Circuit Court for Baltimore City
Case No.: 115363027

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1797

September Term, 2017

DEVANTE BRIM

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: July 11, 2018

*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.

Appellant, Devante Brim, was indicted in the Circuit Court for Baltimore City, Maryland, and charged with: (1) first-degree premeditated murder; (2) use of a firearm in the commission of a crime of violence; and, (3) wearing, carrying and transporting a handgun. The court also instructed on the lesser included offense of second-degree murder. The jury returned a not guilty verdict for first-degree murder but was unable to reach a decision on the remaining counts. After the court declared a mistrial on those counts, and prior to the start of a retrial, appellant filed a motion to dismiss on double jeopardy grounds. When that motion was denied, appellant timely appealed, and this Court stayed the trial pending our resolution of the following question:

> Did the lower court err in denying the motion to dismiss the charges of second-degree murder and use of a firearm in the commission of a felony or a crime of violence?

We shall answer "No" to that question.

BACKGROUND

This case concerns competing theories of mistaken identity. Appellant insists that he did not kill the victim, Kendall Fenwick,[1] and that the likely killer was one Craig James. The State, in turn, maintains that appellant was the killer, but that appellant thought he was shooting Tayquan Clark,[2] not Fenwick. Consideration of these theories, in light of the

[1] Mr. Fenwick's name is listed variously throughout as both Kendal and Kendall Fenwick, but for consistency we will use Kendal.

[2] Mr. Clark's name is also listed as Taquan Clark, but for consistency we will use Tyquan.

record and evidence in this case, is useful in determining whether retrial on the two most serious charges is permitted.

Considered in the light most favorable to the prevailing party, *i.e.*, the State, the evidence at trial established the following: On November 4, 2015, at around 9:00 p.m., appellant was visiting his grandmother's residence, located at 2816 Hilldale Avenue in Baltimore City. At some point that evening, Tayquan Clark, also known as "Tay," arrived and, for some unknown reason, fired a gun at appellant and at the house. Appellant later told his friend, Ebony Jones, that he (appellant), returned fire. Tayquan Clark's DNA was later found on a Glock 22 firearm that was recovered near the November 4th crime scene.

Approximately five days later, on November 9, 2015, Ebony Jones and Imani Utsey went to appellant's grandmother's house. There they encountered appellant, who was still "upset" and told them he had been "beefing with somebody." After an interlude, appellant and Ms. Utsey left in Utsey's car while Ms. Jones remained on the porch.

Ms. Utsey testified that appellant said to her: "[t]ake me so I can get these n----s that shot my grandmother house up." Utsey drove appellant a few blocks to an area near 3512 Park Heights Avenue, at which point appellant got out of the car and ran up an alleyway. Utsey then heard gunfire. Next appellant ran back to Utsey's car, got inside, and told her to "pull off." Appellant then admitted to Utsey that he had just shot someone who was "running down the alley."

After the shooting, neighbors discovered that Kendall Fenwick, a young single father, was shot nine times in a poorly lit area behind Mr. Fenwick's home. Fenwick's corpse was found in the back yard between two houses, near a service alleyway in the 3500

block of Park Heights Avenue. That area is known as a place where narcotics distribution takes place. Before his murder, Mr. Fenwick had finished building part of a fence at the front of his property in an attempt to limit drug activity near his home.

Four 9 mm shell casings were found in Mr. Fenwick's backyard. Daniel Lamont, accepted at trial as a firearms expert, testified that these four shell casings, as well as two shell casings found near appellant's grandmother's home, were fired from a Glock model 17, 9 mm Luger semi-automatic pistol that was recovered by police approximately a year after Mr. Fenwick's murder.[3] In addition, two 9 mm bullets and a bullet fragment were recovered from Mr. Fenwick's body during his autopsy. The firearms expert was unable to connect the last mentioned bullets and fragment to a specific firearm, but opined that they were most likely fired from a Glock.

Appellant was arrested on November 18, 2015, which was nine days after Mr. Fenwick's murder. He was interviewed by Baltimore City homicide Detectives Eric Perez, Sean Suiter, and Ray Yost. A video recording of that interview was admitted into evidence and played for the jury.[4]

During that interview, appellant stated that he knew that he was being interviewed in connection with a shooting in his neighborhood because someone was "hit." Appellant maintained throughout the interview that he never shot anyone, or even owned a gun.

[3] The Glock 17 was recovered on October 8, 2016 during the investigation of an unrelated case. There was evidence that this handgun was used in at least two other unrelated shootings.

[4] Although none of the trial exhibits were filed in this interlocutory appeal, appellant's statement is reproduced in the trial transcript.

Nevertheless, he did tell the detectives about the shooting at his grandmother's house, and ultimately told the detectives that "Tay" was the shooter in that incident. He also stated that during the incident at his grandmother's house, his friend, "Craig," pulled out a gun and returned fire.

According to appellant, "Craig" was the one that wanted revenge for the November 4, 2015 shooting and apparently tried to shoot "Tay," but happened to kill Mr. Fenwick while using a Glock .9mm handgun. But, appellant insisted he was at a McDonald's in East Baltimore at the time that Mr. Fenwick was killed. Appellant also insisted during the interview that he was not "beefing" with Tay and that he "never got into it with Tay."[5]

On November 19, 2015, appellant and Ebony Jones spoke on the telephone. Appellant told her that that she should not speak to the police if they asked her about the November 9th shooting.[6] But, Jones confirmed at trial that, she did speak to the police and identified a photograph of appellant. On the back of that photo, Jones wrote "He said he did it over the phone. I was at his grandmother house during that time."

We now turn to the counts submitted to the jury. The day before instructions were read to the jury, and before the end of the State's case-in-chief, defense counsel questioned

[5] During one exchange with the detectives, when appellant apparently was talking in the third person, he stated that "I did not drop that man to shoot and/or kill him. I'm telling you, but I dropped him." It is unclear if appellant is telling the police something "Craig" told him after the shooting, or if he was speaking hypothetically. In any event, appellant maintained that he was not involved in the Fenwick murder. Following this statement, detectives investigated a man named Craig James but did not find any physical evidence connecting him to the murder.

[6] That call was recorded and played for the jury during trial.

whether the court should give an instruction on the lesser included offense of second-degree murder, contending that the State's theory of the case was that this was a first-degree murder and that there was insufficient evidence of second-degree murder. The court ruled that both degrees of murder were at issue in this case. *See State v. Martin*, 367 Md. 53, 55 (2001) ("[C]harging an offense for which there are lesser included offenses permits the conviction of the defendant not simply of the specifically charged offense, but also of any lesser included offense the evidence supports"); *Dishman v. State*, 352 Md. 279, 289 (1998) (concluding that a short form indictment charged first-degree murder, second-degree murder and manslaughter); *Bass v. State*, 206 Md. App. 1, 9 (2012) ("Under Maryland common law, a defendant charged with a greater offense can be convicted of an uncharged lesser included offense as well as the charged offense") (quoting *State v. Bowers*, 349 Md. 710, 718 (1998)).

Toward the end of the next day, after all the evidence was received, the court gave the pattern instruction for first and second-degree murder. *See* Maryland State Bar Ass'n, Maryland Criminal Pattern Jury Instructions 4:17.1 (2012) ("MPJI-Cr"). Appellant's counsel **did not object to that instruction.**[7]

[7] At the end of jury instructions, defense counsel only objected to the court's decision not to give an instruction concerning prior inconsistent statements of the State's witnesses. Contrary to appellant's claim in this appeal, defense counsel *did not* preserve an objection to the first-and second-degree murder instruction. *See* Maryland 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").

Thereafter, during closing argument, the State argued this was a premeditated killing because the killer had "time to think about it" and "had a chance not to do this," and "had an opportunity to make a decision . . . do I kill, do I not kill?" The State pointed to the nine gunshot wounds to the victim's body in support of its theory that this was a first-degree murder case. The State then spent the bulk of its closing addressing the evidence that suggested appellant was the shooter but did not separately address the second-degree murder charge that was before the jury.

In response, the defense challenged the State's failure to investigate Craig James. Defense counsel also suggested that Fenwick was targeted because he had issues with local drug dealers and was building a fence to try to limit drug trafficking in the area.

The State responded in rebuttal by summarizing its overall theory of what happened in this case, saying in pertinent part:

> There's why. He just told you why it happened before we even knew. "That shit is crazy." You know what's crazy? The thought that a man can come down the street with a Glock 22 and extended magazine and shoot up a house full of people and no one gets hurt. No one dies. You walk away. And instead of being thankful for that good fortunate [sic], you spend the next five days festering on this idea of revenge and retaliation. That's crazy. That you invite your girlfriend over to your house, you have her friend and her friend's girlfriend come over [to] your house. You're supposed to hang out, smoke a little weed and have a good time. And instead you use them, the people that are supposed to be close to you, you use them to accomplish this revenge and this retaliation. You say drive me up to an alley. You hop out in of [sic] an alley. You run down, you can't even see anything, you start opening fire and shooting people. That's crazy. . . .

During the ensuing deliberations, the jury sent out several notes, which are not included with the appellate record. However, according to the transcript, and pertinent to our discussion, after approximately five and a half hours of deliberations, the jury informed

the court that "[w]e are unable to reach a unanimous decision." The court and the parties agreed that the court should tell the jury to: "[p]lease continue to deliberate."

After another hour or so, the jury sent a note that stated: "[w]e have discussed further with heart and are unable to reach a unanimous decision. We have begun to go in circles and believe no more progress can be made." The court and the parties agreed that the jury had not been deliberating long enough to warrant a mistrial, but all agreed that the court should give a modified-*Allen* instruction[8] and then excuse the jury for the evening.

The next day, the jury sent the judge several notes, including, but not limited to: one asking for the definition of circumstantial evidence, another asking about cellphone records; and, another asking about recorded phone call between appellant and Ebony Jones.

At approximately 5:24 p.m. on the second full day of deliberations, the jury sent another note that stated: "We are unable to reach a verdict." The court informed the parties that it was going to declare a mistrial. The State responded by asking the court to defer declaring a mistrial for one more day. After hearing from defense counsel, the court agreed to recess for the evening and have the jury return for one more day of deliberations.

On the third day of deliberations, the jury informed the court that it had reached a unanimous verdict of not guilty on count one, first-degree murder, but was unable to reach a verdict as to the remaining counts. During a discussion with the prosecutor, the judge

[8] A modified *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), generally asks the jury "to conciliate their differences and reach a verdict." *Kelly v. State*, 270 Md. 139, 140 n. 1 (1973). The trial court here re-read MPJI-Cr 2:01 before excusing the jury for the evening and asking them to return the following morning.

indicated that she believed the acquittal on the first-degree murder count meant that "the only thing you have left is the wear, carry, transport of a handgun" charges because "both of them, it's murder, which would be first and second-degree murder." The State disagreed. The court then accepted a partial verdict of not guilty of first-degree murder and declared a mistrial as to all remaining counts.

The case was then set for retrial. Prior to retrial, appellant filed a written "Motion to Dismiss and To Prohibit the State from Prosecuting Devonte Brim for the Offenses of Second-Degree Murder and Use of Handgun in the Commission of a Crime of Violence," as well as a supplemental motion to dismiss. Appellant stresses that the State's singular theory of the case was that appellant committed a premeditated first-degree murder, while the defense theory was that the State failed to prove that he was the culprit. Specifically, appellant asserted that "[t]he Jury's verdict of not guilty on the charge of first-degree murder necessarily determined the issue of identity in favor of Mr. Brim." Appellant further contended that permitting the State to prosecute him for second-degree murder violated his right to due process and his double jeopardy rights. Also, he maintained that retrial should be barred under the doctrines of collateral estoppel and res judicata.[9]

The State filed a written response to the motion. It contended that both first-and second-degree murder were before the jury, and that the jury did not resolve the issue of identity. The State also asserted that: "if it were true that the jury believed someone else

[9] Appellant does not argue res judicata on appeal.

murdered Kendall Fenwick, they would have acquitted Defendant of all charges; which they did not." (Emphasis omitted.)

The case was then called for trial but, prior to jury selection, defense counsel argued that trial should not proceed based on his motion to dismiss. Counsel asserted that the defense theory of the case was "It wasn't him" and *not* "It wasn't first-degree murder." Defense counsel maintained that, despite the court's instruction on both first-and second-degree murder, the State's theory was that this was a premeditated killing.[10] Defense counsel also noted that the State requested a transferred intent instruction, which the court rejected, and that instruction would have supported a first-degree murder theory.[11]

The State responded that it was not changing its theory of the case, stating "[w]e have always said Mr. Brim is the one responsible for this murder." The State also noted that a possible explanation for the jury's confusion was its potential acceptance of parts of appellant's statement, and the State's failure in not "giving them the option to believe his statement versus believing our emphasis on other parts of the evidence."

The court denied the motion to dismiss. After summarizing the arguments of counsel, the court recounted the pertinent evidence as follows:

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[10] Defense counsel also noted that the court commented, on the day the verdict was received, that the State could only proceed on the handgun charge. The judge responded that she had since researched the issue and had recognized that retrial was not necessarily barred under the law.

[11] "[I]f one intends injury to the person of another under circumstances in which such a mental element constitutes *mens rea*, and in the effort to accomplish this end he inflicts harm upon a person other than the one intended, he is guilty of the same kind of crime as if his aim had been more accurate." *Henry v. State*, 419 Md. 588, 594 (2011) (quoting *Gladden v. Maryland*, 273 Md. 383, 404 (1974)).

> In this case, the evidence was brought that the Defendant was in the back alley behind the victim's house. The shooting started in the front of the house. And the victim ran to the back in an effort to escape being hit by gunfire.
>
> When the victim reached the area where the Defendant was, the Defendant shot the victim. At that time, the Defendant shot an unknown male who was later identified as Kendal Fenwick running down the alley. He did not know that it was Kendal Fenwick. The Defendant in his statement to the police stated that he later heard that Kendal Fenwick was the person who was shot.

The court then found that there was sufficient evidence to convict appellant of second-degree murder. After the court denied the motion to dismiss, appellant filed an appeal and we granted an emergency stay of trial pending our decision in this matter.

DISCUSSION

Appellant contends, in this interlocutory appeal, that further prosecution of him for second-degree murder and use of a firearm in commission of a crime of violence is barred under principles of double jeopardy, based on the jury's acquittal on the first-degree murder count. Specifically, appellant asserts that the doctrine of collateral estoppel, also known as issue preclusion, applies because "the only real issue before the jury was criminal agency – *i.e.*, was Mr. Brim the person who killed Mr. Fenwick?" Appellant continues that, because the State exclusively pursued a theory that the killing was premeditated, the jury's acquittal on the first-degree murder count decided an issue of "ultimate fact" that cannot be relitigated.

The Double Jeopardy Clause provides that no person shall "be subject to the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. This constitutional guarantee is made applicable to the states through the Due Process Clause of

the Fourteenth Amendment. *State v. Baker*, 453 Md. 32, 47 (2017) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969)). "Under the prohibition on double jeopardy, a court cannot subject a defendant to multiple trials and sentences for the same offense." *Scott v. State*, 454 Md. 146, 167 (2017), *cert. denied*, 138 S. Ct. 652 (2018). Our review of a double jeopardy claim is *de novo*. *Scriber v. State*, 437 Md. 399, 407 (2014) (stating that the appellate courts "grant no deference to the lower court's resolution of the matter.") (citing *Giddins v. State*, 393 Md. 1, 15 (2006)).

The collateral estoppel doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, [then] that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *accord Odum v. State*, 412 Md. 593, 603 (2010); *see also Scriber*, 437 Md. at 403 ("The doctrine of collateral estoppel is a common-law doctrine that, in a criminal case, prohibits "the relitigation of an issue of ultimate fact that has been decided in a defendant's favor").

As with double jeopardy claims, review of a claim of collateral estoppel is reviewed *de novo*. *Tubaya v. State*, 210 Md. App. 46, 49 (2013) (citing *State v. Johnson*, 367 Md. 418, 424 (2002)). Further, the burden of proof is placed on the defendant "to demonstrate that the fact for which he or she is seeking to bar relitigation was decided in a prior proceeding." *Odum*, 412 Md. at 606 (citations omitted). "That burden is a difficult one to carry." *Id*. When "the circumstances themselves are too ambiguous or the record itself too inadequate to permit an accurate assessment of what factual findings the jury must have

made, it is the defendant, as moving party, who necessarily loses." *Butler v. State*, 91 Md. App. 515, 545 (1992), *aff'd*, 335 Md. 238 (1994).

> "[T]he doctrine of collateral estoppel applies after a jury, at a single trial, acquits on one count of a multicount indictment and is unable to agree upon a verdict on a related count of the same indictment involving a common issue of ultimate fact, which if found in favor of an accused would establish his innocence on both counts."

Ferrell v. State, 318 Md. 235, 242 *cert. denied*, 497 U.S. 1038 (1990) (*quoting Powers v. State*, 285 Md. 269, 288 (1979)).

The reviewing court's task is to determine from the trial court record "whether the offense for which the defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, and whether that issue was resolved in the defendant's favor at the earlier trial." *Ferrell*, 318 Md. at 243; *see also Mayne v. State*, 45 Md. App. 483, 488 (1980) (permitting retrial on second-degree murder charge despite acquittal of first-degree murder because "[i]t is apparent that all that the jury decided was that appellant did not premeditate his wife's killing"), *cert. denied*, 288 Md. 739 (1980), *cert. denied*, 450 U.S. 910 (1981); *Rasnick v. State*, 7 Md. App. 564, 571, 256 A.2d 543, 547 (1969), *cert. denied*, 257 Md. 735, *cert. denied*, 400 U.S. 835 (1970). ("Even though a retrial on murder in the first-degree is precluded under some circumstances, *e. g.* an acquittal at the first trial, that does not mean the accused cannot be retried for second-degree murder or manslaughter under the same indictment").

In considering the trial record, we are not to consider "hung" counts, because "there is no way to decipher what a hung count represents." *Yeager v. United States*, 557 U.S. 110, 121 (2009). This directive means that we should not consider the fact that the jury

hung on the second-degree murder count and the handgun counts, and should focus our attention to the meaning of the first-degree murder acquittal.[12]

In considering the first-degree murder acquittal, the Supreme Court has explained that we should:

> "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." We explained that the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Yeager, 557 U.S. at 119-120 (quoting *Ashe, supra,* 397 U.S. at 444; footnote and some internal citations omitted); *accord Ferrell*, 318 Md. at 244-45.

Here, appellant was indicted for first-degree murder, pursuant to Md. Code (2002, 2012 Repl. Vol., 2017) § 2-201 of the Criminal Law ("Crim. Law") Article. First-degree murder may be committed if it is "(1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate" an enumerated felony. *Id.* To prove first-degree murder in

[12] Appellant argues that the court erred by instructing on second-degree murder based on what he contends was insufficient evidence. *See Dishman*, 352 Md. at 293 ("[W]here the evidence would not logically support a finding that the defendant committed the offense covered by the instruction, the trial court should not instruct the jury on that offense"). Although *Yeager* instructs that we should not decide appellant's double jeopardy claim based on the "hung counts," we nevertheless note there was some evidence that would have permitted the jury to conclude that appellant possessed the requisite intent to kill anyone in the zone of harm when he got out of Utsey's car and fired a handgun down the alleyway. *See Harrison v. State*, 382 Md. 477, 495 (2004) (explaining the doctrine of concurrent intent).

the case at hand, the State was required to prove that the killing of Kendall Fenwick was "deliberate, premeditated, and willful." The Court of Appeals has explained that

> For a killing to be "willful" there must be a specific purpose and intent to kill; to be "deliberate" there must be a full and conscious knowledge of the purpose to kill; and to be "premeditated" the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time. Their existence is discerned from the facts of the case.

Tichnell v. State, 287 Md. 695, 717-718 (1980); *accord Bryant v. State*, 393 Md. 196, 215-16 (2006); *Mitchell v. State*, 363 Md. 130, 148-49 (2001).

These principles were conveyed to the jury when the court gave the following pattern instruction concerning first-degree murder:

> The Defendant is charged with the crime of murder. This charge includes first-degree murder and second-degree murder. First-degree murder is the intentional killing of another person with willfulness, deliberation and premeditation. In order to convict the Defendant of first-degree murder the State must prove that the Defendant caused the death of Kendall Fenwick. That the killing was willful, deliberate and premeditated. Willful means that the Defendant actually intended to kill Kendall Fenwick. Deliberate means that the Defendant was conscious of the intent to kill. Premeditated means that the Defendant thought about the killing and that there was enough time before the killing, though it may only have been brief, for the Defendant to consider the decision whether or not to kill in enough time to weigh the reasons for and against the choice. The premeditated intent to kill must be formed before the killing.

See MPJI-Cr 4:17.1.

The State's evidence, of course, supported a rational inference that appellant went to the alley to kill Tayquan Clark. Notably, during opening statement, the State insisted the case concerned retribution for the November 4th gunfight when shots were fired into the home of appellant's grandmother. According to the prosecution's theory, the shooting

at issue occurred five days later after appellant learned that "the people that shot up his grandma's house are out there on Park Heights right now," and that he could then "get his revenge." The State continued that, in the confusion of the ensuing events, appellant only saw "a silhouette of is [sic] his intended target, and he fires four times, and he kills" Fenwick.

Under these circumstances, it was possible that appellant was acquitted because the jury believed that appellant intended to kill someone else and that, in effect, Fenwick was akin to an innocent bystander. Because the trial court refused to give a transferred intent instruction, the jury could have decided the State did not prove premeditation beyond a reasonable doubt. In sum, we conclude that appellant has failed to meet his burden of demonstrating that the jury actually decided that appellant was not the person who shot the victim.

Appellant also claims that retrial would violate his right to due process "because it would permit the State to proceed on a theory of criminal liability inconsistent with the theory at the first trial." The State responds that this issue is not ripe for consideration "because there has not yet been a second trial at which a potentially inconsistent theory of criminal liability could be presented." *See Twigg v. State*, 447 Md. 1, 19 n. 11 (2016) (noting that "this Court has "long forbidden" the practice of issuing an advisory opinion concerning an issue that is not "ripe," that is, one that involves "a matter which is future, contingent and uncertain") (citation omitted); *see also State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 591-92 (2014) ("The purpose of ripeness is to ensure that adjudication will dispose of an actual controversy in a conclusive and binding

manner, where an issue is not ripe, the issue is not justiciable, and thus, a court will not entertain the claim") (internal citations and quotations omitted).

In this case, however, we question how "uncertain" the issue is considering that, after the motion to dismiss was denied, a jury actually was selected for appellant's retrial before the case was stayed for this interlocutory appeal. *See generally, Stewart v. State*, 282 Md. 557, 566-67 (1978) (recognizing the right to interlocutory appeals in cases concerning the alleged deprivation of a constitutional right). Moreover, not only was the second-degree murder charge before the jury in appellant's first trial, the question whether appellant may be retried on that charge is a justiciable issue that is properly before us.

We turn to the merits of appellant's due-process argument. In that regard, the following language from *Sifrit v. State*, 383 Md. 77 (2004), *cert. denied*, 543 U.S. 1056 (2005) is instructive:

> Based on our analysis of the relevant case law, we are in accord with the courts that hold that a due process violation will only be found when the demonstrated inconsistency exists at the core of the State's case. <u>Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts</u>. We recognize that the evidence presented at multiple trials is going to change to an extent based on relevancy to the particular defendant and other practical matters. The underlying core facts, however, should not change. The few courts that have found due process violations did so in cases where the inconsistencies were inherent to the State's whole theory of the case or where the varying material facts were irreconcilable. It is this type of inconsistency that renders the conviction fundamentally unfair, thus violating due process.

Sifrit, 383 Md. at 106. (Emphasis added.)

Upon retrial, the jury undoubtedly will be instructed pursuant to the pattern jury instruction as to second-degree murder, *viz.,*

> Second-degree murder is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result. Second-degree murder does not require premeditation or deliberation. In order to convict the defendant of second-degree murder, the State must prove:
>
> (1) that the conduct of the defendant caused the death of victim; and
>
> (2) that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result.

In other words, in the second trial, the prosecution needs to prove <u>less</u> than in the first trial because the prosecutor will have no reason to prove or even discuss premeditation or deliberation. As far as we can forecast, upon retrial, the State's case will not be based on inconsistent facts. There will be no need, or likelihood, that the State will proceed on factually inconsistent theories.[13] Put another way, if the core facts proven at the re-trial by the State do not change, appellant's due process rights will not be violated by a retrial in this case.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[13] *See State v. Poe*, 822 N.W.2d 831, 840-47 (2012) for an excellent review of cases dealing with alleged due process violations based on evidence presented on retrial; *see also Smith v. Groove*, 205 F.3d 1045, 1052 (8th Cir. 2005) ("the use of inherently <u>factually</u> contradicting theories violates the principles of due process.") (Emphasis added.)