Circuit Court for Allegany County
Case No. C-01-CR-22-000666

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2002

September Term, 2022

COLE M. McCORMICK

v.

STATE OF MARYLAND

Berger,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 3, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

Following a jury trial, Appellant Cole M. McCormick ("McCormick") was convicted of three counts of disorderly conduct and one count of resisting arrest. McCormick was sentenced to a period of two years' incarceration with all but six months suspended for resisting arrest. For disorderly conduct by failing to obey a lawful order made to prevent a disturbance of the public peace, McCormick was sentenced to 60 days' incarceration, suspended, to be served consecutively. For disorderly conduct by entering the premises of another and disturbing the peace or acting in a disorderly manner, McCormick was sentenced to 60 days' incarceration, consecutive, suspended. Count 2, acting in a disorderly manner that disturbs the public peace, merged into Count 4, disorderly conduct by entering the premises of another and disturbing the peace or acting in a disorderly manner, for sentencing purposes. The circuit court further imposed a three-year term of probation.

McCormick raises a single question on appeal: whether the circuit court erred in not merging his conviction for entering the premises of another and disturbing the peace or acting in a disorderly manner with his conviction for disorderly conduct by failing to obey a lawful order made to prevent a disturbance of the peace. For the reasons explained herein, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

Factual Background

On June 28, 2022, McCormick arrived at UPMC Western Maryland, where his ex-girlfriend, Kimberly Dada, worked as a nurse.[1] He sought to retrieve his belongings from Ms. Dada's vehicle after the two had argued that morning. Upon finding Ms. Dada on her assigned floor, McCormick asked to borrow her car keys to retrieve his things, but she did not give him the keys. Instead, Ms. Dada told McCormick to leave and called security. UPMC security officer Todd Brown later testified that Ms. Dada called him and reported someone breaking into her car. Mr. Brown directed another security officer, Russell Zang, to respond to the parking lot incident.

When Mr. Zang arrived at the parking area, he saw McCormick "banging on the car," "screaming," "cussing," and "ranting and raving" as people walked by. McCormick was being "verbally threatening" and got "three inches away from" Mr. Zang's face. Mr. Zang told McCormick to leave and called for assistance when McCormick did not. Three security officers and a deputy sheriff then arrived at the scene of the confrontation. Mr. Zang testified that McCormick "was threatening everybody. He was very, very agitated."

Another security officer at the scene, Nicholas Beeman, heard McCormick threaten the other officers. Mr. Beeman testified that McCormick laced up his shoes, which Mr. Beeman understood to "mean he was in the mood to fight." Mr. Beeman heard McCormick

[1] Kimberly Dada's name appears in court transcripts spelled phonetically, as she was not asked to spell her name.

"using profanity and making threats to kick officer[s'] asses." Security Officer Kenneth Nestor, also at the scene, testified that McCormick's voice was "very loud and very threatening," and shouting that "he was going to F-- us up." During this incident, there were many people in the vicinity who were coming and going from the hospital.

Allegany County Sherriff's Deputy Jacob Martel testified that he responded to the hospital and found a "combative and boisterous" McCormick yelling at security officers. Deputy Martel testified that he "told [McCormick] to cease his behavior and stop yelling and screaming and attempting to fight everybody," repeating this direction more than three times. When McCormick failed to comply, Deputy Martel placed him under arrest. Deputy Martel told McCormick he was under arrest and instructed him to put his hands behind his back. Deputy Martel "grabbed [McCormick's] arms and [McCormick] tried to resist by using his body to pull forward" and "pull his arms away from" Deputy Martel.

Security officer Nestor's testimony was consistent with the testimony of Deputy Martel. Mr. Nestor recounted that when Deputy Martel attempted to arrest McCormick, McCormick "pulled away" and "twisted his body to try to keep Officer Martel from placing the cuffs on him." Mr. Nestor "grabbed McCormick's opposite arm and held [McCormick] in place until [Deputy] Martel placed the cuffs on [McCormick]."

Procedural History

The State charged McCormick in the District Court of Allegany County with three counts of disturbing the peace and disorderly conduct under Section 10-201(c) of Maryland's Criminal Law Article ("CR"), in addition to one count of resisting a lawful

arrest in violation of CR § 9-408(b). Specifically, Count 1 charged McCormick with failing to obey a reasonable lawful order of a law enforcement officer to prevent disturbing the public peace in violation of CR § 10-201(c)(3); Count 2 charged McCormick with willfully acting in a disorderly manner that disturbs a public place in violation of CR § 10-201(c)(2); and Count 4 charged McCormick with entering the land or premises of another to willfully disturb the peace of the persons on the land by acting in a disorderly manner in violation of CR § 10-201(c)(4). Count 3 charged McCormick with resisting a lawful arrest in violation of CR § 9-408(b). After McCormick demanded a jury trial, his case was transferred to the Circuit Court for Allegany County.

Following a jury trial on December 2, 2022, McCormick was found guilty of all four counts. At the sentencing hearing, the State conceded that, for sentencing purposes, the convictions under CR § 10-201(c)(4) (Count 4) and 10-201(c)(2) (Count 2) merged. McCormick's counsel, as well as the court, agreed. The State argued, however, that the convictions for failure to obey a lawful order under CR § 10-201(c)(3) (Count 1) did not merge with either of the other convictions for disturbing the peace under CR §§ 10-201(c)(2) and 10-201(c)(4), nor the conviction for resisting arrest under CR § 9-408(b). When asked by the court if McCormick wanted to be heard regarding the merger matter, McCormick's counsel declined, commenting that "I am not schooled enough to, to give an informed opinion, without studying."

The court sentenced McCormick to two years' imprisonment, with all by six months suspended, for resisting arrest (Count 3); a consecutive 60-days' imprisonment, which was

also suspended, for disorderly conduct based on failing to obey a lawful order (Count 1); and a consecutive 60-days' imprisonment, also suspended, for disorderly conduct by entering a premises of another and disturbing the peace (Count 4). The court also imposed a period of three years' probation upon McCormick's release. McCormick noted his appeal on December 9, 2022.

DISCUSSION

I. Standard of Review

Maryland Rule 4-345(a) allows a court to "correct an illegal sentence at any time." A sentence is illegal if "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). "Whether a sentence is an illegal sentence under Maryland Rule 4-345(a) is a question of law that is subject to de novo review." *State v. Crawley*, 455 Md. 52, 66 (2017) (citing *Meyer v. State*, 445 Md. 648, 663 (2015)), *reconsideration denied* (Aug. 23, 2017); *see also Blickenstaff v. State*, 393 Md. 680, 683 (2006) (reviewing the legality of the appellant's sentence *de novo*).

II. Merger

McCormick argues that the circuit court erred by failing to merge his conviction for disorderly conduct by entering the premises of another and disturbing the peace with his

conviction for disorderly conduct by failing to obey a lawful order made to prevent a disturbance of the peace.

"Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693-94 (quoting *Monoker v. State*, 321 Md. 214, 222–23 (1990)). A sentence imposed in violation of the required evidence test and/or the rule of lenity is an illegal sentence that can be corrected at any time pursuant to Maryland Rule 4-345(a), regardless of whether the issue was preserved. *Taylor v. State*, 224 Md. App. 476, 500 (2015). An illegal sentence does not include a failure to merge sentences based upon the principle of "fundamental fairness." *Pair v. State*, 202 Md. App. 617, 649 (2011). When a "fundamental fairness" argument is not raised at trial, it is not preserved for appellate review. *White v. State*, 250 Md. App. 604, 644 (2021).

A. Required Evidence Test

"Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining the identity of offenses is the required evidence test.'" *Christian v. State*, 405 Md. 306, 321 (2008) (quoting *Dixon v. State*, 364 Md. 209, 236–37 (2001)). Under the required evidence test, "we examine the elements of each offense and determine 'whether each provision requires proof of a fact which the other does not . . .'" *Paige v. State*, 222 Md. App. 190, 206-07 (2015) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

In order to sustain a conviction pursuant to CR §10-201(c)(4), the State must prove the following elements:

> A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:
>
> (i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or
>
> (ii) act in a disorderly manner.

Section 201(c)(3) of the Criminal Law Article provides that "[a] person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public place."

When instructing the jury, the circuit court expressly stated the elements the State was required to prove for each offense. The jury was instructed that, in order to return a guilty verdict for disturbing the peace in violation of CR § 10-201(c)(4), the State must prove: (1) "[t]hat the defendant entered the land or premises of another," and (2) "[t]hat the defendant willfully disturbed the peace of persons on the land or premises by making an unreasonably loud noise," or "that the defendant willfully acted in a disorderly manner on the land or premises." With respect to the offense of failure to obey a reasonable lawful order under CR § 201(c)(3), the jury was instructed that the State must prove: (1) "[t]hat a law enforcement officer gave a reasonable and lawful order to the defendant," (2) [t]hat the order was made in an effort to prevent a disturbance of the public peace, and (3) "[t]hat the defendant willfully refused to obey the order."

Because each offense "contains an element which the other does not," the two offenses do not merge *Moore v. State*, 198 Md. App. 655, 685 (2011) (internal quotation and citation omitted). CR § 201(c)(4) requires (1) entering someone's land or premises, and (2) making an unreasonably loud noise or acting in a disorderly manner. CR § 10-201(c)(3) does not require either of these elements. CR § 10-201(c)(3) requires the refusal to obey the lawful order of a law enforcement officer, which is not an element of CR § 10-201(c)(4).[2] Accordingly, we hold that because each offense contains an element that the other does not, the two convictions do not merge under the required evidence test.

B. Rule of Lenity

McCormick further asserts that CR § 10-201(c)(3) and CR § 201(c)(4) merge under the rule of lenity. As we shall explain, we are not persuaded.

The rule of lenity "amounts to an alternative basis for merger in cases where the required evidence test is not satisfied, and is applied to resolve ambiguity as to whether the legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. 134, 167 (2010). Under the rule of lenity, "a court 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." *Bellard v. State*, 452 Md. 467, 502 (2017) (citation omitted). The rule of lenity "is purely

[2] To the extent that McCormick's argument focuses upon the evidence introduced at trial when arguing that the offenses at issue merge under the required evidence test, we emphasize that "[i]n spite of its name, the focus of the required evidence test is on the elements of the offenses, not the evidence introduced at trial to prove them in a given case." *Koushall v. State*, 249 Md. App. 717, 734 (2021), *aff'd*, 479 Md. 124 (2022).

a question of reading legislative intent." *Latray v. State*, 221 Md. App. 544, 555 (2015) (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)). We explained:

> If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so-called 'Rule of Lenity,' by which we give the defendant the benefit of the doubt.

Id.

McCormick asserts that, unlike certain other statutes, the statutes at issue in this case do not include anti-merger provisions. He points to CR § 4-204, the statute governing the use of a firearm in the commission of a crime, as an example of a statute with an anti-merger provision. The anti-merger provision in CR § 4-204 expressly provides that "[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."[3] We have explained, however, that the absence of anti-merger language in a statute does not itself render a statute ambiguous for rule of lenity purposes. Indeed, as we explained in *Latray*, *supra*, "[t]he absence of an anti-merger provision indicates that the Legislature did not address explicitly the topic of merger in the statutory scheme, but nothing more may be inferred from it." 221 Md. App. at 544.

[3] McCormick directs our attention to other statutes with anti-merger provisions as well. We need not address each because, as we explain, the lack of anti-merger provision in the statutes at issue in this case is not dispositive.

When two statutes "target distinct concerns," separate sentences are permitted for convictions of the offenses. *Clark v. State*, 473 Md. 607, 622 (2021). CR § 201(c)(4) addresses the concern of being loud or disorderly on someone else's property. CR § 10-201(c)(3) addresses the concern of failing to obey the order of a law enforcement officer. Because the two statutes serve different purposes and punish different conduct, there is no ambiguity that must be resolved. Accordingly, the rule of lenity does not apply.

C. Fundamental Fairness

Finally, McCormick asserts that the two sentences should merge under the principle of "fundamental fairness." As we shall explain, this issue is not preserved and, in our view, plain error review is not warranted.

As we explained *supra*, although a sentence imposed in violation of the required evidence test and/or the rule of lenity is an illegal sentence that can be corrected at any time pursuant to Maryland Rule 4-345(a), regardless of whether the issue is preserved, the preservation requirement applies to a "fundamental fairness" argument. *White*, *supra*, 250 Md. App. at 544; *Pair*, *supra*, 202 Md. App. at 649. Fundamental fairness is "fact-intensive" and is essentially a question of equity and "depends on the circumstances surrounding the convictions, not solely on the elements of the crimes." *Latray*, *supra*, 221 Md. App. at 558. "We do not believe that a non-merged sentence pursuant to such a fluid test dependent upon a subjective evaluation of the particular evidence in a particular case is an inherently 'illegal sentence' within the tightly limited contemplation of [Rule 4-345(a)]." *Pair*, *supra*, 202 Md. App. at 649.

McCormick concedes that this issue is not preserved but nonetheless urges us to address the merits of the fundamental fairness argument. We decline to undertake plain error review in this case. While we may invoke the plain error doctrine in support of our review of allegations of unobjected to error, we reserve such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith v. State*, 64 Md. App. 624, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Our review of the record before us convinces us that this is not such a case. Furthermore, even if the issue of merger pursuant to the doctrine of fundamental fairness had been preserved for our consideration, we would hold that there is nothing fundamentally unfair about punishing McCormick separately for the two offenses at issue. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.