Circuit Court for Prince George's County
Case No. CT170762X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 273

September Term, 2018

LARRY GILBERT

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 18, 2019

A jury in the Circuit Court for Prince George's County convicted appellant Larry Gilbert of second-degree assault, second-degree assault on a law enforcement officer, fleeing and eluding, and reckless endangerment, but acquitted him of first-degree assault. The court sentenced Gilbert to ten years of imprisonment, with all but four years suspended, for second-degree assault on a law enforcement officer; two consecutive years of imprisonment for fleeing and eluding; and four concurrent years of imprisonment for reckless endangerment. For sentencing purposes, the court merged the conviction for second-degree assault into the conviction for second-degree assault on a law enforcement officer. The court, however, did not merge the conviction for reckless endangerment into the conviction for second-degree assault on a law enforcement officer. Thereafter, Gilbert noted this timely appeal.

QUESTIONS PRESENTED

1. Did the trial court commit plain error in allowing the prosecutor to make improper statements during closing argument?

2. Did the trial court err in imposing separate sentences for reckless endangerment and second-degree assault on a law enforcement officer?

We affirm the convictions, but vacate the sentence for reckless endangerment.

BACKGROUND

Between 11:00 p.m. and midnight on the evening of January 20, 2017, Officer Quan Lac, of the Prince George's County Police Department, observed a car parked in a hotel parking lot in Calverton, Maryland, that is known for drug activity and prostitution. When he got out of his patrol car and approached the car, Officer Lac noticed that one of

the occupants, a woman in the front passenger seat, was drinking what appeared to be a beer. The officer requested backup and started talking to the occupants of the car.

Gilbert was in the driver's seat. Officer Lac noticed that Gilbert was shaking and acting "very, very nervous" and that he "reached under the seat . . . as if he was tucking something away, [or] putting something underneath there[]." Officer Lac also noticed "multiple beer cans" and "rolling paper and little baggies" in the car.

Officer Lac asked Gilbert to show him his identification. Gilbert responded that he had left it at home, but the female passenger volunteered that Gilbert had lost it. When the officer asked for Gilbert's name, he was evasive and would not answer the question.

In response to Officer Lac's call for backup, Officer Steven Hang arrived. The officers asked Gilbert to get out of the car, so that it could be searched, but Gilbert refused. At that point, Officer Hang attempted to remove Gilbert from the car.

The next series of events unfolded rapidly: while Officer Hang was reaching into the car through an open window, Gilbert put the keys into the ignition, started the car, put it in drive, and sped off. Officer Hang was dragged for at least 20 yards, and as much as 50 yards, before he managed to disengage himself and fall to the ground. Gilbert then led a number of officers on a chase for a considerable distance until they reached the District of Columbia, where the chase was called off. It is unclear how and when Gilbert was apprehended.

DISCUSSION

I.

Gilbert contends that he was denied his right to a fair trial because, he says, the State made "repeated improper and prejudicial statements" during closing argument. Those improper statements, according to Gilbert, included "arguing facts not in evidence, arguing and misstating the applicable law, and asking the jurors to put themselves in the mind of the alleged victim." Acknowledging that he did not lodge an objection to the State's closing argument during trial, and thus that he waived his right to appellate review on that issue, he requests that we invoke our discretion to consider the issue for plain error. We decline his request.

The specific comments made by the State that Gilbert belatedly finds objectionable are as follows:

> I want you to consider this. Officer Hang, as he's being drug [sic] through that parking lot, my notes say twenty to fifty yards, not feet, yards. A[s] he's being drug [sic] through this parking lot, which may take seconds, I would encourage you to think that to him this is not seconds. This is the whole time.
>
> Imagine what was going through his mind as he's being drug [sic] across the parking lot.
>
> * * *
>
> How long does it take to drag somebody twenty to fifty yards? Not quite the length of [sic] football field, but certainly somewhere in that area.
>
> * * *
>
> Remember, Officer Hang is holding on for dear life. To him this seems like out [sic] it was only a few second [sic], but I admit that, but to him hanging on for dear life, hoping he doesn't get run over by the wheels, that's felony assault, that's not a bar fight.

* * *

What you have to decide amongst yourselves is [is] this a misdemeanor or is this a felony . . . .

* * *

[The officers] saw their partner getting drug [sic] across the parking lot. You can't imagine what went through their mind about this officer.

* * *

Here's the question for you ladies and gentlemen – let me try to make this as simple as I can. Is this a misdemeanor or [is] this a felony[?] Is this a big problem or is this a small problem[?] And as you are asking yourself that question, I want you to think about what was in Officer Hang[']s mind as he was being drug [sic] along the parking lot. It's easy for us to [sic] a few seconds, but I'm sure he was thinking he didn't know if he was going to walk away from this. You can imagine what's going through his mind.

Do you think that's a misdemeanor or do you think it's a felony? That's the real question.

* * *

Now again I'm trying to make the most – I'm trying to make this as simple as possible, but again as you're deliberating, ask yourself is this a misdemeanor or is th[is a] felony]?]

* * *

As you're thinking about this, again ask yourself this question: Is this a misdemeanor or is this a felony?

Gilbert contends that the State's closing argument "encouraged the jury to disregard the judge's legal instructions in favor of a simple but inaccurate equation: if they thought that this incident was a 'big problem,' then Mr. Gilbert was guilty of a 'felony'; and if they thought it was a 'small problem,' then he was guilty of a 'misdemeanor.'" Gilbert continues:

> Because there was no testimony during trial about the difference between misdemeanors and felonies, and the judge's instructions did not identify the severity of any of the charged crimes, the jurors were then left to guess, with no factual basis, which of the crimes on the verdict sheet were felonies and which were misdemeanors.[1]

Moreover, Gilbert complains that, because there was no testimony about the length of a football field, the State argued a fact not in evidence when it argued that twenty to fifty yards is approximately the length of a football field. Gilbert also complains that the State repeatedly made prohibited "golden rule" arguments[2] when it invited the jury to consider what was going through Officer Hang's mind while Gilbert dragged him across the parking lot. According to Gilbert, by imploring the jury to consider what was going through the officer's mind while telling the jury to decide whether Gilbert had committed a felony or a misdemeanor, the State "led a reasonable juror to conclude, erroneously, that the difference between a more serious crime and a less serious crime was the mental state of the victim."

Maryland Rule 8-131(a) provides, in pertinent part, that an appellate court "[o]rdinarily" will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" "We have repeatedly held that pursuant to

[1] First-degree assault and second-degree assault on a law enforcement officer are both felonies. *See* Md. Code (2002, 2012 Repl. Vol.), § 3-202(b) and § 3-203(c)(3) of the Criminal Law Article. Second-degree assault, reckless endangerment, and fleeing and eluding are all misdemeanors. *See id.* §§ 3-203(b), 3-204(b); Md. Code (2001, 2012 Repl. Vol.), § 21-904 and § 27-101(a) of the Transportation Article.

[2] A "golden rule" argument is one in which in which a litigant "asks the [jurors] to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests." *Lee v. State*, 405 Md. 148, 160-61 n.6 (2008) (citations omitted).

Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012) (citing *Icgoren v. State*, 103 Md. App. 407, 442 (1995); *Purohit v. State*, 99 Md. App. 566, 586 (1994)). Because Gilbert did not object to the prosecutor's allegedly improper statements, he has not preserved his objection for appellate review.

Recognizing that he did not preserve his objection to the prosecutor's statements, Gilbert requests that we exercise plain error review. We decline that request as well.

"'[A]ppellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)), *cert. denied*, 458 Md. 593, *cert. dismissed*, 461 Md. 509 (2018); *accord Givens v. State*, 449 Md. 433, 469-70 (2016); *White v. State*, 223 Md. App. 353, 403 n.38 (2015).

The Court of Appeals has articulated the following four conditions that must be met before an appellate court will reverse for plain error:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. at 567 (citing *Newton v. State*, 455 Md. 341, 364 (2017); *see*

also Givens v. State, 449 Md. at 469; *State v. Rich*, 415 Md. 567, 578 (2010)).

In our judgment, the third condition has not been satisfied. In this case, the error, if any, is unlikely to have affected the outcome of the proceedings, because the evidence against Gilbert cannot fairly be described as anything other than overwhelming: there is simply no dispute that Gilbert accelerated away from a valid traffic stop while a police officer's arm was caught inside his car and that the officer was dragged for 20 yards or more until he extricated himself and fell to the ground.

Even if the first three conditions were met (which they are not), we would, in the exercise of our discretion, decline to exercise plain-error review. *Wallace v. State*, 237 Md. App. 415, 439 (2018). To say that the trial court committed plain error in this case is essentially to say that the court had an obligation to correct the prosecutor's remarks on its own motion, without any objection from Gilbert. *See Clermont v. State*, 348 Md. 419, 452-53 (1998). On this record, we have little difficulty concluding that the court had no such obligation.

The challenged remarks in this case are completely dissimilar from, for example, those in *Lawson v. State*, 389 Md. 570, 596-605 (2005), where the Court of Appeals invoked the plain-error doctrine to consider the propriety of a prosecutor's comments suggesting that the defendant was a "monster" who would continue to sexually abuse children unless the jury sent him to prison. However objectionable the remarks in this case may or may not have been, they were not so extreme as to "vitally affect [Gilbert's] right to a fair trial." *Id.* at 605. Consequently, we decline to consider Gilbert's unpreserved objection.

II.

Gilbert contends that his convictions for second-degree assault on a law enforcement officer and reckless endangerment should merge for sentencing. The State agrees, and so do we.

The doctrine of merger of offenses derives in part from federal double jeopardy principles and Maryland's common-law principles of double jeopardy. *Pair v. State*, 202 Md. App. 617, 636 (2011). The doctrine "provides the criminally accused with protection from, *inter alia*, multiple punishment stemming from the same offense." *Purnell v. State*, 375 Md. 678, 691 (2003).

Under Maryland law, the principal test for determining whether to merge offenses is the "required evidence" test. *See Dixon v. State*, 364 Md. 209, 236 (2001).

> [R]equired evidence is that which is minimally necessary to secure a conviction for each . . . offense. . . . [W]here only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, . . . merger follows[.]

State v. Lancaster, 332 Md. 385, 391-92 (1993) (internal citations and quotation marks omitted); *accord Nicolas v. State*, 426 Md. 385, 401-02 (2012); *Snowden v. State*, 321 Md. 612, 617 (1991).

Even if two offenses do not merge under the required evidence test, merger for purposes of sentencing may be appropriate based on either the "rule of lenity" or the principle of "fundamental fairness." *Marlin v. State*, 192 Md. App. 134, 167 (2010).

The rule of lenity is a principle of statutory construction. *See Miles v. State*, 349 Md. 215, 227 (1998); *Claggett v. State*, 108 Md. App. 32, 51 (1996). It provides an

alternative basis for merger and is applied "to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. at 167; *accord Monoker v. State*, 321 Md. 214, 222 (1990).

"Fundamental fairness" acts as an independent basis for merging convictions. In *Monoker*, the Court of Appeals, finding merger to be warranted on this basis alone, concluded that the crimes of solicitation to conspire and conspiracy merged:

> Although solicitation is not always a lesser included offense of conspiracy, in Monoker's case the conspiracy to burglarize the Dublin home certainly did ripen from the solicitation of [another] to commit that same crime. Similarly, here, we conclude that because the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it, it would be fundamentally unfair to Monoker for us to require him to suffer twice, once for the greater crime and once for a lesser included offense of that crime. For that reason his sentences should merge.

Monoker, 321 Md. at 223-24 (citation omitted); *accord Marquardt v. State*, 164 Md. App. 95, 152-53 (2005) (holding that, under particular facts, malicious destruction of property should have merged into burglary conviction, as malicious destruction was "clearly incidental to the breaking and entering of" residence).

Gilbert did not object to the imposition of separate sentences for reckless endangerment and second-degree assault on a law enforcement officer. Nonetheless, "[t]he State agrees that the trial court's failure to merge a sentence under either the required evidence test or the rule of lenity results in an illegal sentence that can be corrected at any time," including on a direct appeal in which the issue was not properly preserved. *See* State's Brief at 31 n.1.

But while the State agrees that we can evaluate Gilbert's sentence under the

required evidence test and the rule of lenity, it cites *Pair v. State*, 202 Md. App. at 625, 649, for the proposition that a violation of fundamental fairness does not give rise to an illegal sentence that can be corrected on a direct appeal in which the issue was not properly preserved. In fact, *Pair* is a bit ambivalent about whether a violation of fundamental fairness gives rise to an illegal sentence, and this Court has treated a violation of fundamental fairness as an illegal sentence that an appellant may raise on direct appeal despite the failure to raise it at sentencing. *Latray v. State*, 221 Md. App. 544, 555 (2015). Ultimately, however, we need not consider the issue of fundamental fairness, because the State agrees that the sentences in this case violate the rule of lenity.

We accept the State's concession that under the rule of lenity the trial court erred in imposing separate sentences for the convictions for second-degree assault on a law enforcement officer and reckless endangerment. Both statutory offenses were predicated on a single act: dragging Officer Hang alongside of the car while attempting to speed away from the traffic stop. Furthermore, "[t]here is nothing in either statute to suggest that the legislature intended separate punishments based on the same conduct." State's Brief at 34. Consequently, we shall remand the case with directions that the offense carrying the lesser penalty, reckless endangerment, be merged into the offense carrying the greater penalty, second-degree assault on a law enforcement officer. *See McGrath v. State*, 356 Md. 20, 25 (1999).

In view of our conclusion that the offenses merge under the rule of lenity, it is unnecessary to decide whether they also merge under the required evidence test. When offenses merge under the required evidence test, the offense with the smaller number of

elements merges into the offense with the greater number of elements. *Fisher v. State*, 367 Md. 218, 285 (2001). Because reckless endangerment has fewer elements than second-degree assault on a law enforcement officer, the conviction for reckless endangerment would merge into the conviction for second-degree assault on a law-enforcement under the required evidence test, just as it does under the rule of lenity. Therefore, because our conclusion would remain the same regardless of whether the offenses merge under the required evidence test, we need not decide that question.

SENTENCE FOR CONVICTION FOR RECKLESS ENDANGERMENT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.