UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2229

September Term, 2014

GARY LEE SMITH, JR.

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: September 3, 2015

*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.

On September 19, 2014, the Circuit Court for Wicomico County denied appellant's motion to suppress and, thereafter, a jury convicted appellant, Gary Smith, Jr., of two counts of second-degree assault, failure to obey a reasonable and lawful order made to prevent a disturbance to the public peace, resisting arrest, two counts of rogue and vagabond, theft under $100, malicious destruction of property under $1,000, and theft under $1,000.[1]

The court sentenced Smith to 10 years, with all but 18 months suspended for second-degree assault, 60 days, consecutive, for failure to obey a reasonable and lawful order, 3 years, consecutive, for resisting arrest, 18 months, consecutive, for each count of rogue and vagabond, 90 days, consecutive, for theft under $100, 60 days, consecutive, for malicious destruction of property under $1,000, and 3 years, consecutive, for theft under $1,000. The court merged one of the second-degree assault counts into resisting arrest for purposes of sentencing and placed Smith on three years of supervised probation following his release.

Smith filed a timely appeal and presents the following questions, which we have combined and rephrased to facilitate review:[2]

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[1] Smith was found not guilty of attempt to disarm a law enforcement officer.

[2] Smith's questions were phrased, as follows:

1. Did the trial court err in denying the motion to suppress?
2. Was there insufficient evidence to convict Mr. Smith of failure to obey a reasonable and lawful order made to prevent a disturbance of the peace?
3. Was there insufficient evidence to convict Mr. Smith of malicious destruction of property?

(Continued…)

1. Did the trial court err in denying Smith's motion to suppress?

2. Was the evidence sufficient to support Smith's convictions?

3. Did the trial court err by failing to merge Smith's sentences?

Finding no error, we affirm the judgments of the circuit court.

BACKGROUND

Suppression Hearing

Prior to trial, defense counsel moved to suppress evidence that was recovered as a result of an illegal stop, arrest, and search. On April 28, 2014, around 5:40 a.m., Officer Justin Aita was dispatched to the Tide Mill Apartments in response to a 911 call that reported a "white male wearing a black shirt, black jacket, looking into car windows, jiggling car handles." Upon arrival, Aita exited his vehicle and patrolled the area on foot. During this patrol, PFC Jason Sander "found a subject meeting that description asleep in the driver's seat" of a black Honda parked in the apartment complex parking lot. Aita approached the vehicle on the passenger side and attempted to wake the individual, who he identified in court as Smith, by knocking on the windows. At the same time, Sander

(…continued)

4. Did the trial court impose an illegal sentence by failing to merge:
   a. the sentence for failure to obey a lawful order into resisting arrest;
   b. each of the sentences for rogue and vagabond into its corresponding conviction for theft; and
   c. the sentence for malicious destruction of property into the rogue-and-vagabond conviction relating to Richard Strautz?

approached the driver's side of the vehicle, and PFC Dimare approached the front of the vehicle.

When Smith woke up, the officers identified themselves as police and asked Smith to get out of the vehicle. Smith "began to motion underneath his seat" and the officers "asked him numerous times to not do that." "[A]fter maybe the fifth and eighth time of motioning underneath the seat, [the officers] all drew [their] weapons and ordered him out of the car" out of concern for their safety. After several minutes, Smith finally unlocked the door and exited the vehicle. Aita instructed Smith "to stand up and put his hands on top of the vehicle." At first, Smith seemed like he was going to comply, and he "made a motion to put his hands on top of the car[,]" but then, "he turned, pushed PFC Sander and began to run away from" the officers.

The officers chased after Smith and "told him he was under arrest numerous times for pushing PFC Sander[.]" The officers caught up to Smith about 30 feet from the vehicle and placed him under arrest. When Smith was being placed under arrest, several items, which were the subject of the motion to suppress, fell from his person onto the ground.

Aita testified that Smith was ordered out of the vehicle because the officers "were in fear that he was going to pull a gun out and shoot [them]" and "getting somebody out of the car in that situation takes them away from possibly reaching under the seat and getting a weapon out of the vehicle." Aita also explained that the officers approached the car to do a field interview and that they did not intend to detain or arrest Smith until he pushed Sander.

In denying the motion to suppress, the court explained:

> whether or not there had been an illegal stop, given the fact that the defendant doesn't have the right to contest an illegal stop and that he committed – he did commit a crime at that point, the crime of assault, that the police certainly had the right to continue to pursue him, and that any contraband or evidence that was collected by them as a result of his attempt to run, to flee, was legally seized.

Trial

Aita testified, again, at trial and gave the same testimony he gave at the suppression hearing, with the following additions. Aita explained that Smith gave Sander "a good push," which caused Sander to stumble backwards and lose his balance. Then, Smith began to run toward the apartment complex, and Aita screamed at Smith to get on the ground and put his hands behind his back because he was under arrest. The officers caught up to Smith and got him on the ground, but were unable to handcuff Smith because he was actively fighting the officers. Sander explained that Smith was face down on the ground "attempting to push up off the ground like in a push up style. He was flailing about with his upper body, [and] moving his arms back and forth[.]"

During the struggle, Smith "was yelling the whole time" and asked why he was being arrested. Sander responded that he was being arrested for assault. The struggle lasted for about one minute before the officers were able to place Smith in handcuffs. After Smith was handcuffed, he calmed down, and Sander observed a gentleman watching the incident from a second floor balcony. Aita and Sander both testified that Smith did not have permission to touch them.

While Smith was being placed in handcuffs, "multiple materials started falling out of his pockets, change and stuff like that, his wallet. And afterwards, there was just change and his property everywhere all over the ground right where the struggle ended." Thereafter, Sander conducted a search incident to arrest and opened Smith's wallet to look for Smith's identification. Sander found Smith's Maryland driver's license, as well as a Maryland driver's license belonging to a man named Richard James Strautz.

On April 25, 2014, three days before the above incident, Strautz reported to police that several items were missing from his vehicle. These items included a change purse, a black baseball cap with a red letter A, GPS, and his wallet, which stored his driver's license, Best Buy gift card, Lowe's card, and his bankcard.[3] Strautz explained that he did not give Smith permission to be in his vehicle, that his wallet was in a "closed compartment within the vehicle[,]" and that the doors and windows of his vehicle were secured before he went to bed. Police returned Strautz's license and hat to him after they recovered the items from Smith.

Police identified Paul Boyd as the owner of the black Honda Civic where Smith was found sleeping. Boyd was a resident of the Tide Mill Apartments, and he recalled that a police officer woke him up on the morning of April 28, 2014. Boyd went outside, saw Smith on the ground, and saw the coins, around 55 golden dollars, which he kept in his glove compartment, in Smith's pocket. Boyd inspected his vehicle and discovered that his glove compartment "was broken, basically like on the floor." Boyd confirmed

[3] Sander testified that Smith was wearing a black cap with a red letter A on it when he was arrested on the morning of April 28, 2014.

that the glove compartment was closed and operable the night before, that he locked the doors to his car and rolled up all the windows, and that he did not give Smith permission to be in his vehicle or take his coins.

Additional facts will be discussed below as they pertain to the questions presented.

DISCUSSION

I.

Smith argues that he "was subjected to an unlawful arrest when he pushed Sander" and that because he "was subjected to an unlawful arrest, he was justified in using force to resist the arrest." Accordingly, Smith contends, "the push did not cure the taint of the initial illegality, and all evidence subsequently obtained must be suppressed as fruit of the poisonous tree." Finally, Smith argues that even if the assault constituted a new crime, the new crime was not attenuated from the initial illegality, and even if it were, the court erred in admitting evidence of any crime other than the new crime itself.

The State responds that Smith was not arrested until after he pushed Sander and, therefore, "Smith was not privileged to push PFC Sander" because a suspect in Maryland "has no right to resist an illegal stop or frisk." The State also contends that Smith's attenuation arguments are not preserved on appeal.

We agree with the State that Smith's attenuation arguments are not preserved on appeal, but even if they were preserved, we would still conclude that the trial court did not err in denying the motion to suppress.

"In reviewing the ruling of the suppression court, we must rely solely upon the record developed at the suppression hearing." *Briscoe v. State*, 422 Md. 384, 396 (2011) (citing *Lee v. State*, 418 Md. 136, 148 (2011)).

> We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion, here, the State. We give deference to the first-level factual findings made by the suppression court, and we accept those findings unless shown to be clearly erroneous.

Id. (internal citations omitted). "We, however, make an independent appraisal of the constitutionality of a search, 'applying the law to the facts found in each particular case.'" *Id.* (quoting *Elliott v. State*, 417 Md. 413, 428 (2010)).

"The Fourth Amendment, which is applied to the states through the Fourteenth Amendment, protects against unreasonable searches and seizures." *Holt v. State*, 435 Md. 443, 458 (2013) (citing *Lewis v. State*, 398 Md. 349, 360-61 (2007)). "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of [the Fourth Amendment]." *Id.* at 459 (quoting *Whren v. United States*, 517 U.S. 806, 809-10 (1996)) (internal quotation marks omitted). On appeal, we must decide whether the seizure was a Terry stop or an arrest at the time when Smith pushed Sander.

"A '*Terry*' stop refers to a brief investigative detention which is justified when police have an articulable, reasonable suspicion that criminal activity may be afoot." *Elliott v. State*, 417 Md. 413, 429 n.3 (2010) (quoting *Terry v. Ohio,* 392 U.S. 1, 30 (1968)). "The *Terry* stop is 'less intrusive than a formal custodial arrest,' is limited in duration, and purpose and 'can only last as long as it takes a police officer to confirm or

dispel his suspicions.'" *Id.* (quoting *Swift v. State,* 393 Md. 139, 150 (2006)). "At times, [however,] arrest-level force may be warranted in making a[n investigatory] stop, 'to protect officer safety or to prevent a suspect's flight.'" *Riggins v. State*, 223 Md. App. 40, 62-63 (2015) (quoting *Elliott,* 417 Md. at 429).

"We have defined an arrest in general terms as the detention of a known or suspected offender for the purpose of prosecuting him for a crime." *Belote v. State*, 411 Md. 104, 114 (2009) (quoting *Bouldin v. State*, 276 Md. 511, 516 (1976)) (Internal quotation marks omitted). "[I]n order for there to be an arrest . . . there must always be an intent on the part of one to arrest the other and an intent on the part of such other to submit." *Id.* at 114-15 (Internal quotation marks omitted). "Ordinarily, therefore, there can be no arrest where there is no restraint or where the person sought to be arrested is not conscious of any restraint." *Id.* at 115. Accordingly, "[w]hen a police officer directs a person to stop but the person instead flees, there is neither restraint nor submission to custody." *Riggins*, 223 Md. App. at 62.

"In determining whether an investigatory stop is in actuality an arrest requiring probable cause, courts consider the totality of the circumstances." *Riggins*, 223 Md. App. at 62 (quoting *In re David S.,* 367 Md. 523, 535 (2002)) (Internal quotation marks omitted). "'Not every seizure of a person is elevated automatically into an arrest, simply because the police used measures . . . more traditionally associated with arrest than with investigatory detention.'" *Id.* (quoting *Barnes v. State*, 437 Md. 375, 391 (2014)) (internal quotation marks omitted).

Smith argues that he was under arrest when "three officers pointed their guns at [him] and ordered him out of the car, and [he] submitted to the show of authority by exiting the car[.]" We disagree. The testimony presented at the suppression hearing was that the officers asked Smith to exit the vehicle and to place his hands on the car. Even though Smith exited the car voluntarily, he did not submit to the police show of authority because, instead of putting his hands on the vehicle, he turned around and pushed Sanders. Smith then ran away from police, which as stated above, is "neither restraint nor submission to custody." *Riggins*, 223 Md. App. at 62. The testimony also indicated that the officers only pulled out their weapons for the purpose of officer safety and that as soon as the officers determined that Smith was unarmed, they re-holstered their weapons. The stop was limited in duration, and Aita testified that he did not intend to arrest Smith until after Smith pushed Sander. In considering the totality of the circumstances, the testimony elicited at the suppression hearing supports the conclusion that the seizure was an investigatory stop and that Smith was not under arrest at the time he pushed Sander.

Regardless of whether police had reasonable articulable suspicion sufficient to justify the investigatory stop, an individual may not use force to resist an illegal stop. *See Hicks v. State*, 189 Md. App. 112, 125 (2009) ("There is no privilege to resist either an unlawful *Terry* stop or an unlawful frisk." (Internal citations omitted)). Accordingly, when Smith pushed Sander, he was not resisting an illegal arrest, as he claims, but rather, Smith committed an assault, which gave the officers probable cause to arrest him.

When presented with similar facts, in *Hicks*, we concluded that the arrest and the resulting search were justified even though the initial stop was illegal. 189 Md. App. at

125. In that case, Hicks stepped out of the vehicle when ordered to do so, but similar to Smith, who did not follow the instruction to place his hands on the vehicle, Hicks was "uncooperative and combative when directed to take a stance to allow the officer to frisk him." *Id.* Hicks "threw his right elbow back at [the officer], missed, . . . and ran toward the back of the car . . . and he was, basically, fighting us, elbowing us, trying to get away from us." *Id.* We concluded that because there was "no privilege to resist [ ] an unlawful *Terry* stop . . . [a]ppellant's thrust of his elbow at Officer Gottlieb was an assault[.]" *Id.* Accordingly, we held that the police were permitted to arrest appellant for the assault and, pursuant to that arrest, were permitted to conduct a search incident to arrest, wherein a handgun was recovered. *Id.*

In the instant case, while the officers were placing Smith under arrest for assaulting Sander, the items that the defense sought to suppress fell from Smith's person to the ground and, at that point, were in plain view in a public location where the officers were legally permitted to be. The evidence, therefore, was obtained during a lawful arrest, notwithstanding that the initial stop was arguably illegal. The court, therefore, did not abuse its discretion in denying Smith's motion to suppress in a situation where Smith committed a new crime, which was an intervening circumstance that attenuated the taint from any prior illegal police activity. *See State v. Holt*, 206 Md. App. 539, 565 (2012) (holding that "a new crime, even if causally linked to illegal activity on behalf of law enforcement, is an intervening circumstance that attenuates the taint from that illegal [police] activity" and that "[e]vidence of the new crime should not be suppressed"), *aff'd on other grounds*, 435 Md. 443 (2013).

II.

Next, Smith argues that there was insufficient evidence to support his conviction for failure to obey a reasonable and lawful order made to prevent a disturbance of the peace and his conviction for malicious destruction of property.

"In reviewing a question regarding the sufficiency of the evidence presented at trial, the primary question we ask is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Haile v. State*, 431 Md. 448, 465 (2013) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). As an appellate court, "'[w]e do not re-weigh the evidence,' but, instead, seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Id.* at 466 (quoting *Smith*, 374 Md. at 534). "'The limited question before us, therefore, is not whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded any rational fact finder.'" *Olson v. State*, 208 Md. App. 309, 329 (2012) (quoting *Fraidin v. State,* 85 Md. App. 231, 241 (1991)) (emphasis in original), *cert. denied*, 430 Md. 646 (2013).

We address each challenged conviction, in turn below.

Failure to obey a reasonable and lawful order

Smith argues that the "State produced no evidence showing that the officers intended to prevent a disturbance of the peace." Rather, Smith argues that the orders were "made to compel a suspect to submit" and, therefore, "they cannot support a

conviction for failure to obey an order intended to prevent a disturbance of the peace." The State responds that "[t]here was sufficient evidence from which a reasonable juror could conclude that the lawful orders, which Smith concededly failed to obey, were made for the dual purpose of compelling Smith to submit to arrest and to prevent a disturbance of the peace."

As to this charge, the court instructed the jury: "[T]he State must prove that the defendant did willfully fail to obey a reasonabl[e] and lawful order of a law enforcement officer made to prevent a disturbance of the public peace." The court also instructed the jury that "[i]n evaluating the evidence, you consider the light of your own experiences. You may draw any reasonable conclusions or inferences you believe are justified by common sense and your own experiences."

Here, the evidence, viewed in the light most favorable to the State, demonstrated that the incident in this case occurred around 6:00 a.m. in the parking lot of a residential area. During the struggle, Smith was yelling the entire time, flailing his arms, and actively fighting the police officers. The officers asked Smith to stop fighting and to put his arms behind his back, but he refused. During this time, Sander observed a man on a second floor balcony watching the incident.

Based on these facts, a rational juror could have concluded that, due to the early hour of the morning, there were residents sleeping in their apartments who would have been disturbed by Smith's yelling. There was even testimony that at least one resident witnessed the incident from the balcony of his apartment. The jury was entitled to draw any reasonable conclusions or inferences that were justified by common sense and their

own experiences. Accordingly, there was sufficient evidence from which a rational juror could conclude that the lawful orders, which Smith failed to obey, were made, at least in part, to prevent a disturbance to the residents who lived in close proximity to the apartment complex parking lot.

Malicious Destruction of Property

Smith also argues that there was no evidence "that, if Mr. Smith caused the glove box in Boyd's car to break, he did so with malice or intent." The State responds that, in viewing the facts in the light most favorable to the State, the jury could have concluded, based on how the glove box was broken, that "Smith willfully applied force to the glove box in order to gain access to and to steal its contents."

As to the charge of malicious destruction, the court instructed the jury:

> In order to convict the defendant of malicious destruction of property, the State must prove: that the defendant damaged, destroyed or defaced somebody else's property; that he acted with the intent to damage, destroy or deface that property; that he acted without legal justification; and that he caused damage to that property in an amount less than $1,000.

Boyd testified that the glove compartment in his car was closed and operable the night before, that he locked the doors to his car and rolled up all the windows, and that he did not give Smith permission to enter his vehicle. The following morning, Boyd inspected his vehicle and discovered that his glove compartment "was broken, basically like on the floor." A photograph of the damaged glove compartment was admitted into evidence as State's Exhibit 5B. The photograph showed that the glove compartment was ripped out of the dashboard of the vehicle.

Smith argues that no reasonable juror could find that he had the requisite intent to commit the crime because it was "just as likely that Mr. Smith acted negligently as it is that he acted intentionally and with malice[.]" A reasonable juror, relying on their own common sense and personal experiences could have concluded, based on the photograph and Boyd's testimony, that Smith intended to destroy the property in order to obtain whatever was inside the glove compartment. Accordingly, the evidence was sufficient to support Smith's conviction for malicious destruction of property.

III.

Finally, Smith argues that the court erred by failing to merge several of his sentences under the rule of lenity and principles of fundamental fairness. The State responds that "this Court should affirm the imposition of separate sentences for all of Smith's convictions."

"The Court of Appeals has recently reaffirmed that we recognize '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.'" *Bishop v. State*, 218 Md. App. 472, 505 (2014) (quoting *Carroll v. State,* 428 Md. 679, 693-94 (2012)), *cert. denied*, 441 Md. 218 (2015). Because appellant does not argue that the required evidence test applies, we only address merger under the rule of lenity and the principle of fundamental fairness.

The rule of lenity, is "applicable to statutory offenses only" and "provides that where there is no indication that the [General Assembly] intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other." *Garner v. State*, 442 Md. 226, 248 (2015)

(quoting *McGrath v. State*, 356 Md. 20, 25 (1999)) (Internal quotation marks omitted). "The rule of lenity is simply 'an aid for dealing with ambiguity in a criminal statute[,]' 'a tool of last resort' that is applied only where a court 'is confronted with an otherwise unresolvable ambiguity in a criminal statute[.]'" *State v. Johnson*, 442 Md. 211, 224 (2015) (quoting *Oglesby v. State,* 441 Md. 673, 681 (2015)).

"Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences." *Carroll*, 428 Md. at 695. "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." *Id.* (quoting *Monoker v. State,* 321 Md. 214, 223-24 (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." *Id.* (quoting *Pair v. State*, 202 Md. App. 617, 645 (2011)). "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." *Id.* at 697 (Citations omitted).

Failure to obey and Resisting Arrest

Smith argues that merger is required because "it is impossible to distinguish the conduct underlying the resisting-arrest conviction from the conduct underlying the failure-to-obey conviction." The State responds that there is no ambiguity in either statute and that fundamental fairness does not require merger because the convictions "addressed distinct harm to distinct victims[.]"

Smith does not argue that there is ambiguity in either statute nor does he identify any legislative history that might suggest that the legislature did not intend to impose separate sentences in this instance. We have found no ambiguity in either statute and, therefore, we conclude that merger is not required under the rule of lenity. *See Bishop*, 218 Md. App. at 506 ("Mr. Bishop doesn't seriously contend that the rule of lenity applies: he raises no *specific* argument that it does and cites to no statutes or legislative history that suggests it might, and we see no basis on which to conclude that the General Assembly might have intended the handgun charge to merge.").

Merger is also not required under the principle of fundamental fairness because the crimes punish separate wrongdoing. The failure to obey an order to prevent a disturbance to the public peace statute punishes a person for not complying with an order that is aimed at protecting the general public. *See* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 10-201(c)(3). The resisting arrest statute punishes a person for using physical force against an officer during a lawful arrest. *See* CL § 9-408(b)(1). The crimes, therefore, punish separate wrongdoing in that resisting arrest involves using force directed at an officer, while the failure to obey an order involves disturbing the public. Accordingly, merger was not required under fundamental fairness, and the court did not abuse its discretion by imposing sentences on both counts.

Merger of Rogue and Vagabond into Theft

Next, Smith argues that his convictions for rogue and vagabond must merge into the corresponding conviction for theft because a "person's presence with the intent to commit theft would be incidental to the theft itself." Smith points to CL § 6-205(f),

which prohibits convictions for both theft and fourth degree burglary and argues that if he "could not be convicted of both theft and rogue and vagabond in the context of a house, it is fundamentally unfair that the same prohibition should not extend to the same crime in the context of a vehicle."

The State responds that "rogue and vagabond (which is essentially burglary of a vehicle) and theft do not merge on any grounds because they are based on different conduct and protect different interests." With respect to the merger provision in the fourth-degree burglary statute, the State argues that "the conspicuous absence of a similar provision in the rogue and vagabond statute, makes clear that the legislature intended to permit separate punishments for both offenses."

Smith was convicted of two counts of rogue and vagabond pursuant to CL § 6-206(b), which provides: "A person may not be in or on the motor vehicle of another with the intent to commit theft of the motor vehicle or property that is in or on the motor vehicle." Smith was also convicted of two counts of theft pursuant to CL § 7-104.

As Smith points out, the fourth-degree burglary statute includes a merger provision, which provides: "A person who is convicted of violating § 7-104[4] of this article may not also be convicted of violating subsection (c)[5] of this section based on the

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[4] CL § 7-104 contains the general theft provisions.

[5] Subsection (c) provides:

A person, with the intent to commit theft, may not be in or on:

(1) the dwelling or storehouse of another; or

(Continued…)

act establishing the violation of § 7-104 of this article." CL § 6-205(f). The rogue and vagabond statute, however, does not include a similar merger provision. Had the legislature intended to prohibit an individual from being convicted of both rogue and vagabond and theft, it easily could have added similar language from CL § 6-205(f) to the rogue and vagabond statute. *See Cantine v. State*, 160 Md. App. 391, 414 (2004) ("'We cannot assume authority to read into the Act what the Legislature apparently deliberately left out.'" (quoting *Price v. State*, 378 Md. 378, 388 (2003)). Because the rogue and vagabond statute does not include a merger provision, we must assume that the legislature did not intend to prohibit separate sentences for rogue and vagabond and for theft. The statutes in this case are not ambiguous, and, therefore, the rule of lenity does not require merger.

Merger is also not required under the principles of fundamental fairness because the crimes punish separate wrongdoing. The convictions and sentences for rogue and vagabond punish Smith for breaking into both Boyd's and Strautz's vehicles while the theft convictions punish Smith for taking the items inside the vehicles. Accordingly, the court did not abuse its discretion in imposing separate sentences in this instance.

Merger of Malicious Destruction of Property into Rogue and Vagabond

Finally, Smith argues that merger is required because the "malicious destruction of property occurred in the course of the alleged" rogue and vagabond conduct. The State

(…continued)

(2) a yard, garden, or other area belonging to the dwelling or storehouse of another.

responds that there was no ambiguity as to whether the legislature intended to impose separate sentences and that the crimes were not so closely intertwined because "the malicious destruction occurred after the crime of rogue and vagabond was completed."

Again, Smith does not argue that either statute was ambiguous or identify any language that might suggest that the legislature did not intend to impose separate sentences in this instance. *See Bishop*, *supra*, 218 Md. App. at 506. We are not persuaded that there is any ambiguity in either statute and, therefore, merger is not required under the rule of lenity.

We are also not persuaded that merger is required under the principles of fundamental fairness. In *Marquardt v. State*, one of only two cases that have merged sentences based solely on the principles of fundamental fairness, the malicious destruction charge stemmed from breaking the victim's front door, which was the same conduct that supported the breaking element of fourth-degree burglary. 164 Md. App. 95, 111-12, *cert. denied*, 390 Md. 91 (2005); *see Carroll*, 428 Md. at 696 n.6 ("Our research discloses only two cases in which Maryland courts have required merger based solely on the principle of fundamental fairness: *Monoker* in this Court, and *Marquardt v. State* in the Court of Special Appeals[.]"). Under those circumstances, we concluded that "the malicious destruction of property was clearly incidental to the breaking and entering" and, therefore, merged the malicious destruction of property conviction into the fourth-degree burglary conviction. *Marquardt*, 164 Md. App. at 152-53.

Here, however, the breaking of the glove compartment was not incidental to the breaking into the vehicle. Rather, the testimony permitted an inference that Smith first

broke into the vehicle and then, once inside, damaged the glove compartment. Because the destruction of property was not incidental to the breaking into the vehicle, merger was not required under the principle of fundamental fairness and, therefore, the court did not abuse its discretion in imposing separate sentences.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.