Md. 52, 66 (2017).

This Court explained in *Savage v. State* that "[i]f [the State] seeks to establish multiple conspiracies, it 'has the burden of proving a *separate* agreement for each conspiracy.'" 212 Md. App. 1, 15 (2013) (quoting 16 Am. Jur. 2d Conspiracy § 40). We held that "[i]f a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Savage*, 212 Md. App. at 26. When such a violation occurs, "one of [the] two conspiracy convictions must be vacated." *Id.* at 31. In *Savage*, a jury convicted the defendant of two counts of conspiracy to commit first-degree burglary and the court sentenced him on each count. *Id*. at 12. We concluded that the State proved only a single conspiracy, not two different conspiracies, because it never argued to the jury that there were two separate conspiracies, and the jury was never instructed that it could only convict the defendant of two conspiracies if the State proved two different agreements. *Id.* at 27-29.

Similarly here, the State concedes that it never asked the trial court to instruct the jury to designate any of the conspiracy convictions as separate, independent conspiracies. Accordingly, we must vacate two of the conspiracy convictions. The State argues that we should retain the conspiracy to commit robbery conviction because it is the conviction that carries the more severe penalty. *See Campbell v. State*, 325 Md. 488, 507 n.11 (1992) ("Where a defendant is found guilty of conspiracy to commit two crimes, the crime that carries the more severe penalty is the guideline offense for purposes of sentencing."). We agree and, accordingly, shall vacate Mr. Winder's two convictions for conspiracy to commit assault.

Because we are reversing Mr. Winder's flagship conviction for first-degree felony murder and vacating his two conspiracy to commit assault convictions, we shall vacate Mr. Winder's remaining sentences and remand to the circuit court for resentencing on all remaining convictions under *Twigg v. State*, 447 Md. 1 (2016). The purpose of the remand is to provide the circuit court with "maximum flexibility" to "fashion a proper sentence," so long as it does not exceed the original aggregate sentence. *Id.* at 26-30 & n.14.

FIRST-DEGREE FELONY MURDER CONVICTION REVERSED. CONSPIRACY TO COMMIT SECOND-DEGREE ASSAULT CONVICTIONS VACATED. ALL REMAINING SENTENCES VACATED AND REMANDED FOR RESENTENCING. COSTS TO BE PAID 1/3 BY APPELLANT AND 2/3 BY WICOMICO COUNTY.