UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2378

September Term, 2015

GABRIELLE SMITH

V.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 1, 2017

Appellant, Gabrielle Smith was convicted by a jury sitting in the Circuit Court for Baltimore City of second degree murder and carrying a dangerous weapon openly with intent to injure. She appeals those convictions and presents two questions for our review:

1. Did the trial court err in allowing the State to elicit evidence of appellant's silence?
2. Was it improper to impose separate sentences for second-degree murder and openly wearing and carrying a dangerous weapon with intent to injure?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

During the evening hours of October 20, 2013, Latresha Gowdy ("the victim") was stabbed to death outside an apartment on Fairview Avenue in northwest Baltimore City. The incident began when the victim arrived at the apartment, which belonged to her son's father, Maurice Sauers el, to pick up her son. Upon seeing appellant outside the apartment, the victim became angry and a verbal altercation ensued.[1] There are two versions of what happened next.

According to appellant, the victim picked up a beer bottle and was waving it around like she was going to use it as a weapon. Fearing for her safety and acting in self-defense, appellant stabbed the victim. According to the State, the victim, before being stabbed, had wanted no part of a physical altercation and tossed the bottle aside, shattering it on an exterior wall. Therefore, not only did appellant have ample opportunity to avoid a

[1] Appellant and the victim were friends before appellant became romantically involved with Mr. Sauers el, who was the victim's estranged husband.

confrontation by retreating into Mr. Sauers el's apartment, she could not have reasonably feared serious bodily injury when she stabbed the victim.

The Investigation

At approximately 8:00 p.m. that evening, Officer Ronald Zamora of the Baltimore City Police Department responded to the apartment "for a report of an assault call." When he arrived, Officer Zamora "observed [the victim] laying in the parking lot" with two individuals, later identified as Mr. Sauers el and appellant, standing by the victim. Because the victim was unresponsive, Officer Zamora called the "District Detective Unit" and "called for a medic." When the medic arrived, Officer Zamora observed that the victim "had a laceration on her left forearm" and "there was a puncture wound in her lower stomach, [on the] left side."

Detective Frank Miller, the lead homicide detective on the scene, arrived with his partner Detective Gary Niedermeyer sometime between 8:00 p.m. and 9:00 p.m. Detective Miller spoke to Officer Zamora, who notified him that there had been a stabbing and pointed out the evidence that had been observed. Detective Miller directed the investigators on how to proceed, including "who needs to be transported down to the Homicide Unit for an interview."

During his initial investigation, Detective Miller "learned that there was potentially a weapon that was used in the crime that was in the house." He obtained a search warrant for the residence based on a statement that appellant made to a patrol officer that she "hid

the knife in the closet." He also received "information that [a bottle] had been used by the victim against . . . [appellant]."

At approximately 9:13 p.m., a crime lab technician from the Baltimore City Police Department arrived. She talked to several officers and walked around the scene. She observed "a white jacket in the parking lot, and . . . a bottle, pieces of broken piece of bottle" on the grass near the house. The technician photographed the bottle pieces, collected them, and bagged them. Her search of the area did not reveal bottle fragments in any other location.

A second crime scene technician responded at approximately 11:40 p.m., after detectives had been granted the search and seizure warrant. The technician photographed the crime scene along with a grill scraper[2] and a knife that was discovered in a bedroom closet, concealed within a pile of clothing. Using sterile swabs, the technician recovered blood from the knife "for later analysis" and took suspected DNA samples from the grill scraper and the victim's fingernails. But, he did not swab the broken bottle. DNA analysis was conducted based on swabs from the knife, the grill brush, and the victim's fingernails. Later testing revealed that the victim was the source of blood found on the knife and both the victim and appellant were the sources of DNA found on the victim's left-hand fingernails.

Based on the investigation, the State filed a Statement of Charges formally charging appellant with violating Maryland Code (2002, 2012 Repl. Vol.), §§ 2-204, 4-101 of the

[2] On the night of the incident, appellant told the investigating officers that "there was a grill scraper used" during the altercation.

Criminal Law Article ("CR §§ 2-204, 4-101"). A three day trial commenced on October 26, 2015.[3] The State called several witnesses, including investigators and a neighbor, Dora Palmer.[4]

Ms. Palmer testified that she was home on the afternoon of October 20, 2013, when she heard a voice she identified as the victim's coming from outside her apartment. She went to her second floor window to pinpoint the source, but she was unable to see where it was coming from. She then went downstairs to the stoop outside her front door to get a better look.

Once outside, Ms. Palmer saw appellant standing on the stoop outside of Mr. Sauers el's apartment and a man "holding [the victim] back," preventing her from coming towards appellant. The victim was telling appellant that "it's not right that you're messing with my husband. I thought we were good friends." Appellant responded that she should "get over it" because "he don't want you," and then, holding a knife in her right hand, stated "I'll be going to jail tonight." According to Ms. Palmer, appellant sounded "mad."

The victim was eventually able to get to an area next to the stoop where appellant was standing. The victim was "telling [appellant] to come on down" and reached for something on the grill, but there was nothing there for her to grab. Mr. Sauers el then exited his apartment and the victim ran from where she was standing and into the parking lot. Appellant remained on the stoop.

[3] A February 3, 2015, trial ended in a mistrial.

[4] At the time of the second trial, Ms. Palmer had passed away. As a result, her videotaped testimony from the first trial was played for the jury.

In the parking lot, the victim and Mr. Sauers el began arguing. Mr. Sauers el "took both his hand[s] and put [them] on top of [the victim's] shoulder. [Appellant] ran off the stoop" to the parking lot and stopped near Mr. Sauers el's right side. A couple of minutes later, the victim "dropped." Ms. Palmer walked to where the victim had fallen in the parking lot. When she asked appellant if "she cut [the victim]" appellant responded negatively, and, when Ms. Palmer asked Mr. Sauers el what had happened, he stated "he didn't know." Ms. Palmer testified that she could see a cut on the victim's arm. Shortly thereafter, the medics and police arrived, and she gave a statement to the police regarding what she had seen.

On cross examination, Mr. Palmer stated that she never witnessed any physical contact between appellant and the victim. Nor did she observe appellant swing the knife at the victim or bring it into the parking lot.

On redirect, Ms. Palmer stated that initially appellant commented that she thought the victim was faking her injuries stating "I should kick her or stomp her, whatever, she's faking it."

On re-cross Ms. Palmer clarified an earlier statement and confirmed that appellant had the "knife in her hand when she came off that stoop," and "ran into that parking lot." After the victim went down, appellant ran into the apartment and came outside a few minutes later. Ms. Palmer did confirm, however, that she never saw appellant and the victim put their hands on one another.

Later, the State called Detective Miller to testify. On direct, he stated that pieces of a broken bottle were recovered at the crime scene "to the left of the steps there is kind of a little bit of a cove area, like a garden area. It's mulch covered. The bottle was right in there. It was shattered." He did not observe pieces of the bottle anyplace else.

On cross, he stated that the bottle pieces were gathered based on information that it had been used as a weapon against appellant. When asked by defense counsel whether he made "a request for any DNA [analysis] to be done on the bottle," he responded that he had not.

On redirect, Detective Miller was further questioned about the bottle:

> [THE STATE]: Detective Miller, [defense counsel] asked many questions about this beer bottle, okay, in this case?
> [THE WITNESS]: Yes, sir.
> [THE STATE]: Based on your investigation, did you ever learn how the beer bottle got broken, got broken first and then where it was broken and how it was broken?
> [DEFENSE COUNSEL]: I don't object to a yes or no answer, but beyond that I would object.
> [THE COURT]: Come up.
> (Counsel approached the bench without [appellant] and the following ensued:)
> [THE COURT]: Well, it appears that you're going to be eliciting some type of hearsay, so what's he going to say?
> [THE STATE]: Hearsay from – it's not hearsay. It's part of his investigation from the witness that is testifying.
> [THE COURT]: Well from who, who?
> [THE STATE]: Maurice Sauers el.
> [THE COURT]: Well, he hasn't testified yet.
> [THE STATE]: That's correct.
> [THE COURT]: So if Maurice had testified, I wouldn't have a problem with it.
> [THE STATE]: As well as from [appellant]. [She] also told what happened to this beer bottle.

[THE COURT]: Well, the problem is you're going to have to direct the questions as "did you get any testimony from [appellant] concerning the beer bottle?" I'll let you lead him there, but if you're going to start talking about Maurice and Maurice hasn't testified yet.
[THE STATE]: Hasn't testified yet.
[THE COURT]: We don't know if he is going to testify, although he is on the list to testify.
[THE STATE]: Connect [sic]. Understood. Thank you, Your Honor.
(Counsel returned to the trial tables and the following ensued:)
[THE STATE]: Detective Miller, I'm going to rephrase my question.
[THE COURT]: Let me rule first. I'm going to overrule, with the Court's instructions.
[THE STATE]: Yes, Your Honor. Thank you.
[THE COURT]: That means the same with this Court's instruction. Pardon me.
[THE STATE]: Detective Miller, I'm going to rephrase my question and I'm going to point you to a very specific question, okay. Did you learn any information from [appellant] as to how the beer bottle ended up broken next to the wall of the apartment complex?
[THE WITNESS]: Yes.
[THE STATE]: And what, and how did -- pursuant to [appellant], what the [appellant] said, how did the bottle end up there?
[THE WITNESS]: The victim threw it at her.
[THE STATE]: The victim meaning who?
[THE WITNESS]: Latreshia Gowdy.
[THE STATE]: Okay. When? When did [the victim] throw the beer bottle there?
[THE WITNESS]: At the beginning of the argument.
[THE STATE]: Detective Miller, based on your, the total of your investigation, did you ever learn from any witness involved in this, any witness that you talked to, that [the victim] used a beer bottle?
[DEFENSE COUNSEL]: Objection.
[THE COURT]: Sustained.
[THE STATE]: Did [appellant] ever tell you that she was struck with this beer bottle?
[THE WITNESS]: No.
[THE STATE]: When you. were on scene, did [appellant] ever tell you that there is a piece of a beer bottle that you can recover as evidence in this case that was used as a weapon?
[DEFENSE COUNSEL]: Objection.
[THE COURT]: Overruled.
[THE WITNESS]: No.

[THE STATE]: Did you look for one? Did you look for other pieces of beer bottle in this case?
[THE WITNESS]: No.
[THE STATE]: Did you look – Okay. Earlier you testified that you found pieces of beer bottle near the wall, correct?
[THE WITNESS]: Correct.
[THE STATE]: And then I think there was a follow-up question, did you search the rest of the crime scene for any other piece of beer bottle. Do you remember that question?
[THE WITNESS]: I did search the ent[ire] crime scene for other pieces of beer bottle.
[THE STATE]: Did you find another piece of beer bottle anywhere on this crime scene, other than where the pieces were recovered from the wall next to the apartment complex?
[THE WITNESS]: No.

On re-cross, the following colloquy occurred:

[DEFENSE COUNSEL]: And, talking about your memory, do you remember [appellant] indicating that she was attacked with the bottle before the bottle was broken?
[THE STATE]: Objection.
[THE COURT]: Overruled.
[THE WITNESS]: No.
[DEFENSE COUNSEL]: Do you -- Well, let me ask you, what was the importance of the bottle then? After speaking to her, why was it important enough to gather it up?
[THE COURT]: Her, which her?
[DEFENSE COUNSEL]: [Appellant].
[THE WITNESS]: At the initial confrontation, [the victim] picked up the bottle and was waving it around, like she was going to use it as a weapon.
[DEFENSE COUNSEL]: Now, you say initial confrontation –
[THE STATE]: Objection. He's answering the question.
[THE COURT]: Wait a minute.
[DEFENSE COUNSEL]: I'm sorry, Detective.
[THE WITNESS]: And at that point she is like didn't want any parts of it and threw it away.
[DEFENSE COUNSEL]: Who didn't want any parts of what?
[THE WITNESS]: [The victim].
[DEFENSE COUNSEL]: So she is up there, mad, angry, this woman is over there with her baby's father, her husband. They're going at it enough

for Ms., the lady upstairs to hear and you said that she just what, threw the bottle. She just gave up and just threw the bottle down and that was it?
[THE WITNESS]: Yes.
[DEFENSE COUNSEL]: Um hum. And that was right there at the stairs where [appellant] was standing on, is that correct?
[THE WITNESS]: Where the bottle is recovered or where?
[DEFENSE COUNSEL]: Yeah. Where she said "Forget this," you know, and just threw the bottle and it broke. That was right there at the stairs, is that correct?
[THE WITNESS]: Three to five feet to the left of where the stairs are.
[DEFENSE COUNSEL]: Right. Okay. And so this all went on, bottle being broken under whatever, however it happened, there with [appellant] on the steps, there at the steps, right there, you go into the front door, is that correct?
[THE WITNESS]: Yes.
[DEFENSE COUNSEL]: Okay. Didn't have anything to do with the parking lot, right?
[THE WITNESS]: No.

The State called Dr. Carol H. Allan as its final witness. Dr. Allan testified that she performed an autopsy on the victim on October 21, 2013. She observed "one stab wound and four cutting wounds."[5] The stab wound was located on the "lateral left side" of the victim's abdomen, had penetrated six inches deep, and had punctured the iliac artery, which is "the major artery that is going to supply the lower extremit[ies]." In Dr. Allan's expert opinion, the victim died as a result of "[s]harp force injuries," and more particularly, the stab wound to her abdomen. When the detectives showed her the suspected murder weapon, she opined that "the knife that [they] displayed could cause the injuries that [she] saw on [the victim]."

[5] According to Dr. Allan, cutting wounds involve an "injury on the skin [that] is longer than it is deep," and stab wounds involve an "injury on the skin [that] is smaller than it is deep."

The jury found appellant guilty of second degree murder and carrying a dangerous weapon openly with intent to injure. At the November 10, 2015, sentencing hearing, the court sentenced appellant to thirty years on the second degree murder charge and three years on the carrying a dangerous weapon openly with intent to injure charge.[6] Appellant noted this timely appeal on December 2, 2015.

DISCUSSION

Appellant's Silence as Substantive Evidence

Standard of Review

We conduct a two-part analysis to determine the correctness of a trial court's evidentiary ruling: first, we consider de novo whether the evidence is legally relevant; if we determine that the evidence is relevant, we then consider whether it was admitted in error because its "probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5–403." *WMATA v. Washington*, 210 Md. App. 439, 451 (2013) (quoting *State v. Simms*, 420 Md. 705, 725 (2011)). In conducting this analysis, we are mindful that trial courts "retain wide latitude in determining what evidence is material and relevant[.]" *Bryant v. State*, 163 Md. App. 451,

[6] The following exchange occurred at the end of the hearing:

> [THE STATE]: Your Honor, just to be clear. I know your Honor did aggregate the sentences. To be clear the second count is consecutive to the first count?
> [THE COURT]: Well, I didn't make it consecutive, it's just a 33 year sentence.
> [DEFENSE COUNSEL]: Right.
> [THE STATE]: Yes, your Honor. I just want to make sure the record's clear.

490 (2005) (quoting *Merzbacher v. State*, 346 Md. 391, 413 (1997)), *aff'd*, 393 Md. 196 (2006).

Generally, "[i]n a criminal context, we will not reverse for an error by the lower court unless that error is both manifestly wrong and substantially injurious." *Hunter v. State*, 397 Md. 580, 587 (2007) (citation omitted) (internal quotation marks omitted). When an error involves the admission of evidence, we must "be satisfied that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

Contentions

Appellant argues, citing Maryland Rule 5-401,[7] that Detective Miller's statement that she "failed to inform him that [the victim] had used a piece of beer bottle as a weapon, and that the police could recover it as evidence" was "irrelevant and lacking in probative value." She further asserts, citing Maryland Rule 5-402,[8] that because the statement is irrelevant it should not have been admitted. Appellant beseeches us to analyze Detective Miller's statement in the context of the post-arrest "privilege against self-incrimination" provided in the United States Constitution and the Maryland Declaration of Rights. More particularly, she asserts, citing *Smith v. State*, 367 Md. 348, 361 (2001), that a defendant's "failure to explain events to the police may [not] be construed as evidence of guilt." She

[7] Maryland Rule 5-401 states: "'Relevant evidence' means 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."

[8] Maryland Rule 5-402 states: "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."

looks for support in *Weitzel v. State*, 384 Md. 451, 453, 456, 462 (2004), in which the State introduced at trial "as a 'tacit admission' that [the defendant] had sat by silently as [a witness] told [police] that [the defendant] had thrown [the victim] down the stairs."

Alternatively, appellant argues that if Detective Miller's statement has some probative value, "that value was minimal, and substantially outweighed by the danger of unfair prejudice," which was particularly acute in her case because she "relied on a self-defense theory." She further argues that Detective Miller's testimony "improperly shifted the burden of proof to the defense" by implying that she "had a burden to produce certain evidence and had failed to meet that burden." More specifically, that alleged burden was to produce evidence that the victim "used the bottle as a weapon and that [she told the police they] should collect it as evidence." In appellant's view, any error under such circumstances "cannot be held harmless."

The State responds that appellant's argument that her silence should not be construed as evidence of guilt is "not properly before this Court" because she failed to object "to each question asked in [that] regard." The State asserts, citing Maryland Rule 4-323(a) and *Brown v. State*, 90 Md. App. 220, 225 (1992), that an objection must be made "to each and every question" for an issue to be preserved. In the State's view, because defense counsel failed to object to the question "[d]id [appellant] ever tell you that she was struck with this beer bottle?" his objection to the question "[w]hen you were on the scene, did [appellant] ever tell you that there is a piece of beer bottle that you can recover as evidence in this case that was used as a weapon?" was insufficient to preserve the issue.

Alternatively, the State asserts that if the issue is deemed to have been properly preserved, appellant's claim fails "on its merits" because appellant "was not silent" and even "offered her version of events with regard to the beer bottle to the police." According to the State, Detective Miller's testimony was "an exploration of the content of [appellant's] comments to police about the beer bottle," and not improper evidence of her silence. That she failed to "mention that she was struck by that beer bottle or that it could be gathered as evidence because it was used as a weapon," was not offered as evidence of her remaining silent in the presence of the police "or even that she was silent in response to any particular questions."

The State also argues that Detective Miller's testimony was relevant to how the bottle "was 'used' against [appellant] by [the victim]" and why "Detective Miller did not have the bottle tested for DNA," issues which were "brought out by defense counsel on cross-examination."[9] If the testimony had not been relevant on its own, "it became relevant once defense counsel had 'opened the door' on cross-examination." In other words, it was admissible "as a 'fair response' to the cross-examination of defense counsel regarding the

[9] The relevant portions of that cross-examination are included below:

> [DEFENSE COUNSEL]: Okay. The bottle was gathered up as a part of your investigation, is that correct?
> [THE WITNESS]: Correct.
> [DEFENSE COUNSEL]: Because you had information that it had been used by the victim against [appellant], is that correct?
> [THE WITNESS]: Correct.
>
> * * * *
>
> [DEFENSE COUNSEL]: Okay. But you didn't make a request for any DNA to be done on the bottle?
> [THE WITNESS]: No.

broken bottle." Thus, the circuit court was "well within its discretion in determining that the probative value of the evidence was not 'substantially outweighed by the danger of unfair prejudice.'"

In the State's view, the testimony of Detective Miller did not "shift the burden of proof." The jury was instructed by the circuit court on the proper burden of proof, and is "presumed to have followed these instructions." And, regardless of any alleged error in its admission, it was "harmless beyond a reasonable doubt" because appellant's self-defense narrative did not depend on being struck with the bottle or asking the police to test it for DNA. Moreover, the State contends, "there was no evidence that [appellant] actually believed that she was in immediate danger of death of serious injury" because she did not testify.

Analysis

We first consider the issue of preservation. Under Maryland Rule 4-323(a) "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent," unless, under Maryland Rule 4-323(b), a party makes a "continuing objection to a line of questions by an opposing party." Otherwise, the objection is waived.

In this case, defense counsel did not object to every question concerning the broken bottle and he did not lodge a continuing objection to such questions. Thus, the admission of *any* evidence concerning the bottle would not have been properly preserved under Maryland Rule 4-323. For example, Detective Miller testified that appellant told him that

the bottle broke when the victim threw it at her. Therefore, appellant's objection was limited to appellant's failure to request that the police collect the glass bottle as evidence. We turn now to that exchange.

Generally, "all relevant evidence is admissible" while "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. Relevant evidence is defined as "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." Md. Rule 5-401. But, even relevant evidence will 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.

In this case, Detective Miller's statement on redirect examination concerning appellant's failure to request that police recover the pieces of bottle and test it for DNA was a response to defense counsel's cross examination when counsel asked whether Detective Miller had made "a request for any DNA [analysis] to be done on the bottle." The State's question on redirect was, "[w]hen you were on the scene, did [appellant] ever tell you that there is a piece of beer bottle that you can recover as evidence in this case that was used as a weapon?" This question and Detective Miller's response that appellant had not, were relevant to why a DNA test had not been conducted on the bottle, and a response to defense counsel's attempt to undermine the thoroughness of the detective's investigation.

The probative value of this information was not substantially outweighed by the danger of unfair prejudice. Appellant's failure to ask for the bottle to be collected had no bearing on the accuracy of her version of events. In fact, on cross examination, Detective Miller testified that he had decided to gather up the bottle pieces because he "had information that it had been used by the victim" against appellant. And, as noted, on redirect Detective Miller testified that appellant had informed him that the bottle shattered when the victim "threw it at her."

This evidence did not implicate appellant's "privilege against self-incrimination." Article Twenty-two of the Maryland Declaration of Rights provides that "no man ought to be compelled to give evidence against himself in a criminal case" and the Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Nor was the corollary of that right, the State's inability to use "one's failure to explain events to the police . . . as evidence of guilt," implicated. *Smith*, 367 Md. at 361.

Unlike the defendant in *Weitzel*, 384 Md. at 453–54, no evidence was introduced at trial that appellant remained silent when confronted with specific allegations of criminal conduct at the scene of the crime or that any such silence was used as a "tacit admission" of guilt. To the contrary, the record indicates that appellant spoke to police at the crime scene and cooperated in the investigation. For example, Detective Miller stated that appellant told a patrol officer that she had used the grill scraper during her affray with the

victim and that he was told by a patrol officer that appellant had indicated that the knife was located "in the bedroom." On cross, Detective Miller confirmed that appellant told police at the scene where they "could find the knife." Appellant's argument is fundamentally flawed in that it conflates the failure to direct certain aspects of an investigation, namely not telling the investigators to collect and test the bottle, with a failure to explain her view of the circumstances surrounding the event to the police, which appellant obviously did.

And, we are not persuaded that Detective Miller's testimony "improperly shifted the burden of proof to the defense" by implying that appellant was obligated to produce evidence that the victim "used the bottle as a weapon and that [she told the police they] should collect it as evidence." That the victim had thrown the bottle at appellant was in evidence through other witnesses at trial, and there was sufficient supporting evidence to generate a jury instruction on self-defense along with an instruction that the burden of proof was on the State. *See Dillard v. State*, 415 Md. 445, 465 (2010).

In sum, we perceive no error, and even if there were, we are satisfied beyond a reasonable doubt that it did not contribute to the verdict in this case.

Separate Sentences

Standard of Review

We typically review the legality of a sentence under the de novo standard. *See Blickenstaff v. State*, 393 Md. 680, 683 (2006). The application of the "rule of lenity is a

matter of legislative intent," and thus, a question of law that is also subject to the de novo standard of review. *Latray v. State*, 221 Md. App. 544, 555 (2015).

Contentions

Appellant contends that the "trial court erred in failing to merge the two sentences" for second degree murder and carrying a weapon openly with intent to injure. She asserts, citing *Chilcoat v. State*, 155 Md. App. 394 (2004), that the "carrying of the weapon openly [was] merely incidental to the stabbing that constitute[d] the murder." And, because there is "no evidence that the Legislature [sic] intended that an individual be convicted of the additional crime of carrying a weapon openly with intent to injure where the carrying of the weapon is merely incidental to the commission of the other offense," any doubt regarding sentencing should "be resolved in favor of merger" under the rule of lenity.

Alternatively, appellant argues that her sentences should merge "as a matter of fundamental fairness." She asserts, citing *Monoker v. State*, 321 Md. 214, 222–23 (1990), that the "carrying of a weapon was 'part and parcel' of the murder and thereby an 'integral component' of it." According to appellant, her actions should be viewed as "one continuous event" because "mere moments passed between when [she] was seen holding the knife and when she stabbed [the victim]," and the "act of carrying the knife was part of a mutual fight" that resulted in the victim's death. Therefore, the facts do not support separate sentences.

Regarding her failure to preserve the fundamental fairness argument, appellant asserts that preservation should not be required. More specifically, she challenges, as

wrongly decided, this Court's decision in *Pair v. State*, 202 Md. App. 617 (2011), in which we declined to extend to fundamental fairness arguments the procedural dispensation in Maryland 4-345 that exempts other merger arguments from preservation requirements.

The State responds that appellant's "convictions do not merge under the rule of lenity because there is no doubt or ambiguity as to the Legislature's intent with respect to multiple punishments in concert with the crime of carrying a weapon openly with intent to injure." It asserts, citing *Biggus v. State*, 323 Md. 339 (1991), that the Court of Appeals has concluded, with regard to CR § 4-101's predecessor, that a primary purpose of proscribing the carrying of dangerous weapons is to discourage their use in criminal activity, and therefore, the carrying of such weapons is an aggravating factor warranting additional punishment.

Regarding appellant's fundamental fairness argument, the State contends that "the 'fundamental fairness' theory of merger is not properly before this Court" because appellant did not raise the issue of merger at sentencing. And, even if it was preserved, appellant's argument "fails on its merits" because "there is nothing fundamentally unfair about punishing [appellant] for both carrying a knife openly with intent to injure and second degree murder," and the carrying of the knife in this case was not "'clearly incidental' to the second degree murder."

Analysis

"Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental

fairness.'" *Carroll v. State*, 428 Md. 679, 693–94 (2012). Appellant advances the latter two on appeal, which we address in order.

Under the rule of lenity, "[t]wo crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence." *Marlin v. State*, 192 Md. App. 134, 167-68, (2010) (quoting *Monoker*, 321 Md. at 222). This rule of statutory interpretation applies only "when we are uncertain whether the legislature intended one or more than one sentence" for the offenses in question. *Marlin*, 192 Md. App. at 167. In other words, we "give the defendant the benefit of the doubt" when legislative intent is unclear. *Id.* at 168.

Our goal in a rule of lenity analysis is to ascertain and implement legislative intent. *Osglesby v. State*, 441 Md. 673, 681 (2015). We do so by looking first at the statute's plain language to determine whether there are "two or more reasonable alternative interpretations." *Wyatt v. State*, 169 Md. App. 394, 400 (2006). Only when the statute is ambiguous do we look beyond the statutory language to determine legislative intent though other sources. *Id.*

Appellant was convicted of violating CR § 2-204 and CR § 4-101 and sentenced to thirty years and three years respectively. CR § 2-204 states that "murder that is not in the first degree under § 2-201 of this subtitle is in the second degree,"[10] and that a "person who

[10] CR § 2-201 provides:

In general

(a) A murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration of or an attempt to perpetrate: (i) arson in the first degree; (ii) burning a barn, stable, tobacco house, warehouse, or

commits a murder in the second degree is guilty of a felony and on conviction is subject to imprisonment not exceeding 30 years." CR § 4-101 provides, in relevant part, that a "person may not wear or carry a dangerous weapon of any kind concealed on or about the person . . . openly with the intent or purpose of injuring an individual in an unlawful manner." The penalty portion of CR § 4-101 states that for a person convicted under the statute, "if it appears from the evidence that the weapon was carried, concealed or openly, with the deliberate purpose of injuring or killing another, the court shall impose the highest sentence of imprisonment prescribed."

In *Biggus*, 323 Md. at 356–57, the Court of Appeals was tasked with interpreting language nearly identical to the current penalty provision of CR § 4-101 in Maryland Code (1957, 1987 Repl. Vol., 1990 Cum. Supp.), Art. 27, § 36(a).[11] It concluded that the statutory

> other outbuilding that: 1. is not parcel to a dwelling; and 2. contains cattle, goods, wares, merchandise, horses, grain, hay, or tobacco; (iii) burglary in the first, second, or third degree; (iv) carjacking or armed carjacking; (v) escape in the first degree from a State correctional facility or a local correctional facility; (vi) kidnapping under § 3-502 or § 3-503(a)(2) of this article; (vii) mayhem; (viii) rape; (ix) robbery under § 3-402 or § 3-403 of this article; (x) sexual offense in the first or second degree; (xi) sodomy; or (xii) a violation of § 4-503 of this article concerning destructive devices.
>
> **Penalty**
>
> (b)(1) A person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to: (i) imprisonment for life without the possibility of parole; or (ii) imprisonment for life. (2) Unless a sentence of imprisonment for life without the possibility of parole is imposed in compliance with § 2-203 of this subtitle and § 2-304 of this title, the sentence shall be imprisonment for life.

[11] CR § 7-104 contains new language derived without substantive change from former Art. 27, § 36. The relevant portions of Art. 27, § 36 provided, "in case of conviction, if it shall appear from the evidence that such weapon was carried, concealed or openly, with

language expressed "a sentiment somewhat inconsistent with merger under the rule of lenity." In its view,

> [a] primary purpose of statutes proscribing the carrying or employment of dangerous or deadly weapons is to discourage their use in criminal activity. Where the underlying criminal activity does not itself necessarily involve the carrying or use of [a] dangerous or deadly weapon, the carrying or use of a dangerous or deadly weapon, in violation of a statute like § 36(a), is an aggravating factor warranting punishment in addition to the punishment imposed for the underlying criminal activity. When someone commits a crime . . . , and also employs a dangerous or deadly weapon in violation of Art. 27, § 36(a), there is no unfairness associated with the imposition of separate sentences for each offense.

Biggus, 323 Md. at 357.

The Court further pointed out that the General Assembly had taken no action to abrogate "Maryland cases [that] have uniformly refused to merge § 36(a) convictions into convictions for other offenses where such merger was not mandated by the required evidence test." *Id.* 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." *State v. Jenkins*, 307 Md. 501, 517 (1986). In other words, "[i]f each offense requires proof of a fact which the other does not . . . the offenses are not the same . . . even though arising from the same conduct or episode." *Thomas v. State*, 277 Md. 257, 267 (1976).

In this case, the jury instructions for the second degree murder charge discussed its elements in greater detail than CR § 2-204. More particularly, the State was required to

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the deliberate purpose of injuring the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed."

prove that appellant had "kill[ed] . . . another person with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result," and that "the killing was not justified;" and "there were no mitigating circumstances." The CR § 4-101 charge, on the other hand, required the State to prove that appellant "carr[ied] a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner." The "two statutes each contain a distinctive element" and one is "not a lesser included offense" of the other. *Hawkins v. State*, 291 Md. 688, 692 (1981). Stated differently, appellant could have committed a second degree murder without "carrying a dangerous weapon . . . openly with the intent . . . [to] injure," and vice versa. Thus, the circuit court did not err when it sentenced appellant separately for her convictions under CR § 2-204 and CR § 4-101.

Regarding appellant's fundamental fairness argument, we agree with the State that, because it was not raised at trial or during sentencing, it is not properly preserved for appellate review.[12] And, even if the argument had been preserved, it would fail.

There are only two Maryland cases, *Monoker*, 321 Md. 214 and *Marquardt v. State*, 164 Md. App. 95, 152 (2005), "wherein a merger was actually dictated by 'fundamental fairness' as an autonomous criterion." *Pair*, 202 Md. App. at 644. In *Monoker*, the Court of Appeals concluded that Monoker's solicitation of other individuals to commit a burglary comprised a necessary element of his conspiracy to commit burglary "and thereby an

[12] In, *Pair*, 202 Md. App. at 649, Judge Moylan opined that the "issue of merger pursuant to the so-called 'fundamental fairness' test" does not "enjoy[] the procedural dispensation of Rule 4–345(a)," and therefore must be preserved for appellate review. We decline appellant's invitation to reexamine that holding.

integral component." 321 Md. at 223–24. According to the *Monoker* court, it would have been "fundamentally unfair," under those circumstances, "to require [Monoker] to suffer twice, once for the greater crime and once for a lesser included offense of that crime." *Id.* Similarly, in *Marquardt,* this Court concluded that the "malicious destruction" of two panes of glass by Marquardt "was clearly incidental to the breaking and entering" element of his burglary charge. 164 Md. App. at 152. Therefore, under the facts of that case, we held that the "malicious destruction of property . . . should have been merged into . . . the burglary conviction." *Id.* at 152–53.

We are not persuaded that the facts in this case are so similar to the factual situations presented in *Monoker* and *Marquardt* that they compel the same result. Appellant's carrying of the knife "openly with the intent . . . [to] injure" and the murder were not a "continuous event," as in *Marquardt,* or an "integral component" or a necessary element of the murder, as in *Monoker*. Here, according to Ms. Palmer's testimony, appellant held the knife on the stoop outside Mr. Sauers el's apartment and stated "I'll be going to jail tonight," for a period of time before Mr. Sauers el exited his apartment and the victim fled into the parking lot. Additional time passed before appellant ran into the parking lot with the knife and the victim fell to the ground. Therefore, even if the argument had been preserved, fundamental fairness would not compel merger of appellant's convictions in this case.

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