UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1356

September Term, 2011

TIMOTHY GASKINS

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Reed,

JJ.

Opinion by Reed, J.

Filed: May 20, 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.

This matter arises out of a fight that escalated into a shooting in Baltimore City. Appellant Timothy Gaskins was tried and convicted by a jury in the Circuit Court for Baltimore City on two counts of attempted second-degree murder; two counts of use of a handgun in a crime of violence; two counts of wearing and carrying a handgun; two counts of reckless endangerment; and one count of illegal possession of a regulated firearm. The circuit court imposed sentences of imprisonment totaling fifty-four years. Appellant now appeals[1] his convictions and presents the following questions for our review, which we have rephrased[2] as follows:

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[1] Appellant's original notice of appeal was dismissed in April 12, 2012. After filing a Motion to Rescind Order Dismissing Appeal, which we granted on September 23, 2013, appellant filed the present appeal.

[2] Appellant originally presented his questions as follows:

I. Did the trial court fail to comply with Rule 4-215?

II. Did the trial court abuse its discretion when it denied Mr. Gaskins's motion for a mistrial after a witness referred to the fact that Mr. Gaskins had previously been incarcerated?

III. Did the trial court abuse its discretion when it permitted the prosecutor to introduce a photograph of Mr. Gaskins in shackles?

IV. Did the trial court commit plain error when it instructed the jury on concurrent intent?

V. Must Mr. Gaskins's sentence for wearing and carrying a handgun merge into his conviction and sentence for use of a handgun?

VI. Must Mr. Gaskins's sentence for reckless endangerment merge into his conviction and sentence for attempted second-degree murder?

I. Did the trial court err when it declined to conduct a Maryland Rule 4-215 inquiry?
II. Did the trial court abuse its discretion when it denied appellant's motion for mistrial on the basis of impermissible bad acts evidence?
III. Did the trial court abuse its discretion in admitting potentially prejudicial evidence?
IV. Did the trial court commit plain error in the instruction it gave to the jury on concurrent intent?
V. Did the trial court err when it did not merge appellant's sentence for wearing and carrying a firearm into his sentence for unlawful use of a handgun and his sentence for reckless endangerment into his sentence for attempted second-degree murder?

We shall affirm appellant's convictions for second-degree murder, unlawful use of a handgun, and possession of a regulated firearm by a disqualified person. We shall vacate, however, appellant's sentences for wearing and carrying and for reckless endangerment because we determine those sentences merge into his sentences for unlawful use of a handgun and attempted second-degree murder, respectively. We explain further.

FACTUAL AND PROCEDURAL BACKGROUND

Andrea Brown was watching a local pick-up basketball game in an alley in her neighborhood near Broadway and Madison Street in East Baltimore City on September 1, 2009. The father of Andrea's child, Kevin Brockett, was participating in that game.

Andrea was joined in the alley by her sister, Alexandria, and Kevin's brother, James Brockett.

At one point during the game, a group of several women walked past the spectators in the alley. In this group was a woman who went by the name "Boo Boo" and her companion Brielle. Boo Boo and Brielle seemingly did not care for Andrea, as Brielle referred to her as "Princess." As the women walked past Andrea and Alexandria, they expressed their contempt for the two sisters. The sisters did not take kindly to this, and Andrea and Boo Boo eventually came to blows.

Before the fight intensified, one of the women threatened to "jump in [the fight]," to which Kevin responded by threatening to join the fight as well. This greatly concerned appellant, who then made a phone call. According to James, the call was ostensibly to secure support for the fight; Kevin, however, was not clear as to who appellant called. The fight continued to escalate and, eventually, Alexandria joined the melee. Soon after Alexandria became involved, all the women were fighting.

Kevin and James were drawn away from the game and entered the fray in an attempt to stop the fighting. The brawl took a turn for the worse when Alvin Brown, Andrea's brother,[3] struck one of the women in the fight. The woman who Alvin hit was, in fact, the mother of appellant's child.

[3] The record is unclear if Alvin is also Alexandria's brother as well.

Just after Alvin struck one of the fighting women, he was sprayed in the face with pepper spray and the fight ended. Nevertheless, appellant was deeply upset by the turn of events and told James that he would "pay for that." As the fight ended, appellant got into a black car, drove off, and returned mere minutes later. He got out of the car and walked toward the house where Andrea, Alexandria, and Alvin lived. Kevin was sitting on the steps of the house with one of Andrea's relatives when appellant approached them. Appellant demanded to know who had been speaking disrespectfully at the outset of the fight.

Kevin and Andrea's cousin demurred. It was not until James came jogging past that appellant finally lost his temper. Appellant produced a gun, asked James where he was going, and then began firing at James. Kevin testified that he told James to run once appellant began shooting, but he did not think appellant was shooting to kill because he was aiming toward the ground. Andrea quickly ran into the house and called the police when she saw James running and appellant in hot pursuit firing shots.

James escaped, but the bullets found other targets instead. Alexia Garcia was leaving from a class at the Kennedy Krieger Institute near the intersection of Madison and Broadway, when she heard the gunshots. Mere seconds later, she felt a warmth in her hand and realized one of the bullets had struck her. Anna Matthews also heard gunshots as she was walking from the Institute, and upon reaching her car, noticed a bullet hole in her bag and a bullet inside the bag itself.

The police apprehended James later that evening. When questioned, James explained that appellant had shot at him and then identified appellant from a photo array. The police also interviewed Kevin, Andrea, and Alexandria about the shooting. Kevin and Andrea both separately identified appellant from a photo array. In addition, during appellant's trial, James, Kevin, and the mother of Andrea and Alexandria, Sholavet Hawkins, were shown a security video that showed appellant and the black car in which he rode prior to the shooting. James, Kevin, and Sholavet were able to identify appellant in the surveillance video as the individual standing next to the black car.

Appellant was arrested in the evening of September 1, at a Baltimore County residence. As officers arrived at the residence, appellant arrived in the same dark-colored car the witnesses described seeing him get in and out of prior to the shooting.

Appellant was tried and convicted by jury in May 2011. He was sentenced to a term of incarceration totaling fifty-four years on July 27, 2011. On August 1, 2011, he timely noted his appeal. On April 5, 2012, however, this Court dismissed the appeal because appellant did not timely file his brief by March 26, 2012. Appellant filed a Motion to Rescind Order Dismissing Appeal on August 29, 2013, which we granted on September 23, 2013, and this appeal proceeded.

DISCUSSION

i. Request to Discharge Counsel

A. Parties' Contentions

Appellant first contends he made a sufficiently clear request to discharge counsel under Maryland Rule 4-215, and the circuit court failed to conduct the required inquiry under the rule.

The State disagrees and explains that, although the circuit court is required to conduct a Rule 4-215 inquiry when a defendant does in fact request a discharge of counsel, appellant did not make that request and the circuit court committed no error in not conducting the required inquiry.

B. Standard of Review

The circuit court's compliance with Maryland Rule 4-215 is reviewed *de novo*. *Gutloff v. State*, 207 Md. App. 176, 180 (2012). We require strict compliance with the directives of the rule. *See Webb v. State*, 144 Md. App. 729, 741 (2002).

C. Analysis

Appellant states that certain remarks he made during a colloquy with the circuit court in a pre-trial motions hearing were sufficient to trigger the operation of Rule 4-215(e). The circuit court failed, according to appellant, to conduct the necessary inquiry under the Rule regarding discharge of counsel. Appellant argues this warrants reversal of his convictions. We disagree. The controverted colloquy contains no statements—

unambiguous or otherwise—indicating appellant's displeasure with his attorney or his desire to seek new counsel.

Rule 4-215(e) provides that

> [i]f a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

What constitutes a "request" to discharge counsel is not defined by the Rule, nor does the Rule's history provide any guidance. *See Gambrill v. State*, 437 Md. 292, 302 (2014). As our Court of Appeals has established, a "request" under 4-215(e) is broadly defined. In order to trigger the inquiry, a request need only be "any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel." *Williams v. State*, 435 Md. 474, 486–87 (2013) ("*Williams II*"). A defendant need not make an explicit request nor is he required to express his position or desire to discharge his attorney according to a specific manner. *Id.* at 486. The defendant himself

must indicate he wishes to discharge counsel. *See Henry v. State*, 184 Md. App. 146, 169–70 (2009) (holding Rule 4-215 not triggered because request for new counsel was based on conversations between defendant's mother and public defender, and defendant himself did not indicate he wished to discharge counsel). Additionally, the request should be unconditional. *See State v. Taylor*, 431 Md. 615, 637–38 (2013) (holding collective statements regarding postponement request of public defender and private attorney, which contained conditional assertion that private attorney would represent defendant if postponement were granted, were insufficient to trigger Rule 4-215(e) inquiry).

Even if the statements are ambiguous or unclear, as long as there is some indication the defendant wishes to discharge counsel, a court must undertake the 4-215 inquiry. *See State v. Davis*, 415 Md. 22, 27, 34–36 (2010) (concluding that ambiguous statements by defendant, which were relayed by defense counsel to court on day of trial, indicating his desire for jury trial and new counsel were sufficient to trigger 4-215); *Snead v. State*, 286 Md. 122, 126–27 (1979) (holding that 4-215 inquiry triggered where defendant's statements to court were unclear as to whether he wished to discharge or waive counsel; such statements "serve[] to alert the trial judge that further inquiry may be necessary."); *Gambrill*, 437 Md. at 304–05 (holding that statement by public defender—"Your Honor, on behalf of [defendant], I'd request a postponement. He indicates he would like to hire private counsel in this matter"—was ambiguous, but that lack of clarity did not preclude need for 4-215 inquiry).

The colloquy in which appellant argues that he made a 4-215(e) request took place in a pre-trial motions hearing, where the parties were discussing a potential plea agreement:

> [APPELLANT]: Can I say one thing, please?
>
> COURT: Uh-huh.
>
> [APPELLANT]: This is my issue with the whole thing, (inaudible). She would tell me about a case that was similar to this, right. And what she actually got, right. Even when I had my lawyer (inaudible), right. She convinced me that she was more better qualified, right. That her and her got a history together.
>
> COURT: She—
>
> [APPELLANT]: Now, listen to me.
>
> COURT: She might be.
>
> [APPELLANT]: This is what I'm saying.
>
> COURT: But you know, go ahead. When you're finished I'm going to tell you why. Okay. Go ahead.
>
> [APPELLANT]: She even convinced me, like, they had a thing like, you know what I mean and she knew how to handle this. Up until, not last Friday, the Friday before last, she was my attorney, right.
>
> [STATE'S ATTORNEY]: No.
>
> [APPELLANT]: Listen, I never received a letter from her saying she wasn't my attorney, right.
>
> COURT: Okay.

[APPELLANT]: All I know is he came to the jail, right, at 3:00 and said I'm your attorney. And then I don't think that she turned over everything to him.

COURT: Well, if there's anything that hasn't been turned over, you let him know and he'll let me know and we'll see what we can do about that. Okay. The only reason I brought you all u[p] was to tell you—

[APPELLANT]: I thought they was going to bring me into court and say, I want to step down from being your attorney. There wasn't nothing brought to my attention, right. It was, like, here you go. Right. Even though I think he's a good attorney but it wasn't a (inaudible) right. When I had a paying attorney that I was paying that she came into the courtroom and they made her make a decision.

COURT: Didn't you pay the attorney to come on in here and try this case.

[APPELLANT]: That's the—he was doing it pro bono. I didn't have to pay him—I didn't have to pay him what he normally gets, right. I can never get that back, right.

COURT: That's true.

[APPELLANT]: Because he made it—he made it a one-time deal.

COURT: Okay.

[APPELLANT]: Right. And she convinced me on that—my point is that she didn't even come back to let me know what was going on. She just sent him, not even a week and a half ago.

COURT: All right. Did, whoever she is, turn all of the files—

[DEFENSE COUNSEL]: As far as I know, Your Honor.

COURT: —over to you? Is that it?

> [DEFENSE COUNSEL]: Yes, sir.
>
> [APPELLANT]: She told me, she took pictures of the area and everything, right. I don't see none of that.
>
> [DEFENSE COUNSEL]: I've got pictures.
>
> [APPELLANT]: Your pictures or her pictures?
>
> [DEFENSE COUNSEL]: These are the pictures she gave me.
>
> COURT: All right. Anyhow, I just thought I'd bring you up. We're still on the pre-trial motions and we'll see what we're going to do.
>
> [STATE'S ATTORNEY]: Thank you, Your Honor.
>
> COURT: All right.
>
> [DEFENSE COUNSEL]: We have both actually.
>
> COURT: We're going to continue the pre-trial motions at this point.

Reviewing this particular colloquy, we are unable to discern any remarks made by appellant indicating a desire either to discharge or waive counsel. Appellant appeared concerned primarily with the assignment of a new public defender, rather than the abilities of his new counsel; in fact, he stated on the record that he believed the new counsel was "a good attorney." Although ambiguous statements may still trigger a 4-215 inquiry, there must still be some inkling that the defendant wishes to proceed with new counsel or *pro se*. We can find no such desire in this colloquy. There is no request, let alone an unconditional one, to discharge counsel.

The court did not err where it did not conduct a 4-215(e) inquiry.

ii. Denial of Motion for Mistrial

A. Parties' Contentions

Appellant additionally argues the circuit court abused its discretion where it failed to order a mistrial after a witness referred to appellant's past incarceration. He avers this past-crimes evidence was grossly prejudicial and warranted the grant of a mistrial.

The State counters that the witness statements regarding appellant's prior incarceration were innocuous statements that provided no indication as to whether appellant had been convicted of a crime in the past. The statements, therefore, were not prejudicial and there was no abuse of discretion in failing to grant a mistrial.

B. Standard of Review

The grant of a mistrial is an extraordinary act utilized only "to serve the ends of justice." *Cooley v. State*, 385 Md. 165, 173 (2005) (internal citations omitted). The extraordinary nature of a mistrial requires that this remedy is committed to the sound discretion of the trial court. *See id.* Accordingly, we will review the denial of a motion for mistrial for an abuse of discretion. We will find the circuit court committed an abuse of discretion if no reasonable person would take the view adopted by that court or if that court acted without reference to any guiding principles, and the ruling under consideration is in violation of facts and logic. *Beyond Sys. Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (citations omitted) (internal quotation marks omitted).

C. Analysis

In the present matter, after a witness testified inconsistently with a recorded statement she gave to the police on the night of the shooting, the recording was introduced into evidence and played to the jury. In that recorded statement, the witness was asked how long she had known appellant, to which she replied "I just met him when he got out, when he got out of jail." When asked to speak up on the recording, the witness repeated "I just met him when he got out of jail."

Appellant's trial counsel took issue with those two statements and moved for a mistrial on the grounds that the statements were "extremely prejudicial."

The grant of a mistrial is an extraordinary remedy. We do not find these statements to be so seismic in nature that a mistrial is warranted. The circuit court did not abuse its discretion in denying appellant's motion for a mistrial.

The trial judge is vested with "considerable discretion" when determining if a mistrial is warranted. *Powell v. State*, 406 Md. 679, 694 (2008). A mistrial shall be granted only "if necessary to serve the ends of justice." *Klauenberg v. State*, 355 Md. 528, 555 (1999). We do not reverse the trial court where the defendant was not prejudiced by the court's exercise of its discretion. *Hunt v. State*, 321 Md. 387, 422 (1990).

Maryland Rule 5-404(b) proscribes the admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in

conformity therewith." The rule also provides exceptions if the so-called "bad acts" evidence is used to prove "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.* 5-404(b). This list of exceptions in the rule is not a finite list, but a "representative list of examples" of permissible uses for bad acts evidence. *See Merzbacher v. State*, 346 Md. 391, 407 (1997) (citations omitted) (internal quotations marks omitted). Ultimately, the rule's primary purpose is to prevent the usage of bad acts evidence to prove the defendant's "guilt of the offense for which [he] is on trial." *See Ayers v. State*, 335 Md. 602, 630 (1994).

A case from this Court, *Burral v. State*, 118 Md. App. 288 (1997), *aff'd*, 352 Md. 707 (1999), is on point. In that case, the defendant was on trial for second-degree murder and the trial court received testimony from a police lieutenant who had interviewed the defendant. *Id.* at 296. During his testimony, the lieutenant read out a statement from his interview with the defendant. *Id.* The lieutenant stated to the defendant in that interview: "[Y]ou've been on the streets, you've been to prison . . . ." *Id.* Defendant objected to this statement as inadmissible bad acts evidence, but this Court disagreed. *Id.* We explained that the statements by the lieutenant constituted an "oblique, ambiguous reference to previous criminal activity, *at best*." *Id.* at 297 (emphasis added). We further explained that, because the lieutenant's testimony was not the sort of "direct and unequivocal" evidence Rule 5-404(b) aims to exclude, the State did not make a deliberate attempt to

impugn the defendant's character in front of the jury. *Id.* at 297–98. Moreover, aside from the statement's relative weakness as a potentially prejudicial statement, we explained that the statement could not influence the jury because it was outweighed by the "rather stark evidence of guilt." *Id.* at 298.

We disagree with appellant and *Burral* persuades us that a mistrial was properly denied. The statements in this case were, like *Burral,* "oblique" and "ambiguous reference[s]" to appellant's prior criminal activity. They were also introduced to demonstrate how long the testifying witness knew the appellant and not to impugn his character. The jury was not made aware of the basis for appellant's prior incarceration or how long the term of incarceration was, and there was sufficient evidence of guilt that the likelihood of the jury's reliance on those statements is limited. We cannot find that Rule 5-404(b) was violated by the admission of these two statements such that a mistrial is warranted.

The circuit court did not abuse its discretion in denying appellant's motion for a mistrial.

iii. Introduction of Photograph of Appellant in Shackles

A. Parties' Contentions

Appellant again contends the circuit again abused its discretion, this time because it permitted the prosecution to introduce photographic evidence of the appellant bound in

shackles. This, appellant argues, like the past-crimes testimony, was also prejudicial and warrants reversal of his convictions.

The State counters that the evidence was more probative of appellant's identity than it was prejudicial. The photograph's admission into evidence was, therefore, a permissible use of the circuit court's discretion.

B. Standard of Review

With regard to evidentiary rulings, it is generally within the sound discretion of the trial court to determine the admissibility of evidence. *Merzbacher*, 346 Md. at 404. We will defer to the trial court's decisions "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009) (quoting *Merzbacher*, 346 Md. at 405).

C. Analysis

The weighing of the relevance of evidence by a trial court is generally within its broad discretion. *Clark v. State*, 218 Md. App. 230, 241 (2014) (citations omitted). That discretion is not unlimited, as trial courts may not admit irrelevant evidence. *Id.* Our review requires us to determine, first, "whether the evidence is legally relevant," and, second, if relevant, "whether the evidence is inadmissible because its probative value is

outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403."[4] *Id.* at 241.

Photographs are admissible if their prejudicial effect does not *substantially* outweigh their probative value. *State v. Broberg*, 342 Md. 544, 552 (1996) (citations omitted). Because this balancing inquiry is left to the discretion of the trial judge, we shall not disturb that decision unless it is "plainly arbitrary." *Id.* (citing *Johnson v. State*, 303 Md. 487, 502 (1985)). Trial judges are afforded such deference because they are in the best position to assess the evidence. *Broberg*, 342 Md. at 552 (citations omitted); *see also Mason v. Lynch*, 388 Md. 37, 50–51 (2005). Because of this deference, very few cases exist where the reviewing court discerned reversible error in the admission or exclusion of photographic evidence. *Mason*, 388 Md. at 52. In the rare instance there was a reversible error, the Court of Appeals has explained that the error was due to the admission of photographs that did not accurately represent the person or scene, or were not properly verified. *Id.*

[4] Md. Rule 5-403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We are not persuaded that appellant suffered any prejudice by the introduction of the photograph of him in shackles. He was not shackled *during* trial—an inherently prejudicial practice. *See Bruce v. State*, 318 Md. 706, 721 (1990) (explaining that shackling during trial is an inherently prejudicial practice that must be justified by compelling state interests in the particular case); *but see State v. Latham*, 182 Md. App. 597, 616–17 (2008) (explaining in course of holding that momentary viewing of appellant in shackles by juror was not prejudicial: "[O]ne inadvertent viewing of a defendant in handcuffs, even while in the courtroom, does not necessarily establish a need for corrective measures."). Rather, the jury saw a photograph of him from the evening of his arrest in plainclothes and with a pair of shackles leading to his ankle. Notably, the photograph does not clearly show the shackle cuff around appellant's ankle.

Although courts in Maryland have yet to address the prejudicial effect of the photograph of a defendant in shackles, other courts have had the opportunity. The Supreme Court of Appeals of West Virginia discussed the issue in *State v. Carey*, 558 S.E.2d 650 (W. Va. 2001). That court affirmed the trial court's admission into evidence of a photograph of the appellant in shackles because, although it expressed caution about the practice, the overwhelming evidence of guilt persuaded the court there was no reversible error. *Id.* at 658. (stating first that "[w]e caution trial courts in the strongest possible terms to avoid allowing jurors to see a defendant in shackles–whether in the flesh, in photographs, or by any other method" and, second, "[e]ven though we believe

the better practice would have been to remove the shackles before photographing the defendant's bare feet, based on the overwhelming evidence of guilt, admission of the photograph is not reversible error.").

As in *Carey*, there is a larger quantity of evidence here that is probative of appellant's guilt. For instance, far more apparent in the photograph is appellant's attire, which was referred to frequently during his trial. Consistently, witnesses described appellant as wearing a pair of blue or light blue jeans on the day of the shooting. Given that the photograph depicts appellant wearing the aforementioned jeans, and the shackling did not occur in front of the jury such that it was grossly prejudicial, the probative value of the photograph far outweighs any prejudicial effect.

Furthermore, there was already testimony given during trial by the arresting officer that he had taken appellant to the Eastern District Detective Unit, where the photograph was taken. The jury was already aware that appellant had been arrested and taken to the Eastern District station, which the photograph confirmed, along with the descriptions of appellant's attire on the evening of his arrest.

We discern no abuse of discretion here because there was no substantial prejudice present to outweigh the probative value of the photograph. The jury only saw appellant in shackles in a photograph, not in person. *See Bruce*, 318 Md. at 721 (discussing shackling at trial as inherently prejudicial); *see also Carey*, 558 S.E.2d at 657 n.2 (explaining that preventing a jury from seeing a defendant in shackles "not only protects the presumption

of innocence of the defendant, but also, and equally important, this practice upholds the integrity, dignity, and decorum of judicial proceedings."). Though not ideal, the probative nature of the photograph would outweigh any prejudice, regardless of whether appellant was depicted as shackled or not. *See Carey*, 558 S.E.2d at 658 ("Even if the photograph had depicted [the appellant] in a Boy Scout uniform, under the facts presented here, we believe the jury would not have been swayed.").

iv. Plain Error Review of Concurrent Intent Instruction

A. Parties' Contentions

Appellant requests that we conduct a plain error review of the trial court's instruction on concurrent intent. According to appellant, the instruction the trial court gave to the jury was improper because it failed to address several important aspects of concurrent intent. Appellant argues, therefore, that the erroneous instruction warrants reversal of his convictions for plain error.

The State strenuously objects to the use of plain error review. It contends that not only was the issue not preserved for appellate review, but there was no error in the instructions mandating review. Even if there was error, it was not sufficiently clear or obvious to necessitate this level of review.

B. Standard of Review

A party objecting to the giving or failure to give a jury instruction must do so promptly after the court has instructed the jury. *See* Md. Rule 4-325(e). An appellate

court may conduct a plain error review of the instructions either on its own initiative or at the behest of a party. *Id.* We rarely review for plain error unless presented by "rare and extraordinary" circumstances. *See Garner v. State*, 183 Md. App. 122, 152 (2008).

C. Analysis

Appellant has requested that we exercise our discretion to review for plain error the trial court's instruction to the jury regarding concurrent intent. Maryland Rule 4-325(e) explains the procedure set forth for objections to instructions given to the jury:

> *No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.* Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added).

We will decline to review this contention because appellant has not properly preserved the issue for our review. *See Stabb v. State*, 423 Md. 454, 464–65 (2011) (explaining Rule 4-325(e) procedure). The transcript of appellant's trial reveals no instance during the discussion regarding the proposed jury instructions, as well as during the recitation of the instructions, where appellant's trial counsel raised an objection as to the trial court's concurrent intent instruction. In fact, it was the State that raised concerns regarding the concurrent intent instruction. When appellant's trial counsel was presented

the opportunity to raise any concerns regarding the instruction, he declined the invitation to object. We determine there is nothing in the record that would indicate appellant was displeased with the concurrent intent instruction.

In addition, we shall not exercise our discretion to examine for plain error. Plain error "vitally affects a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (citations omitted). Accordingly, this level of review is sparingly invoked because the error must be "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Id.* (citations omitted). We have explained that we do not lightly employ plain error review, particularly upon the request of an appellant. *See Garner v. State*, 183 Md. App. 122, 151–52 (2008), *aff'd*, 414 Md. 372 (2010) ("We know, of course, that the possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island."). This is especially the case for jury instructions due to the difficulty in demonstrating facts sufficiently compelling to invoke plain error review. *Steward v. State*, 218 Md. App. 550, 566 (2014); *see also Martin v. State*, 165 Md. App. 189, 198 (2005) (citations omitted) (explaining that the bar for plain error, "high in all events, nowhere looms larger than in the contest of alleged instructional errors.").

We shall decline to review for plain error, particularly in light of the fact that appellant raised no objections to the concurrent intent instruction.

v. Sentence Merger Issues

A. Parties' Contentions

Appellant last argues—and the State agrees—that his sentences for wear and carry and reckless endangerment must be merged into his sentences for use of a handgun in a crime of violence and attempted second-degree murder respectively. He argues that two Court of Appeals precedents mandate that the rule of lenity requires a wear and carry sentence to be merged into a use of a handgun sentence, while the required evidence test enunciated in the U.S. Supreme Court case of *Blockburger v. United States*, 284 U.S. 299 (1932), the rule of lenity, and fundamental fairness all require merger of his reckless endangerment sentence into a sentence for second-degree murder.

B. Standard of Review

The failure of a sentencing judge to merge multiple convictions for the "same offense" pursuant to the required evidence test set forth in *Blockburger* constitutes an illegal sentence in violation of the Double Jeopardy Clause. *See Pair v. State*, 202 Md. App. 617, 625 (2011). Similarly, where the sentencing judge imposes multiple sentences where the legislature only intended for a single sentence, that sentence will constitute an illegal sentence in violation of the rule of lenity. *See id.* Accordingly, violations of the Constitution and the rule of lenity are matters of law, and we review them *de novo*. *Id.*

C. Analysis

Both appellant and the State ask this Court to vacate appellant's sentence for wearing and carrying a handgun with respect to the convictions arising from the attempted murder of James Brockett. The parties argue that *Wilkins v. State*, 343 Md. 444, 445–47 (1996),[5] compels the merger of appellant's wearing and carrying sentence into his sentence for the use of a handgun in a crime of violence. We agree and, accordingly, shall vacate appellant's sentence for wearing and carrying a handgun with respect to the shooting of Mr. Brockett.

Appellant and the State also ask that we vacate appellant's sentence for reckless endangerment, as that conviction merges into his conviction for the attempted second-degree murder of Mr. Brockett. The parties seek merger under the required evidence test, and failing that, under the rule of lenity or principles of fundamental fairness.

The required evidence test, which was enunciated by the U.S. Supreme Court in *Blockburger*, is well-established law in Maryland. *Fisher v. State*, 367 Md. 218, 283–84

[5] In *Wilkins*, the Court of Appeals discussed its decision in *Hunt v. State*, 312 Md. 494 (1988). In *Hunt*, the Court held that the General Assembly did not intend to impose a separate punishment for the wearing or carrying of a handgun where a conviction was obtained for the use of a handgun during the commission of a felony or crime of violence. *See Wilkins*, 343 Md. at 446–47. Pursuant to that legislative intent, the Court explained wearing and carrying convictions should merge into convictions for the use of a handgun. *Id.* at 447. The *Wilkins* Court further held that the issue of merging wearing and carrying and use of a handgun convictions may be raised at any time, including on appeal. *Id.*

(2001) (Bloom, J. concurring and dissenting) (citations omitted). The Court of Appeals has explained the required evidence test:

> The required evidence is that which is minimally necessary to secure a conviction for each statutory offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.

Id. at 284 (quoting *Thomas v. State*, 277 Md. 257, 267 (1976)).

Because we are asked to examine whether reckless endangerment merges with attempted second-degree murder, a review of the elements of the respective offenses is warranted. The elements of an attempted second-degree murder are that the accused possessed a specific intent to kill the victim and that he took a substantial step toward killing that person.[6] *See Harrison v. State*, 382 Md. 477, 489 (2004). Reckless endangerment, on the other hand, requires that the defendant acted recklessly by engaging in unreasonable conduct that created a substantial risk of death or serious physical injury to another. *See Jones v. State*, 357 Md. 408, 427 (2000) (citing *State v. Albrecht*, 336 Md. 475, 501 (1994)). The *mens rea* of recklessness that is required for

[6] Unlike consummated criminal homicides, which entail four discrete *mentes reae*, there is only one *mens rea* for an inchoate homicide, including attempted murder—the specific intent to kill. *See Abernathy v. State*, 109 Md. App. 364, 373 (1996).

reckless endangerment is an element short of the specific intent *mens rea* required for attempted murder.[7]

Appellant here was convicted of both reckless endangerment and the attempted second-degree murder of Mr. Brockett. As Brockett jogged past appellant after the altercation among the women in the alley, appellant loudly asked where Brockett was going—less as an interrogatory, and more as a command to stop. When Brockett failed to stop, appellant immediately drew his gun and began firing at him. Moreover, appellant steadily pursued Brockett down the alley, continuing to fire. Although appellant chose to walk rather than run after Brockett, there was a pursuit nonetheless.

Appellant's *mens rea* did ripen into a specific intent to kill. His actions did not have an unfocused character to them. Appellant's subjective intent, gleaned from his

[7] We have previously explained that reckless endangerment is a "doubly inchoate" crime. *Williams v. State*, 100 Md. App. 468, 490 (1994). It is doubly inchoate because, in terms of its *actus reus*, "it is one element short of consummated harm[,] and, as explained, its *mens rea* "is one element short of the specific intent necessary for either an attempt or for one of the aggravated assaults." *Id.* at 481. To move along a spectrum from reckless endangerment to a "more malicious crime[] where death or serious bodily harm is affirmatively desired or specifically intended—such as attempted murder," the *mens rea* must escalate from recklessness to the specific intent to kill. *Id.* at 490. When evaluating the movement of the *mens rea* along this spectrum, we consider the subjective *mens rea* of the defendant. *See id.* at 510 (explaining that "the subjective *mens rea* of reckless indifference to a harmful consequence at a certain point along the rising continuum of blameworthiness may ripen into the even more blameworthy specific intent to inflict the harm."). Once this *mens rea* has ripened, "the lesser included offense of reckless endangerment [will] merge[] into the greater inclusive offense . . . ." *Id.* (citing *Blockburger* generally).

actions and statements, demonstrate a focused intent to kill or injure Mr. Brockett. Appellant did not simply spray bullets into the alley; they were fired in Brockett's direction. But for a fortunate turn of events, Brockett would not have escaped with only a pair of bullet-grazed trousers.

Reckless endangerment and attempted second-degree murder are alike in that the *actus reus* has resulted in an unconsummated harm. Where the crimes differ is in the level of *mens rea* displayed. If reckless endangerment merges into second-degree murder, it follows that the *mens rea* has moved along that spectrum from recklessness to specific intent, and the harm has, unfortunately, been consummated. *See Williams*, 100 Md. App. at 490 ("To move from reckless endangerment . . . to one of the more malicious crimes where death or serious bodily harm is affirmatively desired or specifically intended—such as attempted murder . . . —*primarily involves ratcheting the mens rea up to the next level of blameworthiness*." (emphasis added)). Similarly, if reckless endangerment is to merge into attempted second-degree murder, the *mens rea* has moved from recklessness to specific intent, but without a consummated harm. The same evidence may be used to prove the *mens rea* of reckless endangerment and attempted second-degree murder, as well as the *acti rei* of those offenses—particularly where the harm is unconsummated in both those offenses.

Accordingly, we do not think *Williams* and subsequent cases preclude the merger of reckless endangerment and attempted second-degree murder. *See id*. at 510; *cf. Alston*

v. State, 101 Md. App. 47, 60 (1994), *aff'd*, 339 Md. 306 (1995) (holding that the defendant's reckless endangerment and depraved-heart murder convictions should merge, and explaining that "the only significant difference" between the two offenses was in the consequences, *i.e.*, "that [the victim] was hit and killed by one of the flying bullets."). We agree with appellant and the State that appellant's sentences for reckless endangerment and attempted second-degree murder as to Mr. Brockett should merge under the required evidence test.[8] We shall, therefore, vacate his conviction for reckless endangerment.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY FOR ATTEMPTED SECOND-DEGREE MURDER AND USE OF A HANDGUN AFFIRMED. SENTENCES FOR RECKLESS ENDANGERMENT AND WEARING AND CARRYING A HANDGUN VACATED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[8] We need not address the parties' assertions regarding the rule of lenity and fundamental fairness because the required evidence test persuades us the sentences must merge. The rule of lenity and fundamental fairness essentially act as alternative bases for merger where the required evidence test would not be satisfied. *See Marlin v. State*, 192 Md. App. 134, 167–69 (2010).