UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1081, 1604, & 1770

September Term, 2015

DIRK DEVON LYNCH

v.

STATE OF MARYLAND

ROBERT FRANCIS CONNOR

v.

STATE OF MARYLAND

DEION MARCUS STEVENSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
White, Pamela J.
(Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 26, 2016

A jury in the Circuit Court for Prince George's County convicted Dirk Devon Lynch, Robert Francis Connor, and Deion Marcus Stevenson, the appellants, of robbery with a dangerous weapon, robbery, first-degree assault, second-degree assault, use of a handgun in a crime of violence, theft of property valued between $1,000 and $10,000, motor vehicle theft, false imprisonment, and conspiracy to commit robbery with a dangerous weapon, robbery, assault, and theft. Stevenson also was convicted of being a felon in possession of a firearm.

The court sentenced Lynch to an aggregate term of 58 years in prison with all but 35 years suspended, and five years' supervised probation upon release. Two months later, it sentenced Connor to an aggregate term of 60 years in prison with all but 20 years suspended, and five years' supervised probation upon release; and Stevenson to an aggregate term of 70 years in prison with all but 30 years suspended, and five years' supervised probation upon release. The three noted appeals, which were consolidated in this Court.

Lynch, Connor, and Stevenson pose several questions, some overlapping. In its brief, the State has rephrased, reorganized, and consolidated these questions. With some minor rewording, we shall adopt the questions as restated by the State. They are:

Question Presented By Connor and Lynch:

I. Did the trial court err by denying Connor's and Lynch's requested jury instruction modification that for certain of the offenses the State had to prove that they had advance knowledge that one of their co-defendants would use a firearm in the robbery?

Question Presented By Connor and Stevenson:

II. Did the trial court abuse its discretion by admitting into evidence the surveillance video from the hotel where the robbery and assault took place?

Questions Presented Only By Connor:

III. Did the trial court abuse its discretion in denying Connor's requested additional jury instruction on conspiracy?

IV. Was the evidence legally sufficient to support Connor's conviction for use of a handgun in the commission of a crime of violence?

V. Did the trial court abuse its discretion in denying Connor's motion for mistrial based on the prosecutor's closing argument?

Question Presented Only By Stevenson:

VI. Did the trial court properly impose separate sentences for Stevenson's convictions of robbery with a dangerous weapon and first-degree assault, and if not, should the sentences be remanded under *Twigg v. State*, 447 Md. 1 (2016), for reconsideration of the sentence package in light of the merger?

Questions Presented Only By Lynch:

VII. Should Lynch's sentences for second-degree assault merge into first-degree assault and should the sentences be remanded under *Twigg* for reconsideration of the sentence package in light of the merger?

VIII. Does Lynch's commitment record properly reflect 35 years of executed incarceration?

For the following reasons, we shall vacate Lynch's sentence for second-degree assault and remand his case for the clerk to amend his commitment record accordingly. Otherwise, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

In the early morning hours of April 23, 2014, Kevin Mitchell was robbed at gunpoint and assaulted by three masked men in his hotel room at the Comfort Inn, in Capital Heights. The evidence at trial showed the following.

Mitchell was a frequent patron of the Ebony Inn, a so-called gentlemen's club in Fairmount Heights. On the evening of April 22, 2014, he and a friend went to the Ebony Inn. There, Mitchell talked throughout the night with a dancer he knew as "Knock Out," whose real name is Kadija Clifton. For about a month, Mitchell had been involved with Clifton, who performed dances for him at the club. She did the same on the night in question, and then suggested that they go to a nearby Motel 6 to have sex. Mitchell agreed but said he would rather go to the Comfort Inn, which also was nearby. Before leaving with Clifton, Mitchell drove his friend home and drove back to the club, which took about 30 minutes.

At around 1:45 a.m. (by now April 23), Mitchell and Clifton drove to the Comfort Inn in Mitchell's silver BMW 740. During the drive, Clifton performed fellatio on Mitchell. She also was texting frequently. Upon arriving at the Comfort Inn, Mitchell parked his car, entered the hotel, and paid for a room. He was assigned Room 201. He and Clifton walked to a 7-Eleven across the street. According to Mitchell, throughout this time Clifton was texting "[a] lot" and her texting "kind of made [him] think a little funny," like "something ain't right."

After spending about ten minutes at the 7-Eleven, Mitchell and Clifton returned to the hotel and went to Room 201. Mitchell started smoking marijuana, but stopped when

he noticed that Clifton was not joining in. Someone knocked on the door and asked if they wanted to buy marijuana. Clifton told Mitchell to open the door but he said no. She began to perform fellatio on him again, but stopped to answer a ring or other alert from her cell phone. Clifton then told Mitchell she was going to get a soda from the vending machine. She took the room key, but left the door to the room slightly ajar. Mitchell noticed that and closed the door. He began to think "[s]he was trying to set [him] up."

Moments later, Mitchell heard someone put a key in the door. He was standing near the door, next to the bathroom, when the door opened and Clifton entered, followed by three men dressed in black and wearing masks. Clifton quickly retrieved her handbag and left the room without saying anything. One of the men hit Mitchell in the jaw with a gun, knocking him to the ground. A man then struck Mitchell repeatedly in the forehead with a gun. Another man took his wallet from the pocket of his pants, which were lying nearby. The wallet held approximately $600 in cash, his ATM card, and his ID. One of the men told Mitchell that if he called the police they would go to the address on his ID and hurt his mother. That man demanded that Mitchell provide the Personal Identification Number ("PIN") for his ATM card. Mitchell complied. Two of the men left and one stayed, placing Mitchell in a chair in the bathroom and tying him up with bedsheets. In addition to the wallet and its contents, the men took Mitchell's cell phone and the keys to his BMW.

Mitchell untied himself, put on some clothes, and went to the hotel lobby. From there, he looked outside and saw that his car was gone. Anna Branch, the front desk

agent on duty, saw that Mitchell was bleeding and asked him what had happened. Mitchell insisted that she call his mother. Branch called an ambulance and hotel security. Mitchell was taken to the Prince George's County Hospital Center ("PGC Hospital") where he was found to have a fractured jaw. He was hospitalized for three days.

The Comfort Inn had surveillance cameras in the lobby, hallways, and parking lot. From her position at the front desk, Branch could see some of the camera surveillance. Before Mitchell and Clifton went to their room, she saw on one of the cameras three men standing in the area of Room 201. She didn't think anything of it because "there is a lot of drug traffic through the hotel and prostitution." It was not until Mitchell appeared in the lobby, bleeding, that she realized something was wrong and called 911.[1]

Officers with the Prince George's County Police Department ("PGCPD") responded. They collected evidence from Room 201 and interviewed the hotel staff. Later that day, Cheryl Gover, a video analyst with the PGCPD, retrieved surveillance videos from the hotel's security system. Detective Jonathan Sanders of the PGCPD robbery unit, the lead investigator on the case, reviewed the surveillance videos Gover recovered. Video recordings of the hotel parking lot showed three men arriving in a burgundy colored Mitsubishi Endeavor, and Mitchell and Clifton arriving shortly thereafter. Using stills from the surveillance videos, Detective Sanders created a wanted poster for Clifton and the three men. He posted it online and e-mailed it to all local law enforcement.

[1] A recording of the 911 call was played at trial.

At 2:55 a.m. on April 23, PGCPD Detective Michael Praytor was leaving his secondary job as a security guard at a Motel 6 across the street from the Comfort Inn when he saw two vehicles driving in tandem on Hampton Park Boulevard. The second vehicle, a silver BMW, was "following the first vehicle very closely" and did not have its headlights on. Detective Praytor activated the emergency lights on his unmarked vehicle and pulled the BMW over. He drove along side the driver's window and told him to turn his headlights on. The driver searched for the headlight switch but could not find it. A female passenger turned on the dome light and assisted him. Detective Praytor assumed the BMW belonged to the female passenger and drove away. When Detective Praytor reported to work the next morning, he saw the wanted poster Detective Sanders had created and recognized Clifton as the female passenger. He positively identified her from additional photographs and also identified the BMW.

At 4:24 p.m. that same day, Mitchell's BMW was found in Washington D.C., less than a five minute walk from where it was later determined Lynch lived. It had sustained damage to the passenger's side.

On April 24, 2014, Detective Shaniece Singh interviewed Mitchell at PGC Hospital. Mitchell identified Clifton from a photo array.

Four days later, on April 28, 2014, Connor's mother contacted Detective Sanders and told him her son was one of the men depicted in the wanted poster. The detective obtained a photo of Connor, compared it to the stills from the surveillance videos, and confirmed that he was one of the three assailants. He investigated and learned that

Connor drove a burgundy Mitsubishi Endeavor that matched the car driven by the three men in the hotel parking lot surveillance video. Connor turned himself in later that day. The police obtained and executed a search warrant for his residence. From his bedroom, they recovered a black ski mask and a black North Face jacket that matched items worn by one of the men in the surveillance videos.

Upon further investigation, Detective Sanders learned that Stevenson and Lynch were the other two men in the surveillance videos. Stevenson was arrested at his apartment on May 1, 2014. A search of his bedroom revealed a .9mm Sig Sauer semi-automatic handgun, a Ziploc bag containing ammunition for the handgun, a skull cap, and a black hat. Lynch was arrested on June 27, 2014.

Portions of the surveillance videos and still images from those videos were admitted into evidence at trial. They showed three men, later identified as Stevenson, Lynch, and Connor, scoping out the second floor of the hotel, near Room 201, and then leaving the second floor before Mitchell and Clifton got off the elevator there. A short time later, they returned to the second floor and walked down the hallway to Room 201. As one of them knocked on the door, the other two sidled up against the wall, out of view of anyone looking through the peephole. When no one answered the door, the three men walked to the other end of the second floor hallway and waited.

Soon thereafter, Clifton emerged from Room 201, turning to make sure the door did not fully close; but it then was closed from inside. She walked to the end of the hallway and spoke to the three men. All four of them went to Room 201. As Clifton

entered the room, using a key, the three men donned masks and followed her inside. The video then shows Clifton leaving the room. The next person to leave is Lynch, who, as his mother testified at trial, was dating Clifton. The parking lot surveillance video shows Lynch and Clifton getting in Mitchell's BMW and driving off. The videos from the second floor hallway show Stevenson and Connor leaving the room, and eventually Mitchell leaving the room and going to the front desk.

Lynch, Connor, and Stevenson did not present a defense case.

The jury returned special verdicts that, among other things, addressed the basis for each defendant's first-degree assault conviction. For Stevenson, the jurors based the conviction on the use of a firearm *and* the intent to cause serious physical injury. For Connor and Lynch, they based the conviction on the use of a firearm only.

We shall include additional facts as pertinent to the issues.

DISCUSSION

Questions Presented By Connor and Lynch:

I.

On direct examination, Mitchell testified as follows about what he saw when the three men entered the room:

Q. Do you recall how many of [the men] had guns?

A. I seen three.

Q. One for each?

A. I mean, I seen three.

Q. When you say you seen three?

A. I seen more than one gun, more than one of them had guns.

Q. Okay. Did all three of them participate in this?

A. Yes.

On cross-examination, Mitchell was asked, "How many guns did you see?" He responded, "I seen three." He then was asked, "Do you remember telling the police officer that you only saw one gun that night?" He answered, "No."

On re-direct examination, the prosecutor followed up on this line of questioning:

Q. Did you know that when Knock Out came back in the room there were three men behind her?

A. Yes.

Q. Did you know it was three men armed with guns?

A. Yes.

Q. Did you know that the three men with guns pistol[-]whipped you, held you up, and left you in the bathroom?

A. Yes.

Detective Sanders testified on direct examination that the only gun found in the searches of the defendants' homes was the .9mm Sig Sauer automatic handgun recovered from Stevenson's apartment. On cross-examination, he explained that he was not present when Detective Singh interviewed Mitchell at the hospital. After Detective Sanders repeated that only one gun was retrieved in the searches, the following colloquy took place:

Q. That was with all the information you received was that it was one gun involved in this incident; is that right?

A. As far as from the documents I have, the victim did not know how many weapons were involved.

There was no testimony about what documents Detective Sanders was referring to. No reports written by the investigating officers were moved into evidence. Detective Singh did not testify.

The evidence was not absolutely clear that there were three guns and each assailant was carrying one of them; the State proceeded on an accomplice liability theory.

Connor asked the court to give a modified version of the Maryland Pattern Criminal Jury Instructions ("MPJI-Cr") for armed robbery, first-degree assault, and use of a handgun in a crime of violence.[2] Relying upon *Rosemond v. United States*, ___ U.S. ___, 134 S. Ct. 1240 (2014), he proposed to add language to each instruction saying that if the jurors found that the defendant did not physically possess a gun, they were to consider whether the defendant knew, before the gun was used, that it would be present; and if he did not, there must be a finding of not guilty. The court heard argument of counsel about the *Rosemond* case and concluded that it did not apply. Consequently, it denied the proposed modifications.

In a later discussion about an accomplice liability instruction, the prosecutor asked the court to include the use of a handgun in the commission of a crime of violence as an

[2] The pattern instruction for armed robbery is MPJI-Cr 4:28.1; for first-degree assault is MPJI-Cr 4:01.1; and for use of a firearm in a crime of violence is MPJI-Cr 4:35.4.

offense subject to accomplice liability. The prosecutor argued that if the jury were to find that only one defendant physically possessed a handgun during the robbery, all three defendants could be convicted for use of a handgun as accomplices. Again relying on *Rosemond*, counsel for Connor and Lynch argued that there could not be accomplice liability for the use of a handgun offense unless the accomplices had advance knowledge that a handgun was going to be used. The court disagreed and instructed the jury in accordance with MPJI-Cr 6:00:

> The Defendant may be guilty of armed robbery, robbery, first-degree assault, second-degree assault, theft, unlawful taking of a motor vehicle, false imprisonment and use of a handgun in the crime of violence as an accomplice even though the Defendant did not personally commit the acts that constitute that crime. In order to convict the Defendant of the crimes as an accomplice, the State must prove that the crime occurred and that the Defendant, with the intent to make the crime happened [sic], knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to the primary actor in the crime, that he or she was ready, willing and able to lend support if needed.

Because *Rosemond* is central to Connor's and Lynch's first contention, and we disagree with their interpretation of it, we shall discuss it before addressing their arguments. *Rosemond* arose from a "drug deal gone bad." 134 S. Ct. at 1243. Vashti Perez, an associate of Rosemond's, arranged to sell a pound of marijuana to two men, with the exchange to take place in a local park. Perez drove Rosemond and a man named Ronald Joseph to the park and they waited in the vehicle for the buyers. The evidence was unclear as to whether Rosemond or Joseph was the back seat passenger. When the buyers arrived, one got in the back seat while the other stood outside. The buyer inside the vehicle inspected the marijuana. Perez, Rosemond, and Joseph expected that he

would pay for the marijuana and take it. Instead, he punched the back seat passenger in the face, jumped out of the vehicle, and fled with the marijuana. One of the passengers (either Rosemond or Joseph, again unclear) got out of the vehicle, fired shots from a semi-automatic handgun, and got back inside. The three drove after the fleeing robbers but were stopped by the police.

Among other crimes, Rosemond was charged with using or carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. section 924(c), or aiding and abetting that offense, under 18 U.S.C. section 2. At trial, he asked the court to instruct the jurors that to find him guilty of aiding or abetting the section 924(c) offense, they must find that "he 'intentionally took some action to facilitate or encourage the use of the firearm[.]'" *Id.* at 1244 (citations omitted). The trial court declined, and instructed the jury that to find Rosemond guilty as an accomplice, it need only find that he "'willfully and knowingly associate[ed] himself in some way with the crime, and [sought] by some act to help make the crime succeed.'" *Id.* (Citations omitted.) Rosemond was convicted of violating section 924(c). (The verdict sheet did not reveal whether he was found guilty as a principal or an aider or abettor.)

After the Tenth Circuit affirmed the conviction, *United States v. Rosemond*, 695 F.3d 1151 (10th Cir. 2012), the Supreme Court granted Rosemond's petition for writ of *certiorari* to decide "what it takes to aid and abet a [section] 924(c) offense." 134 S. Ct. at 1245. The Court observed that a section 924(c) offense is "double-barreled," requiring proof that the defendant used or carried a firearm and did so during or in relation to a

drug trafficking crime. *Id.* It explained that aiding and abetting liability under section 2 derives from common law accomplice liability, which requires proof that the defendant took an affirmative act in furtherance of the offense and did so with the intent to facilitate the commission of the offense.

The Court held that the evidence that Rosemond participated in the drug trafficking crime satisfied the affirmative act requirement for aiding and abetting a section 924(c) offense. It further held, however, that for Rosemond to have intended to facilitate the commission of the section 924(c) offense, he had to have had "advance knowledge of a firearm's presence." *Id.* at 1251. If he participated in the section 924(c) offense *with* that advance knowledge, "he ha[d] chosen . . . to align himself with the illegal scheme in its entirety–including its use of a firearm." *Id.* at 1249. With that knowledge, he could choose whether to participate in "an *armed* offense" or to "alter that plan or, if unsuccessful, withdraw from the enterprise[.]" *Id.* (Emphasis in original.) "A defendant manifests that greater intent, and incurs the greater liability of [section] 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it." *Id.* at 1251 (footnote omitted). The Court concluded that the trial court should have instructed the jurors that to find Rosemond guilty of aiding and

abetting the section 924(c) offense, they needed to find that he had advance knowledge of the firearm's presence.[3]

Based on *Rosemond*, Connor contends the trial court erred by declining to include in the jury instructions for armed robbery, first-degree assault, and use of a handgun the additional language he had proposed, stating that if the jurors did not find that he was in physical possession of a handgun, then to find him guilty as an accomplice, they would have to find that he knew, in advance of the robbery, that one of the other assailants was in possession of a handgun (or, for purposes of the armed robbery conviction, a dangerous weapon). Lynch advances the same contention but confines it to the instruction for use of a handgun.[4]

The State counters that *Rosemond* is distinguishable on its facts; its analysis applies to federal, not Maryland, law; other jurisdictions have declined to apply *Rosemond* under circumstances similar to these; the jury was not required to find advance

[3] The Court remanded the case to the Tenth Circuit to consider other issues that were raised on appeal but were not necessary for the Court to decide.

[4] In the body of his brief, Lynch makes the alternative argument that accomplice liability attaches only to felonies, and because the use of a handgun offense is a misdemeanor, the trial court erred in including that offense in its instruction on accomplice liability. This argument was neither raised nor decided below, and therefore is not properly before the Court on appeal. Md. Rule 8-131(a). Moreover, as the State points out, Lynch does not include it as a question presented. We also decline to review the issue for plain error. *See Malaska v. State*, 216 Md. App. 492, 524 (2014) ("Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[] a defendant's right to a fair and impartial trial.'" (Alteration in original) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)).

knowledge because the use of a handgun is a "natural and probable" consequence of the underlying offense, *i.e.*, armed robbery; and the use of a handgun is not a required element of the crime of robbery with a dangerous weapon.

The Court of Appeals has explained:

> "A trial court must give a requested jury instruction where[:] (1) the instruction is a correct statement of [the] law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given. . . . [I]f, taken as a whole, [jury instructions] correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, [then] the defendant has not been prejudiced[,] and reversal is inappropriate."

State v. Bircher, 446 Md. 458, 484 (2016) (alterations in original) (quoting *Derr v. State*, 434 Md. 88, 133 (2013)). The issues here are whether the proposed modification to the jury instructions was an accurate statement of the law and was generated by the evidence.

In Maryland, "'[t]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime.'" *Silva v. State*, 422 Md. 17, 28 (2011) (quoting *State v. Raines*, 326 Md. 582, 597 (1992)). In this case, the State put forward a principal in the second degree theory of accomplice liability. That is, it posited that at least one defendant was in physical possession of a handgun during the robbery, and any defendant who was not in physical possession of a handgun was present and participating in the crimes. *See Pope v. State*, 284 Md. 309, 326 (1979) (stating that an accomplice who is "[a] principal in the second degree is one

who is actually or constructively present when a felony is committed, and who aids or abets in its commission").

As noted, accomplice liability likewise depends upon proof of "common criminal intent[.]" *Silva*, 422 Md. at 28. An accomplice must know or have reason to know of the intent of the principal in the first degree and must share that same intention. "'"[I]ntention" includes not only the purpose in mind but also such results as are known to be substantially certain to follow.'" *State v. Williams*, 397 Md. 172, 195 (2007) (quoting *Raines*, 326 Md. at 596), *overruled on other grounds by Price v. State*, 405 Md. 10 (2008); *Pope*, 284 Md. at 332. When the offense committed by the principal in the first degree is a specific intent crime, the accomplice must have "'entertained such an intent or knew that the principal in the first degree entertained such intent.'" *Williams*, 397 Md. at 194 (quoting *Raines*, 326 Md. at 594).

Robbery, a common law crime codified under Maryland Code (2002, 2012 Repl. Vol.), section 3-402 of the Criminal Law Article ("CL"), is "the felonious taking and carrying away of the personal property of another, from his person or presence, by violence or putting in fear[.]" *West v. State*, 312 Md. 197, 202 (1988) (citations omitted); s*ee also Spitzinger v. State*, 340 Md. 114, 121 (1995). It requires proof of the intent to withhold the property of another, usually permanently. CL § 3-401(e)(2). Robbery with a dangerous weapon, prohibited by CL section 3-403, is a statutory penalty enhancement that requires proof of robbery committed with a dangerous weapon (or by displaying a note claiming to have a dangerous weapon). A handgun is a dangerous weapon. *See*

Teixeira v. State, 213 Md. App. 664, 682 (2013); *see also Brooks v. State*, 314 Md. 585, 599 (1989) (defining a "dangerous weapon" as any device that is "inherently dangerous or deadly or . . . may be used with dangerous or deadly effect" (citations omitted)).

Use of a handgun in the commission of a crime of violence requires proof that the defendant committed a crime of violence and used a firearm in doing so. CL § 4-204(b). It is a general intent crime, *i.e.*, the State need not prove that the defendant intended to use the firearm in committing a crime of violence, but simply that he intended to use the firearm in what is in fact and law a crime of violence. *Biggs v. State*, 56 Md. App. 638, 649 (1983). Finally, a second-degree assault, prohibited by CL section 3-203, is a simple assault under the common law. It can be perpetrated by committing a battery or an attempted battery, or by acting with the intent to frighten. In the case at bar, the court instructed the jury on the battery form of second-degree assault. A first-degree assault requires additional proof that, in committing the assault, the defendant used a firearm or intended to cause serious physical injury. CL § 3-202.

The Supreme Court's holding in *Rosemond* about accomplice intent is an interpretation of two federal statutes: one governing accomplice liability and one creating the offense of use of a handgun in the commission of a drug trafficking crime. As other state courts have pointed out, it is not a holding on a federal constitutional issue and does not dictate how state courts must apply their own common law and statutory law on accomplice liability. *See State v. Ward*, 473 S.W.3d 686, 693 (Mo. Ct. App. 2015); *Hicks v. State*, 759 S.E.2d 509, 514–15 n.3 (Ga. 2014).

Even if *Rosemond* were controlling, which it is not, the case at bar is readily distinguishable. The drug dealers in *Rosemond* thought they were engaging in a drug transaction that, although illegal, was not violent in character. The exchange "went bad" when one of the putative purchasers attacked one of the dealers and made off with the drugs. It was that unexpected turn of events that prompted either Rosemond or Joseph to draw a gun and shoot at the drug robbers. Without evidence that Rosemond (as opposed to Joseph) was the shooter, the government was left to prove that Rosemond had used a handgun in the commission of a drug trafficking crime as an accomplice. Reasoning that the non-violent nature of the crime itself would not have put Rosemond on notice that a handgun would be used, the Court held that to prove shared intent, *i.e.*, that Rosemond had the same intent to use a handgun in the course of a drug trafficking crime as the shooter, the government had to show that he knew, before the three embarked on the drug sale, that one of his confederates had a handgun.

The State correctly points out that, unlike the situation in *Rosemond*, where a drug sale "went bad," in this case an "'armed robbery [went] right.'" Quoting *United States v. Lawson*, 810 F.3d 1032, 1042 (7th Cir. 2016). Just as Mitchell himself began to suspect, Clifton "set him up" to be robbed. She befriended him at the Ebony Inn for about a month or so, and on the night in question, proposed that they go to a hotel and have sex. Her boyfriend–Lynch–and Connor and Stevenson scoped out the second floor of the Comfort Inn while Clifton and Mitchell were across the street at the 7-Eleven. Clifton was texting the entire time, and the only way the three men could have known that

Mitchell had been assigned Room 201 was from her. The men were careful not to be in view on the second floor when Clifton and Mitchell took the elevator there. Once Clifton and Mitchell were in Room 201, the three returned to the second floor and knocked on the door to that room. When that did not work (because Mitchell refused to answer), Clifton exited the room, reconnoitered with the three men, and led them into the room.

Although Mitchell's testimony could support a finding that all three men were in physical possession of a handgun, at the very least it supported a finding that one of them was, and that the gun was drawn and in use when, dressed in black and wearing masks, the three men entered Mitchell's room. One man (determined by the jury to be Stevenson) immediately hit Mitchell with a gun, incapacitating him. The three men coordinated their efforts to take Mitchell's valuables; steal his car; threaten to harm his mother; and tie him up.

If, in fact, Stevenson was the only robber who brought a handgun with him, Connor and Lynch could not possibly have been surprised to see him draw it when the three of them entered Room 201 to rob Mitchell. Indeed, it is inconceivable that the three men would have plotted to burst into the hotel room of a man they did not know to rob him *without* using a weapon. This was not a spur of the moment purse snatching or a crime of opportunity; it was a planned and orchestrated robbery of a man in the privacy of his hotel room.

In *Rosemond*, because the character of the planned offense (drug trafficking) was not such that the unarmed participants would think that a gun would be used to carry it

out, they would not have had reason to know that another participant would bring a gun with him. Here, by contrast, the character of the planned offense (robbery) was violent, and the use of a handgun in committing it was a "natural and probable" consequence of that crime. "'[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom.'" *Williams*, 397 Md. at 195 (alteration in original) (quoting *Raines*, 326 Md. at 598); *Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013). *See also Jones v. State*, 440 Md. 450, 457 (2014) (holding that a fact finder may infer from a defendant's conduct that he intended the natural and probable consequences of his actions); *Chilcoat v. State*, 155 Md. App. 394, 403 (2004) ("[A] jury may infer the necessary intent from an individual's conduct and the surrounding circumstances[.]").[5]

To be sure, it was three against one. Even so, the likelihood that the mission, violent in nature, would be a success was much greater with a weapon than without a weapon; and the usual "arm" with which to carry out an armed robbery is a handgun. Indeed, the jury convicted the three defendants of conspiracy to commit armed robbery, establishing that at the very least Connor and Lynch intended that a "dangerous weapon,"

[5] In its analysis under the prevailing federal statutes in *Rosemond v. United States*, the Court noted an exception to the general rule that a defendant must intend to commit the full scope of a charged offense "when another crime is the 'natural and probable consequence' of the crime the defendant intended to abet." ___ U.S. ___, 134 S. Ct. 1240, 1248 n.7 (2014) (citations omitted). The Court "express[ed] no view on the issue[,]" however, because "no one contend[ed] that a [section] 924(c) violation is a natural and probable consequence of simple drug trafficking." *Id.*

i.e., a handgun, would be used in the commission of the robbery. *See Armstead v. State*, 195 Md. App. 599, 646 (2010) ("[A] conspirator 'is liable for an act of a coconspirator not only when such act was part of the original plan but also when it was a natural and probable consequence of a carrying out of the plan.'" (Quoting 4 *Wharton's Criminal Law* § 685, at 561–63 (Clark Boardman Callaghan 15th ed. 1996) (footnotes omitted)). The nature of the conspiracy and the execution of the robbery supported a reasonable inference that the use of a firearm was at least "'known [by Connor and Lynch] to be substantially certain to follow.'" *Williams*, 397 Md. at 195 (quoting *Raines*, 326 Md. at 596).

In sum, the court's instructions correctly stated the requisite intent required to convict Connor and Lynch of armed robbery, first-degree assault, and use of a handgun. The facts adduced at trial generated those instructions. The court's instructions that the jury must find that the defendants "knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to the primary actor in the crime, that [he was] ready, willing and able to lend support if needed," and that the jurors "may but are not required to infer that a person ordinarily intends the natural and probable consequences of his or her acts and omissions" fairly covered applicable Maryland law and were not misleading. *Bircher*, 446 Md. at 484 (citations omitted). The proposed modifications to the instructions on the requisite intent needed to sustain Connor's convictions for armed robbery and first-degree assault were not correct

statements of Maryland law and were not generated by the evidence. Accordingly, the court did not abuse its discretion in declining to grant the modifications.

Questions Presented By Connor and Stevenson:

II.

At 1:42 p.m. on April 23, 2014, Gover went to the Comfort Inn to retrieve surveillance videos covering the time period of the robbery, *i.e.*, 1:45 a.m. to 3:30 a.m. that same day. The hotel manager provided Gover with access to the hotel's DIVIS security system by allowing her to enter the locked location where the servers are kept and by entering the system password for her.

There were 32 surveillance cameras located throughout the hotel. Gover reviewed all of the surveillance videos associated with the 32 cameras and selected 16 to download onto a USB drive.

At trial, she described the process as follows:

> A. You have to go into the system, go into the menu, bring up a form, like a menu and you put in the date that you want, the time that you want, the camera that you want and where you want it sent to. That's how you do it.
>
> Q. What about the cameras in terms of how they operate, whether they are motion detected or run constantly?
>
> A. Some of the cameras do run constantly and some of them only run when something activates it. The motion can be a person or rain drop. It depends on how the system is set up by whom ever [sic] installs it how sensitive it is.
>
> Q. You had occasion to observe the video on the system prior to downloading it onto the USB?

A. Right.

Q. Did you make any changes to it prior to downloading it on the USB?

A. You can't, no.

As she does in the ordinary course of business, Gover prepared a report listing the 16 cameras from which she pulled surveillance videos and where each was located. She based the locations on her personal knowledge of the hotel's layout and, in some instances, a description on the surveillance footage itself identifying where the camera is located. In addition, she verified that the time stamp on each surveillance video was accurate. She transferred the surveillance videos from the USB to a DVD. She testified that the surveillance videos could not be altered during the transfer.

When the State moved the admission of Gover's report and DVD, counsel for all three defendants objected. The following colloquy took place at the bench:

> [STEVENSON'S COUNSEL]: From what I understand from her testimony, it seems like she is familiar with the general system that was recorded. Unless I'm mistaken, this is the first time she ever went to the hotel where this actual system was.
>
> THE COURT: She is very familiar with the system called DIVIS.
>
> [STEVENSON'S COUNSEL]: She is familiar with the system DIVIS, but I don't think she has sufficient background in this particular system.
>
> THE COURT: You think she needs personal knowledge of this particular system; is that the basis of your objection?
>
> [STEVENSON'S COUNSEL]: It is.
>
> THE COURT: Is that the basis of your objection?

[CONNOR'S COUNSEL]: I have a secondary basis, Your Honor. What was testified she went electronic data was downloaded from the hard drive onto USB and later transferred. There has not been testimony regarding data integrity whether she took steps to ensure the data was securely transmitted what is on the disc is even what is on the system.

THE COURT: What is yours?

[LYNCH'S COUNSEL]: I would add to that, she is supposed to indicate -- she indicated -- the witness indicated independent upon how the system was set up may have some [e]ffect on interpreting the disc and the way it was transferred.

THE COURT: Overruled. Now all of your reasons are on the record.

* * *

[STEVENSON'S COUNSEL]: While we are up here, I'm going to launch one more objection. I'm going to object on the hearsay basis. She indicated she is custodian of records[,] her records kept in the course of business.

THE COURT: No one else[,] she did it.

[STEVENSON'S COUNSEL]: No one employed in the hotel, no one who set up the system, no one familiar with the system, the type of data they collect. We got general information of what some do some don't[,] her activity was within her police practice not as an employee of the hotel.

THE COURT: I understand. Thank you so much.

[LYNCH'S COUNSEL]: We also join, Your Honor.

THE COURT: No problem.

On cross-examination, Gover acknowledged that while she is familiar with the DIVIS system generally, she had never accessed the Comfort Inn's particular security system until April 23, 2014; she assumed that whatever descriptions there were on the surveillance videos purporting to give the cameras' locations were accurate; and she did

not know whether anyone had access to the system from the time of the robbery until she downloaded the surveillance videos onto the USB drive.

On appeal, Connor and Stevenson contend the trial court abused its discretion by admitting the surveillance videos and still-framed photos taken from the videos. Connor argues that Gover could not have properly authenticated the videos because she did not know where the cameras were located in the hotel and had no prior experience with the hotel's security system. Stevenson makes the same arguments, and also argues that the State failed to provide any testimony that the surveillance system was functioning properly at the time of the robbery, and that it was possible that someone could have altered the surveillance videos.

The State responds that the surveillance videos were admissible under the "pictorial testimony theory of authentication" because they were "authenticated through the testimony of a witness with personal knowledge," *i.e.*, Mitchell. It maintains that Mitchell's testimony identifying himself and Clifton arriving at the hotel, and later identifying the three men outside his hotel room before they entered "was sufficient . . . to provide foundation for admitting the [surveillance] video[s]." Moreover, Gover's testimony describing how she retrieved the surveillance videos from the system provided further authentication that the surveillance videos were what the State was representing them to be.

Rule 5-901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a

finding that the matter in question is what its proponent claims." "[T]he burden of proof for authentication is slight, and the court 'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.'" *Dickens v. State*, 175 Md. App. 231, 239 (2007) (emphasis omitted) (quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006)). "Whether there is sufficient authenticating evidence to admit [a surveillance video] is a preliminary question to be decided by the court, which [w]e review . . . for abuse of discretion[.]" *Carpenter v. State*, 196 Md. App. 212, 230 (2010) (first alteration, internal quotation marks, and citations omitted).

In *Washington v. State*, 406 Md. 642 (2008), the victim was shot outside a bar. Among other crimes, Washington was charged with attempted first-degree murder. At trial, the bar owner testified that cameras located inside and outside the bar recorded "24 hours a day," and that he called a "technician" who went to the bar and created a CD with surveillance footage from the night of the shooting. *Id.* at 646. A detective testified that another officer transferred the footage on the CD to a VHS tape, which the detective then reviewed and used to identify Washington as a suspect. The surveillance video was played at trial, over objection. Washington was convicted of attempted murder and other offenses.

On appeal, this Court agreed with Washington that the bar owner's testimony and the detective's review of the footage was insufficient to authenticate the surveillance video and that the trial court had abused its discretion by admitting the footage into

evidence. We affirmed Washington's convictions, however, holding that the court's error was harmless beyond a reasonable doubt. *Washington v. State*, 179 Md. App. 32, 52–53 (2008) (citing *Dorsey v. State*, 276 Md. 638, 648 (1976)).

The Court of Appeals granted Washington's petition for writ of *certiorari* and reversed. It explained that the surveillance video was offered as probative evidence to show that Washington was present at the bar on the night of the crime. Critical to the Court's analysis was the fact that "[t]he videotape recording . . . was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape." *Washington*, 406 Md. at 655. Because the bar owner did not know how the surveillance footage was taken from the system and the detective "saw the footage only after it had been edited by the" unknown technician, the State failed to "establish that the videotape and photographs represent[ed] what they purport[ed the evidence] to portray." *Id.*

In this case, the evidence at trial was sufficient to establish that the surveillance videos and photos were what the State claimed them to be. Gover testified that she was familiar with the DIVIS system in general and explained, in detail, the process by which she copied the surveillance videos to the USB drive and, later, from the USB drive to a DVD. Gover further explained that the surveillance videos could not be altered during that process and, unlike in *Washington*, she was the only person responsible for transferring the surveillance videos. Furthermore, she testified that the hotel manager had to login to the DIVIS system to provide her access because it was password protected.

She verified that the times on the system were correct and, to the best of her knowledge, the locations of the cameras in her report were accurate.

Moreover, Mitchell's testimony further authenticated the surveillance videos. He identified himself and Clifton in the surveillance videos and discussed the events that took place on April 23, 2014, while the surveillance videos were played for the jury. The surveillance videos showed him and Clifton walking to the 7-Eleven and returning to the hotel, and three men knocking on his hotel room door, all of which corroborated Mitchell's account of what happened. The trial court heard evidence establishing that the surveillance videos were properly retrieved from the hotel system, that the surveillance videos indeed depicted the events of the morning of April 23, 2014, and it did not abuse its discretion in admitting the surveillance videos into evidence.

Questions Presented Only By Connor:

III.

Connor's lawyer asked the court to give the pattern jury instruction for the charge of conspiracy to commit armed robbery, robbery, assault or theft, *see* MPJI-Cr 4:08,[6] with the following additional language defining what constitutes an "agreement":

[6] MPJI-Cr 4:08 reads:

> The defendant[s] is [are] charged with the crime of conspiracy to commit the crime[s] of (crime(s) to which conspired). Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant[s] of conspiracy, the State must prove:

(Continued…)

> In order to prove the existence of an agreement, the State must show a meeting of the minds. This means the parties to the conspiracy must have:
>
> (1) have [sic] given sufficient thought to the matter, however briefly or even impulsively, to be able to mentally to appreciate or articulate the object of the conspiracy–the objective to be achieved or the act to be committed, and
>
> (2) whether informed by words or by gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act.

He relied upon *Mitchell v. State*, 363 Md. 130, 145–46 (2001), to support this request. The court denied the request, and instructed the jury in accordance with the pattern instruction, as follows:

> The Defendant is charged with the crime of conspiracy to commit the crime of armed robbery, robbery, assault and theft. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the Defendant of conspiracy, the State must prove: One, that the Defendants agreed with at least one other person to commit the crime of armed robbery, robbery, assault or theft; and two, that the Defendant entered into the agreement with the intent that the crime of armed robbery or robbery, or assault or theft be committed.

After instructing the jury, the court asked all counsel if there were "[a]ny objections to the instructions?" Connor's lawyer responded: "I ask to renew the arguments made previously."

(…continued)

> (1) that the defendant[s] agreed with at least one other person to commit the crime[s] of (crime(s) to which conspired); and
>
> (2) that the defendant[s] entered into the agreement with the intent that the crime[s] of (crime(s) to which conspired) be committed.

On appeal, Connor contends the trial court abused its discretion by denying his requested modification of the jury instruction on conspiracy. He argues that his proposed instruction modifying MPJI-Cr 4:08 was a correct statement of law; that it was generated by the evidence; and that it was "not fairly covered in the pattern jury instruction, which lacks any explanation of the proof required to find the existence of an agreement to constitute a conspiracy."

The State counters that this issue is not preserved for review because Connor's counsel "never made an argument as to why the court should give his instruction rather than the pattern instruction" and "fail[ed] to give any reason for modifying the pattern instruction." The State maintains that even if the issue is preserved, it lacks merit because the elements of conspiracy were fairly covered by the pattern instruction.

We disagree with the State that the issue was not preserved for appellate review. Rule 4-325(e) provides in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, ***stating distinctly the matter to which the party objects and the grounds of the objection***." (Emphasis added.) *See also Bowman v. State*, 337 Md. 65, 67–68 (1994) ("The party making the objection also must specifically state the grounds therefor." (citing *Gore v. State*, 309 Md. 203, 207 (1987)). Here, Connor specifically asked the trial court to include a definition for the term "agreement" in the jury instruction for conspiracy. The argument that Connor advances on appeal, *i.e.*, that the instruction was not "fairly covered" in the pattern jury instruction, was implicit in that

request. Because the "ground for objection is apparent from the record," *Gore*, 309 Md. at 209, the issue is preserved.

"'We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Albertson v. State*, 212 Md. App. 531, 551–52 (2013) (quoting *Arthur v. State*, 420 Md. 512, 525 (2011)). Trial courts are strongly encouraged to use the pattern jury instructions. *Johnson v. State*, 223 Md. App. 128, 152 (2015); *see also Yates v. State*, 202 Md. App. 700, 723 (2011) ("This Court has recommended that trial judges use the pattern instructions."); *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004); *Green v. State*, 127 Md. App. 758, 771 (1999). The trial court's jury instructions will deviate from a pattern jury instruction when "'(1) the requested instruction is a correct statement of 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.'" *Wagner v. State*, 213 Md. App. 419, 473 (2013) (quoting *McMillan v. State*, 428 Md. 333, 354 (2012)).

Here, the court's instruction adequately covered the elements of conspiracy. The court instructed the jury that the evidence must establish each defendant's guilt beyond a reasonable doubt and that the evidence could be based on direct or circumstantial evidence. That includes a finding that the defendants entered into an agreement to commit armed robbery, robbery, assault, or theft and did so with the intent that those crimes be committed. Moreover, the court instructed the jury that mere presence at the time the crime was committed was not enough to convict, but that it could be considered

along with the defendants' "acts and statements as well as the surrounding circumstances" in determining whether there was an agreement to commit the crimes listed. Connor has not cited, nor are we aware of, any "authority supporting his argument that the court was required to modify the" MPJI-Cr instruction on conspiracy to further define "agreement." *Id.* at 474. The trial court did not abuse its discretion in denying Connor's requested jury instruction.

IV.

CL section 4-204, entitled "Use of a handgun or antique firearm in commission of crime," provides, at subsection (b):

> *Prohibited*. – A person may not use a firearm in the commission of a crime of violence . . . or any felony, whether the firearm is operable or inoperable at the time of the crime.

Subsection (a) defines a "firearm" as follows:

> (1) In this section, "firearm" means:
>
> (i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or
>
> (ii) the frame or receiver of such a weapon.
>
> (2) "Firearm" includes an antique firearm, handgun, rifle, shotgun, short-barreled rifle, short-barreled shotgun, starter gun, or any other firearm, whether loaded or unloaded.

Connor contends the evidence was legally insufficient to support his conviction for use of a handgun in the commission of a crime of violence. Specifically, he argues that Mitchell's testimony that his assailants possessed "guns" and the fact that police recovered a .9mm Sig Sauer semi-automatic handgun in Stevenson's apartment did not

sufficiently establish that a "handgun" was used during the robbery, and there was no proof that whatever weapon (or weapons) the assailants had could expel or was designed to expel a projectile. The State counters that the evidence "supports a reasonable inference that the robbers used a 'handgun,'" and therefore a "firearm" as contemplated by statute, and in any event, the evidence was sufficient to prove that a "firearm" was used.

> In reviewing the sufficiency of the evidence, an appellate court determines "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); *see also Derr* [434 Md. at 129]; *Painter v. State*, 157 Md. App. 1, 11 (2004) ("[t]he test 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'") (citations omitted) (emphasis in original).

Benton v. State, 224 Md. App. 612, 629 (2015) (parallel citations omitted).

When viewed in a light most favorable to the State, the evidence was sufficient to support a finding that the assailants used a firearm in committing the robbery. Mitchell testified that the three masked men entered the room, that he saw three "guns," that one of the men hit him in the jaw with a "gun," that when he fell to the ground one of the assailants began "[h]itting [him] with the gun," and that "more than one of them had guns." The fact that the assailants were able to hold the guns and use them (or it) to strike blows supported a reasonable inference that the guns were handguns, which is a type of firearm under CL section 4-204. Indeed, several times in his testimony Mitchell agreed that he had been "pistol-whipped." In addition, the officers recovered a semi-

automatic handgun hidden in Stevenson's bedroom closet. All of this evidence supported a reasonable inference that the weapon used to assault Mitchell during the robbery was a handgun.

Moreover, the definition of "firearm" in CL section 4-204 is very broad, including rifles, shotguns, and a host or other weapons. This distinguishes this case from *Beard v. State*, 47 Md. App. 410, 414 (1980), which Connor relies upon to support his sufficiency argument. When *Beard* was decided, the statute in effect required proof of the use of a handgun and did not include the broad definition of firearm in the version of CL section 4-204 under which Connor was convicted. There was no evidence in *Beard* of a handgun being found, and the victim only could describe the weapon as a big, brown, rusty gun. She gave no testimony that would support a reasonable inference that the gun was a handgun, as opposed to a rifle or shotgun or weapon of that sort.

V.

In closing argument, the prosecutor stated:

> Just a few things, the Judge read an instruction to you today about accomplice liability. I just wanted to remind you that the State doesn't have to prove each of these gentlemen possessed a firearm for the purposes of finding them guilty of armed robbery, or robbery or assault in the first degree or assault in the second degree or use of a handgun or firearm in a crime of violence. Each of these gentlemen don't have to have personally committed an act in order for you to find them as an accomplice to the crime.
>
> There is no I in team. You've heard that expression before. And that means that we win together, we lose together[.]

At the conclusion of the State's summation, counsel for Connor moved for a mistrial:

> [CONNOR'S COUNSEL]: Your Honor, on behalf of Mr. Connor, I'm going to move for a mistrial at this time.
>
> THE COURT: Based on what?
>
> [CONNOR'S COUNSEL]: Based on during the State's closing, she said we win together, we lose together. That is a direct diminishment --
>
> THE COURT: -- she is talking about the act of the crime.
>
> [CONNOR'S COUNSEL]: In the course of accomplice liability which is the jurors have to make an individual determination.
>
> THE COURT: It's denied.

Connor contends the trial court abused its discretion by denying his motion for a mistrial. He argues the "prosecutor's remarks flew in the face of the court's own instructions to the jury that it must consider each offense and each defendant separately."

The State responds that the prosecutor's remarks were appropriate and that she "was necessarily indicating that each of the three deliberately joined a group and that each was working together with the others for a criminal purpose." Moreover, Connor did not request a curative instruction and a mistrial was not an appropriate remedy under the circumstances.

> "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001). "In the environment of the trial[,] the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm v. State*, 272 Md. 404, 429 (1974). "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial." [*State v.*] *Hawkins*, 326 Md. [270,] 278 [(1992)]."

Simmons v. State, 436 Md. 202, 212 (2013) (first alteration added) (parallel citations omitted).

"Mistrials are required for improper remarks in closing argument only when 'the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Washington v. State*, 191 Md. App. 48, 108 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). In weighing whether the trial court abused its discretion in denying counsel's request for a mistrial based on the State's allegedly improper remarks, we consider "[1] the severity of the improper remarks, [2] the measures taken to cure any potential prejudice, and [3] the weight of the evidence against the accused." *Id.* at 118–19 (citing *Lee*, 405 Md. at 165).

Here, the prosecutor's comments that the jury did not have to find that Lynch, Connor, and Stevenson all possessed a firearm in order to find them guilty of the charges and that they "win together" and "lose together" "did not involve the sort of impropriety that traditionally requires a mistrial." *Id.* at 119. The prosecutor correctly summarized the court's previous instructions, which as we have held, were correct statements of law and were not misleading or confusing. Moreover, the only remedy Connor sought was a mistrial, which is "an extreme remedy not to be ordered lightly." *Nash v. State*, 439 Md. 53, 69 (2014) (citations omitted). Connor did not object when the comment was made, and he did not request a curative instruction. Thus, the court was left with granting the extraordinary remedy of a mistrial, which clearly was not appropriate under the circumstances.

Questions Presented Only By Stevenson:

VI.

As noted, among other crimes, Stevenson was convicted of armed robbery and first-degree assault, and the verdict sheets show that he was the only defendant whose first-degree assault conviction was based on the use of a firearm *and* upon the intent to cause serious bodily injury.

At sentencing, the court stated: "It was a vicious robbery, because [Mitchell] was kind of a little guy and he did get pistol-whipped and there was a lot of blood in the room"; and "I do think that [Stevenson was] the main player in this assault and the pistol-whipping[.]"

The court sentenced Stevenson to 20 years, all but 10 suspended, for armed robbery, and 20 years, all but five suspended, for first-degree assault, to run consecutively.

Stevenson contends that his first-degree assault conviction should have merged into his armed robbery conviction for sentencing because they arose from the "same act or transaction," *i.e.*, the armed robbery. The State counters that the facts support separate convictions and sentences for armed robbery and first-degree assault. Specifically, the evidence showed that Mitchell was hit repeatedly with a gun, which was a separate assault from the assault involved in the armed robbery. It argues that because Stevenson was the only defendant convicted of first-degree assault based on the intention to cause

serious physical injury, the jury's findings support convictions and sentences for both offenses.

For double jeopardy purposes, "[s]entences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014); *see also State v. Lancaster*, 332 Md. 385, 391 (1993). Two offenses are the same under the required evidence test when all the elements of one offense are included in the elements of the other offense. *Garcia-Perlera v State*, 197 Md. App. 534, 557 (2011) (citations omitted); *accord Blockburger v. United States*, 284 U.S. 299 (1932).

As this Court explained in *Pair v. State*, 202 Md. App. 617, 636–37 (2011), first-degree assault based on the infliction of serious bodily injury and robbery with a deadly weapon are not the same offense under the required evidence test. Robbery (and robbery with a deadly weapon) requires proof of theft of property, which first-degree assault does not. First-degree assault of the kind described, and for which Stevenson was convicted, requires proof of the infliction of serious bodily injury, which robbery does not. In addition, as discussed in *Pair*, the rule of lenity does not apply because robbery and assault are common law crimes. *Id.* at 637–42.

The court only would have been required to merge these offenses for sentencing, therefore, if the "fundamental fairness" test compelled that result. In *Monoker v. State*, 321 Md. 214, 223–24 (1990), the Court held that even though the crimes of solicitation

and conspiracy did not merge under the required evidence test, it would be fundamentally unfair for the defendant to be sentenced for both crimes because, in the circumstances of the case, "the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it[.]" *See also Marquardt v. State*, 164 Md. App. 95, 152 (2005) (holding that while convictions for malicious destruction of property and fourth-degree burglary did not merge for sentencing under the required evidence test or the rule of lenity, they merged under the principle of fundamental fairness because the malicious destruction of property offense was "clearly incidental to the breaking and entering").

Merger under the fundamental fairness test is fact-specific. In the case at bar, the facts adduced at trial showed that Stevenson robbed Mitchell at gunpoint and then pistol-whipped him with the gun, causing him to suffer serious physical injuries. Although the pistol-whipping was temporally close to the robbery with a deadly weapon, it was not incidental to it. As the court pointed out in sentencing, it was a "vicious" act of violence, and the pistol-whipping went above and beyond the armed robbery. Accordingly, merger is not compelled under the fundamental fairness test.

Questions Presented Only By Lynch:

VII.

The court imposed separate sentences against Lynch for second-degree assault and first-degree assault. He contends that the former conviction merges into the latter conviction for sentencing, under the required evidence test, and therefore the court erred by imposing separate sentences.

The State concedes as much but argues that under *Twigg*, *supra*, "the merger of the second-degree assault sentence would have the effect of reducing the overall sentencing 'package,'" and therefore Lynch's sentences (other than armed robbery for which he received the maximum sentence) should be remanded to allow the trial court to determine whether or not to reduce the overall sentence package.

The second-degree assault conviction should have merged for sentencing with the first-degree assault conviction, under the required evidence test. The holding in *Twigg* is not relevant here because we are not remanding for resentencing but simply are vacating the second-degree assault sentence.

VIII.

Lynch contends his commitment record improperly reflects 35 years of executed incarceration, when in fact he was only properly sentenced to 28 years. He does not explain how he calculated 28 years, instead of 35. The State responds that the commitment record accurately reflects the sentence issued by the court, but concedes that if we vacate Lynch's sentence for second-degree assault, the commitment record should be altered accordingly.

The record reveals that the commitment record properly reflects the sentence of the court as announced in open court. Because we are vacating the sentence for second-degree assault, the commitment record should be amended accordingly.

LYNCH'S SENTENCE FOR SECOND-DEGREE ASSAULT VACATED AND CASE REMANDED FOR THE CLERK TO AMEND THE COMMITMENT RECORD ACCORDINGLY. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID AS FOLLOWS:
FOR LYNCH'S APPEAL NO. 1081, COSTS TO BE PAID 2/3 BY THE APPELLANT AND 1/3 BY PRINCE GEORGE'S COUNTY;
FOR CONNOR'S APPEAL NO. 1604, COSTS TO BE PAID BY THE APPELLANT; AND
FOR STEVENSON'S APPEAL NO. 1770, COSTS TO BE PAID BY THE APPELLANT.