Circuit Court for Baltimore City
Case No. 120183018

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1248

September Term, 2021

DARELL WENDELL ROBERTS

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Eyler, James R.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, James R., J.

Filed: January 6, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury sitting in the Circuit Court for Baltimore City convicted Darell Roberts, appellant, of reckless endangerment and acquitted him of first- and second-degree assault. The court sentenced him to 5 years. Appellant's motion for a new trial was denied. On appeal, he presents nine questions for our review, which we have combined and rephrased as eight:

> 1. Was appellant denied his right to be tried within 180 days under § 6-103 of the Criminal Procedure Article ("CP") of the Maryland Code and Rule 4-271?
>
> 2. Was appellant denied his constitutional right to a speedy trial?
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> 3. Did the trial court abuse its discretion by excluding impeachment evidence?
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> 4. Did the trial court abuse its discretion by not instructing the jury on self-defense?
>
> 5. Was appellant denied a fair trial based upon the trial court's management of the jury deliberations and acceptance of the verdict?
>
> 6. Did the trial court plainly err by accepting an inconsistent verdict?
>
> 7. Was the evidence legally insufficient to sustain appellant's conviction for reckless endangerment?
>
> 8. Did the trial court abuse its discretion by denying appellant's motion for a new trial?

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

FACTS AND PROCEEDINGS

On February 25, 2020, appellant and his girlfriend, Michelle Tolson, began arguing at the apartment Tolson shared with Gloria Bradley. During the fight, Tolson

suffered a stab wound to her upper chest and Bradley called 911. Appellant left before police arrived but was arrested a week later.

The charges against appellant were tried by a jury over three days.[1] The State called two witnesses, Tolson and Bradley, and introduced Tolson's extensive medical records into evidence. Appellant did not testify in his case or call any witnesses. Two 911 calls made by Bradley after Tolson sustained the stab wound were played for the jury.

Tolson's testimony

Tolson and appellant dated for two years. On the evening of February 25, 2020, he came over to see her. Tolson had consumed four beers and used cocaine but did not consider herself intoxicated. Appellant was drinking vodka. Appellant was "a monster" and "very violent" when he drinks alcohol.

While Tolson was doing laundry in the basement, they began arguing about the rent. The argument became violent. Appellant punched her in the face with a closed fist and he choked her. Tolson broke away from him and ran to the kitchen of the apartment. She heated up a pot of water on the stove to use as her "only defense" if he hit her again. Appellant continued to beat her in the kitchen, pushing her through a pantry door and then stabbing her in the chest. They moved into the dining room, where he broke a wooden chair over her back. Tolson identified photographs taken in the apartment

[1] Appellant was indicted on charges of attempted first- and second-degree murder and wearing and carrying a dangerous weapon. The State entered a *nolle prosequi* on the attempted murder charges prior to jury selection. The State later elected not to include the wearing and carrying count on the verdict sheet.

depicting the pantry door broken off its hinges and a wooden high back chair that was splintered in pieces on the floor.

Bradley "ran to get help." Bradley did not witness appellant stab Tolson.

Tolson ran outside to try to get away from appellant, but he continued to beat her and kick her, breaking her rib. When Tolson heard sirens, appellant fled on his bicycle.

At the hospital, Tolson was treated for a punctured lung and a broken rib. She was hospitalized for three months and still experiences breathing issues and fluid retention around her lungs.

On cross-examination, Tolson acknowledged that she has a mental health diagnosis of "STB Syndrome,"[2] but denied that she is diagnosed with bipolar disorder. She is prescribed Seroquel to help her sleep because she has "dreams . . . about murders." She testified that she had not taken her medication on February 25, 2020. She was drinking "Natty Daddy" malt liquor and had consumed four 25-ounce cans, each with eight percent alcohol content. She smoked cocaine around 6 p.m.

Bradley's testimony

Bradley has known Tolson for about three years. Tolson rents the bedroom in Bradley's one-bedroom apartment and Bradley sleeps on a daybed in the living room. Bradley was familiar with appellant, whom she knew as "Soldier."

[2] The meaning of this term was not explored at trial.

On February 25, 2020, appellant knocked on the door of the apartment and Bradley let him in. He asked for Tolson and Bradley directed him to go to the bedroom. Bradley heard them arguing "about money" in the bedroom with the door closed.

Tolson came out of the bedroom, with appellant following her. She picked up a pot of boiling water from the stovetop[3] and "was getting [ready] to throw it" at appellant. Bradley told Tolson to put the pot down and she did. Tolson and appellant continued to argue and returned to the bedroom.

A few minutes later, they came out of the bedroom "fussing and fighting," which Bradley clarified meant arguing and "[t]hrowing their arms at each other." Bradley grabbed her dog and ran outside to seek help from a neighbor. The neighbor did not answer his door.

Bradley returned to her apartment building and found appellant and Tolson out front. Tolson said she had been stabbed. Appellant was "standing over" Tolson. Bradley called 911 twice.

While Bradley was speaking to the 911 operator, appellant grabbed the phone out of her hand and said, "she stabbed me first." He then rode off on his bicycle.

Bradley was shown photographs of the interior of the apartment and confirmed that prior to the fight, the chair and the pantry door were not broken. She could not tell who the aggressor in the fight between appellant and Tolson was, but she did not recall seeing any injuries on appellant.

[3] According to Bradley, Tolson was boiling chicken in the pot.

On cross-examination, defense counsel questioned Bradley about her statement to the police and ultimately played it for her, outside the presence of the jury, to refresh her recollection. Bradley then acknowledged that she told the police that when Tolson first ran out of the bedroom, she grabbed the pot of boiling water *and* a knife. Appellant also grabbed a knife, according to Bradley.

Defense counsel played the 911 calls for the jury.[4] Bradley told the operator: "I have domestic violence in my house" and that her "girlfriend got stabbed." The operator asked Bradley who stabbed Tolson, and Bradley replied, "I don't know who he is," later adding "he's her boyfriend." Bradley confirmed that appellant was still there. At that point, appellant began speaking to the operator, stating: "Give me the phone right now. She stabbed herself. She got, she got, she got mental health and hygiene issues. She take, she take, she takes drugs, right? She gets prescription drugs for her bipolar. I didn't do anything to this lady."[5] The operator asked a question, but the call cut off.

Bradley called back and spoke to a different 911 operator. She stated repeatedly that Tolson was bleeding and needed an ambulance. Bradley added, "he says she stabbed herself." She told the operator that "they're out there fighting right now" and that they "tore [her] damn kitchen up."

We shall include additional facts as necessary to our resolution of the issues.

[4] We correct the transcription of the 911 call based upon our independent review of the recording.

[5] The trial transcript reflects appellant saying, "I didn't do anything to the b***h." Our transcription reflects the language actually used by appellant.

DISCUSSION

I.

Appellant contends the trial court erred by not dismissing the indictment because he was tried beyond his *Hicks* date without good cause. The State responds that appellant's trial commenced within 180 days, accounting for tolling of that period during the pandemic. We conclude that appellant was tried before the 180-day period expired. Consequently, the trial court did not err by denying his motion to dismiss on this basis.

The scheduling of a trial date in a criminal matter is governed by CP § 6-103 and Rule 4-271(a). Together, they require that, absent a showing of good cause, "a criminal case be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the circuit court, whichever occurs first." *Choate v. State*, 214 Md. App. 118, 139 (2013). The 180-day deadline, known as the "*Hicks* date," emanates from *State v. Hicks*, 285 Md. 310 (1979). The 180-day rule is "mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause for the delay has not been established. *Ross v. State*, 117 Md. App. 357, 364 (1997).

Defense counsel proffered the following undisputed timeline, which we supplement with the relevant administrative orders. Appellant was arrested on March 3, 2020 and was held without bail. A preliminary hearing was scheduled for March 19, 2020. On March 12, 2020, Chief Judge Barbera issued the first of a series of

administrative orders[6] in response to the state of emergency caused by the COVID-19 pandemic.[7] On March 16, 2020, the Chief Judge issued an administrative order closing the courts and suspending court operations through April 3, 2020, except for certain emergency proceedings.[8] That order included the following pertinent language at section (k):

> Pursuant to Maryland Rule 16-1003(a)(7), statutory and rules deadlines related to the adjudication of criminal and juvenile matters shall be suspended and shall be extended by the number of days that the courts are closed by order of the Chief Judge of the Court of Appeals, but no fewer than twenty-one (21) business days after the first day that the courts have been reopened[.]

Appellant's preliminary hearing was postponed several times due to the closure. Ultimately, counsel entered an appearance on behalf of appellant on August 10, 2020. The 180-day clock did not begin running at that time, however, because criminal jury trials remained suspended under subsequent administrative orders issued by the Chief Judge and were then set to resume on October 5, 2020.[9] The then applicable administrative order suspended the running of the 180-day period during the court

[6] The orders all are available at https://mdcourts.gov/coronavirusorders.

[7] *See Administrative Order on the Statewide Suspension of Jury Trials* (March 12, 2020).

[8] *See Administrative Order on Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency* (Mar. 16, 2020).

[9] *See Administrative Order Lifting the Statewide Suspension of Jury Trials and Resuming Grand Juries* (May 22, 2020).

closures and for an additional thirty days after jury trials were set to resume, *i.e.*, through November 4, 2020.

After jury trials resumed on October 5, 2020, counsel agreed to a trial date of March 11, 2021.

Then, on November 12, 2020, the Chief Judge issued a new administrative order suspending criminal jury trials due to a resurgence in COVID-19 cases effective November 16, 2020.[10] That order reimposed the tolling provision relative to the 180-day rule until thirty days after jury trials resumed. That order was extended several times through April 25, 2021, resulting in postponement of appellant's trial date to August 2, 2021.[11]

With this background, the 180-day period in which appellant's trial was required to commence did not begin to run until November 5, 2020. Eleven days elapsed between that date and when jury trials again were suspended and the 180-day period was tolled, leaving 169 days remaining. The period began to run a second time on April 25, 2021, which resulted in an expiration date on Monday, October 11, 2021. Because that was a court holiday (Columbus Day), appellant's *Hicks* date was extended until Tuesday, October 12, 2021. *See* Md. Rule 1-203. That is the date on which jury selection commenced in this case.

[10] *Third Amended Administrative Order Re-Imposing the Statewide Suspension of Jury Trials and Maintaining Grand Juries* (Nov. 12, 2020).

[11] *Fifth Amended Administrative Order Extending the Statewide Suspension of Jury Trials and Maintaining Grand Juries* (Dec. 22, 2020).

The circuit court found that appellant's *Hicks* date was October 11, 2021, that it was extended to the following day by Rule 1-203 and ruled that the "*Hicks* issue . . . [was] not . . . available to be raised[.]" Appellant did not dispute the trial court's calculation of the *Hicks* date[12] and, consequently, did not preserve any argument that it was miscalculated, which it was not. Because appellant's trial commenced before the 180-day period expired, we need not address any argument that good cause did not support postponements of his trial date. *See, e.g.*, *State v. Frazier*, 298 Md. 422, 428 (1984) ("The critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of *extending the trial date beyond 180 days*." (emphasis added)); *accord Hogan v. State*, 240 Md. App. 470, 491, *cert. denied*, 464 Md. 596 (2019).

Appellant argues, in the alternative, that the Chief Judge's emergency orders "could not, and did not, alter the requirement of trial within 180 days, codified by statute and rule." To the extent this argument is preserved, it is without merit. The Supreme Court of Maryland[13] recently considered whether Chief Judge Barbera acted within her authority when, in her capacity as administrative head of the Maryland Judiciary, she issued the administrative tolling order during the pandemic. *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 340 (2022). The Court, citing Article IV, Section 18 of the Maryland

[12] In the circuit court, appellant's counsel stated that "*Hicks* ran on Monday," *i.e.*, October 11, 2021, which as mentioned was a court holiday.

[13] On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland.

Constitution and Maryland Rules 16-1001 and 16-1003(a)(7), concluded that the Chief Judge had "ample and explicit authority" to issue the administrative tolling order. *Id*. at 369. In reaching its decision, the Court held that the Chief Judge's administrative tolling order did not usurp the Legislative Branch's power because the order was based on rules that "fell within the Court's 'practice and procedure' and administrative functions under the Maryland Constitution." *Id*. at 382. The Court further concluded the administrative tolling order was "inherently within the Court's constitutional rulemaking power." *Id*. at 384.

Based on the Supreme Court's decision in *Murphy*, appellant's argument that the Chief Judge's orders suspending the 180-day rule were ineffective is without merit. Although *Murphy* involved the tolling of the statute of limitations in a civil action, the *Hicks* deadline in appellant's case likewise "falls within the field of procedural matters in which the Court may play a role." *Id*. at 376. Therefore, applying the Court's holding in *Murphy*, we conclude Chief Judge Barbera acted within her authority when she suspended judicial proceedings and tolled deadlines with respect to criminal matters, including appellant's case.

II.

Speedy Trial

The Sixth Amendment to the United States Constitution, and Article 21 of the Maryland Declaration of Rights, guarantee a criminal defendant the right to a speedy trial. In assessing whether a defendant was denied this constitutional right, this Court

makes its own independent examination of the record. *Glover v. State*, 368 Md. 211, 220 (2002); *accord Howard v. State*, 440 Md. 427, 446-47 (2014).

Appellant contends the trial court erred by not dismissing the indictment because the 589-day delay between his arrest and the commencement of his trial, during which time he was jailed, violated his constitutional right to a speedy trial. As explained, appellant was arrested on March 3, 2020 and was held without bail. Appellant filed, *pro se*, a speedy trial motion on June 22, 2020. He was indicted in the circuit court on July 8, 2020. An attorney from the Office of the Public Defender entered her appearance in the case on August 10, 2020 and demanded a speedy trial. Appellant's initial appearance was scheduled for October 28, 2020 but was not held because defense counsel and the prosecutor agreed to a March 11, 2021 trial date in advance of that date.

On March 11, 2021, while jury trials were suspended, appellant's trial was postponed until August 2, 2021. On July 11, 2021, appellant again filed a *pro se* motion demanding a speedy trial.

On August 2, 2021, the court postponed the trial to August 12, 2021 due to "Covid 19." On August 12, 2021, the trial date was postponed until August 24, 2021, again due to COVID-19 related delays. On that date, trial counsel was substituted in place of a colleague and requested a postponement until October 12, 2021 to prepare for trial. As mentioned, jury selection commenced on that date.

In arguing his motion to dismiss on the first day of trial, defense counsel maintained that all but the delay between the August 24, 2021 postponement request and

the trial date should be taken into account in the speedy trial analysis, making the total delay one year and five months. He argued that the prejudice to appellant was clear because the State's case was based almost entirely on the testimony of Tolson and Bradley, whose memories would have faded. This was especially so because Tolson never gave a statement to the police and, consequently, appellant would be hearing her version of events for the first time on the witness stand. Appellant also was prejudiced because the lack of a speedy trial had caused a rift between him and defense counsel, as evidenced by his *pro se* motions. Defense counsel recognized that most of the delay was occasioned by the court closures arising from the pandemic but argued that "other jurisdictions were doing it sooner."

The prosecutor responded that, accepting that a 589-day delay triggered a speedy trial analysis, the motion still failed. He emphasized that the cases discussing prejudice to a defendant arising from fading memories related to defense witnesses, not State's witnesses. Here, fading memories would favor, not prejudice, appellant. Further, because the reason for the majority of the delay stemmed from the pandemic related closures – a neutral basis for postponing the trial – dismissal of the charges was not warranted. The prosecutor added that part of the delay stemmed from appellant "fir[ing]" his appointed counsel, causing another attorney from the Office of the Public Defender to step in.[14]

[14] Defense counsel disputed that appellant discharged his appointed counsel, maintaining that it was an "internal decision to switch attorneys."

The trial court found that appellant was not prejudiced by the delay because he did not assert that he could not locate defense witnesses or that their memories had faded. Further, though the period of pretrial incarceration was lengthy, the delay was almost entirely occasioned by the pandemic. For those reasons, the court ruled that appellant's right to a speedy trial was not violated and denied the motion to dismiss.

Four factors are relevant to whether a defendant's right to a speedy trial has been violated: "'Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *State v. Kanneh*, 403 Md. 678, 688 (2008) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). "None of these factors are 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id*. (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

Length of Delay

The length of the delay factor "is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Id.* (quoting *Glover*, 368 Md. at 222-23). The parties and the court assumed that the delay here of more than 19 months was of constitutional dimensions and we agree. *See, e.g., Icgoren v. State*, 103 Md. App. 407, 423 (1995) (delay of eleven months was presumptively of constitutional dimensions).

When a delay is presumptively prejudicial, the mere "fact that this delay is long enough to trigger a *Barker* inquiry does not, absent more, require dismissal." *Vaise v. State*, 246 Md. App. 188, 224, *cert. denied*, 471 Md. 86 (2020). "Indeed, the length of the delay, by itself, 'is the least determinative of the four factors that we consider in analyzing whether [a defendant's] right to speedy trial has been violated.'" *Id*. (quoting *Kanneh*, 403 Md. at 690) (alteration in *Vaise*). Delays far longer than the one here have been upheld. *See, e.g., Barker*, 407 U.S. at 534-45 (five-year delay); *Vaise*, 246 Md. App. at 224 (thirty-four months); *Kanneh*, 403 Md. at 690 (thirty-five months). Here, the 19-month delay does not weigh in favor of dismissal.

Reasons for the Delay

Turning to the reasons for the delay, we assign "different weights" to "different reasons." *Barker*, 407 U.S. at 531. Deliberate attempts by the State to "hamper the defense" are weighed heavily against it, whereas overcrowding of the court docket or negligence are treated more neutrally, though still weighed against the State. *Id*. Here, as appellant concedes, the vast majority of the delay – from his arrest on March 3, 2020 through at least April 25, 2021, or nearly 14 months – was caused by COVID-19 related administrative orders, which is a neutral reason that is not weighed heavily against the State. The delay from appellant's postponed August 24, 2021 trial date through the beginning of trial on October 12, 2021 (49 days), does not factor into our analysis because the defense requested the postponement to prepare for trial. Given that none of

the delay in this case was occasioned by the State's deliberate actions, this factor does not weigh heavily in favor of dismissal.

Assertion of the Right

The parties do not dispute that appellant repeatedly and forcefully asserted his right to a speedy trial. This factor weighs in his favor.

Prejudice

"[T]he most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry v. State*, 204 Md. App. 509, 554 (2012). Here, appellant contends his defense was impaired because of his lengthy pretrial incarceration and the effect the delay had on the witnesses' recall of the events. We do not "discount the length of appellant's pretrial incarceration and its attendant anxiety and concern, but the burden to show actual prejudice rests on the defendant." *Phillips v. State*, 246 Md. App. 40, 67 (2020). As the trial court found, appellant did not allege that any defense witnesses were unavailable or otherwise compromised because of the delay. Tolson and Bradley's faded memories worked to appellant's advantage at trial, as defense counsel ably discredited their versions of events on cross-examination. Because appellant did not show that he was actually prejudiced in the presentation of his defense, this factor does not weigh in his favor. *See Wheeler v. State*, 88 Md. App. 512, 525 (1991) (Actual prejudice must be shown beyond "the fact of the [pretrial] incarceration itself.").

Because, on balance, the *Barker* factors do not weigh strongly in appellant's favor, the trial court did not err by denying the motion to dismiss.

III.

Impeachment Evidence

Appellant contends the trial court abused its discretion by denying his motion *in limine*, made on the first day of trial, to permit defense counsel to cross-examine Tolson about a 2013 police report pertaining to an allegation that she assaulted a man while armed with a knife during a "domestic violence incident" and was "not forthcoming with the police" about it. She was charged with assault, but those charges later were *nol prossed*. Defense counsel argued that he should be able to impeach Tolson's credibility by questioning her about whether she had lied about this prior incident and that appellant's knowledge of the prior incident could be relevant to his claim of self-defense. Defense counsel also argued that a second incident mentioned in the 2013 police report, from 2006, in which Tolson was accused of throwing a full bottle of cider at a man, also was relevant to appellant's state of mind.

The trial court ruled that a statement in a police report that an officer disbelieved Tolson's version of events was insufficient to establish a factual basis for permitting inquiry about the incident. The court emphasized that evidence of a prior domestic violence incident involving another man would be improper propensity evidence. The court barred defense counsel from mentioning it in opening statements but left open the possibility that the evidence could come in if a proper foundation were laid. Defense counsel did not raise the issue again during trial.

We agree with the State that this issue is not preserved for review. "When a trial court grants a motion in limine to exclude a category of evidence and clearly intends for its decision to be final, the ruling ordinarily can be reviewed on appeal even if the proponent of the evidence makes no further effort to offer the excluded evidence later during the trial." *Wallace-Bey v. State*, 234 Md. App. 501, 544-45 (2017). Here, the trial court ruled preliminarily that appellant had not laid a proper foundation for admission of the evidence, but expressly left open the possibility that the evidence "might come in" if defense counsel was able to establish that foundation. In that circumstance, in order to preserve his objection to the exclusion of the evidence, appellant was obligated to attempt to lay the foundation during Tolson's testimony and, if the ruling stood, to lodge an objection at that time. *See* Md. Rule 4-323(c) (To preserve an objection to an order excluding evidence, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.").

Even if preserved, we would hold that the trial court did not err. "[M]ere accusations of crime or misconduct may not be used to impeach [a witness,]" but cross-examination of a witness regarding "prior bad acts which are relevant to an assessment of [a] witness' credibility" may be permitted. *State v. Cox*, 298 Md. 173, 179 (1983). Under Rule 5-608(b),

> The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing

> of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

In other words, where a party has objected to such examination, as is the case here, the court may not permit the inquiry unless: (1) the conduct was probative of untruthfulness and (2) is established by a reasonable factual basis. *Pantazes v. State*, 376 Md. 661, 686-87 (2003).

The trial court determined, preliminarily, that the police report did not establish a reasonable factual basis that the alleged prior assaults occurred or that Tolson lied or misled police about them.[15] Given that criminal charges for the 2013 assault were *nol prossed* and the record does not reflect that the police report explained why the police officer disbelieved Tolson, the trial court did not abuse its broad discretion by precluding inquiry about the police report and the incidents mention in it.

IV.

Self Defense Instruction

Appellant next contends that the trial court erred by not instructing the jury on self-defense. He argued at trial that the instruction was generated through the testimony of Tolson and Bradley. Specifically, he pointed to both witnesses' testimony that Tolson grabbed a pot of boiling water and threatened to throw it at appellant; Bradley's testimony that Tolson armed herself with a knife; and appellant's alleged statement on

[15] The police report was not marked as an exhibit and does not appear in the record.

the 911 call that he sustained a cut on his neck.[16] He maintains that this was "some evidence" warranting a self-defense instruction.

"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." Md. Rule 4-325(c). In determining whether a requested jury instruction should have been given, we consider "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012) (quotation marks and citation omitted). The defendant bears the "burden of initially producing 'some evidence' on the issue of mitigation or self-defense . . . sufficient to give rise to a jury issue[.]" *Wilson v. State*, 422 Md. 533, 541 (2011) (quotation marks and citations omitted). "Once the issue has been generated by the evidence, the defendant is entitled to a jury instruction explaining the elements of perfect or imperfect self-defense." *Porter v. State*, 455 Md. 220, 240 (2017) (citing *Dykes v. State*, 319 Md. 206, 215-16 (1990)).

"The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case[.]" *Dishman v. State*, 352 Md. 279,

[16] The trial transcript reflects that appellant's first statement to the 911 operator was "[o]n my neck." Our independent review of the 911 call recording does not bear this out and it was not argued below, but even if this statement had been made, it would not alter our analysis.

292 (1998) (internal citation omitted). Here, we conclude that appellant did not satisfy that threshold showing.

To generate a self-defense instruction, in either of its recognized forms, appellant was obligated to adduce some evidence that he actually believed he was in imminent danger. *State v. Marr*, 362 Md. 467, 473 (2001). "[D]etermining whether there is evidence in the record pertaining to the defendant's mental state at the time of the incident is critical" because "[o]nly if the record reflects, from whatever source, that, at that time, the defendant subjectively believed that he or she was in imminent danger of death or great bodily harm could the issue be generated." *State v. Martin*, 329 Md. 351, 362-63 (1993). Here, there was no evidence bearing upon appellant's subjective state of mind during the fight between him and Tolson. His statement to the 911 operator that Tolson stabbed herself is not evidence that he believed himself to be in danger, nor does evidence that Tolson was, at separate times, armed with a pot of boiling water and a knife suffice to establish his state of mind. Because appellant did not satisfy his minimum showing to generate the defense, the court did not err by refusing to give the instruction.

V.

Verdict Sheet and Polling of the Jury

Appellant asserts that the trial court committed reversible error by its conduct during jury deliberations and the acceptance of the verdict, which undermined his right to a fair trial. We set forth the pertinent facts.

Due to COVID-19 precautions, the jury deliberated in a courtroom, rather than a jury room, and that courtroom was located three floors below the trial courtroom. After closing arguments on the second day of trial, the court released the jurors for lunch and to begin deliberations. At 5:29 p.m., the trial court reconvened, announced that it was going to discharge the jurors for the day, and asked counsel if the trial judge could "go down and release [the jurors] from downstairs" or if counsel wanted them "brought back up here to be sent home?" Defense counsel stated, "No, that's fine." The prosecutor likewise assented to that procedure.

The next day, the court recounted the following events that had occurred the prior evening and that morning. First, after the trial judge discharged the jurors and most had left the jury room, a male juror asked the trial judge if he had received "their message." Apparently, the foreperson had informed the sheriff that the jury had reached a verdict, but the message had not reached the trial court before it recessed. The foreperson, who had not yet left, was holding the completed verdict sheet. The court directed her to place the verdict sheet in an envelope and to sign her name over the seal. The courtroom clerk then took custody of the sealed envelope and secured it inside a lockbox overnight. Second, that morning, the court learned that Juror Number 4 could not appear because her three-year-old son had been admitted to the hospital. Considering these events, the court gave defense counsel a chance to confer with appellant and both parties an opportunity to ask questions and make suggestions as to how to proceed.

Defense counsel expressed concern about how the jury could be polled with an absent juror, though he stated that appellant would "waive polling" if the verdict were a complete acquittal. The prosecutor suggested that Juror Number 4 could be polled by telephone. The court stated that it already had arranged to do so and that there were "ways" to identify the juror conclusively.

Defense counsel responded that he and appellant were "at an impasse" because appellant objected to "the procedure that [the court] employed with the verdict sheet" and that he didn't "like what's going on with the reading of the verdict." Defense counsel added that he understood Juror Number 4's personal situation and that he did not have any further questions about the circumstances from the prior evening. He stated that appellant would "proceed with objection."

Before the verdict sheet was removed from the envelope, counsel was permitted to examine it. Defense counsel then renewed his objections for the record, both to the "process of taking the verdict sheet" and to Juror Number 4 participating by telephone.

The court then contacted Juror Number 4 by telephone and placed her on speaker. It questioned her briefly on the record about the reason for her absence. The jurors all affirmed verbally that they had reached a verdict. The foreperson was shown the envelope containing the verdict sheet and confirmed that her signature was on it and that it did not appear to have been opened or tampered with in any way.

After the verdict was read, finding appellant not guilty of first-degree and second-degree assault, and guilty of reckless endangerment, the jurors were polled at defense

counsel's request. All the jurors, including Juror Number 4, affirmed verbally that their verdict was the same as that announced in open court. The jurors hearkened to the verdict.

A. Verdict Sheet

"[T]he conduct of a criminal trial is committed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse." *Bruce v. State*, 351 Md. 387, 393 (1998). "If the exercise of discretion results in the denial of a fair trial to a defendant, the discretion is certainly abused." *Wiggins v. State*, 315 Md. 232, 240 (1989), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990).

Appellant has not articulated how the procedure employed by the trial court in taking custody of the completed verdict sheet violated his right to a fair trial. The court gave counsel an opportunity to raise any concerns about that procedure and, though lodging a general objection, defense counsel asked no questions and did not explain how the procedure prejudiced him. Defense counsel likewise did not note any concerns about tampering with the envelope in which the verdict sheet was contained. The record reflects that the jurors reached a verdict prior to being discharged and the security and secrecy of that verdict was maintained until it was announced in open court. We perceive no error.

B. Polling of the Jury

Rule 4-327(e) requires that the jury be polled after it has returned a verdict on request of either party or the court. Appellant contends that the rule does not permit

remote polling of a juror; that the manner of identifying Juror Number 4 was conducted off the record; and that the procedure employed deprived him of his constitutional right to a unanimous verdict.

Rule 4-327 implements a criminal defendant's constitutional right to a unanimous verdict. *See Jones v. State*, 384 Md. 669, 682-83 (2005) ("The requirement of unanimity is, of course, a constitutional right" and "[a] poll of the jury is conducted to ensure the unanimity of the verdict prior to its entry on the record."). "A jury verdict that is not unanimous is defective and will not stand." *Caldwell v. State*, 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id*. at 636. In other words, "to satisfy the unanimous consent requirement, a verdict must be unambiguous and unconditional and must be final – in the sense of not being provisional or tentative and, to the contrary, being intended as the last resolution of the issue and not subject to change in further deliberation." *Id*. at 642-43. "Whether a verdict satisfies the unanimous consent requirement is a . . . mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Id*. at 643.

Here, the record reflects that the court satisfied itself of Juror Number 4's identity, that Juror Number 4 was questioned on the record prior to the reading of the verdict, and that defense counsel did not request the opportunity to question her on the record or otherwise challenge the way the court ascertained her identity. Consequently, appellant waived any contention that Juror Number 4's identity was in doubt. Juror Number 4 was

present remotely when the verdict was read, heard it, and, when polled, confirmed unconditionally that it was her verdict. Under the totality of circumstances, there was no ambiguity in the unanimity of the verdict. Though Rule 4-327 does not expressly permit a juror to be polled remotely, because we are satisfied that the procedure followed by the trial court permitted appellant to poll the jury and did not violate his right to a unanimous verdict, any error was harmless beyond a reasonable doubt.

VI.

Inconsistent Verdicts

Appellant contends that the jury's verdict, acquitting him of the assault counts and convicting him of reckless endangerment, is legally inconsistent and that his conviction must be vacated. Because he did not object on the record after the verdict was read and before the jury was discharged, however, this argument is not preserved for our review. *See Givens v. State*, 449 Md. 433, 472-73 (2016) ("[T]o preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury.").

We decline appellant's invitation to engage in plain error review but, if addressed, we would hold that because the verdicts were factually inconsistent, not legally inconsistent, there was no error, plain or otherwise. *See Williams v. State*, 478 Md. 99, 105-06 (2022) ("[V]erdicts are factually inconsistent where proof of the charged offenses involves establishing the same facts and the offenses have different legal elements, and a

trier of fact acquits the defendant of one offense but convicts of the other.").[17] Factually inconsistent verdicts are permissible in a criminal jury trial because they "'may be the product of lenity, mistake, or a compromise to reach unanimity[.]'" *Id*. at 106 (quoting *McNeal v. State*, 426 Md. 455, 470 (2012)).

VII.

Sufficiency of the Evidence

Appellant contends that the evidence was legally insufficient to sustain his conviction for reckless endangerment. Our well-established standard of review requires us to ask 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *State v. Morrison*, 470 Md. 86, 105 (2020) (applying the *Jackson* standard).

"The elements of a *prima facie* case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly." *Jones v. State*, 357 Md. 408, 427 (2000). Here, Tolson testified that appellant struck her, choked her, pushed her, broke a chair over her back, and stabbed her. Recognizing that this evidence is legally sufficient to sustain his conviction, appellant contends that Tolson's testimony should not be credited

[17] That the inconsistency was factual, not legal, is underscored by appellant's resort to arguing the particular facts of this case in support of his argument on appeal.

because it may have been "influenced by" her mental health condition, her prescription drug use, or intoxication.[18] In assessing legal sufficiency, however, an "appellate court does not 're-weigh' the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Morrison*, 470 Md. at 105 (quoting *Fuentes v. State*, 454 Md. 296, 307-08 (2017)). There was evidence from which a rational juror could find that appellant's conduct created a substantial risk to Tolson's life and that he acted unreasonably and recklessly in engaging in that conduct.

VIII.

Denial of Motion for a New Trial

Appellant contends that the trial court erred or abused its discretion by denying his motion for a new trial, filed within ten days after the verdict. First, he argues that the trial court erred by not ruling on the motion within ten days. CP § 6-105 states that a trial court "shall hear [a motion for a new trial] . . . (1) within 10 days after the motion is filed" unless "[t]he time for the hearing of a motion for a new trial" is extended by agreement of the parties or by order of the court.

As the State points out, the Supreme Court construed identical language in the predecessor to CP § 6-105 as being "directory, and not mandatory[.]" *Garland v. Dir. of*

[18] Appellant also reiterates his inconsistent verdicts argument, asserting that because the jury acquitted appellant of first- and second-degree assault, it necessarily did not credit Tolson's testimony that he committed the acts that would support a reckless endangerment conviction. Only the legal sufficiency of the evidence to convict appellant of reckless endangerment is before us on appeal, however. *See Manigault v. State*, 61 Md. App. 271, 281 (1985) ("The issue of evidentiary sufficiency . . . is a self-contained phenomenon, totally uninfluenced by what may have happened to other counts.").

Patuxent Inst., 224 Md. 653, 655 (1961); *see also* CP § 6-105, *Revisor's Note* (noting that "the 10-day time period within which a court is required to hear a motion for a new trial in a criminal case is contrary to current practice" and suggesting that the legislature "may wish to delete subsection (a) of this section as obsolete"). In *Garland*, 224 Md. at 655, the Court reasoned that the 10-day period to hear a motion for a new trial should be "followed by the trial courts when possible and practical," but that the failure to adhere to that deadline was not a ground for post-conviction relief, especially given that the delay in hearing the motion did not result in any unfairness to the defendant or a deprivation of his rights. In this case, appellant likewise identifies no prejudice to him occasioned by the delay in consideration of his motion for a new trial.

We turn to the merits. Ordinarily, we review the denial of a motion for a new trial for abuse of discretion "because the decision to grant or deny a motion for new trial . . . 'depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]'" *Williams v. State*, 462 Md. 335, 344-45 (2019) (quoting *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 59 (1992)). An exception to this rule arises where there was error during the trial that was not discovered through no fault of trial counsel. *Id*. at 345 (citing *Merritt v. State*, 367 Md. 17, 30-31 (2001)). Then the denial of the motion is reviewed for error and to determine if that error was harmless. *Id*.

Appellant urges that the latter standard applies here. We disagree. Appellant does not identify undiscovered trial errors, but rather alleges that the trial court made errors "in

resolving the claims raised in the motion for a new trial." Specifically, he argues that the court failed to consider his argument concerning the 2013 incident of domestic violence and erroneously referred to the "defendant" when it meant to refer to Tolson when discussing her mental health diagnosis. We are satisfied that the court's opinion and order denying the motion for a new trial adequately addressed the issues raised and we perceive no abuse of the trial court's broad discretion.

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