UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1512

September Term, 2014

DELMAR HERNANDEZ

v.

STATE OF MARYLAND

Meredith,
Berger,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 20, 2016

At the conclusion of a trial in the Circuit Court for Prince George's County, a jury convicted Delmar Hernandez, appellant, of robbery, robbery with a dangerous weapon, second-degree assault, first-degree burglary, reckless endangerment, and attempted robbery. The court sentenced appellant to an active prison sentence of 23 years, followed by five years of probation. Appellant timely noted this appeal.

QUESTIONS PRESENTED

Appellant presents three questions for our review:

> 1. Did the trial court err in not redacting certain portions of Appellant's statement to police, which a police witness read aloud for the jury?
>
> 2. Did the trial court abuse its discretion in admitting testimony by Ms. Murillo that was more unfairly prejudicial than probative?
>
> 3. Did the sentencing court err in imposing separate sentences for robbery with a dangerous weapon and reckless endangerment?

For the reasons stated below, we answer the first question "no." We conclude appellant waived the objection raised in the second question because similar testimony came in without objection before Ms. Murillo testified. We answer the third question in the affirmative, and will vacate the sentence imposed on the conviction for reckless endangerment. Otherwise, we affirm all judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

At the time of the events in this case, Adolfo Sical-Rosales and his wife, Rosa Murillo, lived in an apartment in Hyattsville, Maryland. Around 1:00 a.m. on July 26, 2013, a man identified by Mr. Sical-Rosales as appellant came to the apartment to purchase beer.

Mr. Sical-Rosales knew appellant because appellant stopped by the apartment periodically to buy beer, always paying cash. Appellant left after completing his 1:00 a.m. purchase.

Later, around 3:00 a.m., Mr. Sical-Rosales and Ms. Murillo were awakened by a knock on the door. Mr. Sical-Rosales looked through the door's peephole and observed appellant. As Mr. Sical-Rosales opened the door, appellant "pushed it" and entered the apartment with two other men. One of the men had a gun, and he pointed it at Mr. Sical-Rosales, asking for money. Mr. Sical-Rosales testified: "[W]hen they came in, they told me it was a robbery." Ms. Murillo, who was still in the bedroom, heard someone say "it was a robbery, not to call the police." The man with the gun threw Mr. Sical-Rosales to the floor. Mr. Sical-Rosales testified that, when the man put the gun to Mr. Sical-Rosales's head, appellant said: "I don't know anything. I don't know what's going on here." Ms. Murillo cautiously peeked into the kitchen from the bedroom, and she observed her husband and appellant on their knees. Ms. Murillo started to dial 911.

The other man, whom Mr. Sical-Rosales described as the "hairy" one, went to the bedroom. The hairy man took the phone from Ms. Murillo and ordered her to take off her shorts (the only clothing she was wearing at the time). Ms. Murillo testified that the hairy man said he wanted to rape her and told her: "[L]ay on the bed, turn around and take your shorts off." Ms. Murillo pleaded with the man and said she was sick and on her period.

Back in the kitchen, Mr. Sical-Rosales heard the hairy man speaking with his wife, and he tried to get up. The man with the gun hit Mr. Sical-Rosales, who fell back to the

floor. At that point, appellant told the man with the gun "not to do anything to [Mr. Sical-Rosales]." The man with the gun told appellant that he would kill him, too. When the hairy man became distracted by the commotion in the kitchen, Ms. Murillo jumped out of the bedroom window, wearing only a pair of shorts. Half-naked, she knocked on neighbors' doors until she found someone who called 911.[1]

Meanwhile, in the kitchen, the man with the gun demanded that Mr. Sical-Rosales give him money. By this time, the hairy man had returned from the bedroom, and Mr. Sical-Rosales told him where to find some money. Mr. Sical-Rosales estimated that the men took between $200 and $400. The man with the gun ordered appellant to lie down next to Mr. Sical-Rosales, which he did. The attackers grabbed a twelve pack of beer and backed to the door. Then the man with the gun pointed it at Mr. Sical-Rosales. He pulled the trigger, but the gun did not fire. The attackers then left the apartment. As soon as the men had left the apartment, Mr. Sical-Rosales heard the sound of a gun being fired in the hallway.

Appellant asked Mr. Sical-Rosales what the men had taken. When Mr. Sical-Rosales responded, appellant told him that he would get his money back. Mr. Sical-Rosales testified that appellant then grabbed a knife from the kitchen and ran out the door. He did not return (and never did get the victims' money back).

[1] The 911 call was played for the jury, but the transcript states merely: "(Whereupon the 9-1-1 call was played.)"

After calling 911, Ms. Murillo headed back toward her apartment to see if she could help her husband. As she neared the apartment, she heard two gunshots, and then observed three men get into a vehicle she described as a small blue or green car with a spare tire on the back. She identified appellant as the last man to enter the vehicle, describing him as "the one we knew." No one forced appellant into the vehicle. The vehicle drove away.

Around 3:30 or 4:00 a.m., Officer Rion Robinson responded to a 911 call for a breaking and entering and a shooting. (All law enforcement officers in this case work for the Prince George's County Police Department, unless noted otherwise.) When Officer Robinson arrived at the apartment, he first ensured that Mr. Sical-Rosales and Ms. Murillo were safe. He then observed bullet fragments in the hallway. Officer Robinson testified that a bullet struck the metal staircase railing in the hallway and had splintered into three fragments. Detective Patrick Whittington recovered the bullet fragments from the scene. Detective John Maxwell spoke with Mr. Sical-Rosales and Ms. Murillo at the apartment. Both Mr. Sical-Rosales and Ms. Murillo told Detective Maxwell that three men had robbed them, and they both recognized appellant as one of the robbers.

Later that same morning, around 8:00 a.m., Montgomery County Police Department Officer Petr [sic] Speight was on patrol duty. He responded to a report of a possible DUI, involving a green or white, jeep-type vehicle. Officer Speight discovered a vehicle matching this description, motionless in the median of the road, blocking traffic. Officer Speight observed that the vehicle was a Geo Tracker. (At trial, Ms. Murillo identified a picture of

this vehicle as the one she had seen appellant and the two other attackers enter and drive away from the apartment.) When Officer Speight arrived, the driver of the Geo was yelling at the driver of another vehicle, while appellant was passed out in the passenger seat. Officer Speight observed beer cans and beer bottles in the Geo, and he also saw a long "butcher-style kitchen knife" on the rear seat. At trial, Officer Speight identified appellant as the man he found passed out in the passenger seat of the Geo. Because the vehicle was in Prince George's County, Officer Speight held the vehicle and its occupants at the scene until Prince George's County Police responded.

Officers Kevin Carter and Daniel Evans were among the Prince George's County Police officers who responded to the scene. Officer Carter testified that police directed the driver and appellant to exit the vehicle. Both men appeared intoxicated. Officer Carter observed a kitchen knife in plain view on the rear seat. A subsequent search of the vehicle revealed a gun underneath the driver's seat. After the gun was discovered, appellant "mentioned" that the gun had been fired that night, and said that he could take the officers to the location. Police recovered the weapon, and took the driver and appellant to the police station.

There, Detective William Diaz, who is fluent in Spanish, met with appellant. Detective Diaz testified that he went over a waiver of rights form with appellant, and appellant then indicated that he wanted to give a statement to police. Appellant wrote out

his statement in English. At trial, Detective Diaz read the statement to the jury, over appellant's objection, as follows:

> I [appellant] was at Emelis [sic] drinking when this guy came up and he said that he wanted to keep on drinking, and if we want, we can take his car. So I told him he can drink with me, we just needed to go buy more beer at my friend's house. In [sic] our way to my friend's house – and on the way to my friend's house he pulled out a .38. He said he was not going to pay for something he can have for free. So we went inside, he threw me and Cholopo in [sic] the ground and the other person went inside the room to shut *la catracha* up.

After Detective Diaz explained that *la catracha* is a slang term that means "the woman of the house," he continued reading appellant's statement:

> He told me and Cholopo to get up and get on our knees. So we did. Then he told me, it's time to go, let's go. So I got in the car with him and the other person. So he pulled out a .38 and started shooting in the air. Then we waited until the liquor store was open. We got more beer. He then took me someplace in Wheaton, and many guns from AK-47 to grenade launcher, many guns and ammo. So then he left to Langley Park to wait for Las ordenes de arriba like that dude said he was going to pull over.[2]

Detective Diaz testified that appellant never told him he was shocked and surprised by the actions of the two men who went to the apartment with him. Detective Diaz took a picture of appellant and took two copies of the photo back to the victims' apartment. Mr. Sical-Rosales and Ms. Murillo independently identified appellant as one of the three men who had robbed them.

[2] We note that this portion of the written statement actually reads: "So then we left to Langley Park to wait for *Las ordenes de ariba* [sic] like that dued [sic] said the[n] we got pull over [sic]." The phrase *las ordenes de arriba* translates as "the orders from above."

The recovered gun was identified as a .38 caliber Smith & Wesson revolver. Jaimie Smith, a firearms examiner with the Prince George's County Crime Laboratory, was admitted as an expert in forensic firearm and tool mark examination. Mr. Smith testified that he test-fired the gun, and it "fired and functioned properly." He compared bullets test-fired from the gun to the bullet fragments recovered from the hallway and testified that he concluded that the gun recovered from the vehicle was the same one used in the robbery of Mr. Sical-Rosales and Ms. Murillo.

Appellant was indicted on charges of first-degree burglary and conspiracy to commit robbery with a dangerous weapon, as well as the following crimes as to Mr. Sical-Rosales: attempted murder, robbery, robbery with a dangerous weapon, first-degree assault, use of a handgun in a crime of violence, and reckless endangerment. Appellant was also indicted and charged with the following crimes as to Ms. Murillo: robbery with a dangerous weapon, attempted robbery, first-degree assault, and use of a handgun in a crime of violence.

The jury acquitted appellant of attempted murder, first-degree assault, the handgun offenses, and conspiracy. He was convicted of the remaining charges and second-degree assault as to Mr. Sical-Rosales. Appellant was sentenced to a total of 23 years of active imprisonment, to be followed by five years of probation. The sentences included a 20-year term of incarceration (with all but 10 years suspended) for robbery with a dangerous weapon, and a consecutive 3-year term of incarceration for reckless endangerment. In appellant's third issue on appeal, he argues that the latter two sentences merge.

DISCUSSION

I. Evidentiary Issues

Appellant contends that the circuit court committed two errors relating to the admission of evidence. First, appellant argues that the court erred when it permitted Detective Diaz to read the entirety of appellant's statement for the jury. Second, appellant asserts that the court erred in permitting Ms. Murillo to testify that one of the robbers said "it was a robbery, not to call the police."

The Court of Appeals has noted that "[t]rial judges generally have 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011). "[T]rial judges do not," however, "have discretion to admit irrelevant evidence" when a timely objection has been asserted. *Id.* In summarizing the standard of appellate review applicable to evidentiary rulings, this Court has said:

> In evaluating the correctness of the trial court's ruling, we engage in a two-pronged analysis. First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*. *Simms*, 420 Md. at 725. Evidence is relevant if it has "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." Md. Rule 5-401. If we conclude that the challenged evidence meets this definition, we then determine whether the court nonetheless abused its discretion by admitting relevant evidence which should have been excluded because its "probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725.

Wash. Metro. Area Transit Auth. v. Washington, 210 Md. App. 439, 451 (2013).

A. Appellant's Statement

Prior to trial, appellant moved *in limine* to exclude any reference appellant made to alleged gang activity, and the State agreed not to elicit such testimony. During trial, when the State advised the trial court of the prosecutor's intent to introduce the statement appellant wrote out following his arrest, appellant objected, and the following colloquy ensued:

> [APPELLANT'S COUNSEL]: Your Honor, at this time, I would object not to the entire exhibit, but to specific portions of it. I don't know if it can be under redaction. Specifically, with respect to the motion *in limine* that I raised prior to trial. At the point in time that the defendant is talking about – although this is not referencing MS-13 by name, and I'm sure the State wants to get in most of it, and **I'm not saying that it's totally inadmissible**, but the portions of the statement – there's a portion of the statement that reads, after they went to the liquor store, he took me to someplace in –
>
> [THE STATE]: Wheaton.
>
> [APPELLANT'S COUNSEL]: Okay. **["]They had many guns, from AK-47 to grenade launcher, many guns and ammo. So then we left to Langley Park to wait for Las ordenes de arriba like that dude said, then we got pulled over.["]**
>
> **The part that I just read, I would argue that it's in line with my motion *in limine*. It's not relevant**. I know it's his statement so it can come in but not all of his statement. I have no problem with him saying he went into the liquor store if that's what he wrote, but I wonder the effect that it has. I mean the jurors can choose to believe it or not, but with respect to the reference to the guns, the AK-47, again, I'm not saying they're going to draw a connection to that but it's possible **and I think that the prejudicial value outweighs the probative value, that portion of the statement. Other than that, I don't object to the statement itself. That particular portion I would object to and ask that it be redacted before being published to the jury**.

> [THE STATE]: Your Honor, the motion *in limine*, with regards to MS-13, there's nothing in the statement that says anything about MS-13, so I think the statement should be admitted as is.
>
> [APPELLANT'S COUNSEL]: Even without the MS-13 being something separate from that, it's prejudicial value versus the probative value.
>
> THE COURT: The defendant's statement?
>
> [APPELLANT'S COUNSEL]: It is, Your Honor. I'm making a record. **I think the references to the guns and whatnot are overly prejudicial.**
>
> THE COURT: I'll deny the motion.
>
> [APPELLANT'S COUNSEL]: Thank you. Please note my objection.
>
> THE COURT: So noted.

(Emphasis added.)

On appeal, appellant contends that the court erred in admitting the portion of appellant's statement that said:

> and many guns from AK-47 to grenade launcher, many guns and ammo. So then he left to Langley Park to wait for [l]as ordenes de arriba like that dude said he was going to pull over.

Appellant argues that this portion of the statement was irrelevant to the issues at trial, and alternatively, even if somehow relevant, the language is inflammatory and unfairly prejudicial. Appellant notes that "*las ordenes de arriba*" translates to "the orders from above," and could have led the jury to conclude that appellant was involved in gang activity. Furthermore, appellant argues, the references to AK-47s and grenade launchers "could have sidetracked the jury" or unfairly associated appellant with those items.

Citing Maryland Rule 4-323(a), the State counters that appellant "has waived his right to appellate review of the admission of the testimony" because he failed to object when Detective Diaz read the statement to the jury after the document had been admitted into evidence. This is a frivolous argument. Appellant's counsel vigorously objected to the admission of the written statement, and made virtually the identical arguments he makes on appeal. There was no obligation for the appellant's counsel to renew the objection when, immediately *after* the document was received into evidence, the State asked Detective Diaz to read the statement to the jury.

With respect to the merits of the objections raised by appellant, the State argues that the challenged portion of appellant's statement was relevant because "the State's theory of the case was that Hernandez was an accomplice," and his statement— including the portions appellant sought to have redacted — was probative of the issue of whether he willingly aided in the commission of the robbery. Accordingly, the State contends, the court did not abuse its discretion in denying appellant's request for redaction of the portions of the statement referring to weapons and *ordenes de arriba*.

Maryland Rule 5-401 states: "'Relevant evidence' means 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." (Emphasis added.) The State's theory of the case was that appellant was an accomplice of the two men robbing the apartment. "'To be an accomplice a person must participate in the commission

of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime.'" *In re Anthony W.*, 388 Md. 251, 274 (2005) (quoting *State v. Raines*, 326 Md. 582, 597 (1992)). Accordingly, any evidence that had any tendency to make it more probable that there was an accomplice relationship between appellant and the other two men was relevant to the issues the jury was asked to decide in this case.

During the State's opening statement, the prosecutor alerted the jury to the fact that the court's instructions on the applicable law would include instructions about accomplice liability. The prosecutor told the jury: "Accomplice liability is a law that when there's criminal enterprise, everyone that's involved in it is responsible for the actions of everybody else." The prosecutor continued:

> [W]hat is the defendant's role in this home invasion?
>
> In order for there to be a home invasion, there needs to be, one, a residence with somebody in it. He knew that. He provided that. He knew the people in that house and he provided the means of that part of the home invasion. Number two, there needs to be something in that house to take. He also knew that because he was familiar with the people inside that house. And three, he needed to get away and he left when everybody else left as well.
>
> And so this a case about the inside man, the one who provided the way to get into that apartment . . . .

Appellant's opening statement revealed that the defense to the claim of accomplice liability would focus on the issue of whether appellant was a willing and knowing participant in the robbery. Appellant's counsel told the jury:

One of the things that I think is important to understand about this case also is some very basics and that's probably two or three basic things. My client didn't rob anyone[;] he didn't try to kill anyone[;] he no bad intentions that day. **His involvement as you'll soon find out was one of complete surprise and just kind of being caught up in a bad situation**. And my grandmother used to tell me from a young age that nothing good happens after 12 o'clock midnight and I think that's true in this case and I think that Delmer [Hernandez] knows that as well. But just because he's got bad judgment doesn't mean he's guilty of any crime. **He committed no crime. And there will be no evidence to prove that he did.** . . .

* * *

So before I sit down, I just kind of want to give another spin on the version that [the prosecutor] gave. . . .

* * *

That day, it was a . . . Thursday evening, my client was starting his weekend early. He was drinking at a local club. . . . **So he was sitting there drinking beer, watching a game at a bar when he meets up with two other people who he doesn't know before that day. He never met them. They all drink together** and they all start drinking black coffee, **become drinking buddies**, bar buddies, whatever you want to call it.

The bar closes[;] they want to keep drinking. My client knows about this speakeasy, this brewhouse that exists where these two people live. . . . They go there, and my client, unbeknown to him, this person that's with my client has a gun, this gun. . . . **[M]y client is there with the intention of buying beer,** a place that he's gone a million times before, a place that he was at that same day earlier, boom, **this guy rushes in, pulls out the gun, threatens the home owner, within a matter of seconds, it's over**. Runs out the door.

. . . So that's the short version of what happened. . . .

(Emphasis added.)

Because appellant did not testify, there was no evidence offered to support defense counsel's "spin" other than appellant's written statement. But defense counsel's opening statement had placed before the jury assertions that appellant had never met the other two assailants before the night of the robbery, and the commission of the robbery was a "complete surprise" to appellant.

Appellant never disputed that the victims had been robbed at gunpoint, and, in his statement, he admitted that he was present during the home invasion and robbery. Because the opening statements made it plain that the key factual dispute in the case related to appellant's state of mind at the time of the robbery and the nature of his relationship with the other two robbers, the entirety of the statement that he gave to police when he was arrested the same day as the robbery was relevant. The details in that statement had a "tendency to make the existence of [the fact that he was a knowing and willing participant in the robbery] more probable . . . than it would be without the evidence." Appellant's description of his post-robbery exploits with his allegedly new-found drinking buddies, including his reference to viewing assault weapons and waiting for orders from above, tends to support the State's theory that appellant was in cahoots with the two men and knowingly participated in the robbery. The evidence that appellant accompanied the men to view guns and rode around drinking with the robbers while waiting for them to receive communications from others — after he knew that they had stolen money from Mr. Sical-Rosales at gunpoint — also tends

to refute the defense theory that appellant was totally surprised by his cohorts' criminal conduct and was a mere bystander.

And, because the hand-written statement was appellant's own version of the events that transpired after he fled from the scene of the robbery, we see no abuse of discretion in the trial court's rejection of appellant's claim that his statements were unfairly prejudicial and should have been redacted pursuant to Maryland Rule 5-403.

B. Ms. Murillo's Testimony

In the second issue raised on appeal, appellant contends that the trial court erred in permitting Ms. Murillo to testify, over objection, that, when the intruders entered the apartment, she heard one of them say "it was a robbery, not to call the police." Appellant argues that this testimony was unfairly prejudicial, and the court should have excluded it. The State contends that this testimony was not unfairly prejudicial and, moreover, was admitted to demonstrate why Ms. Murillo attempted to dial 911.

Although appellant raised a timely objection (based on hearsay) prior to Ms. Murillo's testimony about what she heard one of the home invaders say, appellant had not raised any objection when Mr. Sical-Rosales had testified, earlier in the trial, that, as appellant entered the apartment with the two men, "when they came in, they told me it was a robbery." Consequently, any hearsay objection to the announcement of a robbery had already been waived prior to the time Ms. Murillo testified. As we explained in *Benton v. State*, 224 Md. App. 612 (2015):

> **An appellate court "will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses."** *Yates v. State*, 429 Md. 112, 120, 55 A.3d 25 (2012) (citation omitted). Moreover, "[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State,* 407 Md. 16, 31, 962 A.2d 383 (2008) (citing *Peisner v. State*, 236 Md. 137, 145–46, 202 A.2d 585 (1964), *cert. denied*, 379 U.S. 1001, 85 S.Ct. 721, 13 L.Ed.2d 702 (1965)).

Id. at 627 (emphasis added).

In this case, the prior testimony of Mr. Sical-Rosales that "when they came in, they told me it was a robbery" placed in evidence the same facts that appellant is complaining came in through Ms. Murillo. Accordingly, because the fact that one of the men announced "it was a robbery" came in without objection during Mr. Sical-Rosales's testimony, appellant waived any appellate challenge to the subsequent admission of Ms. Murillo's testimony that she heard someone say "it was a robbery."

We further observe that appellant has never disputed the fact that Mr. Sical-Rosales and Ms. Murillo were the victims of a robbery. The statement was not admitted for proving the truth of the matter asserted, but, rather, for the timing of the statement, *i.e.*, the fact that the purpose of the visit was announced as soon as appellant and the other two men entered the apartment, which supported the State's theory that appellant was an accomplice, and refuted the defense theory that appellant was shocked and surprised when his associates committed a robbery.

II. Sentencing Issues

Appellant argues that the sentencing court erred in imposing separate sentences for reckless endangerment and robbery with a dangerous weapon. He contends, first, that the rule of lenity compelled the court to merge these two convictions. Appellant asserts that any action that formed the basis for the reckless endangerment conviction was in furtherance of the robbery with a deadly weapon and the counts should, therefore, merge. In the alternative, appellant contends that the convictions must merge based on principles of fundamental fairness because it is unclear whether the jury based the convictions on separate acts.

The State argues that appellant's convictions do not merge under the rule of lenity, and, moreover, the convictions were based on two separate transactions. The State also contends that appellant has not preserved the issue of merger pursuant to fundamental fairness because this argument was not presented to the sentencing court.

A court may merge offenses pursuant to the rule of lenity when it finds "'as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction.'" *Pair v. State*, 202 Md. App. 617, 637-38 (2011) (emphasis omitted) (quoting *Brooks v. State*, 284 Md. 416, 423 (1979)).

This Court has noted: "The rule of lenity . . . deals only with legislative intent and, therefore, only with the situation wherein at least one of the crimes subject to merger analysis is a statutory offense." *Id.* at 638 (citing *Khalifa v. State*, 382 Md. 400, 434 (2004)). In this

case, robbery – even the aggravated form of robbery with a deadly weapon – is a common law crime. *See id.* at 642-43 (citing *Whack v. State*, 288 Md. 137, 140-41 (1980)). Reckless endangerment, however, is a statutory crime, and the rule of lenity may, therefore, be applicable. *See Holbrook v. State*, 364 Md. 354, 365 (2001).

The Court of Appeals has remarked:

> Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. . . . [I]f we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.

Monoker v. State, 321 Md. 214, 222 (1990).

The rule of lenity requires that "doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction will be resolved against turning a single transaction into multiple offenses." *Miles v. State*, 349 Md. 215, 227 (1998) (internal quotations and citations omitted). Under the rule, "if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Monoker, supra*, 321 Md. at 222.

Although the State argues that the rule of lenity does not mandate merger of appellant's sentences in this case because appellant's convictions for reckless endangerment and robbery with a dangerous weapon stem from separate acts, *see Graham v. State*, 117 Md. App. 280, 290 (1997), the record does not support the State's argument on appeal that the

specific act giving rise to appellant's conviction for reckless endangerment was the firing of shots in the hallway after the robbery had been completed. To the contrary, the prosecutor never argued that the jury should find that the charge of reckless endangerment was based on acts that occurred after the robbery had been completed.

In the prosecutor's closing argument, after the prosecutor explained to the jury why it should find appellant guilty of all the other charges, the prosecutor cited this evidence as the basis for a conviction of reckless endangerment, stating:

> Reckless Endangerment. The defendant engaged in conduct that created a substantial risk of death or physical injury to another. **When you have a guy that's holding a gun that says he's not going to pay for something he can get for free and you're going into someone's house, if that's not reckless endangerment, I don't know what is.** That is a hot topic [sic], hot button dynamic situation which creates a substantial risk of death or serious physical injury.

(Emphasis added.)

The prosecutor never suggested to the jury that the State was claiming that appellant was guilty of the crime of reckless endangerment because his associates committed some act separate and distinct from the robbery. Nor did the jury instructions advise the jury that it could find the appellant guilty of reckless endangerment only if it found that the man with the gun fired one or more shots after the robbery.

We find the analysis in *Nicolas v. State*, 426 Md. 385 (2012), to be instructive. In *Nicolas*, the Court of Appeals was asked to consider whether a conviction for the battery form of second degree assault was required to be merged into a conviction for resisting

arrest. The Court held that, "when the force used by a defendant to resist arrest *is* the same as the offensive physical contact with a law enforcement officer attempting to effectuate that arrest, the convictions merge under the required evidence test." 426 Md. at 407-08.

In response to the State's assertion that Nicolas's assault convictions could have been based upon contact which preceded any attempt to arrest Nicolas, the defendant argued that "the record is ambiguous as to whether the jury convicted him of assault based on conduct that preceded or followed the initiation of the officers' attempt to arrest him," and "that ambiguity should be resolved in [his] favor." *Id*. at 411. The Court of Appeals agreed that, based upon its review of the trial transcript, the judge's jury instructions, and the verdict sheet, it was possible that the assault conviction could have been based upon the same conduct as the resisting arrest conviction, and the Court held that that ambiguity had to be resolved in favor of the defendant. The Court explained, *id*. at 412:

> Upon reviewing the trial transcript, the judge's instructions to the jury, and the verdict sheet, we hold that the record is ambiguous as to the factual bases for which the jury found Petitioner guilty of second degree assault of Officer Anspach and Officer Burhoe. In our view, **a reasonable jury could have found that the assaults were based on acts that preceded the officers' attempt to arrest Petitioner, or that the assaults were an integral part of the resisting arrest. In accordance with Maryland precedent, we must resolve this factual ambiguity in Petitioner's favor. Accordingly, the trial judge should have merged the assault convictions into the conviction for resisting arrest.**

(Emphasis added.)

At other points in the *Nicolas* opinion, the Court made similar statements that emphasized the requirement for the appellate courts to resolve in the defendant's favor ambiguities in the record regarding the basis for the convictions that might have been based upon the same conduct. The Court stated, *id*. at 400:

> Furthermore, **we hold that where there is a factual ambiguity in the record, in the context of merger, that ambiguity is resolved in favor of the defendant.** Here, a reasonable jury could have concluded either that the factual bases underlying Petitioner's convictions for second degree assault were separate and distinct from the facts surrounding his conviction for resisting arrest, or that the assaults were an integral part of the resisting arrest. In light of this factual ambiguity, we resolve the issue in Petitioner's favor by determining that the assault convictions and the resisting arrest conviction were based on the same act or acts committed by Petitioner. Thus, the trial judge should have merged the second degree assault convictions with the conviction for resisting arrest.

(Emphasis added.)

Similarly, the Court stated, *id*. at 408 n.6:

> As Maryland case law indicates, the appropriate standard to apply when addressing a question of factual ambiguity in the context of merging convictions is to resolve the ambiguity in the defendant's favor in a situation where it is impossible to know for certain the rationale of the trier of fact for finding the convictions entered against the defendant. *See Snowden*, [*v. State*, 321 Md. 612, 619, 583 A.2d at 1059–60 [(1991)]; *Nightingale*, [*v. State*, 312 Md. 699, 708], 542 A.2d at 377 [(1988)]; *State v. Frye*, 283 Md. 709, 723–25, 393 A.2d 1372, 1379–80 (1978); *Cortez v. State*, 104 Md. App. 358, 361, 656 A.2d 360, 361 (1995).

This Court applied a similar approach in the case last cited in the quote above — *Cortez v. State*, 104 Md. App. 358 (1995) — a case in which the defendant was convicted of both second degree assault and sexual offense in the fourth degree. In *Cortez*, we held that,

because the trial judge had not made explicit findings that separate conduct supported the two convictions, the convictions for battery and fourth degree sexual offense merged for sentencing purposes. We explained, *id.* at 368-69:

> We are confronted with the same problem of ambiguity of verdict that confronted the Court of Appeals in *Snowden*. We may assume, for the sake of argument, that the trial judge could have found appellant guilty of battery on the basis of an act or acts separate and distinct from the act that constituted the fourth degree sexual offense. Nevertheless, the trial judge's rationale for the battery conviction is not readily apparent to us. Therefore, we are constrained to hold that the conviction and sentence for battery merges into the conviction and sentence for the fourth degree sexual offense and, therefore, that the sentences for battery must be vacated. *Snowden*, 321 Md. at 619, 583 A.2d 1056; *Nightingale*, 312 Md. at 708-709, 542 A.2d 373.
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> This merger problem continues to arise despite *Nightingale*, *Biggus* [*v. State*, 323 Md. 339 (1991)], *Snowden*, and [*State v.*] *Lancaster*[, 332 Md. 385 (1993)]. We believe it can be avoided in a case in which separate convictions and sentences might be sustainable on the evidence. In a bench trial, the solution is simple: the trial judge need only articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions. **In a jury trial, the solution, as suggested in *Snowden*, is the giving of an appropriate instruction.** For example, the trial judge might instruct the jury that, if it found the defendant guilty of robbery (or kidnapping, or other compound crimes in which force or the threat of force is an element), it could find the defendant guilty of battery (or assault, or both) only if it found that there was a use of force (or threat of force) separate from and independent of the force (or threat of force) employed to effect the greater offense. If such an instruction were given, a conviction of battery or assault in addition to the conviction of the greater offense would not merge, and the only debatable issue would be the sufficiency of the evidence of a separate battery or assault to sustain the conviction.

(Emphasis added.)

In the present case, the State contends that the closing argument by the prosecutor "describes two different criminal transactions: (1) a robbery with a dangerous weapon; and (2) shots fired at Sical-Rosales during the robbers's flight from his apartment." But, because of the argument the prosecutor made (quoted above) about the basis of the reckless endangerment charge being the use of the gun *during* the robbery, we agree with appellant that the jury *could have* based its reckless endangerment verdict on the same conduct that supported the charge of robbery with a dangerous weapon.

Moreover, as we stated in *Cortez,* it is the finder of fact — not the prosecutor — who must "articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions." *Cortez*, *supra*, 104 Md. App. at 511. *See also Williams v. State* 187 Md. App. 470, 477 (2009) (where charging document was ambiguous as to the particular act for which Williams was charged with first degree assault, and trial court did not instruct jury how the assault and robbery charges related to one another, this Court resolved the question of whether the assault and robbery charges were based upon the same conduct in Williams's favor); *Gerald v. State*, 137 Md. App. 295, 312 (2001) (Although the trial court instructed the jury on the elements of each offense, "it did not explain how the assault and robbery charges related to one another, how they differed, and what the jury needed to find to convict under both charges.").

Here, neither the jury instructions, nor the verdict sheet, nor the argument of the prosecutor limited the reckless endangerment charge to any specific conduct distinct from

the conduct that supported the robbery with a dangerous weapon charge. Consequently, as in *Nicolas*, we resolve that ambiguity in favor of the appellant, and assume that the jury could have based both verdicts upon the same conduct.

Although the *Nicolas* Court concluded, after resolving the ambiguities in favor of the defendant, that merger of the two convictions in that case was compelled by the required evidence test, we view the rule of lenity as the more appropriate basis for merger in the present case. In *Marlin v. State,* 192 Md. App. 134, 171 (2010), we concluded that the rule of lenity (as well as fundamental fairness) required that a conviction of reckless endangerment be merged into a conviction for first degree assault where both convictions were based upon a single act of shooting a single victim. Because we were persuaded that "Marlin's conduct as to the reckless endangerment involved the same conduct that formed the basis for the first degree assault by firearm," we ordered merger of the two convictions for purposes of sentencing and vacated the sentence for the "lesser" charge of reckless endangerment.

Similarly, we conclude that merger for sentencing purposes was required by the rule of lenity in the present case. Accordingly, we will vacate the sentence imposed by the circuit court as to the charge of reckless endangerment only.

SENTENCE FOR CHARGE OF RECKLESS ENDANGERMENT VACATED; OTHERWISE, ALL JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID ONE-THIRD BY PRINCE GEORGE'S COUNTY, AND TWO-THIRDS BY APPELLANT.