

Circuit Court for Prince George's County  
Case No. CT160353A

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2087

September Term, 2016

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OLUWASHOLA AJAYI

v.

STATE OF MARYLAND

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Wright,  
Kehoe,  
Harrell, Glenn T., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Harrell, J.

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Filed: August 1, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Oluwashola Ajayi (“Ajayi”), was convicted in the Circuit Court for Prince George’s County of pandering of a minor (hereafter referred to as either “pandering” or “human trafficking”); conspiracy to commit human trafficking of a minor; assignation; and, contributing to the condition of a delinquent minor (hereafter referred to as “contributing”). The trial judge sentenced Ajayi to “twenty[-]five years, all but fifteen suspended for human trafficking; twenty-five years, all but fifteen suspended for conspiracy to commit human trafficking, consecutive; three years, consecutive, for contributing to the delinquency of a minor, and merged the remaining conviction.”

Ajayi avers now that the circuit court admitted erroneously expert testimony from a State lay witness, a law enforcement officer. According to Ajayi, the circuit court failed also to merge his sentences for pandering and contributing. He believes that the “required-evidence test,” the rule of lenity, and principles of fundamental fairness should lead to merger.

### **Facts and Procedural History**

We recount the facts as adduced during the State’s case.

Detective Thomas Crosby of the Prince George’s County Police Department conducted, on 19 January 2016, a prostitution sting operation on “Backpage.com.”<sup>1</sup> He found an ad on the website propositioning a “threesome” to be had in Clinton, MD.

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<sup>1</sup> Backpage.com is a “website, similar to Craigslist. . . . The majority of Backpage.com postings . . . are ads for prostitution in the form of ‘adult escort’ services and ‘adult entertainment.’” *Coleman v. State*, 237 Md. App. 83, 88, n.2, 183 A.3d 834, 836, n.2 (2018)

Detective Crosby, posing as a potential customer, contacted the ad’s supposed administrator. He spoke with a woman identified as Shae’Da Gough (“Gough”). He and Gough agreed to a threesome in which Crosby would pay \$250.00 for 15 minutes of sexual acts. Gough directed Crosby to meet her at the Comfort Inn in Clinton.

Detective Crosby contacted Gough by phone upon his arrival at the Comfort Inn. Gough directed him to room 310. As Crosby entered the hotel’s lobby, he noted a suspicious man. The detective called the stand-by police unit and requested them to keep an eye on the man (who Crosby thought might be a pimp) and, subject to his further direction, follow him to room 310. A young-appearing female answered the door to room 310. The young woman identified herself as C.S. Gough was present also in the room. Crosby paid Gough, and asked “if he could engage in intercourse with them . . . .” Gough acquiesced.

Crosby then identified himself to C.S. and Gough as a police officer. He summonsed Sergeant Adam Doyle and other Prince George’s County police officers to enter and search room 310. A detective remained behind in the lobby to continue to surveil the suspicious man.

The room search “yielded cell phones, condoms, and some paperwork with [what was learned later to be Appellant’s] name including a credit card bill.” At Detective Crosby’s direction, Sergeant Doyle returned to the hotel lobby and joined the other detective, who had remained behind, in requesting identification from the man. The man

offered identification as Oluwashola Ajayi. He was arrested. A search of Ajayi’s person garnished a key to room 310.

The State charged Ajayi with pandering of a minor; conspiracy to commit human trafficking of a minor; assignation; contributing; and, receiving the earnings of a prostitute who is a minor.<sup>2</sup> Gough was charged also with prostitution; human trafficking; and, contributing. She “plead guilty to prostitution and contributing to the delinquency of a minor in exchange for the State dismissing the charge of human trafficking,” and testified at Ajayi’s trial as a State’s witness.

Gough testified that she frequented Backpage.com. She emailed the administrator for a listing as an adult escort. The email address for responses was <MichaelAjayi312@yahoo.com>. Gough and Appellant agreed to meet at the Comfort Inn in Clinton on 18 January 2016. She met

[Ajayi] in the lobby [of the Comfort Inn] and they spoke about the arrangement and he told her that the room would be rented in her name and he gave her cash to that end. They discussed how she would answer a phone [] he provided her. They also discussed pricing and time increments. On [19 January 2016 Gough] spoke to four callers and three ended up meeting her at the hotel. [Gough and Ajayi agreed that he would] be nearby while she was in the room with the customer and that she would text him when the customer arrived, when the act was complete, and when the customer left. Each time that she met with the callers she received money in exchange for sex and then she split that money, 60/40, with [Ajayi].

C.S. testified, also as a State’s witness, that on 18 January 2016, she was at the Comfort Inn in Clinton with a man she knew as “Jay.” C.S. elaborated that she met Gough

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<sup>2</sup> C.S. was sixteen years old at the time of Ajayi’s trial.

also on 18 January 2016 and stayed overnight with her in room 310. She testified that she and Gough were together in room 310 on 19 January 2016 when a man arrived. The man later identified himself as a police officer.

Gough and C.S. identified Ajayi at trial as the man with whom they interacted on 18-19 January 2016. The State introduced as additional evidence advertisements posted on Backpage.com associated with the same phone number and email address connected to the ad Detective Crosby responded to on 19 January 2016. Crosby testified as follows as it related to the sting operation:

[State]: Okay. And based on your training and experience, can you tell us the connection between on-line advertisements and prostitution?

[Detective Crosby]: Yes, the website that we've been using, the main one we use is Backpage.com. You have to go to the section that says ["escort.[]"] We all know what an escort is. And then once you go to escort, then you will do a search of the [geographical] area that we may be working in that night.

[State]: What is your understanding of what an escort is?

[Detective Crosby]: Anybody who exchanges sex for money.

[State]: And you also mentioned earlier in your testimony based on your training and experience what a pimp is. What is your understanding of what that is?

[Detective Crosby]: A pimp is a person who somehow entices a person, whether it be a male or female to have sex for money, but then the pimp gets all the proceeds from the sex acts.

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[State]: Okay, and do you see the part where it says threesome in the body [of the ad]?

[Detective Crosby]: Yes.

[State]: Okay. And in your training and experience, what exactly is a threesome?

[Detective Crosby]: Three individuals having sex together at one time.

A jury convicted Ajayi of pandering of a minor, conspiracy to commit human trafficking of a minor, assignation, and contributing. He was acquitted, however, of receiving the earnings of a prostitute who is a minor. Ajayi appealed timely to this Court.

### **Analysis**

#### **I. Detective Crosby’s “Expert” Testimony.**

Before we would consider delving into the merits of Ajayi’s first question, there is a threshold problem which requires our attention. The State argues that Ajayi’s appellate question regarding Detective Crosby’s lay “expert” testimony is unpreserved for our review under Md. Rule 8-131. Ajayi’s trial counsel did not object to any of the State’s pertinent questions posed to Detective Crosby, as recounted earlier at slip op. 4-5. Moreover, Ajayi failed to demonstrate how his appellate challenge is so extraordinary, compelling, exceptional or fundamental as to warrant this Court’s exercise of plain error review.

As Appellant’s merits argument goes, the trial court usurped his right to a fair trial by allowing erroneously the State to admit expert testimony from Detective Crosby (a State lay witness) based on his specialized knowledge and experience in human trafficking and prostitution. Notably, “[Detective Crosby’s] testimony regarding Backpage.com and the specific terms used in the ads posted therein went beyond what a layperson would know.”

The trial court failed to subject Detective Crosby to the rigors of Md. Rule 5-702, which governs the admissibility of expert testimony. Ajayi acknowledges, however, that his trial counsel failed to object, but urges nonetheless that we should exercise plain error review to reach the merits of his appellate challenge.

We agree with the State’s non-preservation argument. Maryland Rule 8–131(a) states: “[o]rdinarily [ ] the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . .” Rule 8–131(a) requires a defendant to make ““timely objections in the lower court,”” or ““he will be considered to have waived them and he cannot now raise such objections on appeal.”” *Breakfield v. State*, 195 Md. App. 377, 390, 6 A.3d 381, 388 (2010) (quoting *Caviness v. State*, 244 Md. 575, 578, 224 A.2d 417, 418 (1966)). Md. Rule 8-131 provides, however, that an appellate court may exercise plain error review to “decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.”

Instances where we recognize, under plain error, an un-objected-to alleged shortcoming are when there are “compelling, extraordinary, exceptional or fundamental [circumstances] to assure the defendant a fair trial.” *State v. Brady*, 393 Md. 502, 509, 903 A.2d 870, 874 (2006) (quoting *Conyers v. State*, 354 Md. 132, 171, 729 A.2d 910, 931 (1999)). The Court of Appeals explained in *Robinson v. State*, 410 Md. 91, 111, 976 A.2d 1072, 1084 (2009), that

[an appellate court] will intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial. In that regard, we review the materiality of the error in the context in which it arose, giving due

regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.

(internal citation and quotation marks omitted).

These circumstances are absent here. Ajayi failed to demonstrate adequately how Detective Crosby’s testimony regarding “the Backpage.com website and the specific terms used in the ads posted therein” degraded his right to a fair trial. The definition of the terms “escort,” “pimp,” and “threesome,” in the context of a prostitution prosecution, are within the realm of a reasonable juror’s vocabulary and knowledge. Accordingly, we decline to engage in plain error review.

## II. Merger.

Ajayi argues that the trial court erred by sentencing him for the pandering and contributing convictions separately. He maintains that contributing merges into pandering under the required evidence test, the rule of lenity, and/or principles of fundamental fairness. The State responds that Ajayi’s convictions for contributing and pandering possess at least one distinct element not shared by the other. Thus, his convictions do not merge under the “required evidence test” of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). Moreover, according to the State, the record is replete with evidence indicating that Ajayi’s convictions fail to merge under either the rule of lenity or fundamental fairness considerations.

A substantively illegal sentence is subject generally to correction by a court at any time. Md. Rule 4-345(a) (a “[c]ourt may correct an illegal sentence at any time.”). A trial court’s determination as to the legality of a sentence under Md. Rule 4-345(a) is a question



of law subject to non-deferential appellate review. *State v. Crawley*, 455 Md. 52, 66, 166 A.3d 132, 140 (2017) (citing *Meyer v. State*, 445 Md. 648, 663, 128 A.3d 147 (2015)). Merging convictions for purposes of sentencing derives from the double jeopardy prohibition of the Fifth Amendment and Maryland common law. *Brooks v. State*, 439 Md. 698, 737, 98 A.3d 236, 258 (2014).

“Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test [of *Blockburger*], the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.” *Brooks*, 439 Md. at 737, 98 A.3d at 258. The Court of Appeals described the “required evidence test” thusly:

[i]f each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

*Twigg v. State*, 447 Md. 1, 13, 133 A.3d 1125, 1132–33 (2016) (quoting *Nightingale v. State*, 312 Md. 699, 703, 542 A.2d 373, 374–75 (1988)) (solidifying that its rendition of the required evidence test is “essentially the same language” as that iterated in *Blockburger*).

Ajayi was convicted of pandering.<sup>3</sup> The trial judge, consistent with Md. Code (2002, 2012 Repl. Vol.), § 11–303(a)(1) of the Criminal Law Article (“Crim. Law.”), instructed the jury that

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<sup>3</sup> Crim. Law § 11-303 states:

(a) (1) A person may not knowingly:

[Ajayi] is charged with human trafficking of a minor. In order to convict [Ajayi], the State must prove beyond a reasonable doubt that the defendant *persuaded, induced, enticed or encouraged another person to be taken or placed in any place for prostitution and that the victim was a minor at the time of the offense.*

(emphasis added). Ajayi was convicted also of contributing.<sup>4</sup> The trial judge instructed the jury as follows:

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- (i) take or cause another to be taken to any place for prostitution;
  - (ii) place, cause to be placed, or harbor another in any place for prostitution;
  - (iii) persuade, induce, entice, or encourage another to be taken to or placed in any place for prostitution;
  - (iv) receive consideration to procure for or place in a house of prostitution or elsewhere another with the intent of causing the other to engage in prostitution or assignation;
  - (v) engage in a device, scheme, or continuing course of conduct intended to cause another to believe that if the other did not take part in a sexually explicit performance, the other or a third person would suffer physical restraint or serious physical harm; or
  - (vi) destroy, conceal, remove, confiscate, or possess an actual or purported passport, immigration document, or government identification document of another while otherwise violating or attempting to violate this subsection.
- (2) A parent, guardian, or person who has permanent or temporary care or custody or responsibility for supervision of another may not consent to the taking or detention of the other for prostitution.
- (b) (1) A person may not violate subsection (a) of this section involving a victim who is a minor.
- (2) A person may not knowingly take or detain another with the intent to use force, threat, coercion, or fraud to compel the other to marry the person or a third person or perform a sexual act, sexual contact, or vaginal intercourse.

<sup>4</sup> Md. Code (1973, 2013 Repl. Vol.), § 3-8A-30(a) of the Courts and Judicial Proceedings Article (“Cts. & Jud. Proc.”), explains that it “is unlawful for an adult willfully to contribute to, encourage, cause or tend to cause any act, omission, or condition which results in a violation, renders a child delinquent or in need of supervision.”

[Ajayi] is charged with the crime of contributing to the delinquency of a minor. The State must prove beyond a reasonable doubt that [Ajayi] is an adult and that he willfully contributed to or encouraged and *encouraged a child to commit an act that rendered the child in need of supervision*.

(emphasis added).

Given the jury instructions regarding the nature of these two charges against Ajayi, we hold that the two offenses fail “required evidence test” analysis. To convict Ajayi of pandering requires the State to convince the jury that he persuaded, induced, enticed, or encouraged C.S. to be taken to or placed at the Comfort Inn *for prostitution*. The central theme of pandering focuses on prostitution solely. Conversely, contributing requires proof that Ajayi encouraged, caused or tended to cause any act, omission, or condition rendering C.S. *delinquent or in need of supervision*. Contributing does not require proof implicating prostitution necessarily, whereas pandering does. *See Brooks v. State*, 284 Md. 416, 420, 397 A.2d 596, 598 (1979) (explaining that the required evidence test “focuses upon the Elements of the two crimes rather than upon the actual evidence adduced at trial . . . [and] refers to that evidence needed, as a matter of law, to prove the crimes.”).

Ajayi’s merger argument under the rule of lenity fails also to gain traction. The rule of lenity dictates that:

[t]wo crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. It is when we are uncertain whether the legislature intended one or more than one sentence that we make use of an aid to statutory interpretation known as the “rule of lenity.” Under that rule, 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.

*Coleman v. State*, 237 Md. App. 83, 100, 183 A.3d 834, 843 (2018) (quoting *Monoker v. State*, 321 Md. 214, 222, 582 A.2d 525, 529 (1990)). The rule is neither absolute nor exhaustive; there are no fixed criteria for its application. *White v. State*, 318 Md. 740, 745, 569 A.2d 1271, 1274 (1990). In general, however, when evaluating a claim for lenity,

we look first to whether the charges ‘arose out of the same act or transaction,’ then to whether ‘the crimes charged are the same offense,’ and then, if the offenses are separate, to whether ‘the Legislature intended multiple punishment[s] for conduct arising out of a single act or transaction which violates two or more statutes.’

*Alexis v. State*, 437 Md. 457, 485–86, 87 A.3d 1243, 1259 (2014) (internal citation, alterations, and ellipses omitted).

As we explained above, pandering and contributing, in the context of the present case, punish different actions by Ajayi. Although his role in the events of 19 January 2016 contributed to C.S.’s delinquency and/or need of assistance, the evidence adduced at trial evinces also that Ajayi’s contributing occurred as well on other occasions separate and distinct from the events on 19 January 2016 in room 310. Notably, C.S. testified that Ajayi placed her, accompanied by Gough, at the Comfort Inn on 18 January 2016. She testified, further, that she met Ajayi earlier than on 18 January 2016. Ajayi’s supervisory actions directing C.S. to engage in illicit behavior rendered her in need of supervision or contributed to her delinquency. As the State advanced in its closing argument at trial:

[t]he fact that he transported her, that he went out of his way to pick her up wherever she was in Maryland and take her to the Comfort Inn where she was about to engage in prostitution, he contributed to her circumstances and she indeed was in need of supervision.

Thus, the State made clear to the jury that Ajayi’s contributing charge was predicated upon events transpiring *in addition* to those on 19 January 2016.

Moreover, we find no indication in the statutory language of pandering (Crim. Law § 11-303) and contributing (Cts. & Jud. Proc § 3-8A-30(a)) that the Legislature intended these charges to merge for sentencing purposes. Although Cts. & Jud. Proc § 3-8A-30(a) is silent generally on this score, Crim. Law § 11-302 dictates that any violator of the pandering statutes “may also be prosecuted and sentenced for violating any other applicable law.” With this in mind, we find that merger of Ajayi’s pertinent convictions under Crim. Law § 11-303 and Cts. & Jud. Proc § 3-8A-30(a) is not warranted by the rule of lenity.

When all else fails, as is the case at this point, Ajayi contends that his convictions should merge as a matter of fundamental fairness. “[I]t would be fundamentally unfair to impose separate sentences where, at most, the charge of contributing to the delinquency of a minor was incidental to the charge of pandering . . . The offenses are very much ‘part and parcel’ of each other.”

In deciding whether fundamental fairness requires merger, we look to whether the two crimes are “part and parcel” of one another, such that one crime is connected integrally to the other. *Monoker v. State*, 321 Md. 214, 223, 582 A.2d 525, 529 (1990). “This inquiry is ‘fact-driven’ because it depends on considering the circumstances surrounding a defendant’s convictions, not solely the mere elements of the crimes.” *Carroll v. State*, 428

Md. 679, 695, 53 A.3d 1159, 1168 (2012). Finding merger under fundamental fairness is rare, *id.*, and shall remain so.

We decline to review Ajayi’s merger argument under fundamental fairness because it does not “enjoy the procedural dispensation of [Md.] Rule 4-345(a).” *Pair v. State*, 202 Md. App. 617, 649, 33 A.3d 1024, 1042 (2011). Ajayi failed to ask the trial court to consider the principles of fundamental fairness. His neglect to do so renders his fundamental fairness appellate argument unpreserved for review. Md. Rule 8-131; *Coleman*, 237 Md. App. at 101, 183 A.3d at 844; *Potts v. State*, 231 Md. App. 398, 414, 151 A.3d 59, 68 (2016); *Pair*, 202 Md. App. at 649, 33 A.3d at 1042. *See also Carroll*, 428 Md. at 695, n.5, 53 A.3d at 1168, n.5.

Nevertheless, Ajayi’s pandering and contributing convictions are not “part and parcel” of each other. Pandering possesses a required element that contributing does not, e.g., prostitution. Furthermore, the events giving rise to the sustainability of Ajayi’s pandering and contributing convictions did not all occur on 19 January 2016. The circumstances of Ajayi’s relationship with and directions to C.S. provided a sufficient basis for the contributing conviction, and a direct and separate harm culminated ultimately from this transgression, i.e., pandering of a minor under Crim. Law § 11-303. We believe that it was, in fact, fair fundamentally to punish Ajayi under both theories. Separate wrongdoings support separate punishments. *Latray v. State*, 221 Md. App. 544, 558, 109 A.3d 1265, 1273 (2015).

**JUDGMENT OF THE CIRCUIT  
COURT FOR PRINCE GEORGE'S  
COUNTY AFFIRMED. COSTS TO  
BE PAID BY APPELLANT.**