Circuit Court for Anne Arundel County
Case No. C-02-CR-16-001633

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 895

September Term, 2017

DAVIN ALLEN

v.

STATE OF MARYLAND

Wright,
Kehoe,
Reed,

JJ.

Opinion by Reed, J.

Filed: April 4, 2019

A jury in the Circuit Court for Anne Arundel County convicted Davin Allen ("Appellant") of, *inter alia*, armed robbery, false imprisonment, carrying a dangerous weapon openly with the intent to injure, and other related offenses. The court sentenced Appellant to a twenty-year sentence for armed robbery, with all but eighteen years suspended; a consecutive ten-year suspended sentence for false imprisonment; a consecutive three-year suspended sentence for the weapons charge, and five years' supervised probation. Appellant noted a timely appeal and presents three questions for our review:

1. Did the trial court err by admitting irrelevant testimony regarding Appellant's post-arrest demeanor?

2. Did the trial court abuse its discretion by admitting irrelevant mugshot photos of Appellant's alleged co-conspirators?

3. Did the trial court err by failing to merge false imprisonment into armed robbery for sentencing purposes?

For the reasons set forth below, we answer all three questions in the negative and, accordingly, affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Sometime after 8:30 p.m. on the night of July 22, 2016, Thomas Czach ("Mr. Czach") arrived at the Crown Plaza Hotel in Annapolis after traveling from Toronto, Canada to attend a wedding. He checked in and took his luggage, a case of Polish beer he brought from Canada as a wedding gift, sodas, iced coffee, and a bottle of rum to his hotel room. Because the room was not equipped with a refrigerator, he walked down the hall to the ice machine. On his way he encountered a black female walking toward her room. The

woman, later identified as Jameria Bridges ("Ms. Bridges"), was carrying a slice of pizza, and Mr. Czach struck up a conversation, joking with Ms. Bridges that "she's got pizza and I've got beer" before continuing to the ice machine.

Mr. Czach showered, changed, and then walked over to the restaurant located next door to the hotel. He finished his meal thirty to forty-five minutes later, then returned to the hotel. As he was opening the door to his room, he noticed Ms. Bridges standing behind him with a "tall and thin" black male who was later identified as Appellant. Ms. Bridges asked whether she and her companion could have a drink. Because he recognized her from their earlier conversation, Mr. Czach invited the couple into his room.

Once inside, Mr. Czach stepped into the bathroom to retrieve a soda from the ice bucket. When he returned, he saw that Ms. Bridges was seated at the desk and Appellant was seated on his bed. They made small talk while Mr. Czach mixed alcoholic beverages. Ms. Bridges identified herself as Mya and when Mr. Czach asked Appellant his name, Appellant "mumbled something" in response. After receiving several mumbled answers, Mr. Czach went back to the bathroom for more drinks.

Mr. Czach testified that he had previously placed his wallet, watch, and camera on a shelf over the desk, and when he returned to the room, he noticed that his wallet was missing. Appellant and Ms. Bridges both denied having the wallet, so Mr. Czach searched the desk drawer. He then asked if the wallet was in Appellant's pocket and asked him to empty his pockets to show that the wallet was not inside. Appellant stood up from the bed and began repeatedly punching Mr. Czach in the head, pushing him toward the back of the

room until Mr. Czach fell to his knees. As Appellant hit him, he repeatedly told Mr. Czach that he was armed with a gun and a knife.

Ms. Bridges searched his luggage, then approached Mr. Czach with his wallet in her hand. Mr. Czach testified that she and Appellant demanded the PIN to his credit cards, which he disclosed immediately. Appellant and Ms. Bridges, disbelieving his answer, told Mr. Czach that he was not cooperating and "the beating became worse." Appellant then used two of Mr. Czach's neckties to bind his hands behind his back, telling him to "give her the PIN number, if not, [he'd] melt [Mr. Czach's] balls off." Appellant then touched the hotel room clothes iron, which they had plugged in and was now hot, to Mr. Czach's inner thigh. Each time Mr. Czach repeated his PIN, Appellant touched the hot iron to his skin, causing burns to his lower back, shoulder, buttock, calf, and ear. Appellant then placed his hands around Mr. Czach's neck and began to strangle him. Unable to breathe and anxious to escape, Mr. Czach offered to accompany Appellant and Ms. Bridges to the ATM in the lobby to prove that he had given the correct PIN.

They agreed, and Mr. Czach left the room with Appellant and Ms. Bridges. Waiting at the elevator, Mr. Czach told his assailants that they would look suspicious if they went to the lobby with his hands still bound, and then struggled to free his hands. A second black male, who was "over six feet tall" and "more physically built than [Appellant]" exited Ms. Bridges and Appellant's room and joined them at the elevators. Mr. Czach was able to remove the ties from his wrists and placed them on a table near the elevators. The man, later identified as Sean Weah ("Mr. Weah"), rode the elevator down to the lobby with

Appellant, Ms. Bridges, and Mr. Czach. When they reached the lobby, Appellant and Ms. Bridges accompanied Mr. Czach to the ATM and Mr. Weah exited the hotel.

Ms. Bridges stood next to Mr. Czach at the ATM, which was in a nook next to the reception desk. She clutched his arm intimately and called him "sweetie" to decrease suspicion, and Appellant stood directly behind them. Ms. Bridges handed Mr. Czach his credit card and he, while reciting his PIN out loud, withdrew $200. Appellant began punching him in the back of his head and demanding that he withdraw more money so Mr. Czach withdrew another $200. Because he had reached his daily withdrawal limit, he offered to obtain a cash advance at the reception desk. Mr. Czach, Ms. Bridges, and Appellant then left the ATM to wait in line at the desk.

According to Mr. Czach, when he reached the desk, an employee informed him that it was against hotel policy to provide cash advances. He testified that he then alerted the clerk that he was being held against his will and asked her to call the police. At this point, Appellant and Ms. Bridges walked out of the hotel, taking his credit cards and car keys with them. Sherea Offer ("Ms. Offer"), the reception desk employee on the night of the incident, testified that she saw Mr. Czach approach the desk with Ms. Bridges. However, Ms. Offer's testimony differed from Mr. Czach's; she testified that she recalled two black males with him rather than one, and she said that he asked for the cash advance first, at which point she directed him to the ATM, which was visible from the front desk.

Ms. Offer also testified that she saw one of the men attack Mr. Czach and grab him around his neck after he had withdrawn money from the ATM. She testified that Mr. Czach yelled "stop," which caused everyone in the lobby to turn in the direction of the ATM.

When Mr. Czach yelled "stop" again, Ms. Offer alerted hotel security. By the time the guard had arrived, the three individuals had left, and Ms. Offer called the police. Mr. Czach testified that he called his bank to secure his card and was informed that his card was being used at a CVS approximately one mile away from the hotel. He then provided the address to police officers who had responded to the scene.

Officer Christopher Wilson of the Anne Arundel County Police Department testified that when he arrived at the CVS, he saw Appellant and Ms. Bridges standing outside of the store. Because they matched the radio dispatch description, officers detained Appellant, Ms. Bridges, and Mr. Weah until Mr. Czach was transported to the store for a show up identification a short time later. Mr. Czach identified all three suspects as the individuals involved in the robbery at the Crown Plaza Hotel, and specifically identified Appellant as the person who had beaten and burned him. He was then transported to the hospital for treatment of several first and second-degree burns.

Ms. Bridges' purse was searched at the CVS, and several cards bearing Mr. Czach's name and his car keys were recovered. Appellant was also searched, and $180.00 was found in the front pocket of his shorts. A Crown Plaza Hotel key card, $101.00, and a beer that was the same brand that Mr. Czach had brought from Canada, was found in Mr. Weah's vehicle.

The State introduced photographs of Ms. Bridges and Mr. Weah during its direct examination of Mr. Czach; he identified Ms. Bridges as the woman who helped Appellant rob him and Mr. Weah as the man who met them at the elevator. He also identified Appellant in open court as the individual who had punched, restrained, and burned him

while demanding his PIN. Ms. Offer was also shown Ms. Bridges' photograph, and she testified that Ms. Bridges was the woman she saw with Mr. Czach at the reception desk. CVS surveillance footage, introduced into evidence, showed Appellant following Ms. Bridges into the store at 12:39 a.m., shortly before their arrest.

We shall set forth additional facts as necessitated by our discussion of Appellant's questions.

DISCUSSION

I. EVIDENTIARY ISSUES

A. Parties' Contentions

Appellant claims that the trial court committed two errors concerning the admission of evidence: first, he argues that Officer Wilson's testimony describing his "uncooperative" post-arrest conduct was "too equivocal and ambiguous to be relevant," and was therefore inadmissible as a matter of law; and second, Appellant contends that the court erred in admitting his alleged co-conspirators' mugshots into evidence because Ms. Bridges and Mr. Weah's identities were not relevant to any contested issue at trial. He contends that the admission of the photographs prejudiced his defense "by association," and that the resulting prejudice from the admission of the photographs substantially outweighed their probative value.

The State disagrees, explaining that Officer Wilson's testimony was relevant evidence of Appellant's consciousness of guilt. The State also contends that Appellant's identity as the perpetrator was a contested issue in this case. Therefore, the photographs of

Appellant's alleged co-conspirators were relevant to the reliability of Mr. Czach's identification of Appellant and his credibility as a witness.

B. Standard of Review

We utilize a two-step process to review a trial court's decision to admit evidence: "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*.'" *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Md. Rule 5-401. Therefore, all evidence that is relevant is admissible. Further, the Maryland Rules provide that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Md. Rule 5-403.

After we determine that the evidence is relevant, we must then determine whether the trial court abused its discretion in admitting it. *See Smith,* 420 Md. App. at 704. We defer to the trial court's decisions "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009) (quoting *Merzbacher v. State*, 346 Md. 391, 405 (1997)). An abuse of discretion exists when "no reasonable person would take the view

adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Baker v. State*, 223 Md. App. 750, 759 (2015).

C. Analysis

i. Officer Wilson's Testimony

On the first day of trial, defense counsel moved *in limine* to preclude evidence of verbal threats that Appellant made toward Officer Wilson while being transported to the station, arguing that "my motion is in regards to that specific paragraph of Officer Wilson's report. And as to specifically with the statements my client made in his absence [sic] after being arrested."[1] Defense counsel explained that the threats were "inflammatory statements that the jury will hold specifically just against my client and, again, has nothing to do [sic] whether or not my client committed the acts beforehand." The State argued that the statements were made shortly after the crime had occurred and that they were relevant because they reflected Appellant's intention to flee to avoid prosecution and his consciousness of guilt. The trial judge reserved on the issue of whether the testimony would

[1] Defense counsel referenced the following passage in Officer Wilson's report:

> [Appellant] made several threats toward me. He said he was going to kick my teeth down my throat. [Appellant] also stated he knew my name and was going to find me after this and kill me. While at Western District, [Appellant] stated he wanted to throw down $1,000 to take him out of handcuffs while in booking and fight me. [Appellant] also stated that he had been locked up before and wasn't scared and that he wouldn't cooperate in the booking process and be fingerprinted.

come into evidence. The following exchange occurred during the State's direct examination of Officer Wilson:

> [STATE'S ATTORNEY]: Can you describe [Appellant's] demeanor overall as he was being transported?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> OFFICER WILSON: Very uncooperative.
>
> [STATE'S ATTORNEY]: How was he when you tried to place him in the police car?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> OFFICER WILSON: At first, he was resistant, but we were able – there was more officers there. Another officer helped me place [Appellant] into my vehicle. I have a – what you call a cage car, which one quarter of my rear seat is caged off specifically for transporting prisoners.
>
> [STATE'S ATTORNEY]: Okay. Did his demeanor change throughout the transport or was it consistently agitated?
>
> OFFICER WILSON: His demeanor was consistently agitated.
>
> [STATE'S ATTORNEY]: When you arrived at the Western District, did you bring him into the station for booking?
>
> OFFICER WILSON: Yes, that is correct.
>
> [STATE'S ATTORNEY]: When you arrived at the station, did his demeanor change with regard to his level of cooperation by the arrest?
>
> OFFICER WILSON: When we first arrived at the Western District, his demeanor did change. Prior to the arrival to Western District Police Station, due to him being uncooperative, I asked for additional police officers to be standing by in the sally port, which is the area that we unload the prisoner

> from before entering into the booking process; to standby just in case [Appellant] decided to become aggressive.
>
> [STATE'S ATTORNEY]: Did he become aggressive at the station?
>
> OFFICER WILSON: No, ma'am.
>
> (Pause.)
>
> OFFICER WILSON: Can I add to that, ma'am?
>
> [STATE'S ATTORNEY]: A brief indulgence.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Wait for a question.
>
> [STATE'S ATTORNEY]: Were there any statements made to you by the Defendant while you were transporting him to the station?
>
> [DEFENSE COUNSEL]: Objection.

At the bench, Appellant's attorney requested that the trial court exclude the threats that he made from evidence and argued:

> Your Honor, this is my same—my standing objection. I don't see how it is relevant to whether or not he committed the crimes charged. It is purely to inflame to the jury the statements because they are inflammatory, if believed, and they certainly show a propensity towards not just being violent, but for murder. And that is highly prejudicial to my client. So, I make a strenuous objection based off of that.
>
> **And also, we got out that he was aggressive and he was uncooperative.** (Emphasis supplied).

The trial court then ruled that Appellant's threats were not probative of his intention to flee and sustained the objection. We observe that Appellant's counsel did not move to strike Officer Wilson's testimony describing his demeanor as "uncooperative" or "agitated," and did not make a continuing objection to the admission of this evidence. The

prosecutor resumed direct examination of Officer Wilson, and the following exchange occurred:

> [STATE'S ATTORNEY]: Officer Wilson, how did your contact with the [Appellant] end that evening?
>
> OFFICER WILSON: At the end of that evening, while we were attempting to do the booking process, [Appellant] was still being uncooperative. He was placed inside the holding cell because he did not want to be booked and processed, which is photographed and fingerprinted, at that time.

As a preliminary matter, we find that any objection to the evidence regarding Appellant's uncooperative behavior post-arrest was waived. Md. Rule 8-131(a) provides that, except for issues pertaining to subject matter and personal jurisdiction, "the appellate court will not decide ... [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court." To preserve an objection to the admission of evidence, a party must object "at the time the evidence is offered … [o]therwise, the objection is waived." *See* Md. Rule 4-323(a), *see also Benton v. State*, 224 Md. App. 612, 627 (2015) ("[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection.").

Although defense counsel's argument in support of the motion *in limine* was ambiguous as to whether he sought to exclude Appellant's threatening statements or his uncooperative behavior, he clarified that the objection was limited to the threats the following day when he argued that "we got out that he was aggressive and he was uncooperative" during the bench conference. Since Appellant's counsel did not object to the testimony describing his uncooperative behavior or when Officer Wilson was asked to

describe his conduct at the station, we find that Appellant's failure to contemporaneously object precludes him from raising this issue on appeal.

Moreover, even if Appellant had preserved the issue, we agree with the State that Officer Wilson's testimony was properly admitted as relevant evidence from which consciousness of guilt may be inferred.

The Court of Appeals has previously held, "[i]t is well established in Maryland that, [i]f relevant, circumstantial evidence regarding a defendant's conduct may be admissible under Md. Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending to show consciousness of guilt." *Decker, supra,* 408 Md. at 640 (quoting *Thomas v. State*, 372 Md. 342, 351 (2002)). Evidence of "flight after a crime, escape from confinement, use of a false name, and destruction or concealment of evidence" and "resistance to arrest" are admissible to prove consciousness of guilt. *Decker*, 408 Md. at 640-41 (quoting *Thomas*, 372 Md. at 351); *accord*, *Sorrell v. State*, 315 Md. 224, 228 (1989)). The refusal to submit to fingerprinting is also admissible evidence of consciousness of guilt. *See Myers v. State*, 48 Md. App. 420, 423-24 (1981) (this Court found when an appellant refused to cooperate with the fingerprinting process, it was admissible evidence).

Consciousness of guilt evidence need not conclusively establish a defendant's guilt. *Jones v. State*, 213 Md. App. 483, 509 (2013) Instead, "[t]he proper inquiry is whether the evidence could support an inference that the defendant's conduct demonstrates a consciousness of guilt." *Id.* (quoting *Thomas*, 372 Md. at 356). Explanations that may weaken the inference that a defendant's conduct is attributable to consciousness of guilt should be considered by the jury. *Id.* (citing *State v. Edison*, 318 Md. 541, 549 (1990)).

However, if an Appellant has an "innocent" explanation for conduct offered by the State as consciousness of guilt evidence, then "it [is] incumbent upon him to generate that issue." *Decker*, 408 Md. at 647-48 (quoting *Thomas*, 397 Md. at 578).

Appellant relies on *Thomas* in support of his argument that his post-arrest demeanor was not relevant evidence of consciousness of guilt because it was not sufficiently connected to the charged offenses. The defendant in *Thomas* was convicted of murder after the trial court admitted evidence that he had refused to provide a blood sample to police officers and had to be restrained, conduct that the prosecutor argued was probative of his consciousness of guilt. *Id.* at 348. The Court of Appeals reversed, holding that the record was devoid of any evidence that the defendant was aware that the blood sample had been ordered in connection with the investigation of an unsolved murder that had occurred three years earlier. *Id.* at 356-57. The Court in *Thomas* explained that since the record lacked evidence connecting the alleged consciousness of guilt on the defendant's part to the murder, the evidence lacked probative value and was inadmissible. *Id.* at 358.

Appellant's reliance on *Thomas* in this case is erroneous, as the facts are distinguishable. Unlike in *Thomas*, where the blood sample was requested three years after the crime was committed, Appellant was detained and then apprehended a mile away from the Crown Plaza Hotel, less than thirty minutes after the crime had occurred. Further, the record in *Thomas* lacked evidence that the defendant was aware that the blood sample had been ordered in connection with an unsolved murder before he refused to give the sample. In contrast, Appellant's agitated demeanor and uncooperative behavior began immediately after he was apprehended with $180.00 in his pocket, accompanied by Ms. Bridges, who

had items belonging to Mr. Czach in her purse. Appellant's other co-conspirator, Mr. Weah, had cash, a Crown Plaza Hotel key card, and one bottle of the same brand of Polish beer that Mr. Czach had brought from Canada when he was apprehended. The trial record contains sufficient evidence for a jury to conclude that he was aware that his arrest was related to the armed robbery that had occurred at the Crown Plaza Hotel that evening, and to draw an inference that his post-arrest demeanor was related to consciousness of guilt. We thus hold that the trial court did not abuse its discretion on the part of the trial court in admitting the testimony.

ii. Co-Conspirator Photos

The State, during its direct examination of Mr. Czach, sought to introduce photographs of Ms. Bridges and Mr. Weah into evidence, and defense counsel objected. A bench conference ensued:

> [DEFENSE]: The State is trying to bring in booking photos --
>
> THE COURT: I am sorry?
>
> [DEFENSE]: The State is trying to show him booking photos – booking information on two individuals who aren't on trial here today. I don't see how it is relevant at all.
>
> [STATE]: There is no – objecting to booking photos of the co-Defendants.
>
> Both individuals were mentioned as being individuals who were present when this entire incident occurred. And using these in order to indicate that these were the individuals described in all of his previous testimony as ---
>
> THE COURT: His objection is as to relevance. What is the relevance to what?
>
> [STATE]: It is relevant that they are identified and they are --

THE COURT: But they are not on trial. That is something that I think he is making. They are not here. They are not Defendants in this case and this jury ---.

[STATE]: Part of the issue that the State needs to prove is who, in fact, the conspiracy was with. We have to have a way in order to introduce who those individuals were and were present when these events were happening. There is no identifying --

THE COURT: He has a conspiracy count?

[STATE]: Yes with both of those individuals.

[DEFENSE]: Well, yes, but the conspiracy is just with other individuals to prove. Not what they actually look like or what their characteristics are, or what their – who their pictures are?

THE COURT: Well, why do you have to have the pictures – you can't at least --- physical description, age, that kind of thing ---.

[STATE]: It is an official police document. It was turned over in discovery. **I can certainly redact if Your Honor believe [sic] there is something prejudicial or were neither of those individuals are on trial at this point and doesn't at all prejudice Mr. Mann's client.** The booking photos are of two other individuals introduced into evidence. It is not Mr. Allen's booking photograph.

* * *

THE COURT: Well, it may matter that the State has charged him with conspiring with two individuals. The State is attempting to prove who – that these are the two individuals, did they charge him with conspiring ---

[DEFENSE]: Well, he already said their names. He testified that [Ms.] Bridges and [Mr.] Weah are the two people that were with my client at the time, so, by barebones, the burden has been met.

[STATE]: It is relevant for him to be able to identify the woman who he described as the co-conspirator. He described her photograph; **if the objection is to the fact that the booking photos have the wor[d] booking photo around it, I am happy to either redact it or provide a copy.** But we should be able to identify the two individuals that he named and also

> conspired in this crime to show it is not an absence of mistake and to show that why the other known individual that was reference as a --- question.
>
> ***
>
> THE COURT: **Well, suppose she redacts the --- what information is here other than the picture? What information is objectionable?**
>
> [DEFENSE]: I just don't find what relevance it is in showing a picture of somebody – again, it doesn't matter what they look like as to whether or not a conspiracy took place. He has identified them. They are not on trial here today.
>
> THE COURT: All right, overruled. (Emphasis supplied.)

Appellant, relying upon *Arca v. State*, 71 Md. App. 102 (1987), contends that Ms. Bridges and Mr. Weah's identities were not related to any contested issue at trial and, therefore, their booking photographs were irrelevant evidence that should not have been admitted. The defendant in *Arca* was convicted of first-degree murder after a kick he delivered to another man's head led to a skull fracture and fatal brain injury. *Id.* at 103. The defendant did not deny kicking his victim but asserted that the blow was delivered in self-defense. *Id.* at 103-04. During direct examination of an eyewitness to the incident, the State introduced a photographic array that included the defendant's mugshot into evidence for purposes of identification. *Id.* at 104. We reversed, concluding that the mugshot was not relevant where the identity of the assailant was not at issue. *Id.* at 106.

Arca is inapplicable in the instant case, where the identity of Mr. Czach's assailant was contested and his credible identification of Appellant was critical to the State's case. In his defense, Appellant challenged the show-up identification procedure as suggestive and questioned whether Mr. Czach was intoxicated. During closing arguments, defense

counsel implied that intoxication and trauma had caused Mr. Czach to mistake Appellant for Mr. Weah. Because the identity of the perpetrator was at issue in this case, the photographs were probative to determine whether Appellant and Mr. Weah bore such a resemblance that Mr. Czach may have misidentified his attacker.

Appellant omits from his argument that defense counsel used the photographs to highlight the discrepancies between Ms. Bridges and Mr. Weah's objective physical characteristics and the descriptions that Mr. Czach had previously given to police of his attackers. On cross-examination, Appellant's attorney emphasized that Mr. Czach had reported that Ms. Bridges and Mr. Weah were in their thirties when, in fact, she was nineteen and he was twenty-two years old. Appellant cannot now challenge the relevance of the booking photographs before this Court after using the photos to impeach the credibility of a witness' perceptions at trial. We find that the photographs were relevant, and there was no abuse of discretion on the part of the trial court in admitting them into evidence.

We also find that the "invited error doctrine" precludes review of Appellant's argument that the probative value of the photographs was outweighed by their undue prejudice. "The 'invited error' doctrine is a 'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit-mistrial or reversal-from that error.'" *State v. Rich*, 415 Md. 567, 575 (2010) (citing *Klauenberg v. State*, 355 Md. 528, 544 (1999) (citations omitted)); *see Smith v. State*, 218 Md. App. 689, 701 (2014) ("The invited error doctrine makes sense where an *affirmative* act of the appellant produced the error he raises on appeal.") (Emphasis in original).

Here, Appellant refused the prosecutor's repeated offer to redact the booking information from Ms. Bridges and Mr. Weah's photographs, which was the only signifier that the photographs were, in fact, mugshots. *See Wagner v. State*, 213 Md. App. 419, 455 (holding that a head shot photograph, "in which all that was visible was [the] face and neck area … was not obviously a mugshot"). Appellant cannot now claim that he was prejudiced by his attorney's strategic decision to refuse the offer from the State to "sanitize" the photographs by redacting Ms. Bridges and Mr. Weah's booking information, especially since, as we have already discussed, defense counsel used this information to attack the reliability of Mr. Czach's identification. Therefore, we find no error and affirm the decision of the trial court.

II. MERGER OF CONVICTIONS FOR ARMED ROBBERY AND FALSE IMPRISONMENT

A. Parties' Contentions

Appellant argues that the trial court erred in failing to merge his convictions for false imprisonment and armed robbery and instead imposed a separate eighteen-year sentence for armed robbery and a consecutive ten-year suspended sentence for false imprisonment. He contends that the principle of fundamental fairness, as articulated in *Monoker v. State*, 321 Md. 214 (1990) and *Marquardt v. State*, 164 Md. App. 95 (2005), requires merger of the convictions because Mr. Czach's detention was "incidental" to the execution of the robbery and the two offenses were "part and parcel" of one another.

The State argues that the trial court properly imposed separate sentences for false imprisonment and armed robbery because the convictions are based on separate and

distinct acts. The State maintains that the facts in this case establish a detention apart from the robbery, and that the two sentences should stand as imposed.

B. Standard of Review

A failure to merge a sentence is considered, under Maryland Rule 4-345, to be an illegal sentence within contemplation of the rule. *See Pair v. State*, 202 Md. App. 617, 624 (2011). Thus, we address the question of whether a trial court should have merged Appellant's convictions under a *de novo* standard of review. *See Bishop v. State*, 218 Md. App. 472, 504 (2012) ("We address the legal issue of the sentencing … under a *de novo* standard of review.") (quoting *Blickenstaff v. State*, 393 Md. 680, 683 (2006)); *Nesbit v. GEICO*, 382 Md. 65, 72 (2004) ("When the trial court's order 'involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review.'") (quoting *Walter v. Gunter*, 367 Md. 386, 392 (2002)). Nevertheless, the scope of potential remedy for Appellant is narrow:

> [T]his category of "illegal sentence" [is] limited to those situations in which the illegality inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantially unlawful.

Chaney v. State, 367 Md. 460, 466-67 (2007).

C. Analysis

The Fifth Amendment to the United States Constitution guarantees that no individual shall be punished twice for the same offense. That protection is extended to the individual states through the Fourteenth Amendment. *See Snyder v. State*, 210 Md. App. 370, 396 (2013), *cert. denied*, 432 Md. 470 (2013) (citing *Benton v. Maryland*, 395 U.S. 784, 787 (1969)). Although the Maryland Declaration of Rights does not contain a provision barring double jeopardy, "well-established protections" exist in common law. *Latray v. State*, 221 Md. App. 544, 553 (2015) (quoting *State v. Long*, 405 Md. 527, 536 (2008)). The protection against double jeopardy prevents the imposition of multiple punishments for the same offense. *See Snyder*, 210 Md. App. at 396 (citation omitted).

This Court has observed that there are three grounds on which an individual's convictions may be merged for sentencing purposes: "(1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Johnson v. State*, 228 Md. App. 27, 46 (2016) (quoting *Carroll v. State*, 428 Md. 679, 693-94 (2012)), *cert. denied*, 450 Md. 120 (2016). The required evidence test is used to determine if two offenses constitute the same offense by examining the elements of each offense and determining "whether each provision requires proof of a fact which the other does not." *Paige v. State*, 222 Md. App. 190, 206 (2015) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "If all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Paige*, 222 Md. App. at 206 (quoting *State v. Jenkins*, 307 Md. 501, 507 (1986)). But, "*even though each offense may arise from the same act or criminal episode*," multiple

punishments are not barred by the prohibition against double jeopardy under the required evidence test "*if each offense requires proof of a fact which the other does not*." *Latray*, 221 Md. App. at 553 (quoting *Cousins v. State*, 277 Md. 383, 388–89 (1976)) (emphasis added).

The rule of lenity "applies only where at least one of the two offenses subject to the merger analysis is a statutory offense," "'[i]f we are uncertain as to what the Legislature intended…we give the defendant the benefit of the doubt.'" *Latray*, 221 Md. App. at 555 (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)). Under this rule, courts merge sentences because "[t]wo crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence." *Walker*, 234 Md. App. at 171 (quoting *Monoker v. State*, 321 Md. 214, 222 (1990)). Although "we do not follow any 'rigid or fixed criteria' in applying the rule of lenity," "we do not create an ambiguity where none exists." *Latray*, 221 Md. App. at 556 (citations omitted).

The principle of fundamental fairness is "heavily and intensively fact-driven," making it very different from merger based on the required evidence test and the rule of lenity, which "can both be decided as a matter of law." *Pair v. State*, 202 Md. App. 617, 645 (2011). Merger based on fundamental fairness rests not only on the elements of the crimes, but also "depends on the circumstances surrounding the convictions." *Latray*, 221 Md. App. at 558. "The principle justification for rejecting a claim that fundamental fairness begs merger in a given case is that the offenses punish separate wrongdoing." *Id.* Fundamental fairness "is a defense that, by itself, rarely is successful in the context of merger." *Id.*

In reviewing whether the required evidence test and the principle of fundamental fairness obliged the circuit court to merge Appellant's convictions for false imprisonment and armed robbery, this Court places emphasis on this analysis conducted in *Latray*. There, the evidence at trial established that the defendant placed a bag on the counter at a shoe store, handed the sales associate a note indicating that the bag contained a bomb, and then demanded the money from the register after telling her that he had a gun. *Id.* at 550-51. On appeal, the defendant sought to merge his convictions, arguing that his making a false bomb threat was the underlying act that established the aggravated robbery. *Id.* at 552. We declined to merge the convictions, concluding that the principle of fundamental fairness was inapplicable where the charges were "two separate acts arising from a single criminal episode." *Id.* at 562. Likewise, in *Carroll v. State*, 428 Md. 679 (2012), the Court of Appeals held that the principle of fundamental fairness did not require that convictions for conspiracy to commit armed robbery and attempted armed robbery merge where the defendant's convictions "targeted two different crimes." *Id.* at 697-700.

False imprisonment is defined in Maryland as the deprivation of the liberty of another with his consent and without legal justification. *See Dett v. State*, 161 Md. App. 429, 441 (2005). Armed robbery, on the other hand, is defined as robbery with a dangerous or deadly weapon. Md. Code, Crim. § 3-403. Robbery requires proof of intent to withhold property of another permanently through the use of force for the time necessary to complete the act. Md. Code, Crim. § 3-401.

The record in this case reflects that Appellant restrained Mr. Czach for far longer than was required to accomplish the robbery. Further, the facts supporting the charge of

false imprisonment are independent of the facts supporting the armed robbery. Appellant and Ms. Bridges completed the armed robbery when they took Mr. Czach's wallet, which was missing when he returned to the room, and then elicited his PIN by beating him and threatening that they were armed. Restraining his hands, burning him with an iron, and choking him were not necessary to accomplish the robbery, as he had disclosed the PIN the first time he was asked and then repeated the number several times. Moreover, his valuables had already been forcibly taken at the time Appellant and Ms. Bridges took him to the ATM in the lobby against his will, as evidenced by the fact that Ms. Bridges had to give his card back to him before he could withdraw money from the machine. Under these circumstances, we are not persuaded by Appellant's contention that the false imprisonment is "part and parcel" of the armed robbery, and we conclude that the trial court's imposition of separate sentences for both harms was fair and appropriate, and the required evidence test was not satisfied. Simply put, the elements for false imprisonment and armed robbery are distinct.

Furthermore, under the rule of lenity, this Court finds that merger was not sensible, nor was it required. Appellant has provided zero support, and case law does indicate, that the General Assembly of Maryland intended for false imprisonment and armed robbery to be punished by one sentence. To the contrary, case law provides numerous examples in which defendants were sentenced separately after being convicted of false imprisonment and armed robbery. *See Carroll*, 428 Md. 679; *Pair v. State*, 202 Md. App. 617 (2011) (Holding that convictions of false imprisonment and armed robbery retained their judicially determined meanings and were not created by statute, and therefore could not be afforded

"rule of lenity" analysis). As such, this Court finds that the rule of lenity is inapplicable in this case.

Accordingly, the judgments of the Circuit Court for Anne Arundel County are affirmed.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.