Circuit Court for Montgomery County
Case No.: 126986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1969

September Term, 2016

ERIC SYLVESTER DYSON

v.

STATE OF MARYLAND

Wright,
Kehoe,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: September 24, 2018

Eric Sylvester Dyson, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of second-degree murder, theft of a credit card belonging to another, two counts of use and disclosure of credit card numbers, and theft scheme[1] with a value between $1,000 - $10,000. The court sentenced Dyson to 47 years and six months' imprisonment. Dyson presents the following questions for our review:

1. Did the trial court err in allowing the State to introduce evidence of Dyson's statement to the police where the State had entered into a pre-trial agreement not to introduce such evidence unless three specific pieces of evidence were not admitted?

2. Did the trial court err in denying Dyson's motion to suppress his statement?

3. Is the evidence insufficient to sustain the conviction for credit card theft, use and disclosure of credit card numbers, and theft scheme?

4. Did the trial court err when it failed to merge Dyson's convictions and sentences for credit card theft, use and disclosure of credit card numbers, and theft scheme?

5. Did the trial court err in not striking the entire jury panel when it was discovered that members of the venire were discussing DNA evidence in the hallway?

For the reasons set forth below, we affirm.

[1] Theft scheme is defined under Criminal Law Section 7-103(f) of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.):

> When theft is committed in violation of this part under one scheme or continuing course of conduct, whether from the same or several sources: (1) the conduct may be considered as one crime; and (2) the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor.

FACTUAL BACKGROUND

On February 23, 2015, Dan Belvin was found dead from multiple stab wounds in his apartment in Randolph Village, a senior living community in Gaithersburg. He was 95 years old.

The State adduced the following evidence at trial. Dyson's father, Leslie Dyson, also was a resident of Randolph Village. In August of 2014, Leslie Dyson was transferred to an inpatient facility for medical treatment and Dyson began staying in his father's vacant apartment. Dyson met Belvin at Randolph Village, and in January of 2015, Dyson helped Belvin repair a damaged tire on Belvin's car. Thereafter, Gregory Prather, the service manager of Randolph Village, observed Dyson and Belvin driving together in Belvin's car, and, at times, Dyson drove Belvin's car alone. On February 24, 2015, Mr. Prather observed Dyson enter the Randolph Village parking lot driving Belvin's car.

On February 23, 2015, Dijon Saunders, the assistant manager for Randolph Village, received a phone call from Belvin's friend who was concerned because Belvin had not answered her phone calls. Ms. Sanders knocked on Belvin's door but he did not answer. After noticing that Belvin's door was unlocked, Ms. Sanders entered the apartment where she found Belvin, who appeared to be deceased, with "a pool of blood" by his neck and head. She immediately called 911.

Sergeant Lawrence Haley and Detective Beverly Then of the Montgomery County Police Department responded to Randolph Village and initiated an investigation of Belvin's death. During a search of Belvin's apartment, Sergeant Haley and Detective Then located Belvin's cell phone and pocket calendar. Belvin's pocket calendar contained an

entry for February 18, 2015 which read, "Get car keys back this p.m." A second calendar entry on the following day also read, "Get keys back!!" A "sticky" note attached to the calendar contained Dyson's name and phone number.

Cell phone records of Belvin and Dyson indicated that, on February 19, 2015, Belvin's phone received two incoming calls from Dyson; one at 8:38 p.m. and one at 8:40 p.m. Those were the last calls received on Belvin's phone. Dyson did not call Belvin's phone again after February 19, 2015.

The police thereafter executed a search and seizure warrant at Dyson's father's apartment and located a black jacket with gold lining and jeans belonging to Dyson. Laboratory testing of Dyson's black jacket revealed the presence of blood on the jacket lining. DNA analysis of that blood specimen matched Belvin's blood and DNA. Belvin's car keys were located inside a pocket of Dyson's jeans.

Detective Then obtained Belvin's bank records for his account at Navy Federal Credit Union, which indicated that at 9:04 p.m. on February 19, 2015, Belvin's debit card was used at a 7-Eleven on Georgia Avenue, located approximately three miles from Randolph Village, for a balance inquiry and withdrawal of $300. Belvin's debit card was subsequently used in multiple transactions at the following 7-Eleven locations: 1) in Washington, D.C. on February 20, 2015 at 3:06 a.m. for a withdrawal of $300, and again at 5:48 a.m. for a balance inquiry and withdrawal of $300; 2) University Boulevard on February 21, 2015 at 2:30 p.m. for five transactions; and 3) East-West Highway on February 22, 2015 at 2:07 a.m., and 5:57 a.m. for four transactions. Detective Then's review of the surveillance video of each of the 7-Eleven stores where Belvin's Navy

Federal debit card was used showed that Dyson was present in those stores during the times of the transactions on Belvin's account.

Belvin's Navy Federal Credit Union bank records indicated that his debit card was used also at the Giant in Hyattsville on February 21, 2015 at 10:02 a.m. for two purchases; one for $166.82 and a second for $136.78. A few hours later, at 12:51 p.m., Belvin's debit card was approved for a purchase at a Riggs Mart in Hyattsville. At 3:24 p.m., Belvin's debit card, however, was declined in four attempts at a second Giant location.

Michelle Fajardo, an acquaintance of Dyson who had not seen him "in a few years," testified that she spent approximately three days with Dyson at a crack house in February of 2015. During that time, she saw Dyson with a Navy Federal Credit Union credit card and cash, which Dyson used to buy crack cocaine for Fajardo and himself. Fajardo recalled that she accompanied Dyson to a Giant store where he used a credit card to make a purchase and receive cash back.

Following his arrest, Dyson was interrogated by Detective Then, Detective Frank Springer and Sergeant Haley. The video recording of appellant's interrogation was introduced in evidence at trial. In that video recording, Dyson admitted to "going off," stabbing Belvin and disposing of the knife.

Dyson subsequently was convicted of second-degree murder, theft of a credit card belonging to another, two counts of use and disclosure of credit card numbers, and theft scheme between $1,000 - $10,000. Dyson noted a timely appeal.

DISCUSSION

Pre-Trial Agreement

At a pre-trial hearing, Dyson's counsel informed the court that the parties had reached an agreement that the State would not use Dyson's recorded statement to police in its case in chief if evidence of bank records, video surveillance and DNA evidence, which the court had not yet ruled upon, were admitted. The parties indicated that, in the event that either the bank records, video surveillance or DNA evidence was not admitted, they would ask the court to address Dyson's motion to suppress his statement at that time. Dyson had moved to suppress his statement on the following grounds: 1) it was involuntary because it violated his right to prompt presentment; 2) it was involuntary because it was the result of police coercion; 3) it violated his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966); and 4) it violated his right to counsel under *Miranda*.

On the third day of trial, the State requested that the court address Dyson's motion to suppress his statement. The State argued that, because defense counsel's opening statement challenged the jury to consider why a knife recovered from one of the State's witnesses was not submitted for DNA testing, Dyson's statement to police, in which he informed police that he had thrown the murder weapon away, was now relevant to rebut defense counsel's statement. After hearing argument from the parties, the court determined that the defense had opened the door to the introduction of Dyson's statement and that it would have been inequitable to preclude the State from introducing Dyson's statement at trial.

In so ruling, the court explained:

> There are many aspects of the situation that we have here. The first is the agreement of the State in the first place to essentially place a confession in abeyance and not proceed just in normal course to argue the motion to suppress and decide which way to go with it. The other issue is, that the defense counsel in this case had a copy of the statement and they knew what is in the statement and, in fact, they knew or should have known that there was a possibility based upon this agreement itself, that the contents of that statement may have in fact been allowed as evidence in this court, because the agreement really was a contingency agreement.
>
> And so, if all the contingencies were not fulfilled, then subject to the motion to suppress[,] the statement could come in. And if the statement could come in then there it was, very, very clearly, as represented by counsel to me[,] was the statement of the defendant not only that was inculpatory, but indicated that he got rid of the murder weapon. And so, there would be no reason to look for any other weapon or investigate anybody else.
>
> And so, then the defense opens its argument by asking the jurors to question the very reasons as to why all those other items were not in fact scrutinized more closely. Why there wasn't DNA on the knife from Mr. Keyes? Why there wasn't more of an investigation as to Mr. Keyes? … And … by their doing that and yet knowing what the statement says, they are unfairly putting the State in the position where they cannot in [any way] respond to the argument made by the defense and the [c]ourt has an obligation to make sure that the trial is fair to both sides and in this case it puts the State in an unfair position by not being able to respond.
>
> Now, even if the [c]ourt indicates that the [] State can argue for the use of the statement[,] it is still subject to the motion to suppress and that is another issue to be considered. But under the circumstances of this case where the defense seemed to have opened this door widely, knowing what was in that statement and knowing that this statement could, under certain circumstances, be used[,] essentially put themselves at risk, just as the State put themselves in part at risk in having made this agreement in the first place. So, therefore the [c]ourt is going to grant the State's motion to seek to use the statement of the defendant…

With respect to his first question, Dyson argues that the trial court erred in permitting the State to introduce evidence of his recorded statement to the police in violation of the State's pre-trial agreement. Dyson argues that because he performed his

side of the agreement, the State was bound to adhere to the terms of the agreement. The State argues that the trial court acted within its discretion in allowing the State to introduce evidence of Dyson's statement, as that statement became relevant to respond to Dyson's counsel's challenge of the State's investigation in her opening statement.

In considering the enforceability of pre-trial agreements between prosecutors and defendants, the Court of Appeals has recognized that there is a distinction between plea bargains which are, at all times, judicially enforceable, and "other miscellaneous agreements," the enforceability of which requires an analysis of the "totality of the circumstances" and the proper balancing of equities. *Jackson v. State*, 358 Md. 259, 271-72 (2000). *See also Butler v. State*, 55 Md. App. 409, 427 (1983) (discussing "miscellaneous bargains" with the State which implicate due process concerns "where there is pending before the judge a criminal charge.").

Appellant relies on *Jackson* for the proposition that his agreement with the State was enforceable because he had performed his side of the bargain, and the State was obligated to uphold its side of the bargain. Appellant's reliance on *Jackson*, however, is misplaced. Unlike the defendant in *Jackson*, Dyson was not obligated to cooperate with the State or perform any other action in exchange for the State's agreement to refrain from introducing his recorded statement to police. Here, the trial court found that the State's agreement not to introduce Dyson's statement was conditional. Therefore, Dyson "knew or should have known" that his statement may be introduced as evidence at trial in the event that any of the conditions of the agreement were not satisfied. Consequently, the

court found no unfairness to Dyson in the litigation of the motion to suppress, which was a known contingency to him prior to trial.

We perceive no error in the trial court's determination that the relevance of Dyson's statement at trial was occasioned by his counsel's reference to the police investigation and that equity warranted permitting the State to introduce Dyson's recorded statement, provided the State prevailed in the suppression hearing.

Motion to Suppress

Suppression Hearing

On the fourth day of trial, the court heard argument on Dyson's motion to suppress his statement. Dyson argued that his statement should be suppressed because it was involuntarily made as a result of the unnecessary delay in his presentment to the commissioner and coercion by the police. Dyson further argued that his statement was obtained in violation of his *Miranda* rights to remain silent and to counsel. The State responded that Dyson's statement was voluntary. It argued that Dyson's presentment to a commissioner was not delayed for the purpose of obtaining his confession, but rather the result of the ongoing police investigation of Belvin's murder and ordinary procedures. The State further argued that Dyson's statement did not violate *Miranda* because after Dyson invoked his rights to remain silent and to counsel, he then reinitiated conversation with the police.

The State presented the following evidence at the hearing:

Detective Then, the lead detective in the case, testified that on February 24, 2015 at approximately 6:00 p.m., Dyson was arrested and brought to police headquarters in

Gaithersburg. At the time of Dyson's arrest, Detective Then was executing a search warrant at Dyson's father's apartment in Randolph Village. Detective Then testified that, at approximately 11:00 p.m., she returned to police headquarters to interview Dyson. The detective offered Dyson a blanket, which he accepted, and she observed that he was handcuffed to the table in the interrogation room. The detective recalled that Dyson informed her that he had just returned from using the bathroom.

Dyson's entire interview was video and audio recorded. A transcription was made of the recording and introduced in evidence at the hearing. The trial court reviewed both the video recording and the transcription of Dyson's interview. Detective Then testified that she advised Dyson of his *Miranda* rights at 11:12 p.m., which Dyson waived. Detective Then recounted her interrogation of Dyson, specifically her questioning of Dyson about his relationship with Belvin. In response to Detective Then's questions as to what happened between Dyson and Belvin, Dyson stated: "I'm just done. I didn't do it." Detective Then responded: "You can't keep saying that because you wouldn't be here." Dyson replied, "I'm here, I didn't do it." Detective Then recalled that she asked Dyson to explain what he did to Belvin, and Dyson responded: "This is crazy. I don't want to talk about this shit no more." A short time later, Dyson told Detective Then "I'm done." Detective Then could not recall her response to Dyson, which was transcribed as "unintelligible."

Sergeant Haley testified that he arrived at police headquarters at approximately 2:00 a.m. on February 25, 2015, following the execution of the search warrant at Dyson's father's apartment in Randolph Village. Sergeant Haley assumed control of Dyson's

interrogation from Detective Then, who left the room. Sergeant Haley described Dyson's demeanor as "subdued" when he entered the room. Sergeant Haley noticed, however, that Dyson's demeanor changed when he began discussing his relationship with Belvin; Dyson started having labored breathing and became "very fidgety" in the chair. Sergeant Haley recalled that Dyson asked to use the bathroom and that he responded to Dyson's request by stating: "Yeah, can you give me one second, let me finish my thought." Dyson responded "Okay."

Sergeant Haley explained that Dyson was visibly uncomfortable because they were discussing a very sexual subject matter. The sergeant recalled that he continued to question Dyson and that Dyson again asked to use the bathroom. Sergeant Haley responded, "Yeah, can I ask you one more question," and Dyson replied, "Yeah." Sergeant Haley advised that he continued questioning Dyson about this "uncomfortable subject matter," when Dyson asked to use the bathroom a third time. The sergeant asked Dyson if he could "hold it" so that they could finish their talk and Dyson replied, "no." Dyson then told the sergeant, "I'm done, I just want to talk to my lawyer." Sergeant Haley responded, "Okay. Not a problem." Sergeant Haley testified that, at that point, he would have gotten up to walk away or to do something, but Dyson started talking again "just a few seconds" later. Dyson then asked to go to the bathroom again, at which point, he was taken to the bathroom.

When Dyson returned from the bathroom, Sergeant Haley offered him some food and water. The sergeant then asked Dyson, "Can I tell you something, honestly though, about what I do?" The sergeant stated that Dyson did not respond to his question, but

instead stated, "He hurt me real bad," referring to Belvin. The sergeant explained that he did not, and would not, reinitiate any questioning with Dyson after Dyson asked for an attorney. The sergeant explained that Dyson proceeded to confess to murdering Belvin with a knife and throwing it away.

After hearing argument from counsel and considering the issues raised in Dyson's motion to suppress, the court denied the motion. With respect to the voluntariness of Dyson's statement, the trial court determined, after considering the totality of the circumstances of Dyson's arrest, advisement of rights, and interrogation, as well as Dyson's mental and physical condition, including his frequent requests to use the bathroom, that he was not mistreated or "coerced through improper means" to make his statement to police.

The court further found that there was no intentional or unnecessary delay in Dyson's presentment to the commissioner. The court found that Detective Then was "working the case," executing the search warrant, and that as soon as she could return to police headquarters to interview Dyson, she did so. The court further found that the number of hours between Dyson's arrest and presentment was less than 17 hours, and found that amount of time was not excessive, as it consisted of five hours between arrest and interrogation, three and one-half hours of interrogation, and, after that, "normal processing" prior to Dyson's presentment to the commissioner later that morning.

In determining that Dyson's right to remain silent was not violated, the trial court explained:

> Now throughout the interview, [Dyson] talks and talks and talks and sometimes he voluntarily talks even when questions are not being asked. When he says I'm done, I'm done, I didn't do it, he goes on to talk more. Even in instances where there's no further inquiry by the police officers. But clearly in the context of I'm done, in the context of this interview, the [c]ourt finds that it is ambiguous. That the State was not obligated to then withdraw. Because, in fact, I'm done and then stating I didn't [do] it, is somewhat ambiguous in talking about it with them even after saying, allegedly, I'm not going to talk to you about it. There is one context where [Dyson] says I'm not going to talk about it, I don't want to talk about this shit. Now, once again, it appears to be in the context specifically [of] what they were talking about at that time. Not, I'm not going to talk to you officers, I'm not going to say anything to you. I'm done talking to you at all. It is true that we don't expect defendants to use some legal talisman or specific language in order to invoke these rights. That would not be reasonable, but given the context of this particular case, the [c]ourt does not find that it would be reasonable for the police officers, the detectives involved to know that that was it … That that was the invocation of his [right and it was] time to step back. Once again, in comparison with the invocation of the right to counsel, when that was made, and that was very clear Sergeant Haley stepped back.

Finally, with respect to Dyson's invocation of his right to counsel, the trial court found that, although Dyson had invoked his right to counsel, he subsequently waived that right when he initiated further conversation with Sergeant Haley, specifically:

> [Sgt. Haley] was not compelled to leave the room when [Dyson], after invoking his right to counsel, begins talking about the case. And he does talk about this case. This is not what everyone refers to as just a rant. He is explaining what went on in this case. He's explaining how things got out of hand between him and the victim. This is actually bringing this back to … this discussion clearly. The fact that he ends it by saying that he wants to go to the bathroom and the detective gives him an opportunity to go to the bathroom, shouldn't be looked at as somehow ignoring his statements made after the invocation of the right to counsel.

The court concluded that Sergeant Haley did not wrongfully initiate questioning after Dyson invoked his right to counsel, observing:

> … from [Dyson's] perspective there was no initiation by the Sergeant because, in fact, he [Dyson] was just going forward with his statement,

> continuing with his statement. But even if there was, and even if there appeared to be initiation by the detective in this case, it was clear that that was after [Dyson] had already brought the subject back clearly and in detail and continued to talk about it, even after he invoked the right to counsel.
>
> The [c]ourt finds by a preponderances of evidence that [Dyson's] Fifth and Sixth Amendment[] [rights] were not violated and that the statement is admissible.

Dyson's Statement

Dyson argues that the circuit court erred in denying his motion to suppress because his incriminating statement was made after he invoked his right to silence by stating, "I'm done" and "I don't want to talk about this shit no more" and after he requested counsel by stating, "I'm done, I just want to talk to my lawyer." Dyson further contends that his statements were not made voluntarily because he was mistreated and coerced by police and argues that there was an unreasonable delay in his presentment before a commissioner following his arrest. The State responds that the circuit court did not err in determining that Dyson effectively withdrew his invocation of rights when he provided the police with an unsolicited narrative of his crimes. The State also maintains that Dyson's statements were made voluntarily because his inculpatory statements were not the result of the alleged coercive conduct on the part of the police or delay in presentment to the commissioner.

In reviewing a circuit court's denial of a motion to suppress evidence, we consider only the record developed at the suppression hearing, *Briscoe v. State*, 422 Md. 384, 396 (2011), viewing the evidence in the light most favorable to the prevailing party. *Gonzalez v. State*, 429 Md. 632, 647 (2012). We review the circuit court's factual findings for clear error, but we "make our own independent constitutional appraisal by reviewing the relevant

law and applying it to the facts and circumstances of this case. *Lee v. State*, 418 Md. 136, 148 (2011) (quotation marks and citation omitted); *accord Holt v. State*, 435 Md. 443, 457 (2013).

Miranda Violations

In *Miranda*, the United States Supreme Court recognized that custodial interrogations generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Supreme Court held that unless police advised a suspect of his rights to remain silent and to counsel, any statement made by the suspect could not be admitted into evidence at trial. *Id.* at 464.

The Supreme Court further held that should the suspect indicate at any time during the interrogation that he wishes to remain silent, "the interrogation must cease." *Id.* at 473-74 (footnote omitted). *Accord Lee, supra*, 418 Md. at 150 ("If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.") (quoting *Berghuis v. Thompson*, 130 S. Ct. 2250, 2263-64 (2010)). A suspect's request to cease an interrogation, however, must be clear and "unambiguous." *Berghuis*, 130 S. Ct. at 2260; *Davis v. United States*, 512 U.S. 452, 461 (1994). "The essential inquiry ... is whether the invocation is clear or ambiguous. The test applied, generally, using an objective standard, is whether a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to silence." *Williams v. State*, 445 Md. 452, 475 (2015).

In *Williams*, the Court of Appeals considered whether a defendant unambiguously invoked his right to silence prior to being advised of his *Miranda* rights by stating, "I don't want to say nothing. I don't know." 445 Md. at 476. Following that statement, Williams was advised of his *Miranda* rights, waived them, and proceeded to make an incriminating statement. *Id*. at 460, 464. The suppression court denied Williams's motion to suppress his statement and he appealed, arguing that he "unambiguously and unequivocally" invoked his right to remain silent and the police failed to "scrupulously honor" his right to silence. *Williams v. State*, 219 Md. App. 295, 323-24 (2014).

In considering his arguments before this Court, we determined that Williams's statement, "I don't want to say nothing. I don't know" was ambiguous because the inclusion of "I don't know" strongly suggested that Williams was uncertain of how to proceed. *Id*. at 327. Under the circumstances, therefore, a reasonable police officer could not be expected to understand Williams's statement as an expression of his intent to invoke his right to remain silent. *Id*. We also noted that Williams's comment was even "more ambiguous when placed in context with other statements that he had made in the interrogation room up to that point." *Id*. Specifically, Williams had asked the interrogating officers three times, "What's the incident" and at three other times during the interrogation, he told them that he didn't know "what's going on" or "what you all are talking about." In the context of these questions, we noted that Williams was likely trying to understand the nature of the crime that the police were investigating." *Id*. at 327-28.

The Court of Appeals affirmed, concluding that a reasonable police officer could have interpreted Williams's statement to be a request to remain silent or change the subject

of the investigation, and was therefore ambiguous. *Williams,* 445 Md. at 477. The Court considered Williams's statement in the context of the interrogation, explaining that, because Williams had repeatedly stated some version of "I don't know" in response to questions about the incident, a reasonable officer could believe that Williams's statement "I don't want to say nothing. I don't know" was a further reference to the fact that he did not want to discuss the incident in question. *Id*.

Here, the trial court determined that Dyson's statements "I'm done" and "I don't want to talk about this shit no more" did not invoke his right to remain silent, because those statements were ambiguous in the context of the very sexual subject matter that Dyson and Sergeant Haley were discussing at that point in the interrogation. The trial court concluded that a reasonable police officer could have understood Dyson's statements "I'm done" and "I don't want to talk about this shit no more" to refer to the topic of his sexual encounters with Belvin. The court also contrasted the ambiguous nature of Dyson's statements "I'm done" and "I don't want to talk about this shit no more" with the clear and direct statement he used to invoke his right to counsel: "I'm done, I just want to talk to my lawyer."

Under those circumstances, we hold that the trial court did not err in determining that appellant's statements, "I'm done" and "I don't want to talk about this shit no more" were ambiguous, and that a reasonable police officer, under the circumstances of Dyson's confession, may not construe those statements to be an invocation of Dyson's right to remain silent.

Dyson further contends that his statement should have been suppressed because the detectives' continued interrogation of him after he invoked his right to counsel violated his

Fifth Amendment right against self-incrimination under *Miranda*. The trial court determined that Dyson had invoked his right to counsel, but that he effectively withdrew that right when he reinitiated discussion with the detectives.

Once the right to counsel is invoked, an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *see also Smith v. Illinois*, 469 U.S. 91, 98 (1984) ("*Edwards* set forth a bright-line rule that *all* questioning must cease after an accused requests counsel." (citation and internal quotation marks omitted)). Thus, "before a suspect in custody can be subject to further interrogation after he requests an attorney there must be a showing that the "'suspect himself initiates the dialogue with the authorities.'" *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (quoting *Wyrick v. Fields*, 459 U.S. 42, 46 (1982)). *See also Rush v. State*, 174 Md. App. 259, 275 (2007) ("If during questioning the suspect invokes his right to counsel, questioning must cease until counsel has been provided or the suspect voluntarily reinitiates conversation."), *rev'd on other grounds*, 403 Md. 68 (2008). A suspect "initiates" dialogue with law enforcement when his inquiry or statement can be fairly said to represent a desire for a generalized discussion relating directly or indirectly to the investigation. *Bradshaw*, 462 U.S. at 1045.

The evidence from the suppression hearing showed that, following Dyson's statement that he needed to talk to a lawyer, Sergeant Haley responded, "No problem." Then, without any solicitation from Sergeant Haley, Dyson continued talking and

proceeded to go on "a rant" about his relationship with Belvin. When Dyson came back from the bathroom, Sergeant Haley discussed only whether Dyson was hungry or thirsty. The trial court found that Sergeant Haley did not resume his interrogation of Dyson. Rather, Dyson voluntarily reinitiated conversation with Sergeant Haley, returning to the topic of Belvin and his murder.

We conclude that the trial court did not err in finding that Sergeant Haley's comments relating to getting Dyson something to eat were not reasonably likely to elicit Dyson's confession. *See Williams v. State*, 342 Md. 724, 761 (1996) (holding that after suspect's invocation of right to counsel, police officer's gathering of papers and telling suspect to remove his earring were "routine procedures" not expected to elicit an incriminating statement).

Voluntariness

Dyson contends that his statements were involuntarily made because "there was no justifiable reason" for the seventeen-hour delay from the time of his arrest to his appearance before the commissioner and the conduct of the police was "physically coercive." The State responds that the delay in presentment was not excessive, as it was necessitated by the events of the ongoing police investigation, and that Dyson was not unjustly coerced into making an involuntary statement.

"'Only voluntary confessions are admissible as evidence under Maryland law.'" *Hill v. State*, 418 Md. 62, 74 (2011) (quoting *Knight v. State*, 381 Md. 517, 531 (2004)). In order for a defendant's statement to be considered voluntary, it "must satisfy federal and state constitutional strictures as well as the Maryland common law rule that a confession

is involuntary if it is the product of an improper threat, promise, or inducement by the police." *Id.* The trial court's determination of the voluntariness of a confession is a mixed question of law and fact. *Winder v. State*, 362 Md. 275, 310-11 (2001). As such, we review de novo the trial judge's ultimate determination on the issue of voluntariness. *Id. Accord Smith v. State*, 220 Md. App. 256, 272 (2014).

In assessing voluntariness, the Court of Appeals has observed that confessions that are "the result of police conduct that overbears the will of the suspect and induces the suspect to confess" are prohibited. *Lee v. State*, 418 Md. 136, 159 (2011) (citing *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991)). Courts "must examine the totality of the circumstances affecting the interrogation and confession." *Hill*, 418 Md. at 75. The State has the burden to prove voluntariness. *Lee*, 418 Md. at 159 (citing *State v. Tolbert*, 381 Md. 539, 558 (2004)). The factors to be considered in determining the voluntariness of a statement include: where the interrogation was conducted; its length; who was present; how it was conducted; whether the defendant was given *Miranda* warnings; the mental and physical condition of the defendant; the age, background, experience, education, and intelligence of the defendant; when the defendant was taken before a court commissioner following arrest; and whether the defendant was physically mistreated or psychologically pressured. *Hof v. State*, 337 Md. 581, 596-97 (1995).

With respect to any delay in presentment before a commissioner, pursuant to Maryland Rule 4-212(f) a suspect, who is arrested without a warrant, must "be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest." If the purpose of any unnecessary delay in presentment is to obtain

inculpatory statements, that factor should be given "very heavy weight" when "determining the overall voluntariness of the confession." *Williams v. State*, 375 Md. 404, 434 (2003). Some delays are necessary, such as delays for purposes of reasonable routine administrative procedures, determining whether a charging document should issue, verifying the commission of the crime itself, obtaining information in order prevent the loss of property, and discovering the identity or location of other persons involved, or in preventing loss or destruction of evidence. *Odum v. State*, 156 Md. App. 184, 202 (2004). "In order for a statement to be suppressed for lack of voluntariness, based in whole or in part upon delay in presentment, the statement must result from the delay." *Id*. at 208 (citing *Williams, supra*, 375 Md. at 434).

In this case, the trial court found that Dyson was presented to the commissioner approximately seventeen hours after he was arrested. The court determined that during the five-hour delay between Dyson's arrest and his interview at police headquarters, Detective Then and Sergeant Haley were searching Dyson's father's apartment and "working the case." Upon the completion of that search, Detective Then went directly to police headquarters, where she immediately began Dyson's interrogation, which lasted approximately three and one-half hours. The court found that the interval of time between the end of Dyson's interrogation and his presentment to the commissioner on the following morning was consistent with "normal processing" following an arrest. These first-level fact findings by the trial court were not clearly erroneous.

Moreover, there was no evidence at the suppression hearing indicating that the delay in Dyson's presentment was unnecessary or designed for the sole purpose of eliciting an

incriminating statement. Viewing the circumstances of the ongoing police investigation at the time of Dyson's arrest, the length of his interrogation and the lapse of time between his interrogation and presentment, we conclude that the trial court did not err in concluding that his statement was not elicited as a result of the delay between his arrest and presentment.

Physical Coercion

Dyson also argues that his statements were involuntary because he was "cold, tired, and handcuffed to a table for at least 8 hours" and because his numerous requests to use the bathroom were delayed. In determining the weight accorded to a statement made by an accused, the suppression court "may consider the physical condition of the accused and the circumstances under which it was made, but the critical test in determining its admissibility is whether the disclosure was made freely and voluntarily, and at a time when the accused knew and understood what he was saying." *Hadder v. State* 238 Md. 341, 357 (1965) (emphasis omitted).

The evidence of Dyson's physical condition before the suppression court showed that Dyson was handcuffed to the table in the interrogation room for approximately eight hours prior to and during his interrogation. Dyson argues that he was cold, but the evidence showed that Detective Then provided him with a blanket when she began his interrogation. With respect to Dyson's claims that his requests to use the bathroom were delayed or denied, the evidence showed that Dyson had informed Detective Then at the beginning of the interrogation that he had just returned from using the bathroom. Sergeant Haley indicated that though Dyson made numerous requests to use the bathroom, when asked, he

indicated that he could wait a little longer for the bathroom break. When Dyson responded that he could no longer wait to use the bathroom, Sergeant Haley called for a detective to escort Dyson to the bathroom. After Dyson returned from the bathroom, Sergeant Haley provided him with something to eat.

We conclude, therefore, based on our independent review of the totality of the circumstances, that Dyson's will was not overpowered by the discomforts that he claimed to have endured during his arrest and interrogation. We therefore perceive no error in the trial court's factual findings or legal conclusion that Dyson's statement was voluntary.

Sufficiency of the Evidence

Dyson contends that the evidence was insufficient to sustain his convictions for theft of a credit card, use and disclosure of credit card numbers, and theft scheme because there was no direct evidence that he lacked Belvin's permission to use those items. The State responds that there was sufficient evidence from which the jury could reasonably infer that Dyson did not have Belvin's posthumous consent to use his car and withdraw funds from his bank account.

We review a challenge to the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 430 (2015) (internal quotation marks and citations omitted). This standard applies to all criminal cases, regardless of whether the verdict rests upon circumstantial or direct evidence, since proof of guilt based on circumstantial evidence is no different from proof of guilt based on direct evidence. *Id.* at 432. In applying this

standard, "[w]e defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010)).

Viewed in the light most favorable to the State, there was sufficient evidence to permit the jury to draw rational inferences that Dyson did not have Belvin's permission to use his car or credit card between February 19 and 22, 2015. The evidence demonstrated that Belvin's handwritten calendar notes for February 18 and 19, 2015 indicated that Belvin wanted Dyson to return Belvin's car keys. During his interrogation, Dyson told the detectives that Belvin wanted his car keys back and Belvin's car keys were found in the pocket of Dyson's pants during the search of Dyson's father's apartment. With respect to Belvin's credit card, the evidence showed that Dyson used Belvin's Navy Federal debit card and pin number numerous times between February 19 and 22, 2015 to make purchases and withdraw funds from Belvin's account. The evidence before the jury permitted an inference that Dyson stole Belvin's car and debit card and used those items without Belvin's permission. Accordingly, the State presented sufficient evidence to support Dyson's convictions for theft of a credit card, use and disclosure of credit card numbers, and theft scheme.

Sentencing Merger

Dyson was sentenced to 30 years for murder; 18 months for credit card theft; 8 years for use and disclosure of credit card numbers; and 8 years for theft scheme with a value between $1,000 - $10,000. The court merged, for sentencing purposes, the sentences for

two counts of use and disclosure of credit card numbers. Dyson contends that the court erred by failing to merge his convictions and sentences for credit card theft, use and disclosure of credit card numbers, and theft scheme with a value between $1,000 - $10,000. Specifically, he argues that his conviction for theft scheme should have merged with his conviction for credit card theft under the required evidence test because his theft scheme conviction could have been based upon theft of the credit card. The State argues that Dyson's sentences for credit card theft and theft scheme should not merge because the theft scheme conviction related to Dyson's thefts of Belvin's car and money, not his credit card.

Dyson was convicted of stealing Belvin's credit card in violation of Section 8-204 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.,), which provides:

> (a)(1) A person may not:
>
> (i) take a credit card from another, or from the possession, custody, or control of another without the consent of the cardholder; or
>
> (ii) with knowledge that a credit card has been taken under the circumstances described in item (i) of this paragraph, receive the credit card with the intent to use it or sell or transfer it to another who is not the issuer or the cardholder.
>
> (2) A person who violates this subsection is guilty of credit card theft.

Dyson was also convicted of unlawful disclosure of Belvin's credit card number in violation of Section 8-214 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.), which provides, in pertinent part:

> A person may not use or disclose any credit card number or other payment device number or holder's signature unless:

(1) the person is the holder of the credit card number or payment device number;

(2) the disclosure is made to the holder or issuer of the credit card number or payment device number[.]

Dyson contends that because the jury was never instructed on the specific property that was stolen, the jury may have convicted him of theft scheme[2] based on his theft of Belvin's credit card. He contends that any ambiguity in the verdict must be construed in his favor, and therefore merger is required.

The required evidence test has been summarized as follows:

> The required evidence test focuses upon the elements of each offense; 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. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each [] offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts. But, where 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 [].

[2] The crime of theft is codified at Section 7-104 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.), which provides, in pertinent part:

(a) *Unauthorized control over property.* A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:

(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Abeokuto v. State, 391 Md. 289, 353 (2006) (quoting *McGrath v. State*, 356 Md. 20, 23-24 (1999)). Under the required evidence test, it is sentences, not convictions which merge. *See Moore v. State*, 198 Md. App. 655, 692 (2011).

In support of his argument that his credit card theft and theft scheme sentences require merger, Dyson relies upon *Moore v. State*, 163 Md. App. 305 (2005). In *Moore*, the defendant argued that his theft conviction should have merged into the conviction for receiving a stolen credit card. *Id.* at 314. The defendant was convicted of assault and robbery of the victim's credit cards and $7 in cash. *Id.* at 309-10. Given those facts, we agreed that the defendant's sentences should have merged under the required evidence test because, as we noted, the merger doctrine prohibits multiple punishments for the same offense. *Id.* at 314.

In *Moore*, however, the defendant's convictions stemmed from the theft of his credit card, as that was the only property stolen. Here, Dyson's theft scheme conviction related to the theft of Belvin's money and car. Count Five of the indictment charged Dyson with "THEFT SCHEME: $1000 TO UNDER $10,000" alleging that Dyson "did pursuant to one scheme and continuing course of conduct, steal property of Daniel Belvin having a value of at least $1,000 but less than $10,000 to wit: U.S. currency and a silver 2004 Dodge Intrepid[.]" Thus, there was no ambiguity in Dyson's charging document as to the property that was the basis of the theft scheme charge to be construed in Dyson's favor. *Cf. Snowden v. State*, 321 Md. 612 (1991) (ambiguity in a charging document must be construed in favor of defendant).

We have recognized that credit card theft and theft scheme do not merge for purposes of sentencing, even where the stolen credit card was subsequently used to obtain merchandise. *See Dyson v. State*, 163 Md. App. 363 (2005). In *Dyson*, the defendant was convicted of theft of property with a value less than $500 and theft scheme with a value of $500 or greater relating to his theft of three credit cards. *Id*. at 367-68. Two of the stolen credit cards were then used to purchase merchandise at retail locations. *Id*. at 368. The defendant was convicted of theft of property with a value less than $500 for each of the three stolen credit cards and he was convicted of theft scheme for using the cards to purchase merchandise. *Id*. at 369. In holding that the defendant's sentences did not merge, we explained that, "the conduct or transaction of stealing property consisting of a credit card is not the same conduct or transaction as obtaining or exerting control over other property by use of the stolen credit card[.]" *Id*. at 384. We concluded that the defendant's sentences for credit card theft did not merge into his sentences for felony theft scheme because the sentences for each conviction did not punish him for the same conduct or transaction. *Id*.

Here, as in *Dyson*, though the theft of Belvin's credit card enabled Dyson to steal money from Belvin's bank account, the theft of the credit card and the subsequent use of that card were separate acts, as was the theft of Belvin's car. Under the required evidence test, merger of Dyson's sentences for theft scheme and credit card theft is not warranted.

Dyson further argues that his convictions for theft of a credit card, use and disclosure of credit card numbers and theft scheme should merge under the rule of lenity, given that that the offenses were predicated on the same conduct involving the same victim.

Alternatively, Dyson contends that his sentences should merge under principles of fundamental fairness. The State responds that the rule of lenity does not apply in this case because Dyson's crimes arise from distinct acts, nor does the principle of fundamental fairness provide a basis for reducing Dyson's sentence, and even if it did, the sentences imposed were not unfair.

The Court of Appeals has explained the rule of lenity in *Monoker v. State*:

> Even though two offenses do not merge under the required evidence test, there are nevertheless times when the offenses will not be punished separately. Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence . . . . If we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.

321 Md. 214, 222 (1990) (citations omitted).

We have stated that, "[t]he relevant inquiry when applying the rule of lenity is 'whether the two offenses are "of necessity closely intertwined" or whether one offense is "necessarily the overt act" of the other.'" *Marquardt v. State*, 164 Md. App. 95, 149-50 (2005) (quoting *Pineta v. State*, 98 Md. App. 614, 620-21 (1993)). The principal component of this analysis is the concept that the rule of lenity limits multiple punishments for the same act. *See Abeokuto*, 391 Md. at 356 (2006) (quoting *McGrath v. State*, 356 Md. 20, 25 (1999)) (The rule of lenity "provides that 'where there is no indication that the Legislature intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other.'").

Because Dyson's convictions for credit card theft and theft scheme were not predicated on the same act, those sentences do not merge under the rule of lenity. Moreover, those convictions do not involve the same victim because, though Belvin's estate was the victim of the credit card theft and the car theft, the bank was the victim of the theft of money from Belvin's account. Nor do Dyson's sentences for credit card theft and use and disclosure of credit card numbers merge under the rule of lenity as Sections 8-204 (punishing credit card theft) and 8-214 (punishing use and disclosure of credit card numbers), were designed to punish separate acts of wrongdoing. Specifically, Section "8-214 was aimed at persons who came into possession of a credit card number(s) with a fraudulent intent or who came into possession of the number(s) lawfully, but thereafter formed a fraudulent intent. In either case, it was the fraudulent possession of a credit card number, as a number, that the General Assembly intended to reach. There was no intent to duplicate the existing crimes of stealing and then using a credit card." *Clark v. State*, 188 Md. App. 185, 199–200 (2009).

In addition to using Belvin's credit card number, Dyson also used Belvin's personal pin number to access his bank account. Because Dyson's sentences for credit card theft, use and disclosure of credit card numbers and theft scheme all punish separate criminal acts, merger under the rule of lenity is not warranted.

With respect to Dyson's argument that his sentences should merge under the principle of fundamental fairness, we note that Dyson failed to raise this argument before the circuit court and it is, therefore, not preserved for our review. *See Pair v. State*, 202 Md. App. 617, 625 (2011) (determining that an unpreserved fundamental fairness

argument is not entitled to review because it does not enjoy the "procedural dispensation" of "inherent illegality" found in Maryland Rule 4-345, which exempts other merger arguments from preservation requirements).

Even if Dyson had preserved his fundamental fairness argument, however, we would conclude that merger is not required here as a matter of fundamental fairness. Indeed, fundamental fairness, "is a defense that, by itself, rarely is successful in the context of merger." *Latray v. State*, 221 Md. App. 544, 558 (2015). Our determination of whether fairness requires merger is based on "the circumstances surrounding the convictions, not solely the elements of the crimes." *Id.* In our view, the facts surrounding Dyson's theft-related convictions and sentences do not demand merger as a matter of fairness.

Striking the Jury Venire

Dyson's fifth contention is that the trial court erred in refusing to strike the entire jury venire after learning that some members of the venire had discussed DNA evidence in the hallway during jury selection. The State responds that the trial court did not abuse its discretion in refusing to strike the entire venire because there was no evidence that the venire's discussion was related to Dyson's case or that the venire was so prejudiced that they were unable to give Dyson a fair trial.

A criminal defendant's right to be tried by an impartial jury, "is one of the most fundamental rights under both the United States Constitution and the Maryland Declaration of Rights." *Dillard v. State*, 415 Md. 445, 454 (2010) (quotation marks and citation omitted). *Voir dire* is critical to assuring that a defendant's right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the

Maryland Declaration of Rights will be honored. *State v. Stewart*, 399 Md. 146, 158 (2007); *State v. Logan*, 394 Md. 378, 395 (2006); *Curtin v. State*, 393 Md. 593, 600 (2006); *White v. State*, 374 Md. 232, 240 (2003); *Dingle v. State*, 361 Md. 1, 9 (2000).

The Court of Appeals has held that a "trial court has very wide discretion in conducting voir dire, and the court's rulings will not be disturbed on appeal unless it constitutes an abuse of discretion." *State v. Logan*, 394 Md. 378, 396-97 (2006). "[B]ecause the trial judge has had the opportunity to hear and observe the prospective jurors, we pay substantial deference to the judge's conclusions, unless they are the product of a 'voir dire that is cursory, rushed, and unduly limited.'" *Id.* at 396. "The standard for evaluating a court's exercise of discretion during the voir dire is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *White v. State*, 374 Md. 232, 242 (2003).

The trial court's *voir dire* of potential jurors commenced on the first day of trial. The following DNA-related questions were asked of the potential jurors: 1) whether any of them or their families had any specific knowledge or expertise in the areas of DNA or genetics; 2) whether any potential juror believed that scientific evidence carries more weight than other types of evidence; 3) whether any potential juror believed that DNA evidence is infallible; and 4) whether, if the State introduced DNA evidence, any potential juror would be unable to fairly and fully evaluate other types of evidence in the case. When the court recessed at the conclusion of the first day of jury selection, the judge instructed the prospective jurors not to discuss the case or conduct any research or investigation on their own.

The following day, the court resumed the *voir dire* of the jury venire. In response to the court's questioning of Juror No. 244 regarding his response to the question regarding whether he believed that scientific evidence carried greater weight than other evidence, the following colloquy ensued:

> JUROR NO. 244: Well, I thought – then again, I'm not (unintelligible). So I don't know. I thought that scientific, you know, DNA and stuff like that, when I was out in the hall with people and we were talking DNA, and it's not quite what I thought it was originally. So I'm not sure that would have the bearing that I thought it would have.
>
> THE COURT: Who was talking about DNA?
>
> JUROR NO. 244: The members of the [venire]?
>
> THE COURT: Okay, and do you recall what was said?
>
> JUROR NO. 244: No, it just, we were discussing, we were how DNA has really not necessarily been a critical factor in testing for, for things like criminal cases and stuff like that.
>
> THE COURT: Okay. Well, let me ask you this. You responded to that question. If there was DNA evidence in this case, would you be able to consider that along with all the other evidence - -
>
> JUROR NO. 244: Oh, absolutely.
>
> THE COURT: - - in determining in fact the evidence that may be opposed to the DNA?
>
> JUROR NO. 244: Well, I don't think DNA is going to be the ultimate decision.
>
> THE COURT: Okay.
>
> JUROR NO. 244: I just don't feel that, but I do think it - -
>
> THE COURT: But you - -
>
> JUROR NO. 244: - - carries weight.

THE COURT: So you would consider it with all rest of the evidence?

JUROR NO. 244: Absolutely.

THE COURT: Okay.

JUROR NO. 244: Absolutely.

THE COURT: Okay. Any other questions for this witness?

PROSECUTOR: None from the [S]tate.

[DEFENSE COUNSEL]: No, Your Honor.

Following this colloquy, defense counsel requested that a new panel be brought in because this panel appeared to be unable to follow directions. Defense counsel argued that Dyson had been prejudiced by the jurors' conversations in the hallway because the jurors were discussing DNA evidence and the defense did not know the full extent of the conversation or the identity of the other participants. The court denied Dyson's motion to strike the jury venire, noting that the outcome of the discussion appeared to be a consensus that DNA evidence should not carry greater weight than other evidence, but rather, that it should be considered along with all the other evidence in deciding the case.

"The overarching purpose of voir dire in a criminal case is to ensure a fair and impartial jury." *Dingle*, 361 Md. at 9 (citing cases). Because we presume that prospective jurors are unbiased, the party challenging a prospective juror(s) on grounds of bias bears the burden of proof to overcome that presumption. *Tetso v. State*, 205 Md. App. 334, 369, *cert. denied*, 428 Md. 545 (2012) (citation omitted).

In the instant case, the trial court's questioning of Juror No. 244 confirmed that the conversation among potential jurors regarding "DNA and stuff like that" was a general

discussion in response to the DNA-related *voir dire* questions, and that it did not involve any discussion of the facts of the case. The trial judge was in the best position to assess Juror No. 244's explanation that he could impartially consider DNA evidence along with other evidence at trial. We conclude that there was no abuse of discretion in the trial court's denial of Dyson's motion to strike the venire based on its finding that the discussion among the potential jurors, though in violation of its order, did not reveal juror bias toward DNA evidence or result in prejudice to Dyson.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.