UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2211

September Term, 2014

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DENNIS A. RIVAS-MEMBRENO

v.

STATE OF MARYLAND

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Berger,
Nazarian,
Leahy,

JJ.

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Opinion by Berger, J.

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Filed: February 3, 2016

Following a jury trial in the Circuit Court for Montgomery County, appellant, Dennis A. Rivas-Membreno ("Rivas-Membreno"), was convicted of two counts of robbery with a dangerous weapon, three counts of false imprisonment, conspiracy to commit robbery with a dangerous weapon, inducing false testimony, witness intimidation, solicitation of witness intimidation, and obstruction of justice. On August 21, 2014, Rivas-Membreno was sentenced to a total of thirty years' incarceration.

On appeal, Rivas-Membreno presents two issues for our review,[1] which we rephrase as follows:

> 1. Whether the trial court erred in admitting evidence relied upon by an expert, regarding the locations of cell phone towers.
>
> 2. Whether the trial court erred in failing to merge Rivas-Membreno's sentences for witness intimidation, solicitation of witness intimidation, and inducing false testimony, with his sentence for obstruction of justice.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Montgomery County.

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[1] The issues, as presented by Rivas-Membreno, are:

> 1. Did the trial court err in admitting T-Mobil cell phone records and allowing the state's expert to testify in reliance on them?
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> 2. Should Mr. Rivas-Membreno's convictions and sentences for witness intimidation, solicitation of witness intimidation, and inducing false testimony merge into his conviction and sentence for obstruction of justice?

## FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2013, two men wearing ski-masks and gloves entered a Five Guys restaurant in Gaithersburg, Maryland. One of the men pointed what appeared to be a gun at the supervisor, Rosa Gomez-Melendez ("Gomez-Melendez"), and demanded that she open the restaurant's safe. While one of the men took money from the safe, the other took Gomez-Melendez's and two other employees' cell phones, and led the three employees into the restaurant's walk-in freezer. After the employees determined that the assailants had left, they emerged from the freezer and used a computer to contact their family, who, in turn, contacted the police.

Carolina Caero ("Caero") was one of the employees who was placed in the freezer the night of the robbery. After the robbery, Caero informed the police that she recognized one of the robbers as Alvin Compres ("Compres"). Caero averred that she and Compres had gone to school together, and that in the past Compres frequently came to the restaurant to pick up his wife who had previously worked at the restaurant. Likewise, Stephanie Majia ("Majia"), another employee working that evening, also identified Compres as one of the robbers.

Upon Compres' apprehension, he disclosed that he planned the robbery with Rivas-Membreno. Compress further reported that he and Rivas-Membreno entered the restaurant together, and that it was Rivas-Membreno who ordered Gomez-Melendez to open the safe and that Rivas-Membreno took the money. Additionally, Compres averred that after the robbery he and Rivas-Membreno went to Compres' house and split the $1,500 they stole

between themselves and a third accomplice who drove the getaway vehicle. At the time of Rivas-Membreno's trial, Compres had already pled guilty for crimes relating to his participation in the robbery, and he was awaiting sentencing.

Rivas-Membreno was originally charged with two counts of robbery with a dangerous weapon, three counts of false imprisonment, and conspiracy to commit robbery with a dangerous weapon. Before trial, however, Compres wrote a letter to Rivas-Membreno. Rivas-Membreno responded to the correspondence from Compres and wrote back:

> Oh tambien [sic] man. Look, I'm being offered many years, and I talked to my attorney and he says they don't have evidence on me so for that reason I'm going to trial, if I lose the trial I'm going to get 20 to 30 years and the only way I'll lose is if you with your [woman, wife] accuse me at trial. so look man be very careful don't you two play with my life that way talk to your [woman, wife], because if you do it I swear to you on what's most holy I have to have you m . . . you're older now, you're the father of a family so really think about things if you accuse me they're not going to lower your sentence or are they going to be with you all the time remember that my people are bosses in prison. it's not a threat it's a warning. think about it man it's better if we continue to be friends, and if I win and I get out I'm going to help you with whatever I can. I already did it the first time but you talked and that's why I'm here I let you get away with it the first time but not again man.
>
> so that's it man, take care and don't forget to talk to God so everything comes out okay for us. . . . (alterations in original).[2]

[2] The original letter was hand-written by Rivas-Membreno in Spanish. This quote is taken from a certified translation of the original letter that was admitted into evidence at trial.

In light of Rivas-Membreno's correspondence to Compres, the State secured a second indictment changing Rivas-Membreno with inducing false testimony, witness intimidation, solicitation of witness intimidation, and obstruction of justice.

At Rivas-Membreno's trial, Detective Scott Sube ("Detective Sube"), who worked in the Electronic and Technical Surveillance Unit of the Montgomery County Police Department, testified as an expert in cell tower mapping. Detective Sube used cell phone data associated with the cell phone number belonging to Rivas-Membreno to plot the approximate locations of calls made and received by Rivas-Membreno between the hours of 8:30 p.m. and 3:00 a.m. on September 29 and 30, 2013. Detective Sube's analysis showed that nine calls were made either to or from Rivas-Membreno's cell phone in close proximity to the scene of the robbery on the night the robbery took place.

After a jury trial in the Circuit Court for Montgomery County, Rivas-Membreno was convicted of two counts of robbery with a deadly weapon, three counts of false imprisonment, one count of conspiracy to commit robbery with a deadly weapon, solicitation of witness intimidation, witness intimidation, obstruction of justice, and inducing false testimony. On August 21, 2014, Rivas-Membreno was sentenced to a total of thirty years' imprisonment. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

## DISCUSSION

Rivas-Membreno presents two allegations of error. First, Rivas-Membreno argues that it was error for the trial court to admit evidence relied upon by Detective Sube in his

analysis of Rivas-Membreno's cell phone data. In response, the State maintains that Rivas-Membreno waived his objection to the evidence because he failed to object when the contents of the evidence were admitted prior to, and after, his initial objection. We agree with the State that Rivas-Membreno waived his objection to the admission of the cell phone data. Secondly, Rivas-Membreno asserts that his sentences for solicitation of witness intimidation, witness intimidation, and inducing false testimony should merge with the greater offense of obstruction of justice. We reject Rivas-Membreno's merger argument because the relevant Maryland Code sections clearly provide that a defendant may receive cumulative sentences for the conduct at issue here. Finally, Rivas-Membreno also appears to challenge the sufficiency of the evidence relating to his conviction for solicitation of witness intimidation. We hold that Rivas-Membreno's challenge to the sufficiency of the evidence is not properly preserved for appellate review. For the reasons that follow, we affirm the judgment of the Circuit Court for Montgomery County.

## I. Rivas-Membreno Waived His Objection to the Location of Cell Phone Towers.

Rivas-Membreno first argues that it was error for the circuit court to admit evidence regarding the location of cell phone towers admitted through the testimony of Detective Sube. The State avers that Rivas-Membreno waived this objection because his objection was not timely, and he failed to object when the substance of the evidence was admitted without challenge at subsequent points throughout the trial. Accordingly, the State argues that Rivas-Membreno's challenge to the admission of the location of the cell phone towers is not preserved for appellate review. We agree with the State.

At trial, the State called Detective Sube as an expert to testify about cell tower mapping. Detective Sube explained generally how cell phones and cell towers work. Then, through Detective Sube's testimony, the State admitted a disc containing cell phone records for Rivas-Membreno's phone. The cell phone records were accompanied by an affidavit attesting to the records' authenticity. Rivas-Membreno did not object to the admission of the cell phone records. Accordingly, the cell phone records were admitted into evidence and marked as State's exhibit 35.

In total, the cell phone records contained in exhibit 35 consisted of a comprehensive digital spreadsheet documenting 858 activities that occurred on Rivas-Membreno's phone between 11:23 a.m. on September 20, 2013, and 6:02 a.m. on October 18, 2013. The 26 data points in the columns of that spreadsheet contained, amongst many other things, the time the call was made, the phone number the call was connected to, the Location Area Code ("LAC"), and the Cellular Identification ("CID") corresponding with the cell towers from which the phone calls commenced and concluded,[3] and the geographic coordinates of the cell towers from which each phone call commenced and concluded.

The State sought to admit a second disc containing information upon which Detective Sube would rely in forming his expert opinion. The second disc was admitted as exhibit 37.

[3] LACs and CIDs are used to organize and manage a cell carrier's coverage area. A carrier's coverage area will consist of many LACs and within each LAC there are multiple CIDs. A CID references each specific cell tower operating within a broader LAC. Together, a LAC and CID can be used to reference each cell tower within a carrier's coverage area.

Exhibit 37 was a digital spreadsheet that contained the LACs, CIDs, geographic coordinates, addresses, and other technical data relating to all of T-Mobile's cell phone towers in the northeast region. Rivas-Membreno objected to the admission of the second disc, and the following colloquy ensued:

> [THE PROSECUTOR]: Your Honor, I'd ask that State's 37 enter as a full exhibit at this time.
>
> [DEFENSE COUNSEL]: I would object to the second set of records from T-Mobile as they were not authenticated properly. It's not business records. They're not certified as the first disc was. Now, they may have been relied upon by the expert, but that's a different issue.
>
> They're still hearsay, and any information from that that's going to be published to the jury would be hearsay. It's not been authenticated.
>
> If he had been in court and received the testimony from a T-Mobile representative and they testified as to that, I believe it'd be a different issue, but I don't think he can, you can get that into evidence and have him rely on it.

Thereafter, the circuit court overruled Rivas-Membreno's objection.

The scope of appellate review is articulated in Md. Rule 8-131(a) and provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Additionally, Md. Rule 4-323(a) provides that, "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.*"* Together these rules "have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the

trial court, and these rules must be followed in all cases . . . ." *Conyers v. State*, 354 Md. 132, 150 (1999).

Pursuant to our strict requirement that a litigant must promptly object to potentially inadmissible evidence, "[t]his Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (emphasis in original); Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent"); *Williams v. State*, 131 Md. App. 1, 26 (2000) ("When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection."). Under such circumstances, the objection to evidence after it has already been admitted fails to satisfy the contemporaneous objection rule. *See Cure v. State*, 421 Md. 300, 310 n.3 (2011) ("The contemporaneous objection rule refers generally to . . . Md. Rule 4-323(a).").

Conversely, we have consistently held that Md. Rule 4-323(a) "also requires the party opposing the admission of evidence to object each time the evidence is offered by its proponent." *Klauenberg v. State*, 355 Md. 528, 545 (1999). Critically, even when a party objects to evidence, and that objection is overruled, the objection is "waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). Together, our requirement that an issue be preserved for

appellate review places the onus on the challenger to initially object to potentially inadmissible evidence as soon as possible and preserve the allegation of error by objecting to the evidence at every latter instance when evidence on the same point is offered. *See Yates*, *supra*, 429 Md. at 120 (holding that an objection is not timely if evidence on the same point has already been admitted); *DeLeon*, *supra*, 407 Md. at 31 (holding that an objection is waived if evidence on the same point is later admitted without objection). Accordingly, in order to be preserved for appellate review, an allegation of error must be lodged promptly, and maintained vigilantly.

Here, Rivas-Membreno's challenge to the second disc (exhibit 37) was lodged after the material contents of that exhibit had already been received in the form of the cell phone records (exhibit 35). In Detective Sube's analysis, "[t]he LAC/CID combination equates to a tower location and facing on the ground and is plotted by either the Latitude/Longitude/facing provided on the original records **or** by associating the LAC/CID numbers on a corresponding spreadsheet provided by the carrier." (emphasis added). Therefore, cell phone records (such as those contained in exhibit 35) that contain the LACs, CIDs, and the coordinates of the corresponding cell towers are sufficient for Detective Sube to complete his analysis. If, however, the call data records did not contain the coordinates of the relevant cell towers associated with the LACs and CIDs, Detective Sube would need to rely on the coordinates produced in "a corresponding spreadsheet provided by the carrier" (such as those contained in exhibit 37).

In this instance, the cell phone records (admitted as State's exhibit 35) contained the LACs, CIDs, and the corresponding coordinates for the relevant cell towers. Accordingly, the cell phone records in exhibit 35 were sufficient for Detective Sube to complete his analysis, and the second disc (exhibit 37) merely contained cumulative data. To be sure, the second disc contained a significant amount of technical data that was not relevant to Detective Sube's analysis. Moreover, we recognize that Detective Sube testified at trial that his opinion was based on information that he acquired through exhibit 37. Critically, the relevant portions of the second disc--namely, the LACs, CIDs, and tower coordinates--however, had already been admitted into evidence. Therefore, because the "essential contents of that objectionable testimony ha[d] already been established and presented to the jury without objection," we hold that Rivas-Membreno's attempt to exclude of the locations of the cell towers by objecting to the second disc was untimely. *Yates v. State*, 429 Md. at 120 (emphasis omitted).

To frame the issue differently, Md. Rule 5-703 permits an expert to rely on inadmissible evidence, and sometimes to disclose the otherwise inadmissible evidence to the jury for the purpose of permitting the jury to assess the credibility of the expert. Md. Rule 5-703(a)(b). Accordingly, under Rule 5-703, it is proper for the jury to use exhibit 37 to determine whether Detective Sube is credible. Md. Rule 5-703(b) ("Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference."). It is, however, inappropriate, for the jury to infer that the data contained in the spreadsheet marked as

exhibit 37 is a true and accurate representation of the location of T-Mobile's cell phone towers. Although here it would have been improper for the jury to accept exhibit 37 for the truth of what it asserts, the material assertions contained in exhibit 37 were already in evidence in the form of the cell phone records marked as exhibit 35.

Assuming, *arguendo*, that Rivas-Membreno had timely objected to the evidence relating to the cell tower locations, he subsequently waived his objection by failing to object at the numerous subsequent occasions when evidence of the locations of the cell phone towers was relied upon by the State. Indeed, on the final day of trial, Detective Sube testified that there were nine phone calls either made from or received by Rivas-Membreno's phone between 8:30 p.m. on September 29, 2013, and 3:00 a.m. on September 30, 2013. Detective Sube described the locations of the cell phone towers that facilitated each of the nine phone calls. Detective Sube also prepared a report, that was admitted into evidence, containing maps showing the locations for the towers relating to each of the nine phone calls. Additionally, through Detective Sube's testimony, the State admitted photographs of each of cell phone towers that facilitated the nine calls made near the time of the robbery. Moreover, five large diagrams were admitted that incorporate the data relating to the location of the cell phone towers. Finally, in closing argument, the State relied heavily on Detective Sube's testimony and his assessment of the location of the cell phone towers. At no point during the presentation of any of this evidence did Rivas-Membreno challenge the locations of the cell phone towers. Indeed, after his initial challenge to the introduction of the exhibit

37, Rivas-Membreno never again challenged any evidence relating to the locations of the cell phone towers.

At oral argument, Rivas-Membreno argued that his failure to object at each instance when evidence containing the same information as exhibit 37 was introduced at trial should be excused because cumulative objections would have been futile. Generally, Md. Rule 4-323 requires a litigant to object at each instance where objectionable evidence is offered unless the litigant has obtained a continuing objection. Md. Rule 4-323(a), (b). Notwithstanding this requirement, we may consider an otherwise unpreserved allegation of error if an objection would have been futile. In the context of a litigants failure to renew an objection to jury instructions after the instructions were given, we said that

> "under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule. We make clear, however, that these occasions represent rare exceptions and that the requirements of the Rule should be followed closely."

*Livingstone v. Greater Wash. Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 362 (2009) (quoting *Haney v. Gregory*, 177 Md. App. 504, 518 (2007)).

We decline to employ this narrow exception to the contemporaneous objection rule in the instant case. At the time exhibit 37 was entered into evidence, the permissible purpose for which it was offered was so that the jury could assess the credibility of the expert witness. If Rivas-Membreno believed that the State was relying on the information

contained in exhibit 37 for purposes other than to assess the credibility of Detective Sube,[4] Rivas-Membreno could have objected later in the trial. At that point, the trial judge would have then had the opportunity to exclude the evidence at that time, or perhaps the trial judge could have issued a curative instruction pursuant to Md. Rule 5-703(b). The myriad of remedies the judge could have employed to address a violation of the rules of evidence, if a violation was indeed present, are immaterial to our analysis except to illustrate that an objection could not have been futile when we are left to speculate how the trial judge would have ruled had an objection been lodged. Accordingly, we reject Rivas-Membreno's argument that subsequent challenges to evidence containing evidence also contained in exhibit 37 would have been futile.

In order to adequately preserve his challenge, Rivas-Membreno was required to object to the location of the cell towers before that evidence was admitted. Additionally, after the evidence was admitted, Rivas-Membreno was obligated to maintain his objection by challenging each statement and piece of evidence that was admitted on the same point as the disc in question. We, therefore, hold that by failing to object to evidence relating to the location of cell towers prior to, or after, his objection to the second disc, Rivas-Membreno failed to comply with our preservation requirements set forth in Md. Rules 4-323, and 8-131. Whether the second disc was properly authenticated, or whether the second disc constitutes

[4] To be clear, it is not at all certain that the State did rely on the information contained in exhibit 37 as substantive evidence because, for the reasons stated *supra*, the material information contained in exhibit 37 was already admitted in the form of the cell phone records admitted as State's exhibit 35.

inadmissible hearsay, is immaterial to our determination that Rivas-Membreno waived his objection to the admission of the second disc. Accordingly, we do not reach the merits of Rivas-Membreno's initial objection to the second disc, because Rivas-Membreno waived his objection with respect to those questions.

## II. The Circuit Court Did Not Err by Failing to Merge Rivas-Membreno's Sentences.

Rivas-Membreno challenges the separate convictions and sentences he received for the crimes of witness intimidation, solicitation of witness intimidation, inducing false testimony, and obstruction of justice. Specifically, Rivas-Membreno argues that the crimes of witness intimidation, solicitation of witness intimidation, and inducing false testimony are lesser included offenses that necessarily merge with the greater crime of obstruction of justice. The State, for its part, argues that it was not error for the court to impose separate sentences here.

The doctrine of merger exists to determine "whether the legislature may have intended to preclude cumulative punishment" for two particular offenses. *Spitzinger v. State*, 340 Md. 114, 121 (1995); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the intent of "[l]egislatures, not courts, prescribe the scope of punishments"); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L.Rev. 595, 596-97 (2006) (arguing that issues of multiple punishment involve questions of legislative intent rather than double jeopardy). "Under Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test;

(2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State*, 437 Md. 457, 484 (2014). For the reasons that follow, we conclude that merger was not required under the required evidence test or the rule of lenity. Further, we hold that Rivas-Membreno's argument under the doctrine of fundamental fairness is unpreserved. Assuming, *arguendo*, that it is proper for us to consider the propriety of these sentences under the doctrine of fundamental fairness, we further hold that it was not fundamentally unfair for the court to impose sentences when the Generally Assembly had expressly authorized the court to do so.

*A. Preservation*

"There are limited grounds on which a sentence may be properly reviewed by this Court despite the failure to object at the time of the proceedings. One such avenue for review, relevant to this case is Md. Rule 4-345(a) . . . ." *Bryant v. State*, 436 Md. 653, 662 (2014). Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "A sentence is illegal when the illegality inheres in the sentence itself." *Taylor v. State*, 224 Md. App. 476, 500 (2015) (internal quotations omitted). The "'failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule.'" *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (quoting *Pair v. State*, 202 Md. App. 617, 624 (2011)). Moreover, "a defendant may attack the sentence by way of direct appeal, or collaterally and belatedly through the trial court, and then on appeal from that denial." *Bishop v. State*, 218 Md. App. 472, 504 (2014) (internal quotations omitted).

An argument in favor of merger based on the doctrine of fundamental fairness, however, is an exception to the general rule that the failure to merge a sentence may be reviewed at any time pursuant to Md. Rule 4-345(a). *Pair*, *supra*, 202 Md. App. at 649. An argument that a sentence should merge under the doctrine of fundamental fairness must be presented to the trial court to pass upon in the first instance. *Id.*

In this case, Rivas-Membreno failed to raise the issue of merger before the trial court. The failure to raise the issue of merger before the trial court, however, is not fatal to his allegation of error if the failure to merge sentences results in an illegal sentence. *See McClurkin*, *supra*, 222 Md. App. at 489 n.8. Rivas-Membreno avers that merger is required under the required evidence test, the rule of lenity, and the doctrine of fundamental fairness. Rivas-Membreno's argument is properly before us with respect to his assertion that merger is required under the required evidence test and the rule of lenity, because a sentence in violation of those rules is inherently illegal. *Taylor*, *supra*, 224 Md. App. at 500. We hold, however, that Rivas-Membreno's challenge under the doctrine of fundamental fairness is not properly preserved for appellate review. *Pair*, *supra*, 202 Md. App. at 649. We shall address Rivas-Membreno's merger arguments in turn.

*B. The Required Evidence Test*

"Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining the identity of offenses is the required evidence test.'" *Christian v. State*, 405 Md. 306, 321 (2008) (quoting *Dixon v. State*, 364 Md. 209, 236-37 (2001)). The standard for determining whether two offenses are the same under the required evidence test

is the same standard employed by the U.S. Supreme Court to determine whether two offenses are the same under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Newton v. State*, 280 Md. 260, 266 (1977). Accordingly, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, *supra*, 284 U.S. at 304. In essence, under the required evidence test we ask whether it is possible in the abstract to commit each offense without also committing the other.

In the instant action, Rivas-Membreno argues that the offenses of witness intimidation, solicitation of witness intimidation, and inducing false testimony are necessarily lesser included offenses within the greater offense of obstructing justice. The prohibited conduct for the crime of obstruction of justice is to "obstruct, impede, or try to obstruct or impede the administration of justice" by threat. Md. Code (2002, 2012 Repl. Vol.), § 9-306 of the Criminal Law Article ("CL"). Notably, this *actus reus* requirement is construed broadly and includes conduct that is "intended to influence, intimidate or impede [a witness] from testifying . . . ." *Lee v. State*, 65 Md. App. 587, 592 (1985). Further, one may not "threaten to harm another . . . with the intent to influence a . . . witness to testify falsely," CL § 9-302, or "influence, intimidate, or impede . . . a witness . . . in the performance of their person's official duties" by threat, or one may not solicit another to accomplish the same. CL § 9-305. It is readily apparent to us that the offenses of inducing false testimony, intimidating a witness, and solicitation to intimidate a witness, cannot be

committed without also committing the greater offense of obstruction of justice. *See Romans v. State*, 178 Md. 588, 592 (1940) (holding that threatening a witness and obstructing justice merge because they are the same offense). Accordingly, under the required evidence test, the three lesser included offenses are the same offense as the greater included offense of obstruction of justice.

Our analysis, however, does not end with the observation that these convictions fail the required evidence test. Rivas-Membreno argues that the imposition of multiple punishments for one offense violates "[t]he Fifth Amendment and the Maryland common law." The Fifth Amendment to the U.S. Constitution provides "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the same offense." *Newton*, *supra*, 280 Md. at 263. Here, Rivas-Membreno argues that the court improperly imposed multiple punishments for the same conduct.

Generally, the Supreme Court and the Court of Appeals have indicated that the double jeopardy clause protects defendants from multiple punishments for the same offense, just as it prevents multiple prosecutions arising from the same offense. *Newton*, *supra*, 280 Md. at 265 (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874) ("[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.")). Under some circumstances, however, the imposition of multiple punishments for the same conduct may

not run afoul of the Fifth Amendment if the legislature has specifically authorized cumulative punishments.

> Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, unless the legislature clearly intended to impose multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359, 365–69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *Whalen v. United States*, 445 U.S. 684, 688–89, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct, cumulative punishment may be imposed under the statutes in a single trial. *See Missouri v. Hunter*, 459 U.S. at 368, 103 S.Ct. 673. The Supreme Court has said that with respect to cumulative punishments imposed in a single trial, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id*. at 366, 103 S.Ct. 673. The bottom line in resolving "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

*Jones v. State*, 357 Md. 141, 156 (1999). Accordingly, "even if offenses are deemed the same under the required evidence test, the Legislature may punish certain conduct more severely if particular aggravating circumstances are present, by imposing punishment under two separate statutory offenses." *Frazier v. State*, 318 Md. 597, 614-15 (1990).

Here, Rivas-Membreno seeks to analogize this case with *Romans*, *supra*, where the Court of Appeals determined that the crimes of obstructing justice and threatening a witness merge. 178 Md. at 592. *Romans*, *supra*, however, is distinguishable from this case because *Romans* was decided **before** the General Assembly included language in the relevant statutes

that clearly expresses that the aggravating circumstances articulated in the lesser included offenses of inducing false testimony and intimidating a witness are intended to increase the criminal liability to which a defendant may be exposed by one who obstructs justice by such means.

Notably, in subsections (d) of both CL §§ 9-302, and 9-305, the General Assembly included language that expressly provides "[a] sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section." Accordingly, Subtitle 3, of Title 9, of the Criminal Law Article (titled "Obstructing Justice") sets forth a construct under which CL § 9-306 provides a baseline punishment for conduct that obstructs justice, and a defendant's exposure to criminal liability then increases to the extent it is committed by the means articulated in CL §§ 9-302, 9-303, or 9-305.[5]

In a merger analysis, the required evidence test is merely a tool that ordinarily "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri*, *supra*, 459 U.S. at 366. Although the required evidence test is generally an appropriate tool to discern the intent of the legislature, when the text of a statutory code clearly expresses that a defendant may be subject to cumulative punishments for two offenses that are the same under the required evidence test, we allow the statute to

[5] Critically, CL §§ 9-302, 9-303, and 9-305 do not exclusively enhance the penalty for the crime of obstruction of justice under § 9-306. Rather, CL §§ 9-302, 9-303, and 9-305 are intended to enhance the maximum penalty for "any crime based on the act establishing the violation of [CL §§ 9-302, 9-303, or 9-305]."

control. *Jones*, *supra*, 357 Md. at 156. Here, the offenses outlined in CL §§ 9-302, and 9-305 are lesser included offenses within the greater offense of obstruction of justice. Rivas-Membreno's cumulative sentences, however, are permissible because they are in accordance with the General Assembly's clearly articulated policy determination to "punish certain conduct more severely if particular aggravating circumstances are present." *Frazier*, *supra*, 318 Md. at 614-15. We, therefore, hold that the required evidence test does not compel merger here.

*C. Rule of Lenity*

The rule of lenity "'allows [a court] to avoid interpreting a criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the General Assembly] intended.'" *State v. Johnson*, 442 Md. 211, 218-19 (2015) (alterations in original) (quoting *Khalifa v. State*, 382 Md. 400, 435 (2004)).

> For a court construing a statute, the rule of lenity is not a means for determining–or defeating–legislative intent. Rather, it is a tie-goes-to-the-runner device that the court may turn to when it despairs of fathoming how the General Assembly intended that the statute be applied in the particular circumstances. It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity.

*Oglesby v. State*, 441 Md. 673, 681 (2015).

The rule of lenity is grounded in the principle that when a criminal statute is ambiguous, a defendant should not be punished beyond the extent that he should have been on notice of the perils he would endure for his conduct. *See McBoyle v. United States*,

283 U.S. 25, 27 (1931) (Holmes, J.) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."); *but cf. Knuller v. DPP*, [1973] A.C. 435, 463-64 (H.L.) (Lord Morris) (appeal taken from Eng.) (U.K.) ("Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in.").

Plainly, in order to apply the rule of lenity and require the merger of these sentences, there must first be some ambiguity in the text of the statute to resolve in a defendant's favor. Rivas-Membreno asserts only that "[t]he intent of the legislature in enacting these overlapping statutes is unclear." We, however, perceive no such ambiguity here. The texts of CL §§ 9-302(d), and 9-305(d), clearly provide that "[a] sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section." Notably, CL §§ 9-302, and 9-305, by their express terms, indicate that they may be charged in addition to "any crime" without further limiting language. "If the statute is free of ambiguity, we generally will not look beyond the words of the statute to determine legislative intent." *Md.-Nat'l Capital Park & Planning Comm'n v. Anderson*, 164 Md. App. 540, 569 (2005).

In order to observe an ambiguity here, we would be required to dilute the phrase "any crime," and read nonexistent limiting language into that text. We decline Rivas-Membreno's invitation to manufacture an ambiguity when there is none. By the express terms of CL §§ 9-302(d), and 9-305(d), would-be offenders are clearly put on notice

that they may be punished for these offenses as well as "any crime based on the act establishing the violation of [those] section[s]." CL §§ 9-302(d), and 9-305(d). Accordingly, we hold that merger is not required under the rule of lenity for Rivas-Membreno's sentences of inducing false testimony, witness intimidation, solicitation of witness intimidation, and obstruction of justice.

*D. Fundamental Fairness*

For the reasons stated in Part II(A), *supra*, we hold that Rivas-Membreno's argument under the doctrine of fundamental fairness is not preserved for appellate review. *See Pair*, *supra*, 202 Md. App. 649 (holding that the fundamental fairness test does not enjoy the procedural benefits of Rule 4-345(a), because such decisions require "a subjective evaluation of the particular evidence in a particular case."). Assuming, *arguendo*, that this argument is preserved for review, we hold that the doctrine of fundamental fairness does not compel merger here.

> 'Fundamental Fairness is one of the most basic considerations in all our decision in meting out punishment for a crime. 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. This inquiry is fact-driven because it depends on the considering of circumstances surrounding a defendant's conviction, not solely the mere elements of the crimes. Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences.'

*Garner v. State*, 442 Md. 226, 248-49 (2015) (quoting *Carroll v. State*, 428 Md. 679, 695 (2012)).

To be sure, the crimes at issue here are "part and parcel" to each other in the sense that one cannot commit the lesser crimes of inducing false testimony, witness intimidation, or solicitation of witness intimidation, without also obstructing justice. We are further cognizant that the genesis of these offenses stem from the same instance of conduct. We decline, however, undermine the express authority for the imposition of cumulative sentences for these offenses articulated by the General Assembly under the "essentially tetherless notion of fundamental fairness." *Pair*, *supra*, 202 Md. App. at 622.

We perceive nothing fundamentally unfair in this case about the trial judge's decision to impose separate sentences that are consistent with the directives issued to him by the General Assembly. For the reasons stated above, it was within the prerogative of the General Assembly to prescribe the lesser included offenses here as enhancements to "any crime based on the act establishing the violation of th[ese] section[s]." CL §§ 9-302(d), and 9-305(d). We, therefore, hold that it was not fundamentally unfair for Rivas-Membreno to receive separate sentences for the offenses of inducing false testimony, witness intimidation, solicitation of witness intimidation, and obstruction of justice.

## III. Rivas-Membreno Did Not Preserve His Challenge to the Sufficiency of the Evidence Supporting His Conviction for Soliciting Witness Intimidation.

Within his argument in favor of merging his sentences under the required evidence test, Rivas-Membreno claims that "[w]ith respect to [his] conviction for soliciting witness intimidation, there is simply no evidence to support it." If the State's evidence is insufficient to sustain a conviction with respect to a particular charge, the proper means of challenging

that charge is to make a motion for judgment of acquittal under Md. Rule 4-324(a). If a defendant fails to move for a judgment of acquittal, or fails to renew his motion at the conclusion of his presentation of evidence, the motion is waived. Md. Rule 4-324(c). Here, no such motion was made before the trial court. Accordingly, Rivas-Membreno waived his argument against the sufficiency of the evidence, and it is not properly preserved for appellate review.

## IV. Conclusion

For the reasons set forth herein, we hold that Rivas-Membreno waived his objection to the second disc offered into evidence through the testimony of Detective Sube. We further hold that the trial court did not err in failing to merge Rivas-Membreno's sentences for inducing false testimony, witness intimidation, and solicitation of witness intimidation, with his sentence for obstruction of justice. Finally, we hold that Rivas-Membreno's challenge to the sufficiency of the evidence sustaining his conviction for solicitation of witness intimidation is not properly preserved for appellate review. We, therefore, affirm the judgment of the Circuit Court for Montgomery County.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**