UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1221

September Term, 2015

JAIRO GUTIERREZ-LOPEZ

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: June 23, 2016

A jury in the Circuit Court for Prince George's County convicted Jairo Gutierrez-Lopez, appellant, of first-degree assault, second degree assault, carrying a dangerous weapon with intent to injure, and reckless endangerment. The trial court sentenced appellant to 25 years of incarceration, with all but 13 years suspended for first-degree assault, a consecutive sentence of three years for carrying a dangerous weapon,[1] and to a consecutive five years of incarceration for reckless endangerment. The remaining charge merged for sentencing purposes. Following sentencing, appellant noted this appeal and presents three questions for our review:

> 1. Did the trial court abuse its discretion in permitting improper prosecutorial rebuttal argument?
>
> 2. Did the sentencing court err in ordering separate sentences for first-degree assault, reckless endangerment, and carrying a dangerous weapon with intent to injure?
>
> 3. Does the sentence for carrying a dangerous weapon with intent to injure need to be corrected, where the sentence in the commitment order and docket entries conflicts with the sentence announced in open court?

For the reasons that follow, we answer the first question in the negative. As to the second question, we conclude that appellant's conviction for reckless endangerment should merge with his conviction for first-degree assault for sentencing purposes, but appellant's conviction for carrying a dangerous weapon does not merge with either reckless endangerment or first-degree assault. Lastly, because the sentence announced in open court

[1]As note in appellant's brief, this issue will be addressed in Section III.

for carrying a dangerous weapon does not conflict with the sentence set forth in the docket entries, the sentence does not need to be corrected. Accordingly, we vacate appellant's sentence for reckless endangerment and otherwise affirm the judgments of the circuit court.

BACKGROUND

Amalia Ramirez rented a room in the basement of a home located on Cherry Hill Road in Beltsville, Maryland, where she resided with her young daughter. There were two other rooms that shared a common kitchen and bathroom in the basement area of the house. A Ms. Margarita [2] and her husband occupied one room and appellant lived in the other with his wife and children. At the time of the events in this case, Ramirez had lived there for four years. Appellant and his family had rented their room for one month. Ramirez worked as a housekeeper at a hotel, and she, generally, only saw appellant in the mornings before she left for work.

Around 6:30 or 7:00 p.m. on July 5, 2014, Ramirez returned home from work, and the only people in the house were her daughter, appellant, and appellant's family. Ramirez planned to take her daughter to a friend's house to watch movies. Ramirez put a movie on for her daughter to watch while she packed for the outing.

Through the closed door of her room, Ramirez heard appellant yelling at his wife, and their children were yelling and crying. Ramirez's daughter was scared, so Ramirez turned

[2]The record does not indicate a first name for Ms. Margarita.

up the volume of the television in an attempt to drown out appellant. Ramirez's daughter said that she was afraid and "started yelling and crying." Ramirez left her room and asked appellant, as a favor, to stop yelling because he was upsetting her daughter. Ramirez returned to her room and closed, but did not lock, the door.

Ramirez began to change out of her work uniform when appellant opened her bedroom door and entered the room. Appellant was holding a knife that Ramirez recognized as a knife from the kitchen that they shared. Ramirez described the knife as wooden-handled and "kind of thin." Appellant punched Ramirez in the stomach, threw her to the ground, and proceeded to stab her with the knife. Ramirez was pleading with appellant to stop, and Ramirez's daughter was screaming, "Let my mom go. Let my mom go." At that time, Benjamin Balle, with whom Ramirez planned to spend the evening, was on the phone with Ramirez. He heard Ramirez yelling and Ramirez's daughter crying.

Appellant stabbed Ramirez four times: once on her left hand, once in her chest, and twice on her left leg. Appellant then stood up, said, "You can call the police," and left the room. Ramirez saw appellant's wife in her doorway, but "she took off running." Ramirez told Balle to call the police "because someone was stabbing her." Balle called 911 and had a friend drive him to Ramirez's address.

After the stabbing, Ramirez dragged herself to the door and closed and locked it. She then called 911. Ramirez, however, hung up on the emergency operator because the operator "was asking for too much information that I was not in a condition to offer at that time."

Ramirez stated that she could not breathe and "started seeing everything getting dark around me." Concerned for her daughter's safety, Ramirez called her daughter's father and told him to come pick her up because she had been stabbed.

Meanwhile, Corporal Kevin Knox of the Prince George's County Police Department was on street patrol in Beltsville in a marked police cruiser. A man flagged him down, across the street from Ramirez's house and attempted to translate for a "petite, Latino" woman "with several children." The woman reported that someone had been stabbed and indicated at which house. Corporal Knox called for other officers to respond to his location so that they could set up a perimeter and assess the situation. Corporal Knox explained that "everything was very sketchy at the time," and he was not sure if the attacker was still in the house. Once police had established a perimeter around the house, Corporal Knox entered the basement with two other officers, including Officer Michael Risher.

When the officers entered the basement, they could hear a child crying, and they called out to get a response. Eventually, they came to Ramirez's locked bedroom door; Corporal Knox forced the door open. Ramirez was laying against her bed in a pool of blood, and her daughter was by her side crying. Officer Risher retrieved a trauma kit from his patrol car, and he – and later emergency medical personnel – treated Ramirez and transported her to the hospital.

Detectives Josh Scall and Jason Tidwell of the Prince George's County Police Department arrived at the house to secure the scene and lead the investigation into the

incident. After speaking with officers and witnesses, Detective Scall developed appellant as a suspect. Detective Tidwell went to the hospital to speak with Ramirez. Detective Tidwell testified that he had some difficulty communicating with Ramirez because he does not speak Spanish. Detective Tidwell interviewed Ramirez and showed her a picture of appellant. Ramirez identified appellant as her assailant. Corporal Nicholas Romanchick testified that the police located appellant almost two weeks later, in Connecticut, working under a false identity.

Appellant testified in his own defense. He stated that he did not hit or stab Ramirez. He testified that at approximately 7:45 p.m. on July 5, 2014, he was playing soccer at a nearby field with friends. Appellant said that he did not return home after the soccer game because he had gotten into an argument with his wife about a photograph of a woman, and his wife was upset. He admitted that he was aware that police were looking for him, and he fled to Connecticut.

We will discuss more facts as necessary below.

DISCUSSION

I. Closing Arguments

Appellant contends that the trial court abused its discretion by permitting the prosecutor to portray his counsel as dishonest or deceptive during the State's rebuttal closing argument. Appellant argues that the prosecutor's comments deprived him of his right to a fair trial because the comments misled the jury, and also the evidence against him was

"hardly overwhelming." The State responds that the prosecutor's rebuttal arguments was an appropriate response to defense counsel's closing argument.

The Court of Appeals has remarked that "attorneys, including prosecutors, [have] a great deal of leeway in making closing arguments. 'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). "Whether a reversal of a conviction based upon improper closing argument is warranted 'depends on the facts in each case.'" *Id.* (quoting *Wilhelm v. State,* 272 Md. 404, 415 (1974)). "Reversal is warranted only if 'it appears that the remarks of the prosecutor actually misled or influenced the jury to the prejudice of the accused.'" *Williams v. State*, 137 Md. App. 444, 456 (quoting *Degren v. State*, 352 Md. 400, 431 (1999), *cert. denied*, 365 Md. 268 (2001)). "The trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument[.] 'As such, we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party.'" *Whack*, 433 Md. at 742 (quoting *Ingram v. State*, 427 Md. 717, 726 (2012)). A court abuses its discretion where the decision under consideration is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Moreland v. State*, 207 Md. App. 563, 569 (2012) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

As part of closing argument, defense counsel stated as follows:

> But what in this case is reasonable doubt, it's the fact that the police didn't follow-up and talk to any of these gentlemen. These unknowns. Look at other possibilities.
>
> Wanted to have a simple truth, look at the people who have relationships, real relationships that could give a motive with Amalia Ramirez. They don't talk to – we don't even hear the name of the father of the child who she called.
>
> They don't seem to follow-up and see what exactly Mr. Balle, Benjamin Balle was doing, who, we're to believe with his testimony, had never been to her house before, hadn't been inside her house before, but when this happened, knew the exact address and could drive straight there and saw the police and saw it all blocked off. He described that. The aftermath.
>
> And we don't even know the name, and we didn't get any information about this gentleman who flagged down police, who brought the police, at least on July 5th who brought the police in and had them go assist Ms. Ramirez, maybe because he was remorseful about something he did. I don't know. I'm not saying that he did do it, but you should at least follow-up with him.
>
> The fact that they didn't talk to neighbors. They didn't talk to other people. They didn't really look into it. For goodness sake, they didn't even really get somebody who speaks Spanish to go talk to Ms. Ramirez.
>
> And if she's protecting someone else because she doesn't want somebody she really cares about, if she made a mistake, if she doesn't like [appellant], and she is perfectly willing to see him held responsible, if that's a possibility, if that's something you think reasonably and plausibly could be the truth, that is reasonable doubt, ladies and gentlemen of the jury, and the State has not met its burden.
>
> Truth is sometimes stranger than fiction. It may seem strange that, you know, any one of these things happened, or that it was even

a stranger, and she didn't get a good look before she was disoriented, because she did repeatedly say she got disoriented. Truth is sometimes stranger than fiction.

In response, the State argued in its rebuttal closing:

[PROSECUTOR]: Police presence. That tactical move they did, of course, they wanted to be tactical. They're flagged down, Corporal Knox said, on the road. There's a Hispanic woman. A man is interpreting. It's not, sir, can I get your name, your height, your weight, your address. No. Where is the stabbing victim? I have to get to her. I have to find out what's going on.

He calls for backup. He rushes in once they have their tactical presence. Three officers go, and they have no idea if the suspect is in there or who they're going towards, but they find Amalia Ramirez.

Their priority is securing the scene, making sure she's okay, they testified. As Officer Risher said, he went and got his gear, his emergency equipment, and he was helping her.

They looked for a knife, but hey, what do you know, the defendant took the knife with him. There's no knife on the scene. Obviously, you've got to get rid of that evidence.

Don't fall for it. Don't fall for it. Oh, this man, he was there, and he was interpreting. Don't believe the smoke and mirrors. There's no who-done-it here.

[DEFENSE COUNSEL]: Objection.

(Emphasis added).

The trial court overruled appellant's objection, noting that "[c]ounsel is free to comment on the facts, the evidence, and the law as she sees them." Appellant contends that the State's characterization of appellant's closing argument as "smoke and mirrors" was improper and an attack on the professionalism of his counsel. Appellant argues, therefore, that the court abused its discretion in permitting such rebuttal argument. We disagree.

In *Smith v. State*, 225 Md. App. 516, 528 (2015), the prosecutor referred to Smith's case as "smoke and mirrors" in rebuttal closing argument. We recognized that a prosecutor may not "impugn the ethics or professionalism of defense counsel in closing argument." *Id.* at 529. The "smoke and mirror" comments, however, "were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel." *Id*. *See also Miller v. State*, 151 Md. App. 235, 250-51 ("'There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar . . . . He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.'" (quoting *Wilhelm*, 272 Md. at 413), *cert. denied*, 377 Md. 113 (2003)).

Similarly, the State's exhortations to the jury not to fall for appellant's "smoke and mirrors" in this case was not an attack on the ethics or professionalism of counsel. Rather,

it was a characterization of appellant's argument, which is permitted. We, therefore, do not perceive an abuse of discretion by the trial court in overruling appellant's objection to the State's remarks during rebuttal closing argument.

II. Merger of Offenses

Appellant contends that the sentencing court erred by 1) failing to merge appellant's conviction for reckless endangerment into first-degree assault; and 2) failing to merge appellant's conviction for carrying a dangerous weapon into either reckless endangerment or first-degree assault. The State agrees that the sentencing court should have merged appellant's conviction for reckless endangerment into first-degree assault. The State disagrees, however, as to the merger of appellant's conviction for carrying a dangerous weapon.

This Court has observed that "[t]he failure to merge a sentence when it is required is considered an inherently illegal sentence as a matter of law[,]" which "a court 'may correct . . . at any time.'" *Latray v. State*, 221 Md. App. 544, 555 (2015) (quoting Rule 4-345(a)). Ordinarily, "[t]he preferred test to determine whether offenses stemming from the same transaction merge for double jeopardy purposes is the required evidence test." *Id.* at 553. Sometimes referred to as the Blockburger test,[3] "[t]he required evidence test 'focuses upon the elements of each offense; if all of the elements of one offense are included in the other

[3] The name refers to the decision of the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932).

offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.'" *Snowden v. State*, 321 Md. 612, 617 (1991) (quoting *State v. Jenkins*, 307 Md. 501, 517 (1986)).

Even if a conviction does not merge into another under the required evidence test, merger may be required under either the rule of lenity or pursuant to the principles of fundamental fairness. Under the rule of lenity, "'courts occasionally find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction.'" *Pair v. State*, 202 Md. App. 617, 637-38 (2011) (emphasis omitted) (quoting *Brooks v. State*, 284 Md. 416, 423 (1979)). Stated another way,

> "[t]wo crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. . . . [I]f we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we in effect, give the defendant the benefit of the doubt and hold that the crimes do merge."

Moore v. State, 163 Md. App. 305, 320 (2005) (quoting *Monoker v. State*, 321 Md. 214, 222 (1990)).

Fundamental fairness, on the other hand, "is a defense that, by itself, rarely is successful in the context of merger." *Latray*, 221 Md. App. at 558. Indeed, this Court recently observed that a fundamental fairness argument has been successful in only two cases. *Id.* at 561. "Merger by virtue of the fundamental fairness test . . . is heavily and

intensely fact-driven." *Pair*, 202 Md. App. at 645. Essentially, pursuant to principles of fundamental fairness, a defendant should not be punished twice for the same conduct. *See Carroll v. State*, 428 Md. 679, 695 (2012) ("In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are 'part and parcel' of one another, such that one crime is 'an integral component' of the other.") (quoting *Monoker*, 321 Md. at 223). This Court has noted that "[t]he principal justification for rejecting a claim that fundamental fairness begs merger in a given case is that the offenses punish separate wrongdoing." *Latray,* 221 Md. App. at 558.

First, we agree with the parties that appellant's conviction for reckless endangerment should merge into his conviction for first-degree assault under the rule of lenity.[4] In *Marlin v. State*, 192 Md. App. 134 (2010), *cert. denied*, 415 Md. 339 (2010), Marlin, was convicted of, among other things, first-degree assault and reckless endangerment for the shooting of a man. *Id.* 140-41. This Court observed that "the evidence at trial pertained solely to a single act of shooting a single victim." *Id.* at 171. Accordingly, "Marlin's conduct as to the reckless endangerment involved the same conduct that formed the basis for the first degree assault by

[4] Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim. Law"), § 3-202(a) defines first-degree assault, in pertinent part, as follows: "A person may not intentionally cause or attempt to cause serious physical injury to another."

Crim. Law § 3-204(a) defines reckless endangerment, in part, as recklessly "engag[ing] in conduct that creates a substantial risk of death or serious physical injury to another[.]"

firearm; no other conduct was involved in proving either offense." *Id.* We concluded: "[T]he singular act of shooting Williams properly resulted in two convictions but warranted only one sentence[,]" and we merged Marlin's conviction for reckless endangerment into first-degree assault. *Id.*

Similarly, appellant's convictions for reckless endangerment and first-degree assault were based on the act of stabbing Ramirez. There was no separate conduct. As in *Marlin,* appellant's conduct "properly resulted in two convictions, but warranted only one sentence." *Id.* Appellant's conviction for reckless endangerment, therefore, should merge into the conviction for first-degree assault for sentencing purposes.

We, however, do not agree with appellant as to the merger of his conviction for carrying a dangerous weapon. Appellant contends that the rule of lenity and/or fundamental fairness requires merger of this conviction into either reckless endangerment or first-degree assault because Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim. Law"), § 4-101, the statutory provision governing carrying a dangerous weapon,[5] lacks an anti-merger provision, and his conduct for these convictions was based on the same act of carrying a knife.

In *Biggus v. State*, 323 Md. 339, 356 (1991), the Court of Appeals observed that in Article 27, § 36(a) of the Md. Code, which became Crim. Law § 4-101, the legislature stated:

[5] Crim. Law § 4-101(c)(2) provides: "A person may not wear or carry a dangerous weapon, chemical mace, pepper mace, or a tear gas device openly with the intent or purpose of injuring an individual in an unlawful manner."

"'[I]n case of conviction, if it shall appear from the evidence that such weapon was carried, concealed or openly, with the deliberate purpose of injuring the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed.'" The Court concluded that the legislature's statement "expresses a sentiment somewhat inconsistent with merger under the rule of lenity." *Id.* at 357. The Court went on to remark: "Furthermore, Maryland cases have uniformly refused to merge [Crim. Law § 4-101(c)(2)] convictions into convictions for other offenses where such merger was not mandated by the required evidence test." *Biggus*, 323 Md. at 357. *See also Burkett v. State*, 98 Md. App. 459, 479 (1993) (remarking that the Court of Appeals "laid that ghost to rest" as to the merger of weapons offenses pursuant to the rule of lenity), *cert. denied*, 334 Md. 210 (1994).

Accordingly, appellant's conviction for carrying a deadly weapon does not merge into either reckless endangerment or first degree-assault pursuant to the rule of lenity. As the Court of Appeals stated in *Biggus*, "there is no unfairness associated with the imposition of separate sentences" for both carrying a deadly weapon and reckless endangerment or first-degree assault. 323 Md. at 357.

Neither should appellant's conviction for carrying a deadly weapon merge pursuant to the principles of fundamental fairness in this case. Carrying a deadly weapon is not "part and parcel" of reckless endangerment or first-degree assault such that imposing separate sentences violates fundamental fairness. *See Latray*, 221 Md. App. at 560-61. Furthermore, the act of carrying the knife was not necessary for the commission of reckless endangerment

or first-degree assault. Stated another way, the act of carrying the knife was sufficient to sustain a conviction for carrying a deadly weapon, and the separate act of stabbing Ramirez supports appellant's convictions for reckless endangerment and first-degree assault. Accordingly, appellant's conviction for carrying a deadly weapon does not merge pursuant to the principles of fundamental fairness.

III. Sentencing Issues

Lastly, appellant contends that at the sentencing hearing the trial court did not clearly impose a consecutive sentence for carrying a deadly weapon. Appellant argues, therefore, that the sentence as recorded in the docket entries conflicts with the sentence announced in open court, and the latter takes precedence over the former. The State counters that the sentencing transcript has been corrected since the filing of appellant's brief, and there is no longer a discrepancy between the sentencing transcript and the commitment record.[6] The State further states that it is clear from the record that the trial court did not say "sentence," but rather "sentences" when it sentenced appellant to consecutive terms.

Appellant is correct that if a sentencing court does not clearly designate a sentence as consecutive or concurrent, then the sentence is deemed to be concurrent. *See Nelson v. State*, 66 Md. App. 304, 313 (1986). The sentencing court, however, clearly designated appellant's sentence as consecutive:

[6] The record reveals that the court reporter provided a corrected copy of the July 24, 2015 sentencing transcript.

> As to the first count, First Degree Assault, the sentence is 25 years, suspend all but 13 years. We'll give credit for the 1 year and 9 days to be served followed by 5 years supervised probation. As to the Second Degree Assault charge, that would merge with the First Degree Assault. As to the wearing or carrying a dangerous weapon, the sentence will be 3 years, credit for time served, 1 year 9 days. As to the last charge, reckless endangerment, sentence 5 years, credit for time served, 1 year and 9 days. **The sentences will run consecutively.**

(Emphasis added).

We conclude that the court's use of the plural "sentences" referred to appellant's sentences for reckless endangerment (which should have merged) and carrying a dangerous weapon. Accordingly, there is no conflict between the docket entries and the sentence announced in open court, and appellant's sentence for carrying a dangerous weapon runs consecutively to the sentence for first-degree assault.

SENTENCE FOR RECKLESS ENDANGERMENT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY PRINCE GEORGE'S COUNTY.