Circuit Court for Baltimore City
Case No.: 120029015

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2146

September Term, 2022

MARVIN VAUGHN

v.

STATE OF MARYLAND

Leahy,
Beachley,
Wilner, Alan M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: May 29, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Marvin Vaughn, was indicted in the Circuit Court for Baltimore City on charges of first-degree murder of Theatra Bowman, attempted first-degree murder of her son, Dante Savage, and related offenses. He was tried by a jury and convicted of second-degree murder of Bowman, attempted first-degree murder of Savage, commission of a crime of violence in the presence of a minor, and wearing and carrying a knife openly with intent to injure. He presents a single issue on appeal: Did the trial court err by refusing to instruct the jury on the lesser included offenses of first- and second-degree assault?"

We hold that because the evidence supported a rational inference that Appellant intended to seriously injure Savage, but not to kill him, the court erred by not also including the requested instruction to the jury on the uncharged, lesser-included offense of first-degree assault. Our holding requires us to reverse the judgments of conviction for second-degree murder, attempted first-degree murder, and commission of a crime of violence in the presence of a minor and remand for a new trial.[1]

BACKGROUND

Around 2 a.m. on January 2, 2020, officers from the Baltimore City Police Department responded to 3531 Chesterfield Avenue, a two-story rowhome in East Baltimore City, for a report of a male "yelling out the window or attempting to jump out the window." Officers found Savage on the first floor of the house suffering from stab wounds to his head. In a second-floor bedroom, Bowman was lying on the floor at the foot

[1] As we will explain, Appellant concedes that the instructional error did not impact his conviction for wearing and carrying a knife openly with intent to injure.

of a bed, unresponsive. Appellant was leaning out the bedroom window with his back to the police. He had cutting wounds to both of his hands.

Bowman died of her injuries. Her autopsy revealed that she was stabbed once in the head and once in the upper chest just below her neck. The head wound injured her skull, but not her brain, and the chest wound injured her carotid artery, brachiocephalic artery, superior vena cava, and her trachea. The upper chest wound was fatal.

Savage was transported to the hospital where he was treated for three stab wounds to his head.

Appellant was treated at the hospital for injuries to his hands. The tip of his left pinky was severed off and his left ring and middle finger were nearly severed. He sustained a cut on the palm of his right hand.

The Indictment

On January 29, 2020, Appellant was charged with the murder of Bowman, attempted murder of Savage, two counts of commission of a crime of violence in the presence of a minor; and wearing and carrying a knife openly with the intent to injure. Because he was charged with murder and attempted murder using the statutory short form under Maryland Code (2002, 2021 Repl. Vol.) Criminal Law Article ("CR"), § 2-208, he was charged with first-degree murder, second-degree murder, and manslaughter and the attempted modalities of each. *Dishman v. State*, 352 Md. 279, 285-90 (1998).

The Trial

The following factual account is drawn from the evidence presented at Appellant's jury trial which proceeded over three days in October 2022. The jury heard testimony from

several detectives, the medical examiner, and several crime scene technicians. Both Savage and Appellant testified, presenting on certain consequential points, conflicting accounts.

In January 2020, seven people were staying at the Chesterfield Avenue rowhouse. On the second floor, Bowman occupied one bedroom; Savage, then age 18, his girlfriend, Alisha Davenport, and their two young daughters occupied a second bedroom; and Bowman's then thirteen-year-old son, D.W., occupied the third bedroom. Bowman's adult daughter lived in a bedroom in the basement of the house. Appellant had moved in over the summer. According to Savage and Davenport, he was staying in the basement on an air mattress. According to Appellant, he stayed in Bowman's room with her.

1. Savage's Testimony

In the early morning on January 2, 2020, Bowman banged on Savage's bedroom door and said "[g]et him out of here[.] . . . [H]e just jumped on my face with a pillow and tried to smother me." Savage testified that Bowman's eyes looked frightened. Savage went to put on shorts but heard Bowman and Appellant "tussling[.]" He ran into Bowman's room and observed Appellant "grabbing [Bowman], tryna' like throw her on the bed."

Savage and Bowman grabbed Appellant and pushed him "against the mirror" as Savage began hitting him. Appellant continued to hold onto Bowman. D.W. ran into the bedroom with a bottle in his hand. Savage told D.W. to get out, took the bottle out of his hand, and pushed him out of the bedroom. Savage closed the bedroom door most of the way.

In the meantime, Appellant had released his hold on Bowman and sat down in a chair in the room. Savage told Appellant that Bowman had asked him to leave and that he needed to leave. When Appellant did not move, Savage threw the bottle at him. Appellant stood up and said, "[O]h, I'm a kill you, bitch." Appellant reached into his pocket, pulled out a knife, and as Savage was backing away, stabbed him in the head. Savage fell back against the wall. Appellant came toward him, repeating "bitch, I'm a kill you[,]" and then stabbed Savage a second time in the head.

Bowman jumped in between Savage and Appellant. Appellant reached over Bowman and stabbed Savage in the head a third time. At the same time, Savage saw his mother "grab[] herself" and make a noise.

Savage yelled for Davenport to get his phone so that he could call 911. Savage then ran into the hall, took the phone, and called 911. He was unable to connect to the 911 operator, so he ran downstairs and onto the front porch, where he began screaming for help. Savage then went into the kitchen to look for a weapon to defend himself. He grabbed a heavy pot.

Savage returned to the upstairs bedroom to check on Bowman, whom he found kneeling on the floor with her upper body on the bed. Appellant was next to her. Savage walked towards Appellant and said "[W]hat's wrong with my mother? . . . [W]hat did you do to my mother?" He then hit Appellant in the back of the head with the pot. When Appellant stood up and moved toward Savage like he might stab him again, Savage ran out of the room and shut the door. Savage called the police again and waited for them on the first floor at the bottom of the steps.

Savage was transported to Johns Hopkins Bayview Medical Center by ambulance where he was treated and released the same day. His medical records, which were admitted into evidence, reflect that he suffered three "superficial lacerations to [his] scalp" without penetration of the skull. The wounds were "not very deep" and were "stapled shut with a total of 7 staples."

2. Appellant's Testimony

Appellant testified that he and Bowman knew each other years ago and had reconnected in July 2019. He moved in with her within a week. Their relationship had its "ups and downs."

In the early morning on January 2, 2020, he and Bowman were lying in bed looking at her phone together. She got out of bed and left the bedroom. Appellant heard her knock on Savage's door and tell him she wanted Appellant to leave. Savage came into the hallway and looked in Bowman's bedroom. Appellant was sitting in the chair. Savage returned to his room.

Bowman reentered the bedroom and punched Appellant in the face. Savage returned and asked Bowman if Appellant had hit her. She replied, falsely, that he had. Appellant related to the jury that Savage "charged at me" and "jumped on me like he was a UFC wrestler and locked his legs and arms around me, pinning my arms down." Appellant said that Savage was "choking me out." At the same time, Bowman began punching Appellant in the face. Appellant started to black out.

All three of them fell toward the bed, but they bounced back against the mirror. Savage said, "I got something for you, I'm a hock your bitch ass up" and left the bedroom.

A "few seconds later," Savage returned with a knife. D.W. also entered the bedroom and stood on the bed. Bowman told Appellant to leave so that her "son don't catch a senseless body." Appellant replied that Savage "ain't gonna catch a senseless body" because Appellant "wasn't thinking it was going that far." D.W. threw a bottle at Appellant but missed.

Savage pushed D.W. behind him and approached Appellant with his knife. There were "multiple knives in the room," so Appellant grabbed one to "defend [himself.]" He described what followed:

> We locked up, he swung, I swung. We got the [sic] tussling back and forth. We fell down, all of us fell down. Me, him, and his mother, all us fell down toward the door. His mother was blocking the door.
>
> We got up, I backed away. I noticed that Ms. Bowman started blinking her eye. I'm like baby, what's wrong? I threw my knife down. She came towards me. I grabbed her in my arms. And she not no small woman, I had to do a maneuver to try to slide her over. But somewhere between the incident of us fighting, she got stabbed in the neck and in her head.

Appellant did not know if he stabbed Bowman or if Savage did, explaining that "the altercation was going on between me and [Savage]." He did not intend to stab Bowman, however.

Appellant was asked if he meant to stab Savage and responded, "I did – I mean I was defending myself" and "was on tunnel vision set towards him because he was the one aggressive coming at me with a knife." Appellant assumed that his hands were cut when he grabbed Savage's knife. His left pinky was severed off and the two fingers next to it were "almost . . . chopped off." On his right hand, his palm was cut open from the middle finger to the pinky.

After Appellant and Savage stopped fighting, Savage left the room. Appellant tried to help Bowman by putting pressure on the wound to her upper chest. D.W. was still in the room, and they were both crying. He testified that he did not intend to hurt Bowman because he loves her. He heard Savage on the phone with his father.

Savage soon returned and hit Appellant in the head with a cast-iron frying pan. Appellant felt like the room was spinning and he could not breathe. He walked to the window and took off his shirt. A man outside saw him and asked if he was okay. He told the man to call the police and then passed out with his upper body hanging out the window. When he regained consciousness, the police were there.

On cross-examination, Appellant agreed that Bowman asked him to leave and that he did not comply. He felt that "it was wrong for her to ask [him] to leave" because he was paying rent and had nowhere else to go. Appellant acknowledged that when he and Savage were fighting, he yelled, "I'm going to kill you, bitch" at Savage, adding that that was "when we was all in the heat of the argument of fighting." He admitted stabbing Savage three times in the head while holding the knife in his right hand.

3. Other Evidence and Testimony

Davenport testified consistent with Savage's version of events. She recounted hearing Bowman tell him that Appellant "jumped on her face with a pillow." Though she heard sounds of fighting, she did not witness the altercation because she stayed in the bedroom with her two young daughters. D.W. also came into her bedroom. After the fight ended, Savage came to the door bleeding from the head and took her phone to call 911.

BPD Sergeant Jose Cartagena recovered an orange folding knife from a windowsill in the bedroom where the altercation occurred, beneath a window air conditioner. A "kitchen knife" was recovered on the floor of the bedroom, from underneath clothing. Two folding knives were recovered from Savage's bedroom – one multicolored and one black.

Swabs taken from the handle and blade of the orange knife were analyzed for DNA. The sample from the handle of the knife yielded a DNA profile consistent with a major male contributor identified as Appellant and at least one indeterminate minor contributor. Using probabilistic genotyping software, the profile was analyzed again. Appellant and Bowman matched an inferred genotype in the sample and Savage could not be included or excluded.[2] The sample from the blade of the knife yielded a DNA profile with a major male contributor identified as Appellant and at least one indeterminate minor contributor.

No genetic material suitable for DNA analysis was found on the "kitchen knife" or the black folding knife found in Savage's bedroom. The multicolored knife recovered from Savage's bedroom tested positive for the presence of blood and was analyzed for DNA, but the results were inconclusive.

4. The Jury Instructions

On the last day of trial, the court conferred with counsel concerning jury instructions and the verdict sheet. Because the State had submitted a verdict sheet that included the charge of first-degree assault against Savage, the court initially was under the mistaken

[2] Appellant states on page 8 of his brief that Savage's blood also was present on the orange folding knife. This is not accurate. The DNA analyst testified that his DNA could not be included or excluded from an inferred genotype.

impression that Appellant had been indicted on that charge. The prosecutor clarified that Appellant only was charged with the attempted murder of Savage. She stated that she had erroneously included first-degree assault on the verdict sheet because she "thought it was a lesser included offense of attempted murder, but [she] was wrong." The prosecutor explained that Maryland Criminal Pattern Jury Instruction ("MPJI-Cr.") 4:17.14 provides that when a defendant is charged with attempted first-degree murder and asserts self-defense, the charge includes the lesser included offenses of attempted second-degree murder and attempted voluntary-manslaughter.

Defense counsel responded that first-degree and second-degree assault still could be considered lesser included offenses of attempted murder and should be before the jury. The court agreed with counsel that those charges "could be included," but reasoned that "that's a decision that has to be made by the State. And once that decision is made by the State in order to be made by the defense, it's to put that forward or not." The court then asked the prosecutor if she had "decided to go for broke in this particular matter?" The prosecutor confirmed that she did not wish to send a charge of first-degree assault to the jury. Defense counsel noted his objection for the record.

With respect to Bowman, the jurors were instructed on first-degree murder, second-degree murder, and voluntary manslaughter, and, with respect to Savage, they were instructed on attempted first-degree murder, attempted second-degree murder, and attempted voluntary manslaughter. The jurors were instructed on complete and imperfect self-defense on all those charges. The jurors also were instructed on the charges of

commission of a crime of violence in the presence of a minor, and openly carrying a knife with intent to injure.

5. Closing Arguments and Verdict

In closing, the State argued that the jury could infer that Appellant intended to kill Savage from his act of stabbing Savage repeatedly in the head with a knife and his statements that he would kill Savage. The State argued that even though Appellant did not intend to kill Bowman, his intent to kill Savage transferred to her because her death resulted during his attempt to kill Savage. The State maintained that Appellant was not acting in self-defense because only he was armed with a knife, because he was much larger than Savage, and because he was the initial aggressor.

Defense counsel argued that that Appellant did not attack Savage. He maintained that Savage drew a knife first and what followed was a "free-for-all" and a "melee" in which Appellant sustained severe wounds to both hands that were consistent with defensive wounds, Savage sustained head wounds, and Bowman sustained fatal stab wounds. He argued that this was "not a premeditated case. This is not first-degree. This is not second-degree murder. There was no intent to happen here."

The jury convicted Appellant of second-degree murder of Bowman, first-degree attempted murder of Savage, commission of a crime of violence in the presence of a minor, and openly carrying deadly weapon with intent to injure.[3] He was sentenced to serve life

[3] During deliberations, the jurors sent a note that stated: "Does transfer [sic] intent qualify in first-degree murder only?" The court and the parties agreed that the answer to the question should be "No."

in prison for the attempted first-degree murder of Savage, five years consecutive for commission of a crime of violence in the presence of a minor, and 25 years concurrent for second-degree murder, and three years concurrent for wearing and carrying a knife openly with intent to injure.. This timely appeal followed.

DISCUSSION

"The issue of giving lesser included offense instructions in murder cases is a complicated balancing of the State's interest in determining how to prosecute a defendant and the defendant's right to a fair trial." *Malik v. State*, 152 Md. App. 305, 331 (2003) (citation omitted). Appellant contends that his right to a fair trial was impaired in this case when the circuit court denied his request for a jury instruction on the uncharged, lesser included offenses of first-degree assault and second-degree assault. He asserts that by not giving those instructions, the jury was left with a "'Hobson's Choice': convict [Appellant] of something – attempted murder – rather than nothing at all." (citing *Hook v. State*, 315 Md. 25, 38 (1989)).

The State agrees that there are circumstances in which the court must submit a lesser-included, uncharged offense to the jury. It further concedes that first- and second-degree assault were lesser included offenses of attempted murder. It asserts, however, that the trial court did not err because 1) the evidence did not support a rational basis to convict Appellant of assault in either degree, but not attempted homicide; and 2) the determination not to submit those charges to the jury "did not violate fundamental fairness."

For the following reasons, we hold that first-degree and second-degree assault were lesser included offenses under the elements test. The evidence presented also supported a

rational inference that Appellant intended to seriously injure Savage, but not to kill him, and, consequently, the jury should have been instructed on the uncharged, lesser included offense of first-degree assault. We shall thus reverse Appellant's convictions for second-degree murder, attempted first-degree murder, and commission of a crime of violence in the presence of a minor and remand for a new trial.

A. Applicable Law

Ordinarily, our review of an alleged instructional error concerns the application of Maryland Rule 4-325(c).[4] As the Supreme Court of Maryland has explained, however, "[t]he mandate of th[at] rule does not apply . . . [w]here a particular charge is not before the court[.]" *Ball v. State*, 347 Md. 156, 190 (1997). Here, there is no dispute that Appellant was not charged with first or second-degree assault. Consequently, whether Appellant was entitled to the requested jury instructions must be analyzed under the lesser included offense doctrine. *See State v. Bowers*, 349 Md. 710, 718 (1998).

Two cases decided by the Supreme Court of Maryland in 1989 – *Hook v. State*, 315 Md. 25 (1989), and *Hagans v. State*, 316 Md. 429 (1989) – explicate this doctrine. In *Hook*, the Court held that the State was precluded from entering a nolle prosequi on a lesser-included charge (second-degree murder) over a defendant's objection if there existed a rational, factual basis for convicting a defendant of the lesser and not of the greater charge. 315 Md. at 43. The Court reasoned that though a prosecutor ordinarily has

[4] The Rule provides, in pertinent part, that the "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c).

discretion to enter a nolle prosequi, its discretion is not boundless and when doing so would violate a defendant's right to "fundamental fairness[,]" it may not. *Id*. at 35-37. The Court summarized its holding as follows: "When the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection, to nol pros the lesser included offense." *Id.* at 43-44.

Hagans, which involved two unrelated appeals decided in a single opinion, expanded upon *Hook* to hold that a defendant may be convicted of an *uncharged* lesser-included offense. *Hagans*, 316 Md. at 448. Unlike in this case, in both appeals decided in *Hagans* the prosecutor requested an instruction on an uncharged lesser-included offense over defense objection. *Id*. The Supreme Court reasoned, however, that either party may request an instruction on such an offense if the evidence could be interpreted to permit conviction of a lesser-included charge and acquittal of the greater charge. *Id.*

"[T]he analysis under both *Hook* and *Hagans* is the same," *Johnson v. State*, 90 Md. App. 638, 645 (1992), and involves "a two-step process." *Bowers*, 349 Md. at 721. First, the court must determine if the uncharged offenses are lesser-included offenses under the elements test.[5] *Id*. at 721-22; *see also Hagans*, 316 Md. at 449 (explaining that to be a lesser included offense, "[a]ll of the elements of the lesser included offense must be

[5] The elements test, also known as the required evidence test, "focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *State v. Jenkins*, 307 Md. 501, 517 (1986).

included in the greater offense" and it "must be impossible to commit the greater without also having committed the lesser"). If and only if that threshold determination is satisfied, the court turns "to the facts of the particular case" to assess "'whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.'" *Bowers*, 349 Md. at 722 (quoting *Ball*, 347 Md. at 191).

Under that second prong, "it is not enough to determine that the evidence would be sufficient for the jury to convict on [the lesser included] offense[.]" *Burrell v. State*, 340 Md. 426, 434 (1995). "In other words, 'the test is not whether there is sufficient evidence to convict on the lesser included offense but whether the evidence is such that the jury could rationally convict *only* on the lesser included offense.'" *Henry v. State*, 184 Md. App. 146, 165 (2009) (emphasis added) (quoting *Burch v. State*, 346 Md. 253, 279 (1997)), *aff'd by* 419 Md. 588 (2011). "If a rational jury could not reach this conclusion, then the judge need not submit the lesser offense to the jury." *Ball*, 347 Md. at 191.

Nevertheless, the bar is not high. A criminal defendant need only adduce "some evidence" to satisfy this threshold. *Malik*, 152 Md. App. at 333. "'The source of the evidence is immaterial; it may emanate solely from the defendant.'" *Id*. (quoting *Roach v. State*, 358 Md. 418, 428 (2000)). The court's decision whether to give the instruction, or not, is reviewed for an abuse of discretion. *Henry*, 184 Md. App at 164.

B. Analysis

Step One: Whether the uncharged offenses are lesser included offenses under the required evidence test.

As already explained, when Appellant was charged by statutory short form with attempted homicide, he was charged with attempted murder in the first and second degrees and with attempted voluntary manslaughter. As the circuit court recognized and the State concedes on appeal, "first- and second-degree assault are lesser-included offenses of the attempted murder and attempted manslaughter charges submitted to the jury." We agree. In *Dixon v. State*, 364 Md. 209, 239 (2001), the Supreme Court of Maryland reasoned that the serious physical injury modality of first-degree assault, CR § 3-202(b)(1), is "*subsumed* by attempted voluntary manslaughter" which requires a specific intent to commit a homicide, which itself "embodies an intention to cause or attempt to cause serious physical injury." (Emphasis in original.) The same is true of attempted second-degree murder, which requires an intent to kill, which necessarily subsumes an intent to cause serious physical injury. Because second-degree assault requires only an intent to cause physical injury, it also would be subsumed within the intent to kill necessary for those offenses.

Step two: Whether there was a rational basis for the jury to conclude that Appellant was guilty of the uncharged lesser offenses, but not the greater offenses.

Turning to the second step of the analysis, we must determine whether the evidence supported a rational finding that Appellant committed *only* a first- or second-degree assault on Savage, but did not commit attempted first-degree murder, attempted second-degree murder, or attempted voluntary manslaughter. As the parties agree, this inquiry turns upon

intent. The jurors were instructed that to convict Appellant of any of those offenses, they must find that he had the intent to kill Savage when he stabbed him. They were further instructed that because Appellant asserted that he acted in self-defense, they should acquit him of all the attempted homicide charges if they found that he acted in complete self-defense and should convict him of attempted voluntary manslaughter if they found that he acted in partial self-defense. Because the State's theory was that Appellant intended to kill Savage but not Bowman, it relied upon transferred intent to support the homicide charges relative to Bowman.

The jury, by its verdict, rejected the argument that Appellant was acting in self-defense – perfect or imperfect – and found that the stabbing of Savage was premeditated. Thus, the issue before us on appeal is whether the jurors should have been presented with the option of finding that Appellant attacked Savage with the premeditated intent to cause him serious physical injury (first-degree assault) or attacked him with a general intent to injure him (second-degree assault) but did not form the intent to kill him.

The State maintains that the evidence could not support a rational inference that Appellant did not intend to kill Savage when he stabbed him three times in his head and said "bitch, I'm a kill you." The State relies upon one decision by the Supreme Court of Maryland, *Burch v. State*, 346 Md. 253 (1997), and one by this Court, *Henry v. State*, 184 Md. App. 146 (2009). In *Burch*, the defendant was convicted of two counts of first-degree murder, and related charges, after attacking and killing an elderly married couple during a home invasion robbery. 346 Md. at 259. As pertinent to the issue before us, he argued on appeal that the trial court erred by not instructing the jury on depraved heart murder with

respect to the female victim who died a little over a week after the attack. *Id*. at 275-76. The trial court had refused the defense's request for the instruction, and instead, instructed the jury on premeditated first-degree murder, felony murder, and the specific intent versions of second-degree murder. *Id.* at 275. In rejecting Burch's appellate argument, the Court opined:

> [The defendant] pummeled a 78-year-old, 97-pound frail woman, apparently with a telephone receiver, with such force as to break 13 ribs and two other bones and cause extensive bleeding. Neither the fact that he could have done even more damage and thus ended her life even quicker nor the fact that the victim was still alive when he left the house *detracts, in the least, from the compelling inference that the beating he did administer must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result.* Under [the defendant's] theory, virtually any murder committed by beating or that does not involve instantaneous death could qualify as depraved heart murder. That is not the law.
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> * * *
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> The jury . . . was instructed on two varieties of second-degree murder upon which a plausible verdict could have been returned. It is simply beyond the realm of reasonableness to suppose that any rational jury could find that [the defendant] administered the beating to [the victim] with mere recklessness or indifference as to the result.

Id. at 280 (internal citations and footnote omitted) (emphasis added).

In *Henry*, the defendant was charged with two counts of first-degree murder and related charges arising from a shooting that followed in the aftermath of a fistfight. 184 Md. App. at 152-54. Henry was alleged to have left the scene of the fistfight, which involved one of the victims (Curry) and several of Henry's friends, before returning with a sawed-off rifle which he fired at the fighting parties, killing Curry and a bystander (Bell).

Id. at 153-54. He was convicted of the second-degree murders of both Curry and Bell. *Id.* at 151.

As pertinent, he argued on appeal that the court erred by not instructing the jury on the lesser included offense of involuntary manslaughter as to Bell. *Id.* at 152. The court had instructed the jury on first-degree murder, second-degree intent to kill murder, and second-degree depraved heart murder. *Id*. at 163. This Court framed the issue before us as "whether the evidence was such that the jury could have convicted Henry of involuntary manslaughter and *not* depraved heart murder." *Id*. at 165. We held that because the jury was instructed on the doctrine of transferred intent and Henry's *mens rea* toward Curry, his intended victim, transferred to Bell, his unintended victim, the court did not err by refusing to instruct the jury on involuntary manslaughter. *Id*. We reasoned that a rational jury could not have found that Henry's intent towards Curry was "anything other than an intent to kill . . . or at least an intent to inflict such serious bodily harm that death was the likely result." *Id*.

In contrast, in *Dishman*, 352 Md. at 284, the Supreme Court of Maryland held that the circuit court erred by instructing the jury on first and second-degree specific intent murder, but not instructing the jury on involuntary manslaughter where the defendant admitted to having bound and partially taped over the nose and mouth of the victim, and later attempted to burn her body. *Id*. The autopsy revealed that the victim was alive when she was bound and died from asphyxia. *Id*. The Court reasoned that the evidence supported a rational verdict that the defendant "caused [the victim's] death unintentionally but with gross negligence or with extreme disregard of the life-endangering consequences of his

actions." *Id*. at 300. By not submitting involuntary manslaughter to the jury, they were left with two choices: "convict [the defendant] of a specific intent crime causing the victim's death (either first or second-degree specific intent murder), or, second, it could acquit [the defendant] of any homicide crime." *Id*. Thus, if the jurors "concluded that [the defendant] caused [the victim's] death but that he did not specifically intend to kill or cause her serious bodily injury, it would have no choice but to return a verdict of acquittal." *Id.*

The State asserts that like in *Burch* and *Henry*, a rational jury could not have found that Appellant did not have the intent to kill Savage based upon the undisputed evidence that he stabbed him in the head three times and stated that he was going to kill him. We disagree.

The jury rationally could find that Appellant's statement that he was going to kill Savage, which Appellant testified was made in the "heat of the argument," was hyperbolic. This was consistent with his testimony that he and Savage were "tussling" and that he did not think the fight would "go[] that far," *i.e.*, that anyone would die. Significantly, unlike in *Burch*, where the defendant severely beat and stabbed the victim and left her for dead, and *Henry*, where the defendant shot at the intended victim, killing him and a bystander, here the Appellant inflicted three shallow stab wounds to Savage's head during a physical fight with him. The stab wounds were, according to Savage's own medical records, superficial lacerations to his scalp that did not penetrate his skull. He was not admitted to the hospital. On this evidence—and all that was required was *some* evidence, *Malik v. State*, 152 Md. App. at 333—a reasonable juror could find that Appellant acted with the intent to seriously injure Savage when he stabbed him in the head, but not with the intent

to kill him. Because we conclude that it would not have been rational for the jury to convict Appellant of second-degree assault, but not first-degree assault, however, we perceive no error in the failure to instruct on that offense.

Fundamental Fairness

Having determined that Appellant has satisfied both steps of the two-part test enunciated above, the State nevertheless argues that we must undertake a third step by analyzing whether any error in not submitting the assault charges to the jury rendered the trial fundamentally unfair.[6] This is accomplished, in the State's view, by comparing the severity of possible sentencing outcomes between the assault charges upon which the jury was not instructed and the "least severe attempted homicide charge before the jury,"—attempted voluntary manslaughter.

The State's reliance upon language in *Hagans*, 316 Md. 429, for this proposition is unavailing. As discussed, in *Hagans*, it was the prosecution, not the defense, that requested an instruction on an uncharged, lesser-included offense. In that procedural context, the Supreme Court agreed with cases from other jurisdictions that held that for the doctrine to apply "the uncharged lesser included offense must not be a more serious offense in terms of the maximum penalty prescribed by the Legislature." *Id.* at 452. The Court went on to explain that though the doctrine was "developed at common law largely for the benefit of the prosecution, it may now also be invoked by the defendant." *Id*. at 453 (citations omitted). The Court further held that a trial court should not *sua sponte* instruct the jury

[6] Notably, the State does not argue harmless error.

on an uncharged lesser included offense if neither the State nor the defendant requested the instruction, reasoning that it was a question of trial strategy best left to the parties. *Id*. at 455. The Court did not hold that a defendant only was entitled to an instruction on a lesser included offense if the maximum penalty for that offense was less than for the greater offense.

Even if we agreed with the State that a fundamental fairness analysis required us to compare sentencing outcomes, which we do not, we would reject its framing of that comparison in this case. With respect to Savage, the jury was instructed on three attempted homicide crimes: 1) attempted first-degree murder, which required proof of malice, intent to kill, and premeditation; 2) attempted second-degree murder, which required proof of malice and intent to kill, but not premeditation; and 3) attempted voluntary manslaughter, which required proof of an intent to kill, mitigated by imperfect self-defense. *See Roach*, 358 Md. at 430-31 ("The chief characteristic of imperfect self-defense is that it operates to negate malice, a necessary element of murder; hence, the successful invocation of the defense does not result in complete exoneration of the defendant but mitigates murder to voluntary manslaughter."). Thus, if the jurors found that Appellant intended to kill Savage, but did so under an actual, but objectively unreasonable belief that he was in immediate or imminent danger of death or serious bodily harm, or if he used more force than was objectively necessary to fend off Savage's attack, then the jurors could find him guilty of voluntary manslaughter, rather than first-degree or second-degree murder.

Alternatively, if, as the jury's verdict in this case reflects, they rejected Appellant's claim of self-defense, they were left with the choice to either convict Appellant of

attempted intentional homicide in either the first or second degree *or* to acquit him. The jurors were entitled to be presented with a third option to convict Appellant of the lesser included offense of first-degree assault, which permitted the jurors to find that Appellant was not acting in self-defense when he intentionally stabbed Savage, but that he intended only to seriously injure Savage, not to kill him. *See, e.g.*, *State v. Earp*, 319 Md. 156, (1990) ("on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm" (citation and quotation marks omitted)). This was consistent with defense counsel's argument in closing that there was "no intent" to commit murder in this case. Though the choice here was not as stark as in *Dishman*, it nevertheless was an impermissible choice that offended concepts of fundamental fairness. Consequently, we must reverse Appellant's conviction for attempted first-degree murder of Savage and remand for a new trial.

As the State concedes, because Appellant's conviction for second-degree murder of Bowman could have been premised upon transferred intent, the instructional error also requires reversal of that conviction.[7] It follows that Appellant's conviction for the commission of a crime of violence in the presence of a minor also must be reversed. Appellant's conviction for wearing and carrying a knife with the intent to injure may stand.

[7] As discussed, the only theory presented by the State in closing argument relative to Bowman's death was that Appellant intended to kill Savage and that his intent transferred to the unintentional killing of Bowman. The jury's verdict convicting Appellant of the second-degree murder of Bowman and the attempted first-degree murder of Savage could suggest that it nevertheless found that Appellant intentionally killed Bowman. As the State concedes, however, the jury note asking if transferred intent applied only to first-degree murder permits an inference that this "incongruity" between the verdicts merely reflected confusion on the part of the jurors.

JUDGMENTS OF CONVICTION FOR SECOND-DEGREE MURDER, ATTEMPTED FIRST-DEGREE MURDER, AND COMMISSION OF A CRIME OF VIOLENCE IN THE PRESENCE OF A MINOR REVERSED. JUDGMENT OF CONVICTION FOR WEARING AND CARRYING A KNIFE WITH INTENT TO INJURE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.