Circuit Court for Baltimore City
Case No. 119120019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2189

September Term, 2019

MICHAEL GENTIL

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Beachley,

JJ.

Opinion by Fader, C.J.

Filed: January 6, 2021

*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.

We consider whether the Circuit Court for Baltimore City correctly decided that the law enforcement justification defense did not apply to the conduct of Michael C. Gentil, the appellant, in this case. Mr. Gentil, then a sworn officer of the Baltimore Police Department (the "Department"), was off-duty when he became involved in an altercation in which he drew his firearm on Kevon Miller. In a subsequent criminal prosecution, the court found that Mr. Gentil was not entitled to the benefit of the law enforcement justification defense because he was not acting as a law enforcement officer during the altercation. Mr. Gentil argues that he was entitled to the benefit of that defense because a reasonable law enforcement officer in his position could reasonably have taken the actions he took. He contends that the trial court erred in even considering whether he was acting as a law enforcement officer at the time and also in considering his subjective intent. We hold that the circuit court did not err in concluding that Mr. Gentil was entitled to the benefit of the law enforcement justification defense only for actions taken while he was acting as a law enforcement officer. We further hold that the court did not err in considering Mr. Gentil's subjective intent in finding that he was not acting as a law enforcement officer during his altercation with Mr. Miller.

Mr. Gentil also contends that the circuit court should have merged his convictions for first-degree assault and use of a firearm in commission of a crime of violence for sentencing purposes. However, the General Assembly has expressly provided for separate sentences for those crimes. Accordingly, we will affirm.

BACKGROUND

At approximately 9:45 p.m. on a night in January 2019, while off-duty, in plain clothes, and driving his personal vehicle, Mr. Gentil nearly ran into Mr. Miller while turning left at an intersection in Baltimore City. At the time, Mr. Miller was legally crossing the intersection to return to his nearby place of work while holding a full cup of hot tea. Although the accounts of Messrs. Gentil and Miller differ in important respects, it was undisputed at trial that following the near miss, Mr. Miller's cup of tea hit Mr. Gentil's car; Mr. Gentil stopped and exited his vehicle; the two exchanged hostile words; and Mr. Gentil drew his firearm, trained it on Mr. Miller, and directed Mr. Miller to the ground. Neither man knew the other before the incident or knew the other's identity until they met again at the police station later that night. The State's theory of the case was that Mr. Gentil was acting out of "road rage," not in a law enforcement capacity, and that he assaulted Mr. Miller. Mr. Miller's defense was that he was investigating a misdemeanor—the cup of tea thrown at his car—and took appropriate actions for his safety. We will briefly review the evidence before explaining how the trial court, proceeding in a bench trial, resolved the case.

The Evidence at Trial

Mr. Miller testified that after the near miss he stumbled backward and lost control of the cup of tea, which hit Mr. Gentil's car. Mr. Gentil then pulled over and exited his car, the two exchanged angry words, and Mr. Gentil pulled the gun from around his waist and pointed it at Mr. Miller. Mr. Gentil, who never identified himself as a police officer, then advanced on Mr. Miller with the gun still trained on him, called him vulgar and racist

names, ordered him to "lay flat on the ground," and asked him numerous times what he had thrown at the car. Mr. Miller complied with all of the instructions and explained repeatedly that the substance was tea. Mr. Gentil then put his foot on the back of Mr. Miller's head, causing his chin to hit the ground and "bust[] open," and demanded an apology, which Mr. Miller gave. Mr. Gentil eventually backed up toward his car with the gun still out and directed at Mr. Miller, got in, and left.

Mr. Miller then returned to work for a short time before deciding to go to the nearby Eastern District Police Station to report the incident. While replaying the events in his mind, Mr. Miller concluded that his assailant might have been a police officer based on the way he spoke and pointed his gun. As a result, while approaching the police station, Mr. Miller was looking for his assailant's car and eventually spotted it. At the station, Mr. Miller spoke with a supervisor who, at Mr. Miller's request, called in Mr. Gentil, who was then in uniform. The two spoke for approximately ten minutes, during which Mr. Gentil explained that he had pulled his firearm because he was uncertain what Mr. Miller had thrown at his car or whether Mr. Miller might have been armed. The supervisor offered to call in investigators to explore Mr. Miller's injury claim, but Mr. Miller declined. He also provided the supervisor with a false name, address, and phone number because he felt that the supervisor was not genuinely trying to help him. Outside the police station, two other officers stopped Mr. Miller, gave him some information about Mr. Gentil, and told him to contact the Internal Affairs Division. Mr. Miller did so the next day. Internal Affairs promptly conducted an investigation, with which Mr. Miller cooperated fully.

Mr. Gentil's version of events differed in important respects. He testified that he was on his way to work at the Eastern District Police Station at the time he encountered Mr. Miller, who was not paying attention while crossing the street. About three seconds later, he heard a "loud thud." When he pulled over to check for damage, Mr. Miller was "waving his arms" and advancing on him. Viewing Mr. Miller as a possible threat, Mr. Gentil drew his firearm and immediately identified himself as a police officer. When Mr. Miller continued to advance, Mr. Gentil ordered him to get on the ground. Mr. Miller complied, put his hands up, sat down, and explained that the substance he had thrown was tea. Once Mr. Gentil determined that Mr. Miller did not have a weapon, he decided to "tactically retreat" to his car, initially with his gun still drawn. Mr. Gentil testified that he never got closer than three feet from Mr. Miller, never touched him or kicked him, and never directed him to lie down.

After leaving the scene, Mr. Gentil proceeded to the station, where he informed his supervisor, Sergeant Laron Wilson, of his version of the incident, including that he had pulled his gun on an individual who was advancing on him and waving his arms. Sergeant Wilson directed him to write a report. While he was writing the report, Sergeant Wilson called him in to meet with Mr. Miller, who had shown up at the station.

Although his duty shift had not started at the time of the encounter, Mr. Gentil testified that he typically considered himself to be on duty at all times after "enter[ing] the confines of the City," including during that encounter.

The only witness to the incident other than Messrs. Miller and Gentil was Rhonda Cox, who was driving in the area at the time. Ms. Cox testified that she observed a

Caucasian male in regular clothing exit his vehicle, "immediately" reach for his gun, and approach an African-American male on the street, who then went "from standing to lowering." The African-American male made "no motions other than the lowering." She called law enforcement to report the situation because she "saw a Caucasian male that wasn't dressed like a police officer pulling his gun out on an African American male. And I just felt, again, that something was not right about the situation."

The State also called Sergeant Wilson. On direct examination, Sergeant Wilson testified about the version of the encounter that Mr. Gentil provided that evening, including the claim that Mr. Miller "came running up on him screaming wildly and that Officer Gentil reported that he had to pull his gun, that he was fearful and he pulled his gun and proned Mr. Miller out on the street." Mr. Gentil did not tell Sergeant Wilson that he had any physical contact with Mr. Miller, and Sergeant Wilson did not notice any injury to Mr. Miller when they met. Although Mr. Gentil completed the incident report that Sergeant Wilson directed him to complete, Sergeant Wilson neglected to submit it and, as a result, was suspended the following day. Mr. Gentil was suspended at the same time.

On cross-examination, defense counsel asked Sergeant Wilson to authenticate and review certain Department policies, including Section 20 of Department Policy 302. Although Sergeant Wilson initially testified that an officer is "considered on-duty at all times" when "within the confines of Baltimore City," on redirect he reviewed the policy itself, including provisions stating:

- "Off-duty members, both inside and outside the City limits, are to first consider whether the appropriate action can be effected by the on-duty members of the responsible law enforcement agency."

- “[Off-duty] Members should become directly involved only after due consideration of the gravity of the situation, their present physical and mental ability to act in a non-duty capacity and of their possible liability, along with that of the Department of the City of Baltimore.”
- “[C]ircumstances and events may exist when it is in the best interest of the member, Department, and community for sworn members to refrain from personally taking official police action while off-duty.”
- “Consistent with this, the [Department] cautions off-duty sworn members to use discretion when invoking police powers, particularly involving the use of a firearm. This in no way, however, relieves sworn members from their obligation to notify appropriate on-duty authorities and provide assistance when necessary.”

Sergeant Wilson also reviewed Department Policy 1106, which provides that an officer may make an arrest if the officer has probable cause to believe that a misdemeanor has been committed in the officer’s presence; and Policy 1115, the Department’s use of force policy, which includes the display of a firearm as among the lowest levels of force available to officers. He acknowledged, however, that “unholstering a firearm . . . immediately heightens safety concerns,” and that he had never seen an officer pull a gun on someone for the crimes of “littering or malicious destruction of property,” although he maintained that was not the reason Mr. Gentil gave him for pulling his firearm on Mr. Miller.

The State indicted Mr. Gentil for first-degree assault, second-degree assault, and use of a firearm in the commission of a crime of violence. The first-degree assault and use of a firearm charges were based on Mr. Gentil pointing his firearm at Mr. Miller. The second-degree assault charge was based on Mr. Miller’s claim that Mr. Gentil placed his foot on Mr. Miller’s head and pushed it down on the sidewalk during the altercation.

The Court's Ruling

During closing arguments, the court wrestled with the standard to apply in determining whether Mr. Gentil was entitled to the benefit of the law enforcement justification defense. Mr. Gentil argued that because a misdemeanor had been committed in his presence within the City of Baltimore, the court could consider only whether his use of force was objectively reasonable for a police officer responding to such a crime. The court ultimately rejected that argument and concluded that it could consider whether Mr. Gentil's intent was to act as a law enforcement officer at the time of the encounter.

In announcing its judgment, the court first made findings of fact. The court found that Mr. Miller's tea hitting Mr. Gentil's car was not an accident and that Mr. Miller had thrown the tea "in anger." Then, after the exchange of "[s]ome choice words," Mr. Gentil brought out his gun. Based largely on Ms. Cox's testimony, the court was "persuaded beyond a reasonable doubt . . . that Mr. Miller was not advancing towards . . . Mr. Gentil when [Mr. Gentil] made the decision [to pull out the gun]."

The court found that Mr. Gentil was not acting as a law enforcement officer during the incident. The court observed that aspects of Mr. Gentil's behavior were not consistent with acting as a law enforcement officer, including that (1) Mr. Gentil was advancing on Mr. Miller with his firearm pulled at the same time Mr. Miller was advancing on him,[1] and

[1] On cross-examination, Mr. Gentil had acknowledged that he was taught to retreat when he had a firearm pointed at someone who was advancing on him, but that he did not do so in this case. He also admitted that, contrary to Department policy, he did not write a contact slip to leave with Mr. Miller following the incident and he never performed a "Terry pat" to check Mr. Miller for weapons.

(2) he demanded an apology from Mr. Miller. The court also found Mr. Miller to be generally credible and observed that his behavior in going to the police station to report the incident and confront Mr. Gentil was not the behavior of someone who knew himself to be in the wrong.

The court specifically discussed the Department regulations, which, as the court summarized, give an officer "the discretion to place himself on-duty at a moment's notice if the situation calls for it." But the court was "persuaded beyond a reasonable doubt that [Mr. Gentil] was not placing himself on-duty when he got out of the car and pulled his gun out. That was not his intention to act as a police officer when he got out o[f] the car and pulled a gun out." Instead, the court found that Mr. Gentil "was just angry and in that regard he was in the same position as anybody else who in that same situation . . . would have gotten out and pulled a gun on the object of his ire." Based on those findings of fact, the court "f[ou]nd that justification is not a defense in this particular case." The court concluded that, under "the circumstances[, there was] no basis to believe that this was done in furtherance of any kind of police work. This was . . . a 'road rage' incident."

The court found Mr. Gentil guilty of first-degree assault and use of a firearm in the commission of a crime of violence but not guilty of second-degree assault. The court stated that it would have found Mr. Gentil guilty of second-degree assault as well "[i]f the standard were anything but beyond a reasonable doubt," but that Mr. Miller's initial refusal to participate in the investigation provided the court with reasonable doubt on that count.

Sentencing

In his written sentencing submission, Mr. Gentil argued in a footnote that the offenses of first-degree assault and use of a firearm in commission of a crime of violence should merge for sentencing purposes because they were based on the same conduct; namely, pointing his firearm at Mr. Miller. Merger was not discussed at the sentencing hearing, at which the court sentenced Mr. Gentil to three years' imprisonment for the first-degree assault and the mandatory minimum five years' imprisonment for the use of a firearm in commission of a crime of violence, to run concurrently. The court commented that it would not have imposed a five-year sentence if that were not the required statutory minimum. This timely appeal followed.

DISCUSSION

Mr. Gentil raises two issues in this appeal. First, he contends that the trial court erroneously considered Mr. Gentil's subjective intent in analyzing whether he should receive the benefit of the law enforcement justification defense. Second, he argues that his convictions for first-degree assault and use of a firearm in commission of a crime of violence should have merged. We conclude that the court did not err in either respect, and so will affirm.

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). "We give due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and,

significantly, its opportunity to observe and assess the credibility of witnesses." *Spencer v. State*, 450 Md. 530, 549 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)). We review the trial court's interpretation of Maryland statutes and case law without deference to determine if the ruling was legally correct. *Beall v. Holloway-Johnson*, 446 Md. 48, 76 (2016). "When reviewing mixed questions of law and fact, 'we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in that court's application of the law.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 88 (2009) (quoting *Conrad v. Gamble*, 183 Md. App. 539, 551 (2008)).

We "review[] without deference the question of whether a sentence is legal." *State v. Wilson*, 471 Md. 136, 178 (2020).

I. THE DEFENSE OF LAW ENFORCEMENT JUSTIFICATION APPLIES ONLY TO ACTIONS TAKEN WHILE ACTING AS A LAW ENFORCEMENT OFFICER.

Mr. Gentil first argues that the trial court erred in considering his subjective intent to act as a law enforcement officer at the time of the altercation. In his opening brief, Mr. Gentil contended that his subjective intent was irrelevant because the standard for assessing officer conduct for purposes of the law enforcement justification defense is objective reasonableness. In response, the State pointed out that the court did not apply a subjective standard to the question of whether Mr. Gentil's use of force was reasonable, but did so only in analyzing the threshold question of whether Mr. Gentil was acting as a law enforcement officer during the altercation. In his reply brief and at oral argument, Mr. Gentil took the position that there is no support in Maryland law for the court even to

consider that threshold question. Rather, he argued, once the law enforcement justification defense is raised, the only question before the court is whether the officer's use of force is objectively reasonable.[2] Mr. Gentil's argument is inconsistent with Maryland law and with the rationale underlying the law enforcement justification defense, which we hold applies only when a law enforcement officer is acting in that capacity.

The law enforcement justification defense provides that if an officer uses only "that force reasonably necessary to discharge his official duties . . ., [the officer] is not liable civilly or criminally for the assault or battery that may result[.]"[3] *Wilson v. State*, 87 Md. App. 512, 519 (1991); *see also Riley v. State*, 227 Md. App. 249, 258 (2016) (stating that a police officer can "raise the affirmative defense of law-enforcement justification" as a defense to criminal prosecution). In considering an officer's conduct, "the standard of review . . . is one of reasonableness. A police officer is adjudged by a different standard than that we accord to an ordinary citizen. [The officer's] duties in society are markedly different. Actions that are reasonably necessary to effect [the officer's] responsibilities go unpunished[.]" *Wilson*, 87 Md. App. at 519. That is because a law enforcement officer "is

[2] At oral argument, Mr. Gentil conceded that there would be cases involving purely personal conduct by officers in which the defense would not be applicable, but he did not offer any method of identifying those cases if the finder of fact is not permitted to consider whether an officer was acting as a law enforcement officer at the relevant time.

[3] Law enforcement justification is an affirmative defense. *Riley v. State*, 227 Md. App. 249, 259 (2016). However, as in any criminal case, the burden of persuasion to prove the elements of a charge is always on the State. *Evans v. State*, 28 Md. App. 640, 654 (1975), *aff'd*, 278 Md. 197 (1976). Thus, the State bore the burden of proving that Mr. Gentil's actions were not justified. *See In re Lavar D.*, 189 Md. App. 526, 578 (2009) (explaining the burden of production and persuasion in connection with an affirmative defense).

authorized and, indeed, frequently obligated to threaten deadly force on a regular basis. The standard of conduct demanded of a police officer on duty, therefore, is the standard of a reasonable police officer similarly situated." *State v. Pagotto*, 361 Md. 528, 549 (2000) (quoting *State v. Albrecht*, 336 Md. 475, 501 (1994)).

The most extensive examination of the law enforcement justification doctrine in Maryland case law appears in our decision in *Wilson*. There, Officer Wilson, an off-duty Baltimore City police officer, reported the theft of his sister's car, which he had been driving. 87 Md. App. at 515. When an on-duty officer arrived to investigate, that officer and Officer Wilson rode together in a patrol car, spotted the stolen vehicle, and gave chase. *Id.* When the thieves stopped, Officer Wilson and the other officer ran after separate suspects. *Id.* According to the testimony at trial, after Officer Wilson caught up with the driver, he hit the suspect in the head several times with a flashlight and then dragged him across an alley where other officers met him and joined in the assault. *Id.* at 516-17. After a bench trial, the circuit court convicted Officer Wilson of common law assault and carrying a deadly weapon openly with intent to injure. *Id.* at 515.

On appeal, Officer Wilson argued that the circuit court had improperly applied a subjective intent standard to the law enforcement justification defense.[4] *Id.* at 519. We disagreed and pointed out that the court had properly articulated and applied the correct

[4] In *Graham v. Connor*, the Supreme Court established that the proper standard to assess a claim of excessive force by a law enforcement officer was "the Fourth Amendment's 'objective reasonableness' standard." 490 U.S. 386, 388 (1989). This Court applied that standard in *Wilson*, 87 Md. App. at 520, and the *Graham* standard has been "applied consistently in Maryland courts," *French v. Hines*, 182 Md. App. 201, 262 (2008).

standard in determining that, "from the perspective of a reasonable police officer," the officer's actions in hitting the suspect "about the head without provocation or justification" were not reasonable. *Id.* at 520. We therefore affirmed the conviction. *Id.*

Mr. Gentil contends that because the Court in *Wilson* did not expressly consider whether the officer was acting in his capacity as a law enforcement officer, that is not a relevant consideration. But that argument fails to consider the language employed in *Wilson* and the rationale for the defense. In affirming the circuit court's determination that the officer's conduct was not "reasonably necessary to use *in the discharge of Officer Wilson's duties*," *id.* (emphasis added), and holding that "a police officer . . . may use only that amount of force reasonably necessary under the circumstances *to discharge his duties*," *id.* (emphasis added), this Court implicitly recognized that the justification defense is limited to an officer's conduct undertaken in the discharge of the officer's public duties. Although Mr. Gentil is correct that we did not engage in an analysis of whether the defendant in *Wilson* was acting as a law enforcement officer during the relevant events, it seems likely that that was because the issue was not contested. Although Officer Wilson was off-duty when he reported the vehicle stolen, he then joined on-duty officers in patrol vehicles to search for, chase down, and then apprehend a suspect. Whether he was acting in a law enforcement capacity at the time does not seem susceptible to a reasonable dispute, and there is no indication that it was disputed.

Similarly, there does not appear to have been any dispute regarding whether officers were acting as police officers at the time of the relevant events in other Maryland cases that have mentioned the defense. *See, e.g.*, *Riley*, 227 Md. App. at 258-59 (observing that the

defendant officer was entitled to raise the affirmative defense of law enforcement justification in a case in which an on-duty officer shot at a suspect who was fleeing from the scene of a traffic stop); *Tavakoli-Nouri v. State*, 139 Md. App. 716, 731 (2001) (recognizing that officers "have the right to take reasonably necessary measures to make [an] arrest in a manner that protects both the public and themselves," including "some degree of force," in a case in which on-duty officers were alleged to have used excessive force during an arrest at a Motor Vehicle Administration Office).

The rationale supporting the law enforcement justification defense dictates that it should be available only when the conduct at issue was undertaken while acting as a law enforcement officer. As described above, the purpose for recognizing the defense is to protect law enforcement officers who, in the discharge of their duties, are required to use a degree of force that would be unlawful if employed by private citizens. The defense is thus afforded based on the job responsibilities being performed, not qualities intrinsic to the individual who is performing them. A law enforcement officer who is acting in a private capacity has no privilege to resolve private disputes with spouses, partners, children, neighbors, or even strangers with a degree of force that would be deemed excessive if exercised by others acting privately. Extending the justification defense to an officer's private transactions would not further any legitimate law enforcement or societal interest.

We hold that a threshold issue in determining whether the law enforcement justification defense is available to a defendant is whether the defendant was acting as a

law enforcement officer at the time of the conduct at issue.[5] *See* 2 Wharton's Criminal Law § 185 (15th ed.) ("In the discharge of his official duties . . . a police officer may use whatever force is reasonably necessary to take the accused into custody."). In some cases, such as *Wilson*, *Riley*, and *Tavakoli-Nouri*, it is readily apparent that the defendant was acting in that capacity and it will not be a disputed issue. In other cases, it may be sufficiently apparent that the defense does not apply such that it will not be asserted. *Cf. Washington v. State*, 191 Md. App. 48, 66 (2010) (affirming conviction of off-duty police officer found guilty of involuntary manslaughter for a shooting inside his home where the officer raised self-defense but not the law enforcement officer justification defense). In other cases, such as this one, whether the defendant was acting as a law enforcement officer will be a disputed question for the trier of fact.[6]

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[5] Other jurisdictions are in accord. *See, e.g.*, *People v. Wittig*, 158 Cal. App. 3d 124, 132 (1984) (rejecting the law enforcement justification defense for the conduct of off-duty police officers when "there was *no evidence* from their conduct, words, or the surrounding circumstances . . . [that defendants] were acting as 'public officers' in brawling, hazing, and in shooting wildly, blindly, down a public street at a young man they had just gang-assaulted"); *State v. Smith*, 103 N.W. 944, 945-46 (Iowa 1905) (holding that when acting in an officer's "capacity as an individual," the officer has only those defenses that are available to the general public); *State v. Parker*, 378 S.W.2d 274, 282 (Mo. App. 1964) (determining that a police officer "was then acting only in the position of a private citizen" when he began to fight with a man who had stuck a knife in his tire, and thus only had the same privileges as a private citizen); *cf. Ex Parte Pettway*, 594 So. 2d 1196, 1200-01 (Ala. 1991) (affirming rejection of Alabama's arrest privilege defense where there was no evidence that the off-duty officer defendant was acting in a police capacity to arrest a driver when he shot an individual whose car had hit the officer's car).

[6] Mr. Gentil suggests that permitting this threshold inquiry into whether a law enforcement officer was acting in that capacity threatens to eviscerate the law enforcement justification defense entirely if the finder of fact is permitted to consider subjective intent. He appears to base that contention on a misapprehension of the scope of the threshold

Having established that a threshold inquiry for application of the law enforcement justification defense is whether a law enforcement officer was acting in that capacity at the time, the question remains whether a defendant's subjective intent is a proper consideration in connection with that inquiry. Mr. Gentil contends that it is not, but the only authorities he cites discuss the nature of the inquiry into the reasonableness of the officer's conduct, not the capacity in which the officer acted.

The State argues that an officer's subjective intent is a proper consideration and urges us to look to self-defense as an appropriate analogue. According to the State, just as self-defense involves both a subjective and objective component, the law enforcement justification defense does as well. Self-defense, like defense of others and duress, provides a "legal justification for criminal acts." *Johnson v. State*, 223 Md. App. 128, 146 (2015). The elements of self-defense are

> (1) The accused must have had reasonable grounds to believe himself . . . in apparent imminent or immediate danger of death or serious bodily harm from his . . . assailant or potential assailant;
>
> (2) The accused must have in fact believed himself . . . in this danger;
>
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

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inquiry, which applies to the officer's capacity generally. If the finder of fact determines that a law enforcement officer was acting in that capacity in connection with an encounter, the officer is entitled to the benefit of the law enforcement justification defense, and all actions taken must be assessed based on objective reasonableness. *See Wilson*, 87 Md. App. at 520-21. Here, the court appropriately focused on whether Mr. Gentil was acting as a law enforcement officer generally during his encounter with Mr. Miller.

Haile v. State, 431 Md. 448, 471-72 (2013) (quoting *Roach v. State*, 358 Md. 418, 429-30 (2000)). The defense thus requires both that the defendant have been objectively in danger and subjectively have "believed" that the defendant was "in th[at] danger."[7] *Haile*, 431 Md. at 472-73; *see also Bynes v. State*, 237 Md. App. 439, 446 (2018). Both of those requirements are in addition to the separate requirement that the defendant's use of force must objectively "have not been unreasonable and excessive." *Haile*, 431 Md. at 472-73.

Here, we need not determine if the circuit court was required to consider Mr. Gentil's subjective intent, because, consistent with the underlying rationale for the law enforcement justification defense, we hold that the court did not err in considering his subjective intent as a component of the totality of the circumstances to find that he was not acting as a law enforcement officer. As we have noted, the law enforcement justification defense recognizes that officers are held to a different standard than ordinary citizens because of the nature of their responsibilities and the requirement that they use force in situations in which private citizens may not. *See Pagotto*, 361 Md. at 549. But officers have no privilege to resolve private disputes with a degree of force that would be deemed excessive if exercised by any other private citizen. Put simply, a law enforcement officer intentionally acting as such should not be liable criminally or civilly for using a level of

[7] In contrast, as a defense to murder, imperfect self-defense "does not require the defendant to demonstrate that he had reasonable grounds to believe that he was in imminent danger. Rather, he must only show that he actually believed that he was in danger, even if that belief was unreasonable." *Porter v. State*, 455 Md. 220, 235 (2017). Similarly, a defendant asserting imperfect self-defense need prove only that he believed that his use of force was reasonable, not that it was. *Id.* Imperfect self-defense, however, does not justify the defendant's use of force. Instead, it merely negates malice where that is an element of a crime. *Id.* at 236.

force that would be employed by a reasonable, objective law enforcement officer in a similar situation; but an officer acting only as a private citizen should be held to the same standard as any other private citizen. As demonstrated by this case, an officer's subjective intent can be a relevant factor in determining which standard applies.

The parties presented the court with specific evidence regarding the discretion of a Baltimore Police Department officer in Mr. Gentil's position to place the officer "on-duty" upon observing a misdemeanor. Department policy permits the officer to decide to act as an on-duty officer based on certain considerations identified in the policy, including whether the incident can be better addressed by on-duty officers and "due consideration of the gravity of the situation, the[officer's] present physical and mental ability to act in an on-duty capacity," and possible liability. The State did not dispute that Mr. Gentil *could have* placed himself on-duty to investigate a misdemeanor committed in his presence. But the State disputed that Mr. Gentil actually did so.

The court was thus faced with two different scenarios. Was this, at least in part, an incident of an off-duty law enforcement officer observing a misdemeanor who decided to place himself on-duty to investigate, in which case his actions should be assessed under the parameters of the law enforcement justification defense? Or was this an incident of purely private road rage, in which case Mr. Gentil's actions should be assessed under the parameters applied to any other citizen who acted similarly? Based on a thorough review of the evidence, the trial court made a factual finding that Mr. Gentil had not placed himself on-duty when he pulled his gun on Mr. Miller, ordered him to lie on the ground, and demanded an apology. The court instead found Mr. Gentil's conduct to be reflective of

that of a private individual who exploded in anger in response to a perceived private wrong and took private action in response. We discern no legal error in the court's analysis. *Cf. Baltimore City Police Dep't v. Potts*, 468 Md. 265, 305, 309-10 (2020) (in connection with determining whether law enforcement officers are acting within the scope of their employment for purposes of liability and indemnification in tort claims, holding that the inquiry should be analyzed on a case-by-case, fact-specific basis that may involve consideration of both subjective and objective factors).

II. FIRST-DEGREE ASSAULT AND USE OF A FIREARM IN COMMISSION OF CRIME OF VIOLENCE DO NOT MERGE FOR SENTENCING PURPOSES.

Mr. Gentil next contends that the trial court erred in not merging for sentencing purposes his convictions for first-degree assault with a firearm and use of a firearm in commission of a crime of violence. Mr. Gentil argues that these offenses should have been merged under the required evidence test, the rule of lenity, and fundamental fairness because the crimes for which he was convicted have the same elements—use of a handgun in committing an assault—and the convictions were based on identical conduct—pointing a gun at Mr. Miller. The State contends that the crimes do not merge because the General Assembly has clearly expressed its intent to punish the crimes with separate sentences.[8] The State is correct.

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[8] Relying on *Pair v. State*, 202 Md. App. 617 (2011), the State also argues that Mr. Gentil failed to preserve his merger claim based on fundamental fairness. The defendant in *Pair* raised three merger issues through a motion to correct an illegal sentence pursuant to Rule 4-345(a). None of those issues had been preserved or raised on direct appeal. Notwithstanding the lack of preservation, we held that the defendant's merger claims could be raised under Rule 4-345(a) to the extent they were based on the required

A. Relevant Statutory Provisions

At the time of Mr. Gentil's offense, there were two modalities of first-degree assault: (1) intentionally causing or attempting to cause serious physical injury to another; and (2) committing an assault with a firearm. *See* Md. Code Ann., Crim. Law § 3-202(b) (Repl. 2012; Supp. 2019).[9] Mr. Gentil was convicted of the second variant.

Use of a firearm in commission of a crime violates § 4-204(b) of the Criminal Law Article if the crime is: (1) a crime of violence; or (2) a felony. Assault, including first-degree and second-degree assault crimes, comprises one of 19 categories of crimes expressly identified as a qualifying crime of violence. Crim. Law § 4-204(b) (defining "crime of violence" by reference to § 5-101 of the Public Safety Article); Md. Code Ann., Pub. Safety § 5-101(c) (Repl. 2011; Supp. 2020).

Section 4-204(c)(1)(i) of the Criminal Law Article provides: "A person who violates this section is guilty of a misdemeanor and, *in addition to any other penalty imposed for the crime of violence or felony*, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years." (Emphasis added). The statute further mandates

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evidence test and the rule of lenity because if merger were required under either of those tests, the unmerged sentences would be illegal. *Id.* at 625. However, a failure to merge based on fundamental fairness would not render the resulting sentences illegal and, therefore, we held that such a claim was not cognizable under Rule 4-345(a). *Id.* at 649. Here, by contrast, Mr. Gentil raises his merger claims on direct appeal. And although Mr. Gentil did not expressly identify fundamental fairness as a ground for his merger argument in the circuit court, he also did not restrict that argument only to one or both of the other tests for merger. Because the issue was not discussed during the sentencing hearing itself, he never identified which theory or theories he was or was not pursuing. Under the circumstances, we will address his fundamental fairness claim.

[9] In 2020, the General Assembly added a third modality of first-degree assault: "intentionally strangling another." *See* 2020 Md. Laws ch. 120.

that an individual convicted of use of a firearm in commission of a crime is not eligible for parole for at least 5 years. *Id.* § 4-204(c)(1)(ii). The trial court sentenced Mr. Gentil to three years' imprisonment for first-degree assault and the mandatory minimum five years' imprisonment for use of a firearm in commission of a crime of violence, with the sentences to be served concurrently.

B. The Three Merger Tests

When offenses are based on the same act, Maryland law "will often require that one offense be merged into the other for sentencing purposes, so that separate sentences are not imposed for the same act or acts." *Biggus v. State*, 323 Md. 339, 350 (1993). "Under Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State*, 437 Md. 457, 484 (2009). The Court of Appeals recently succinctly summarized the three tests:

> In *State v. Stewart*, 464 Md. 296, 318 (2019), this Court explained the required evidence test as follows:
>
> > Under the required evidence test—also known as the same evidence test, Blockburger test, or elements test—Crime A is a lesser-included offense of Crime B where all of the elements of Crime A are included in Crime B, so that only Crime B contains a distinct element. In other words, neither Crime A nor Crime B is a lesser-included offense of the other where each crime contains an element that the other does not.
>
> (Cleaned up).
>
> In *Johnson*[*v. State*], 467 Md. [362,] 390 [2020], this Court explained the rule of lenity as follows:
>
> > The rule of lenity is not a rule in the usual sense, but an aid for dealing with ambiguity in a criminal statute. Under the rule of lenity, a court

> that is confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant. For a court that is construing a statute, the rule of lenity is not a means for determining—or defeating—legislative intent. Rather, it is a tie-goes-to-the-runner device that the court may turn to when it despairs of fathoming how the General Assembly intended that the statute be applied in the particular circumstances. It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity. This follows from the fact that our goal in construing statutes is always to ascertain and carry out the legislative purpose of the statute and not to seek out an interpretation that necessarily favors one party or the other.

(Cleaned up).

In *Carroll v. State*, 428 Md. 679, 694-95 (2012), this Court explained the principle of fundamental fairness as follows:

> Fundamental fairness is one of the most basic considerations in all [of] our decisions in meting out punishment for a crime. In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are part and parcel of one another, such that one crime is an integral component of the other. 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.
>
> Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences. . . . One of the principal reasons for rejecting a claim that fundamental fairness requires merger in a given case is that the crimes punish separate wrongdoing.

(Cleaned up).

State v. Wilson, 471 Md. 136, 178-81 (2020).

One attribute that is common to all three tests is that none are absolute prohibitions on multiple punishments for the same conduct; all three tests bend to the clearly expressed intent of the General Assembly to permit multiple punishments. *See id.* at 182-83 & n.12. Thus, in *Wilson*, after determining that the plain language of the applicable statute's anti-

merger provision "demonstrate[d] that the General Assembly intended to allow separate sentences" for witness tampering and obstruction of justice, the Court of Appeals held "that it [wa]s not necessary to determine whether the required evidence test mandates merger of Wilson's convictions for" those offenses. *Id.* at 183. Merger was not appropriate regardless of whether the required evidence test was met. *Id.* For the same reason, "the rule of lenity also d[id] not apply." *Id.* at 183 n.12. And fundamental fairness also did not require merger because that "would negate both the plain language of [the anti-merger provision] and the legislative intent revealed by the history of the statute." *Id.* at 186; *see also Alexis v. State*, 437 Md. 457, 491 (2014) (rejecting a fundamental fairness merger argument because "the plain language of the sentencing clauses of the statutes indicate that the Legislature intended to preclude merger of sentences" and stating that fundamental fairness should not "rule the day here where the clear and plain language of the relevant statutes indicates that merger is precluded").

In sum, regardless of which merger test is employed, a state "may impose cumulative punishment if it is clearly the intent of the legislature to do so." *State v. Frazier*, 469 Md. 627, 641 (2020) (quoting *Jones v. State*, 357 Md. 141, 163 (1999)); *see also Biggus*, 323 Md. at 343 (holding that a defendant can be punished multiples times for the same conduct if the General Assembly clearly "intended to create separate offenses"); *Grandison v. State*, 234 Md. App. 564, 575 (2017) (stating that where the General Assembly has specifically authorized cumulative punishment, "a court's task of statutory construction is at an end . . . and the trial court or jury may impose cumulative punishment

under [two statutes that proscribe the same conduct]" (quoting *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983))).

C. Section 4-204(c)(1)(i), the Anti-Merger Clause

As noted, § 4-204(c)(1)(i) of the Criminal Law Article provides that a person who uses a firearm in the commission of a crime of violence must be sentenced to a statutory minimum of five years' imprisonment, and that sentence must be "in addition to any other penalty imposed for the crime of violence." The plain language of the statute thus mandates the imposition of a separate penalty for (1) use of a firearm in the commission of a crime of violence and (2) the predicate crime of violence.

Our appellate courts have consistently interpreted the statute (and its predecessor) in accord with its plain language and declined to merge sentences. *See, e.g.*, *Whack v. State*, 288 Md. 137, 149 (1980) (in construing § 36B(d) of former Article 27, the statutory predecessor to § 4-204, holding that sentences for robbery with a deadly weapon and use of a handgun in commission of a felony did not merge because it was "clear . . . that the General Assembly intended to authorize the imposition of punishment under both [statutory provisions], when one commits a robbery with a handgun"); *Grandison*, 234 Md. App. at 575 (holding that predicate crimes of violence do not merge with use of a firearm in commission of crime, as "[i]t is manifest that the General Assembly intended that a separate sentence be imposed" for both the crime of violence and the firearm charge).

In *Cagle v. State*, 235 Md. App. 593, *aff'd*, 462 Md. 67 (2018), this Court recently came to the same conclusion in a case involving the same two offenses at issue here. In *Cagle*, a law enforcement officer who fired a round at the groin of a suspect who had

already been subdued by other law enforcement officers was convicted of first-degree assault and use of a firearm in the commission of a crime of violence. *Id.* at 600. The officer argued that the offenses should have been merged because they "have the exact same elements." *Id.* at 613. Based on the plain language of the anti-merger provision, we disagreed. *Id.* at 613-14. Mr. Gentil attempts to distinguish *Cagle* on the ground that the modality of first-degree assault that was at issue there was assault with the intent to cause serious bodily injury and not assault with a firearm. However, although it is not clear which modality of first-degree assault was the basis for the conviction in that case, our opinion clearly accepted for purposes of our analysis the officer's contention that the offenses had "the exact same elements," *id.* at 613, which would only have been the case if the predicate modality were first degree assault based on the use of a firearm.[10] Thus, our holding in *Cagle* is directly on point and dispositive here.

Even if *Cagle* were not dispositive, we would not find persuasive Mr. Gentil's invitation to read an unwritten exception into the statute because, as he asserts, "there is no evidence that the legislature intended to enhance Mr. Gentil's punishment *twice* based on the *single* aggravating circumstance of use of a firearm." As we have discussed, the language of § 4-204(c)(1)(i) is direct, unambiguous, and includes no exceptions. It requires imposition of a mandatory minimum sentence for use of a firearm in commission of a crime of violence that is "in addition to any other penalty imposed for the crime of violence[.]"

[10] If the modality of first-degree assault at issue in *Cagle* had been assault with an intent to cause serious bodily injury, then use of a firearm in commission of a crime of violence would have required proof of an element that was not required to prove first-degree assault; *i.e.*, the use of a firearm.

Crim. Law § 4-204(c)(1)(i). Here, the crime of violence is first-degree assault, so the plain language of the statute requires that the punishment for the offense of use of a firearm in commission of first-degree assault must be "in addition to" any penalty imposed for that crime. It is difficult to see how the General Assembly could have been clearer. Where the General Assembly has chosen not to create an exception to an anti-merger provision, it is not our place to create one. *See Wilson*, 471 Md. at 183 (declining to read an exception into an anti-merger provision where the statutory language "does not contain an exception . . . for crimes that are allegedly the result of one act—or for any crime, for that matter"); *Whack*, 288 Md. at 148 (stating, with respect to similar language in the predecessor statute to § 4-204 concerning predicate felonies, that "[n]othing could more plainly show an intent to impose whatever punishment is provided for the felony plus the punishment set forth in [the predecessor to § 4-204]").

CONCLUSION

We hold:

1. The law enforcement justification defense applies only when a law enforcement officer defendant was acting in that capacity at the time of the conduct at issue;
2. The circuit court did not err in considering Mr. Gentil's subjective intent in finding that he was not acting as a law enforcement officer when he committed a first-degree assault; and

3. The circuit court correctly imposed separate sentences for first-degree assault and use of a firearm in commission of a crime of violence.

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