Circuit Court for Baltimore City
Case No. 118218018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 880

September Term, 2019

SHENNIKA FLOYD

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 25, 2020

Appellant Shennika Floyd was convicted by a jury in the Circuit Court for Baltimore City of second-degree murder and carrying a dangerous weapon openly with intent to injure. She presents the following questions for our review:

> "1. Did the trial court err in instructing the jury with respect to the eyewitness identification of Appellant as the person who committed the crime?
>
> 2. Was it improper to impose separate sentences for second degree murder and openly wearing and carrying a dangerous weapon with intent to injure?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City of first-degree murder and wearing or carrying a dangerous weapon openly with intent to injure. The jury convicted her of second-degree murder and the weapon charge. The court sentenced her to a term of incarceration of forty years, with five years suspended, for second-degree murder and three years for the weapon charge, to be served consecutively, followed by five years supervised probation.

In the evening on July 4, 2018, a group of people were drinking and socializing, as they did almost every day, at a residence located at 1936 West North Avenue in Baltimore City. Shortly after midnight, appellant and her friend Ronald Hawkins accused some people of cheating during their card game, in which she lost ten dollars. They became entangled in a physical altercation with David Daye, appellant's close family friend. Subsequently, appellant and Mr. Hawkins left the residence in a vehicle with her ten dollars

back and another ten dollars from the pot to safekeep until the next day, when they expected to play again. About thirty minutes later, appellant's cousin Edward Capers[1] arrived at the residence, walked up to Mr. Daye, who was sitting on the stoop with his brother, and hit him. In response, Mr. Daye produced a pocket knife and tried to fight back. Appellant then reappeared with Mr. Hawkins and a dagger that she kept in her vehicle, and they joined the pursuit against Mr. Daye, who was running away.

Mr. Capers chased Mr. Daye down a street, while wielding a chair that he came across near the residence, and struck Mr. Daye with the chair numerous times. Appellant then chased and allegedly fatally stabbed Mr. Daye with her dagger. Mr. Daye collapsed, and Mr. Capers beat him with the chair several more times. At trial, the State offered, and the court admitted into evidence, a neighbor's home surveillance system that captured these events occurring outside the residence. Wiley Daye, Mr. Daye's brother, testified that he witnessed appellant and Mr. Capers attacking his brother and identified them in the surveillance video but stated that he did not see the stabbing or "everything that happened because all these people were all around [him]."

Dr. James Locke, a pathologist with the Office of the Chief Medical Examiner who had performed the autopsy on Mr. Daye, was admitted at trial as an expert in forensic

[1] The State charged Mr. Capers with first-degree assault and wearing or carrying a dangerous weapon openly with intent to injure. Appellant and Mr. Capers were tried jointly. The jury found Mr. Capers guilty of both charges. His appeal is separately before this Court. *See Capers v. State*, No. 947, Sept. Term, 2019.

pathology. Dr. Locke testified that Mr. Daye's cause of death was a four-inch stab wound near his heart.

Based on Mr. Daye's brother's identification of appellant and Mr. Capers in the surveillance video, the State requested the Maryland Criminal Pattern Jury Instruction ("MPJI") on "identification of defendant," which reads, in pertinent part, as follows:

> "The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard *evidence about the identification of the defendant as the person who committed the crime.* You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> ***
>
> The identification of *the* defendant by a single eyewitness, *as the person who committed the crime*, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of *the* defendant with great care.
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves."

MPJI 3:30 (emphasis added).

Defense counsel for appellant objected to the instruction on two grounds. First, she objected to the applicability of the second paragraph and requested that it not be given, arguing as follows:

> "[DEFENSE COUNSEL]: . . . I would ask that it not be given because *nobody has identified these individuals as the person who committed the crime*. *They have identified them as being there.* We then have, as the State has argued before, the video. And the jury will have the video to look at.
>
> *But nobody has said he did this, and she did that. They just said yes, that's the person in the—that I see in the video. And that is the person.*
>
> [THE STATE]: Except Mr. Capers was identified as beating the victim with a chair by Mr. Daye in the video.
>
> [DEENSE COUNSEL]: But it says here, 'the identification by a single eyewitness as the person who committed the crime.' And we don't have that.
>
> [THE STATE]: We do with—as to Mr. Capers.
>
> [DEFENSE COUNSEL FOR MR. CAPERS]: And I'm objecting to that paragraph as well, Your Honor. I think the first paragraph is all that is necessary.
>
> THE COURT: Well, I think because there is only one witness, I think the single eyewitness is an important part of the language.
>
> How about if it is, the identification of *a* defendant . . . by a single witness, if it is believed beyond a reasonable doubt, can be enough to convict a defendant?"

The court removed the phrase "as the person who committed the crime" and changed two instances of "*the* defendant" to "*a* defendant." After the change, the second paragraph read as follows:

> "The identification of *a* defendant by a single eyewitness, if believed beyond a reasonable doubt, can be enough to convict *a* defendant. However, you should examine the identification with great care."

Next, defense counsel requested that the court remove the following second sentence in the first paragraph: "You have heard evidence about the identification of the defendant as the person who committed the crime." But the court declined, reasoning that the first paragraph did not relate only to the testimony of the eyewitnesses but "to the entire spectrum of evidence" as follows:

> "THE COURT: Well, I think that is a different situation than the single eyewitness labeling an individual. The State has the obligation to prove they did it. This . . . does not just relate to the testimony of Mr. Wiley Daye. . . . I think the first paragraph refers to the entire spectrum of the evidence.
>
> ***
>
> [DEENSE COUNSEL]: What I'm referring to is the second sentence of the first paragraph.
>
> THE COURT: But what I'm telling you is that that is not limited like the second set is. This has to do with all of the evidence presented by the . . . State as opposed to the part presented by a single eyewitness. Those are two different legal concepts.
>
> [THE STATE]: Your client has been identified.
>
> ***
>
> [DEFENSE COUNSEL]: 'You have heard evidence about the identification of the defendant as the person who committed the crime.'
>
> THE COURT: They have, but not necessarily through a single eyewitness.
>
> [DEFENSE COUNSEL]: Well, my whole thing is that nobody—

> THE COURT: They can infer that the anger over the game led to the kicking, which led to the minor skirmish out front, that led to them coming back.
>
> That is not just limited to [the eyewitness]. That is the thing. The State's whole case is brought to bear in the opening paragraph.
>
> [THE STATE]: And your client has been identified through the video.
>
> [DEFENSE COUNSEL]: *Right. But—let me think about that.*
>
> THE COURT: All right."

Subsequently, the court and defense counsel went on to discuss other jury instructions.

Neither the court nor defense counsel revisited the proposed jury instruction on "identification of defendant," and the court instructed the jury as follows:

> "The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. *You have heard evidence about the identification of the defendants as the persons who committed the crimes.* You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification.
>
> *The identification of a defendant by a single eyewitness, if believed beyond a reasonable doubt, can be enough evidence to convict a defendant.* However, you should examine the identification of the defendant with great care.
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves."

After the court instructed the jury as above, defense counsel stated explicitly, "On behalf of Ms. Floyd, we have no exceptions."

The jury convicted appellant. At sentencing, the court imposed a term of incarceration of three years for wearing or carrying a dangerous weapon openly with intent to injure to be served consecutive to appellant's sentence for second-degree murder, stating as follows:

> "THE COURT: For the use of the weapon, three years consecutive.
>
> [DEFENSE COUNSEL FOR APPELLANT]: You said three years consecutive?
>
> THE COURT: I said three years consecutive. And I understand a lot of people think that these should somehow merge. But frankly, if you're driving around with a dagger, it is just a matter of time before you use it.
>
> So that having been said, please advise your client."

Defense counsel did not object and proceeded to advise appellant of her post-trial rights.

This timely appeal followed.

II.

Before this Court, appellant argues first that the trial court erred or abused its discretion in instructing the jury that it had heard evidence regarding the eyewitness identification of the defendant *as the individual who committed the crime*, when such evidence was never introduced. Although appellant did not object after the court gave this instruction, appellant maintains that she "clearly objected to the issuance of the instruction"

or substantially complied with the preservation rule.

According to appellant, the court believed erroneously that the "eyewitness identification" applied to all of the evidence presented by the State throughout the entire case. Appellant maintains that this interpretation ignores the text of the instruction, arguing as follows:

> "Immediately after the sentence, 'You have heard evidence about the identification of the defendant as the person who committed the crime' the instruction continues, 'You should consider *the witness's* opportunity to observe the criminal act and the person committing it, including the length of time *the witness* had to observe the person committing the crime, *the witness's* state of mind, and any other circumstance surrounding the event.'"

Appellant contends that the entirety of the instruction refers to the circumstances when *a witness* identifies the defendant as having committed the crime charged.

Because Mr. Daye's brother identified appellant and Mr. Capers as participants in the attack on Mr. Daye and identified them in the video footage of the crime but did *not* witness appellant stab the victim, appellant argues that the eyewitness instruction given by the court was misleading. Appellant argues that the instruction reflected the court's factual inference, that the instruction usurped the fact-finding function of the jury, and that it was not harmless error.

Second, appellant argues that his sentences should merge under the rule of lenity because the carrying of the weapon openly was merely incidental to the stabbing that constituted the second-degree murder. Alternatively, appellant argues that the sentences should merge as a matter of fundamental fairness because the carrying of the weapon was

"part and parcel" of the murder and thereby an "integral component" of it.[2]

The State maintains, as a threshold issue, that appellant's claim about the jury instruction is not preserved for our review. Defense counsel told the court that "[she]'ll think about it," did not bring up the identification instruction again, and most significantly, stated after the court instructed the jury that she had no exception. Even if preserved, the State argues that the instruction was proper because it stated that the jurors had heard evidence *about* the identification of appellant (and Mr. Capers), not that appellant had been definitively identified as the person who committed the crime; it asked the jurors to "consider the witness's opportunity to observe the criminal act"; and it informed the jurors that it was up to them "to determine the reliability of any identification and give it the weight [they] believe it deserves." Even if the instruction was erroneous, the State maintains that any error was harmless because of the overwhelming evidence that appellant had stabbed the victim.

As to appellant's sentences, the State argues that they do not merge under the rule of lenity because appellant's carrying of the dagger was not merely incidental to her commission of the murder. As to merger under the principle of fundamental fairness, the State points out that the claim is waived because this basis for merger requires appellant to have raised it below and appellant did not.

[2] Appellant concedes that his sentences do not merge under the required evidence test.

III.

Appellant's claim regarding the jury instruction on identification of defendant is not preserved for our review and does not warrant plain error review.

Maryland Rule 4-325(e) governing objections to instructions to the jury states as follows:

> "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."

Rule 4-325(e) makes clear that an objection to a jury instruction is not preserved for review unless the aggrieved party makes a timely objection *after* the instruction is given and states the specific ground of objection thereto. The Rule requires an objection after the court instructs the jury, even if the party objected previously. *See Choate v. State*, 214 Md. App. 118, 130 (2013). This requirement ensures that the trial court has had "an opportunity to correct the instruction in light of a well-founded objection" and safeguards against the possibility that the party that initially objected may have become entirely satisfied with the instruction given. *Stabb v. State*, 423 Md. 454, 465 (2011). Not only did appellant fail to object, but counsel stated affirmatively that she had no exceptions.

Appellant did not substantially comply with the rule. The requirements of substantial compliance are as follows:

> "[T]there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied

> by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless."

Gore v. State, 309 Md. 203, 209 (1987). Although strict compliance is preferred, an objection that "substantially complies" with Rule 4-325(e) may preserve a claim of error for appellate review. *Watts v. State*, 457 Md. 419, 427 (2018). In this case, appellant's counsel did not comply, substantially or otherwise, with Rule 4-325(e). Although counsel objected to the identification instruction in the beginning of her discussion with the court, she said, "Right. But—let me think about that," after the court explained why the objection was overruled. The court responded, "All right," and counsel never brought up her objection again.

After instructing the jury, the trial judge gave counsel an opportunity to object to the instructions. Counsel acquiesced, stating explicitly that she had no objections. Because the defense acquiesced to the instructions and never lodged an objection after the court instructed the jury, the objection to the eyewitness instruction was not preserved, strictly or substantially. *See Choate*, 214 Md. App. at 129–30 (2013) (finding no substantial compliance where defense counsel told the court during a bench conference following jury instructions that he was satisfied with the instructions); *Braboy v. State*, 130 Md. App. 220, 226–27 (2000) (finding no substantial compliance where defense counsel told the court that the defense had no exceptions). Moreover, there is nothing in the record to suggest that a renewed objection would have been futile, *i.e.*, that the court would not have been open to considering defense counsel's further objection to the jury instruction in question.

Although Rule 4-325 (e) allows appellate courts to exercise discretion to review an unpreserved objection as plain error, plain error review is not a way to circumvent the requirements of the Rule. Plain error review is rare and is reserved for those errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130–31 (2012). It "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). Additionally, the plain error hurdle, "high in all events, nowhere looms larger than in the context of *alleged instructional errors*." *Martin v. State*, 165 Md. App. 189, 198 (2005). We will not exercise our discretion and review the issue for plain error.

In *Hammersla v. State*, 184 Md. App. 295, 307 (2009), we held that the trial court did not commit plain error[3] in giving the pattern jury instruction on identification that included the language that appellant now contests: "You have heard evidence regarding the identification of the Defendant as the person who committed the crime." In that case, the same instruction was applicable to the facts and was proper because it had "merely reminded the jury that they had 'heard evidence *regarding* the identification of the Defendant as the person who committed the crime.'" *Id.* "In essence, the jurors were instructed they had heard evidence *about* the identification of appellant, not that appellant had been definitively identified as the person who committed the crime." *Id.* Similarly, there was no plain error in the trial court's instruction in the instant case.

[3] In *Hammersla*, the defendant conceded that the issue was not preserved. 184 Md. App. at 305.

Turning to the issue of merger, the trial court did not err in imposing separate sentences for appellant's convictions for second-degree murder and carrying a dangerous weapon openly with intent to injure. Appellant concedes that these convictions do not merge under the required evidence test,[4] but contends that they should merge under the rule of lenity or as a matter of fundamental fairness.

The rule of lenity is a matter of legislative intent, which applies when at least one of the offenses subject to the merger analysis is statutory. *Latray v. State*, 221 Md. App. 544, 555 (2015). The rule "give[s] the defendant the benefit of the doubt" when it is not clear whether the Legislature intended to provide for "two crimes arising out of single act." *Walker v. State*, 53 Md. App. 171, 201 (1982). Carrying a weapon openly with intent to injure is a statutory offense.[5]

In general, the offense of carrying a weapon does not merge with another conviction under the rule of lenity when the other offense does not incorporate carrying a dangerous weapon as an element. *Biggus v. State*, 323 Md. 339, 357 (1991); *see also Burkett v. State*, 98 Md. App. 459, 479 (1993) (holding that conviction for carrying a dangerous weapon did not merge with sexual offense in the second degree); *Nance v. State*, 77 Md. App. 259, 267 (1988) (holding that conviction for carrying a dangerous weapon did not merge with

[4] The required evidence test "looks to the elements of the offenses and 'if all 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.'" *Sifrit v. State*, 383 Md. 116, 137 (2004).

[5] The offense is set forth in Md. Code, Criminal Law, §4-101(c)(2) as follows: "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."

rape and sexual offense convictions); *Walker*, 53 Md. App. at 203 (holding that conviction for carrying a dangerous weapon did not merge with attempted first-degree rape). The Court of Appeals explained as follows:

> "Maryland cases have uniformly refused to merge [§ 4-101] convictions into convictions for other offenses where such merger was not mandated by the required evidence test. The General Assembly has taken no action to change the result of those decisions. A primary purpose of statutes proscribing the carrying or employment of dangerous or deadly weapons is to discourage their use in criminal activity. *Where the underlying criminal activity does not itself necessarily involve the carrying or use of dangerous or deadly weapon, the carrying or use of a dangerous or deadly weapon, in violation of a statute like [§ 4-101], is an aggravating factor warranting punishment in addition to the punishment imposed for the underlying criminal activity.*"

Biggus, 323 Md. at 357 (emphasis added) (internal citation omitted); *cf. Eldridge v. State*, 329 Md. 307, 320 (1993) (vacating carrying a dangerous weapon conviction and upholding armed robbery conviction because Legislature set out an enhanced penalty for armed robbery over simple robbery and did not intend to punish a defendant further); *Somers v. State*, 156 Md. App. 279, 317 (2004) (merging conviction for carrying a dangerous weapon openly with the intent to injure with conviction for robbery with a dangerous weapon). Appellant's convictions do not merge because carrying a dangerous weapon is not incorporated into second-degree murder, which is "the killing of another person without legal justification, excuse, or mitigation, and with either the intent to kill or the intent to inflict grievous bodily harm." *Banks v. State*, 92 Md. App. 422, 439 (1992).

As an exception to this general rule, merger under the rule of lenity is appropriate if carrying a dangerous weapon was *merely incidental* to the other offense that does not

incorporate carrying a dangerous weapon as an element. *See Chilcoat v. State*, 155 Md. App. 394 (2004). Carrying a dangerous weapon is merely incidental when movement with the weapon occurs immediately before committing the other offense; minimal steps are taken; and the other offense is committed exclusively or primarily with that weapon. *Id.* (holding that carrying a dangerous weapon was merely incidental to assault since the defendant "pick[ed] up a beer stein that was conveniently located to him and walk[ed] a few steps with it to reach the victim," whom he immediately struck with the stein); *Thomas v. State*, 143 Md. App. 97, 123 (2002) (holding that carrying a dangerous weapon was merely incidental to assault when defendant took a limited number of steps with weapons present in the room and struck victim with them).

We agree with the State that appellant's carrying of the dagger was not merely incidental to the murder. Appellant left the residence, returned thirty minutes later carrying her dagger, and chased the victim with it until she stabbed him. *See Harrod v. State*, 65 Md. App. 128 (1985) (affirming separate convictions for assault and carrying a deadly weapon openly with intent to injure, where the defendant carried a hammer from the bedroom to the living room and repeated this trip to retrieve a hunting knife). Appellant's convictions do not merge under the rule of lenity.

As to appellant's alternative argument under the principle of fundamental fairness, we hold that it has been waived. *See Coleman v. State*, 237 Md. App. 83, 101 (2018) (noting that "fundamental fairness does not enjoy the 'procedural dispensation' of 'inherent illegality' in Md. Rule 4-345, which exempts other merger arguments from preservation requirements"). Regardless of waiver, merger under the principle of fundamental fairness

is "a defense that, by itself, rarely is successful in the context of merger." *Howard v. State*, 232 Md. App. 125, 171–72 (2017); *see also Carrol v. State*, 428 Md. 679, 695 (2012).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.