

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0401

September Term, 2014

TAVON WILLIAMS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 26, 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.

Appellant Tavon Williams was indicted on numerous criminal counts in the Circuit Court for Baltimore City following an incident in which he was alleged to have shot and wounded two people. On October 25, 2013, a jury convicted Williams of a combined eight counts: attempted second-degree murder; second-degree assault; use of a handgun in the commission of a crime of violence; wearing, carrying, or transporting a handgun; possession of a firearm after having been convicted of a disqualifying crime; and discharging a firearm within the City of Baltimore; and two counts of reckless endangerment.¹ The trial court sentenced Williams to a total of 86 years in prison,² after which he timely filed this appeal.

QUESTIONS PRESENTED

Williams presents the following questions for our consideration, which we quote:

1. Did the trial court err in granting the State's motion *in limine* to permit it to use other crimes evidence?
2. Did the trial court err in failing to correct the State's misstatement of the evidence in closing argument?
3. Did the trial court err in admitting [one of the victim's] medical records?

¹ The jury acquitted Williams of two counts of attempted first-degree murder, one count of attempted second-degree murder, and one count of first-degree assault.

² The court allotted the 86 years of incarceration as follows: 30 years for attempted second-degree murder; 20 years (the first five without possibility of parole) for use of a handgun in the commission of a crime of violence; five years each for the two reckless endangerment counts; 10 years for second-degree assault; 15 years (the first five without parole) for possession of a regulated firearm by a disqualified person; one year for discharging a firearm; and three years for wearing, carrying, or transporting a handgun. All sentences save the last were to run consecutively to the first.

4. Did the trial court err in denying Williams’s motion for judgment of acquittal as to the crimes against [one of the victims]?
5. Do Williams’s sentences for reckless endangerment and wearing, carrying or transporting a handgun merge into other sentences?

For the reasons that follow, we find no merit in the first four of Williams’s challenges and affirm the judgments of the trial court. Additionally, we hold that Williams’s sentence for reckless endangerment of one victim merges into the sentence for attempted second-degree murder of that victim, the sentence for reckless endangerment of a second victim merges into the sentence for second-degree assault of that victim, and the sentence for wearing, carrying, or transporting a handgun merges into the conviction for use of a firearm in a crime of violence. We shall remand the matter to the trial court for re-sentencing in a manner not inconsistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

At approximately 11:00 p.m. on May 1, 2012, Baltimore City Police Department (“BCPD”) Detectives Mark Verkest, David Colburn, and Tanesha Todd were patrolling a “hot spot,” an area known for drug transactions, in the 2400 block of Frederick Avenue in Baltimore City. According to their trial testimony, as they turned onto South Catherine Street in their unmarked police cruiser, the detectives heard a gunshot and observed numerous people fleeing the scene. They then witnessed a black man, later identified in court as Williams, wearing dark clothing and gloves and holding a black handgun with a long nose. They saw the man emerge from behind a red vehicle and fire approximately three

shots. Detectives Colburn and Todd saw three other men look at the shooter and then flee across the street. Detective Todd later identified those three men as Michael Smith, Cornelius Moore, and Alexis McBride, whom she knew from prior encounters.

Williams fled when he saw the detectives, prompting Detective Verkest to exit the cruiser and give chase. Williams entered a nearby field with waist-high grass, but fell to the ground. As Williams rose, Detective Verkest tackled him from behind and, with the assistance of Detective Colburn, placed him in handcuffs. Detective Colburn searched Williams, incident to his arrest, to determine if he was carrying weapons. He found none.

The detectives received a call advising them that injured victims had been located in the parking lot of a Checkers restaurant, across the street from the scene of the shooting. Detective Todd and other police units headed to that location. Detectives Verkest and Colburn remained at the grassy field, which they searched. Eventually, the police located a weapon, approximately 10 to 15 feet from where Williams had been tackled.³

At the Checkers restaurant, Detective Todd found the two shooting victims, Alexis McBride and Michael Smith, injured but conscious: Smith had a single gunshot wound to his arm, and McBride had sustained multiple gunshot wounds.

³ The handgun, a .22-caliber revolver, contained eight cylinder positions for cartridges. When the detectives recovered the weapon, two of those eight cylinders contained live ammunition; four contained spent cartridges. The last two cylinders were empty. The gun was later determined to be operable. No usable DNA or suitable fingerprints were recovered from the weapon.

At trial, McBride testified that on May 1, 2012, he, Cornelius Moore, and two other acquaintances had been hanging out at the corner of McHenry and Catherine Streets. A truck pulled up, and a man in a hoodie emerged. The man proceeded to point a gun at McBride and the other men. McBride and the others ran toward the Checkers restaurant across the street. Once safely there, McBride realized he had been shot several times. Michael Smith sat beside him at the restaurant as he fell unconscious.⁴

In his trial testimony, McBride did not identify the shooter as Williams. Instead, he stated that he did not see who had shot him. McBride stated that he thought it likely that the person who shot him was “Tavon,” as the two had argued about drugs earlier in the day. In the hospital, McBride had also identified “Tay” from a photo array and added the following written statement: “We was beefing about drugs.”

Michael Smith did not testify. According to other testimony, he was “very uncooperative” with police and refused to give a statement about the shooting. He advised the prosecutor that he did not want to testify and that, if compelled to do so, he would say that Williams was not his assailant. Nonetheless, the court, over the defense’s objection, admitted medical records that suggested that a Michael A. Smith had been the victim of a shooting on the evening of May 1, 2012.

⁴ McBride stated that his gunshot wounds resulted in a 29-day hospitalization and three surgeries.

At the close of the State’s case-in-chief, Williams moved for judgment of acquittal. He argued that Smith had not testified and that the State could not confirm that the medical records pertained to the person who was shot at the same time as McBride. For those reasons, Williams contended that the State had presented no evidence from which a jury could find that he had anything to do with the shooting of Michael Smith.

The State, in turn, highlighted Detective Todd’s testimony that she saw Williams, whom she knew from prior encounters, shooting a gun in Smith’s direction; and that she observed Smith at Checkers a short time later, suffering from a gunshot wound to the arm. The State emphasized both McBride’s identification of Smith as one of the men with him at Checkers, as well as the medical records, which detailed a gunshot wound to the arm that a Michael Smith had received at approximately the time of the shooting near Catherine Street.

The court ruled that, “as tenuous as [the evidence] may be, particularly with regard to Michael Smith, the motion is denied.” The court also denied Williams’s renewed motion for judgment of acquittal at the close of the entire case.

DISCUSSION

I. Other Crimes Evidence

Before the start of trial, the State moved *in limine* for a ruling allowing it to admit the statement, “We was beefing about drugs,” which McBride had written on the photo array to identify Williams as the man with whom he had quarreled prior to the shooting. The State

contended that the statement provided relevant information as to Williams’s motive to attempt to murder McBride. Williams countered that the reference to drugs was irrelevant and highly prejudicial. Contending that the words “We was beefing” would, in themselves, suffice to demonstrate motive, Williams insisted that the words “about drugs” be excised from the rest of the statement.

The court ruled that the statement was admissible:

[T]he Court disagrees with defense counsel’s interpretation with regard to the importance, if any, of the nature of the beef or the underlying reason of the beef as being not inextricably intertwined with the motive to attempt to murder.

The Court finds that the probative value with regard to the entire statement outweighs any prejudice to the defendant^[5]

Williams argues that, in not redacting the reference to drugs, the trial court erred by improperly admitting evidence of other crimes, wrongs, or acts in violation of Md. Rule 5-404(b). He argues that McBride’s reference to “drugs” on the photo array provided the jury with impermissible and irrelevant evidence of “other crimes” or “other wrongs” that were not proved by clear and convincing evidence. We disagree.

Under Rule 5-404(b), “[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity

⁵ In its comments on the record, the trial court said that it had “denied” the motion. In fact, as the State that had moved for a ruling allowing the statement’s admission, and as the court agreed that the evidence was admissible, the court actually granted the motion. The court’s subsequent docket entries confirmed that it had granted the motion.

therewith.” That evidence may, however, “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.” *Id.*

To be admissible for one of these “other purposes,” evidence of other crimes, wrongs, or acts “must be substantially relevant to some contested issue in the case and be offered for a purpose other than to prove the criminal character of the defendant.” *Snyder v. State*, 361 Md. 580, 603 (2000). If relevant to a contested issue, and used to establish something other than “action in conformity” with character, the evidence may be admitted, in the trial court’s sound discretion, if it finds that the evidence’s probative value outweighs any unfair prejudice to the defendant. *See State v. Faulkner*, 314 Md. 630, 641 (1989).

To determine whether evidence of other crimes, wrongs, or acts is admissible under Rule 5-404(b), a trial court conducts a three-part analysis:

First, the court must decide whether the evidence falls within an exception to Rule 5-404(b). Second, the court must decide whether the accused’s involvement in the other crimes is established by clear and convincing evidence. Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission.

Henry v. State, 184 Md. App. 146, 167-68 (2009) (quoting *Hurst v. State*, 400 Md. 397, 408 (2007) (which cited *State v. Faulkner*, 314 Md. 630, 634-35 (1989))); accord *Wagner v. State*, 213 Md. App. 419, 458 (2013).

An appellate court applies varying standards of review to each of the trial court's three conclusions. An appellate court conducts a de novo review of the first conclusion, that the evidence falls within an exception to Rule 5-404(b), such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. *Faulkner*, 314 Md. at 635. In reviewing the second conclusion, concerning whether there was clear and convincing evidence of the defendant's involvement in the other crimes, wrongs, or acts, the appellate court determines whether the evidence was legally sufficient to support the court's finding. *Id.*

Lastly, in reviewing the third conclusion, concerning the balance between probative value and undue prejudice, the appellate court applies a highly-deferential abuse of discretion standard. *Oesby v. State*, 142 Md. App. 144, 167-68 (2002). Under that standard, “[r]eversal should be reserved for those rare and bizarre exercises of discretion that are . . . not only wrong but flagrantly and outrageously so.” *Id.*

Examining the trial court's ruling in light of these standards, we see no error or abuse of discretion.

First, McBride's written statement, that on the day of the shooting he and Williams had argued about drugs, had special relevance to something other than character, because it tended to suggest that Williams had a motive to attempt to murder McBride. *See Wimbish v. State*, 201 Md. App. 239, 262 (2011), *cert. denied*, 424 Md. 293 (2012) (to be admissible

under motive exception, the other crime or act “must be committed within such time, or show such relationship to the main charge, as to make [the] connection obvious”).⁶

Second, the evidence at trial, consisting of McBride’s written statement on the photo array as well as his identical testimony at trial, was sufficient to permit the trial court to conclude, by clear and convincing evidence, that McBride and Williams had in fact been arguing (or “beefing”) about drugs. *See Oesby*, 142 Md. App. at 164-65; *Emory v. State*, 101 Md. App. 585, 622-24 (1994).

Third and finally, the trial court did not abuse its vast discretion in concluding that the subject matter of the argument – drugs – was, in the court’s words, “inextricably intertwined” with the motive to murder, such that the probative value of McBride’s entire statement outweighed any undue prejudice to Williams. While the statement in its entirety certainly prejudiced Williams, the prejudice resulted from the statement’s special relevance to his motive to kill. In any event, under Rule 5-404(b), prejudice alone is immaterial: Williams is entitled to reversal only if the trial court abused its discretion in concluding that the probative value of the evidence of motive outweighed the danger of “*undue* prejudice.” *See Weiner v. State*, 55 Md. App. 548, 555 (1983), *aff’d*, 302 Md. 550 (1985) (“What is

⁶The statement on the photo array did not say that McBride and Williams had been “beefing about drugs” on the day when McBride was shot, but McBride testified that “beefing” had occurred that day.

meant here is an undue tendency to persuade the jury to decide the case on an improper basis, usually an emotional one”). We see no such undue prejudice in this case.⁷

II. State’s Comment During Rebuttal Closing Argument

Williams contends that the trial court erred when it declined to correct a misstatement made by the prosecutor during her rebuttal closing argument. Although the court actually sustained his objection to the statement, Williams argues that the court erred in not taking additional action, which he failed to request. The issue plainly is not preserved for review.

During her initial closing argument, the prosecutor discussed Williams’s motive to shoot the victims, stating: “His motive we learn, well, it was about drugs, about money. The age old motive to kill, isn’t it?” Defense counsel did not object at the time.

Later, during rebuttal closing argument, the prosecutor stated: “Is it a mere coincidence that Mr. McBride had had an argument about drugs, money earlier that day with the Defendant?” Defense counsel objected, “as to the money part.” The court sustained the objection “as to the money part,” but observed that the prosecutor had, “without objection,”

⁷ Furthermore, even if the circuit court erred in admitting all or any part of the statement on the photo array, the error would be harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976). Before the admission of McBride’s statement on the photo array, McBride had already testified, without objection, that earlier on the day of the shooting he had had an argument with Williams about drugs and that he thought Williams may have been the person who shot him. Maryland courts “have found the erroneous admission of evidence to be harmless if evidence to the same effect was introduced, without objection, at another time during the trial.” *Yates v. State*, 202 Md. App. 700, 709 (2011), *aff’d*, 429 Md. 112 (2012).

alluded to money as a motive in her initial closing. Williams did not request any further action from the court, and the prosecutor did not re-assert any reference to money as a motive.

Because Williams did not ask the trial court to correct the prosecutor’s misstatement, he has failed to preserve this issue for our review. *See* Md. Rule 8-131(a) (“[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court”). In *Hairston v. State*, 68 Md. App. 230 (1986), this Court held that, “[w]here an objection to opening or closing argument is *sustained*, . . . there is nothing for this Court to review unless a request for specific relief, such as a motion for a mistrial, to strike, or for further cautionary instruction is made.” *Id.* at 236 (emphasis in original).

Here, defense counsel objected to the State’s remark. The trial court sustained that objection. Thereafter, defense counsel neither asked for a curative instruction nor moved to strike the statement. Under *Hairston*, therefore, “there is nothing for this Court to review.” *Id.*

III. Admission of Michael Smith’s Medical Records

Williams argues that the trial court erred in admitting Michael Smith’s medical records into evidence. He contends that, in the absence of any testimony proving a link between the Michael Smith who was shot in the arm near the Checkers on Frederick Road

and the Michael Smith who was treated for a gunshot wound to the arm less than an hour after the shooting, the records were irrelevant and highly prejudicial. We disagree that the court erred in admitting the records.

To recapitulate, before the State offered the Michael Smith medical records, the evidence showed that at approximately 11:00 p.m. on May 1, 2012, Williams fired several shots in the direction of three men. The three men, whom Detective Todd recognized as Moore, McBride, and Smith, ran toward a Checkers restaurant across the street. Detective Todd later observed that McBride had multiple gunshot wounds and that Smith had a gunshot wound to his left arm. The men were transported to the hospital by ambulance, and both were treated for their injuries.

When Smith was released from the hospital, he was transported to the police station, where he was uncooperative in providing information about the shooting or the shooter. He also told the prosecutor that, if forced to testify, he would say that it was not Williams who had shot him.

To provide the jury with more evidence that Williams had shot Smith, the State sought to admit Smith's medical records. Those records reflected that one Michael A. Smith, who was born on January 7, 1991, was admitted to the University of Maryland Medical Center at 11:48 p.m. on May 1, 2012, with a gunshot wound to his left arm, approximately one hour after Detective Todd observed the man she knew as Michael Smith

with a gunshot wound to his left upper arm. The medical records reflect that the hospital discharged Michael A. Smith on May 2, 2012.

Williams objected on relevance grounds. He argued that, in the absence of Smith’s testimony or some other corroborating evidence, there was no way to tie these medical records to the Michael Smith whom he was accused of shooting.

The court overruled the objection:

The Court finds that the information is relevant. The extent of the relevance, the weight, if any, to be given to that evidence, will be a[n] issue for the jury to determine . . . as the fact finder.

* * *

But I believe based upon what I’ve heard in the courtroom, the last three days from various witnesses, with regard to a person identified as Michael Smith, with the person having been observed – having left the scene of a shooting, and then discovered across the street, if you will, in the Checkers parking lot, suffering from an apparent wound, then going to – been taken for treatment. I believe that’s sufficient for the jury to consider that document.

Williams contends that the trial court abused its discretion when it admitted the medical records. He claims that “[e]ven the minimal standard for relevance was not met by the medical records” and “[t]his evidence was highly prejudicial to [him] insofar as it bolstered the State’s case that there had been a second victim of the shooting[.]” Williams has got it wrong on both counts.

Rule 5-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence.” In general, “[e]xcept as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible.” Md. Rule 5-402. Nonetheless, a court may exclude relevant evidence “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.” Md. Rule 5-403; *accord Parker v. State*, 408 Md. 428, 437 (2009). Evidence may be unfairly prejudicial to a criminal defendant “if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged.” *Odum v. State*, 412 Md. 593, 615 (2010) (citation and quotation marks omitted).

The determination of whether evidence is relevant is a matter of law, to be reviewed by an appellate court de novo. *DeLeon v. State*, 407 Md. 16, 20 (2008). If the evidence is relevant, a reviewing court “grants wide latitude to trial judges’ decisions on its admissibility.” *Id.* at 21. In addition, if the evidence is relevant, we are loath to reverse unless the evidence is plainly inadmissible or there is a clear showing of an abuse of discretion. *Id.* (citing *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

Here, the trial court did not abuse its discretion in admitting the medical records. The State had the burden of proving the *corpus delicti* of the crimes, *i.e.*, the burden of proving that Michael Smith had been shot and injured and that Williams was criminally responsible for Smith’s injuries. The medical records – concerning a victim with the same name as

Williams’s victim, who had suffered the same injuries in the same locations as the ones Williams’s victim had suffered, and who had suffered those injuries at the same approximate time as Williams’s victim had suffered his – all generally corroborated other evidence that the State had introduced at trial. The records were thus of such obvious relevance to the State’s allegations as to almost preclude discussion. The pertinent issue with regard to Michael Smith’s medical records, as noted by the trial court, was the weight to be given them by the jury, *not* their admissibility. *See Aiken v. State*, 101 Md. App. 557, 573 (1994).

The court did not abuse its discretion in concluding that the probative value was not substantially outweighed by the danger of unfair prejudice. *See* Md. Rule 5-403. “[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.” *Odum*, 412 Md. at 615 (quoting Lynn McLain, *Maryland Evidence State and Federal* § 403:1(b) (2d ed. 2001)). “Probative value is outweighed by the danger of *unfair* prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.” *Odum*, 412 Md. at 615 (emphasis in original) (citation and quotation marks omitted). Here, although the evidence surely prejudiced Williams by strengthening the State’s case against him, we cannot see how it unfairly prejudiced him, much less how any unfair prejudice “substantially outweighed” the evidence’s probative value. *See* Md. Rule 5-403.

IV. Sufficiency of the Evidence

Williams argues that the trial court erred in denying his motions for judgment of acquittal on the two offenses in which Michael Smith was identified as the alleged victim: second-degree assault and reckless endangerment. Williams claims that, considering Smith’s refusal to testify, his statement that he would not identify Williams as the shooter if he were called to testify, and the putative lack of other credible evidence that Smith was a victim of a crime, the State presented insufficient evidence to prove that William had shot Smith. We disagree.

This Court recently set forth the applicable standard of review in determining the sufficiency of the evidence on appeal:

The Court’s concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather . . . whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant’s guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.

Donati v. State, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (internal quotation marks and citations omitted).

Thus, a court, on appellate review of evidentiary sufficiency, will not “retry the case,” *Smith v. State*, 415 Md. 174, 185 (2010), nor “re-weigh the credibility of witnesses or

attempt to resolve any conflicts in the evidence.’” *Holmes v. State*, 209 Md. App. 427, 438, *cert. denied*, 431 Md. 445 (2013) (quoting *State v. Mayers*, 417 Md. 449, 466 (2010)).

Md. Code (2012 Repl. Vol., 2013 Supp.) § 3-203 of the Criminal Law Article (“CL”), criminalizes second-degree assault, of which there are three types: “(1) intent to frighten, (2) attempted battery, and (3) battery.” *See Snyder v. State*, 210 Md. App. 370, 382, *cert. denied*, 432 Md. 470 (2013). The jury instructions establish that the State proceeded on a theory of battery.⁸

To prove second-degree assault of the battery variety, the State was required to prove, beyond a reasonable doubt: (1) that Williams caused physical harm to Smith; (2) that the contact was the result of an intentional act of Williams and was not accidental; and (3) that the contact was not consented to by Smith. *See Maryland State Bar Ass’n, Maryland Criminal Pattern Jury Instructions*, (MPJI-Cr), 4:01, p. 377 (2d ed. 2012).

As to reckless endangerment, the State was required to prove: (1) that Williams engaged in conduct that created a substantial risk of death or serious injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that Williams acted recklessly. *See MPJI-Cr 4:26A*.

⁸ The court instructed the jury that, “[i]n order to convict the Defendant, Tavon Williams, of assault, the State must prove that the Defendant, Tavon Williams, caused physical harm to Alexis McBride and/or Michael Smith, that the contact was the result of an intentional or reckless act of the Defendant, Tavon Williams, and was not accidental, and that the contact was not consented to by Alexis McBride and/or Michael Smith.”

Under these standards, the State introduced sufficient evidence from which the jury could reasonably find, beyond a reasonable doubt, that Williams assaulted Smith in the second degree and recklessly endangered his life. Detectives Verkest and Colburn testified that at approximately 11:00 p.m. on May 1, 2012, they observed Williams shooting a gun in the direction of three men, one of whom Detective Todd knew to be Smith. Moments later, Detective Todd found Smith across the street from the scene of the shooting, with a gunshot wound to his arm. The medical records confirm that a Michael Smith suffered a gunshot wound to his arm late in the evening of May 1, 2012.

For these reasons, the evidence adduced at trial, viewed in the light most favorable to the prosecution, would suffice for the jury to conclude that Williams, without Smith's consent, intentionally caused physical harm to Smith. For the same reason, the evidence would suffice for the jury to conclude that Williams unreasonably and recklessly engaged in conduct that created a substantial risk of death or serious injury to Smith. It was the jury's task to weigh this evidence and to reach any reasonable inferences from it. We defer to any reasonable inferences that the jury could have drawn, and will not retry the case or impose our inferences where they may differ. *See Holmes*, 209 Md. App. at 437-38.

V. Merger

Finally, Williams contends that his conviction for reckless endangerment of McBride should have merged into the conviction of attempted second-degree murder of McBride.

Similarly, Williams contends that his conviction for reckless endangerment of Smith should have merged into his conviction for second-degree assault of Smith. Williams also contends that his conviction for wearing, carrying, or transporting a handgun should have merged into his conviction for use of a handgun in a crime of violence. The State agrees.

A. Legal Standards

The doctrine of merger of offenses derives in part from federal and state common-law double jeopardy principles. *Pair v. State*, 202 Md. App. 617, 636 (2011). It “provides the criminally accused with protection from, *inter alia*, multiple punishment stemming from the same offense.” *Purnell v. State*, 375 Md. 678, 691 (2003).

Under Maryland law, the principal test for determining whether to merge offenses is the “required evidence” test. *See Dixon v. State*, 364 Md. 209, 236 (2001).

[R]equired evidence is that which is minimally necessary to secure a conviction for each . . . offense. . . . [W]here only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, merger follows[.]

State v. Lancaster, 332 Md. 385, 391-92 (1993) (internal citations and quotation marks omitted); *accord Nicolas v. State*, 426 Md. 385, 402 (2012); *Snowden v. State*, 321 Md. 612, 617 (1991).

Even if two offenses do not merge under the required evidence test, merger for purposes of sentencing may be appropriate based on either the “rule of lenity” or the principle of “fundamental fairness.” *Marlin v. State*, 192 Md. App. 134, 167 (2010). The

rule of lenity is a principle of statutory construction. *See Miles v. State*, 349 Md. 215, 227 (1998); *Claggett v. State*, 108 Md. App. 32, 51 (1996). It provides an alternative basis for merger and is applied “to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction.” *Marlin*, 192 Md. App. at 167; *accord Monoker v. State*, 321 Md. 214, 222 (1990).

“Fundamental fairness” acts as an independent basis for merging convictions. In *Monoker*, the Court of Appeals, finding merger to be warranted on this basis alone, concluded:

Although solicitation is not always a lesser included offense of conspiracy, in *Monoker*’s case the conspiracy to burglarize the Dublin home certainly did ripen from the solicitation of [another] to commit that same crime. [W]e conclude that because the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it, it would be fundamentally unfair to *Monoker* for us to require him to suffer twice, once for the greater crime and once for a lesser included offense of that crime. For that reason his sentences should merge.

Monoker, 321 Md. at 323-24; *accord Marquardt v. State*, 164 Md. App. 95, 152-53 (2005) (holding that, under particular facts, malicious destruction of property should have merged into burglary conviction, as malicious destruction was “clearly incidental to the breaking and entering of” residence).

B. Reckless Endangerment

The trial court erred in not merging Williams’s sentence for reckless endangerment of Smith into his sentence for second-degree assault of Smith. We likewise hold that the

court erred in not merging Williams’s other reckless endangerment sentence into his sentence for attempted second-degree murder of McBride.

Under the particular facts of this case, a single act of shooting two persons, in the same brief and uninterrupted period of time, formed the basis for all four convictions. Under either the rule of lenity or the principle of fundamental fairness, the reckless endangerment sentences must merge into their greater offenses. *See Marlin*, 192 Md. App. at 171 (holding that reckless endangerment merged into first-degree assault, under fundamental fairness or rule of lenity, as “Marlin’s conduct as to the reckless endangerment [shooting a victim] involved the same conduct that formed the basis for the first degree assault by firearm; no other conduct was involved in proving either offense”); *accord Manokey v. Waters*, 390 F.3d 767, 771 (4th Cir. 2004) (citation omitted) (“[W]hen a single act is sufficient to result in convictions for both offenses, but the victim suffered only a single harm as a result of that act, then as a matter of fundamental fairness there should be only one punishment because in a real-world sense there was only one crime”). As merger is proper on these grounds alone, we need not engage in the required evidence analysis.⁹

⁹ Williams was sentenced to 30 years in prison for the attempted second-degree murder of McBride and to a consecutive five years for reckless endangerment of McBride. Williams was also sentenced to 10 years in prison for the second-degree assault of Smith and to a consecutive five years for reckless endangerment of Smith. Accordingly, on remand, with these two reckless endangerment sentences merged into the convictions for attempted second-degree murder and second-degree assault, Williams’s aggregate prison sentence shall be decreased by 10 years.

C. Wearing, Carrying, or Transporting Handgun

Williams was sentenced to a prison term of 20 years, the first five years without the possibility of parole, for the use of a firearm in a crime of violence conviction. He was also sentenced to a concurrent term of three years for wearing, carrying, or transporting a handgun. Williams argues that, for sentencing purposes, the conviction for wearing, carrying, or transporting the handgun should merge into the conviction for using the firearm. The State agrees.

“It is well settled that when convictions for use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun are based upon the same acts, separate sentences for those convictions will not stand.” *Holmes*, 209 Md. App. at 456 (citing *Wilkins v. State*, 343 Md. 444, 446-47 (1996); *Hunt v. State*, 312 Md. 494, 510 (1988)). Accordingly, as the two crimes in the case *sub judice* are based upon the same act of shooting, Williams’s sentences for the two convictions must be merged under the rule of lenity. *Holmes*, 209 Md. App. at 456 (citing *Hunt*, 312 Md. at 510).

Applying these principles to our case, we hold that Williams’s three-year sentence for wearing, carrying, or transporting a handgun must merge into his 20-year sentence for use of a handgun in the commission of a crime of violence. *See, e.g., Abeokuto v. State*, 391 Md. 289, 356 (2006) (“Where there is a merger under the rule of lenity, the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty”) (citation and quotation marks omitted).

CONCLUSION

For the reasons set forth above, we affirm the judgments of the Circuit Court for Baltimore City, yet shall merge the two reckless endangerment sentences and the one sentence of wearing, carrying, or transporting a handgun.

**SENTENCES FOR RECKLESS
ENDANGERMENT CONVICTIONS AND
FOR WEARING, CARRYING, OR
TRANSPORTING A HANDGUN
CONVICTION VACATED. JUDGMENTS
OF THE CIRCUIT COURT FOR
BALTIMORE CITY OTHERWISE
AFFIRMED. COSTS TO BE PAID 20% BY
MAYOR AND CITY COUNCIL OF
BALTIMORE AND 80% BY APPELLANT.**