UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1844

September Term, 2015

ROBERT LLOYD PORTER, III

v.

STATE OF MARYLAND

Berger,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 14, 2016

Tried by a jury in the Circuit Court for Queen Anne's County, appellant, Robert Lloyd Porter, III, was convicted of first-degree and second-degree assault, kidnaping, conspiracy to commit kidnaping, false imprisonment, two counts of reckless endangerment, and use of a handgun in the commission of a felony or crime of violence.[1] The trial court sentenced appellant to a total of 60 years in prison, suspending all but 35 years, the first five years of which were mandatory. Appellant timely noted this appeal, presenting the following questions for our consideration:

> 1) Did the trial court abuse its discretion in admitting text messages from a cellphone purported to be Appellant's?
>
> 2) Did the trial court err in failing to merge first-degree assault into kidnaping?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On the afternoon of February 28, 2015, Angela Grimes sent a text message to Kyle Freeman asking to meet him at the Royal Farms Store near Routes 544 and 213 in Queen Anne's County for the purpose of purchasing drugs from him. Freeman offered Chandler Stubbs $20 for a ride to the store. Stubbs agreed and borrowed his mother's minivan for the ride.

According to Stubbs, after a 15 to 20 minute wait in the Royal Farms Store parking lot, a vehicle occupied by four people pulled up to the minivan. Appellant, holding a gun, and a woman exited that vehicle and approached Stubbs's van, asking Freeman, "where is

[1] The court granted appellant's motion for judgment of acquittal with regard to ten charges in the indictment against him, and the State *nolle prossed* one charge during trial.

it?" Freeman rolled down his window, and appellant reached in, unlocked the car door, and patted Freeman down. Unable to find what he was looking for, appellant "ripped [Freeman] out of the car and threw him in the back of the van. . . and started smacking him around" before putting him into another vehicle.

The woman politely assured Stubbs that he was not in danger from the altercation between Freeman and appellant, but she required his keys and cell phone so he could not alert the police. A man returned the items to Stubbs approximately two hours later.

Freeman, incarcerated at the time of trial on a probation violation, confirmed that on February 28, 2015, Stubbs provided him a ride to the Royal Farms Store. Once there, a vehicle pulled up to Stubbs's van, blocking them in, after which appellant exited the car, pointed a gun at him, smacked him, told him to get out of the car, searched him, and forced him into another vehicle occupied by Angela Grimes, Dean Dorman, and Amanda Ralosky.

When Freeman realized that Dorman and Ralosky were in the car with Grimes, who had requested the meeting, he understood what was happening. He had purchased drugs from Dorman and Ralosky, his heroin suppliers, a few days earlier and had stolen from them a box containing logs of heroin, stashing the heroin in the home of Thomas Nelson, where he was staying.

With Grimes driving, the car proceeded down back roads, stopping from time to time so Dorman and Ralosky could make drug deals.[2] Demanding to know the location of the drugs or the money, appellant beat Freeman with his fists.

[2] Ralosky, admitting she had stopped to talk to someone while driving around, denied having made any drug deal during the ride.

During the ride, Grimes stopped the car to get gas in Crumpton, Queen Anne's County, and duct tape at a hardware store in Millington, Kent County. With the duct tape, appellant bound Freeman's wrists together and covered his eyes, ears, and mouth.

At some point, Grimes stopped at a wildlife refuge in Delaware, and someone removed the tape from Freeman's head. Before getting out of the car, appellant and the others told him they were going to discuss what to do with him. When the group returned to the car, Grimes drove to Ralosky's house. Ralosky dropped off some money, and then the group proceeded to a trailer park where appellant, Grimes, Ralosky, and Dorman planned to keep Freeman in appellant's trailer until the latter three returned from Nelson's house with whatever they could retrieve of the stolen drugs or money.

Once in the trailer, Freeman was told to relax on the couch until the trio returned. Appellant "got high," and Freeman watched television for approximately 45 minutes. When appellant took a laundry basket into a back room, Freeman took the opportunity to run from the trailer, to the house of his mother's ex-boyfriend, who lived in the neighborhood. From there, he called his mother, who picked him up and took him to his grandmother's house. Thereafter, Freeman called the police.

As a result of the beating by appellant, Freeman suffered a swollen eye and burns from a cigarette to his leg and face.[3] Appellant also took his wallet -- with "quite a bit of

[3] Maryland State Police Trooper First Class ("TFC") Todd Schillaci responded to Freeman's mother's call. He observed Freeman to be upset and scared, suffering from a swollen face and red markings on his arms consistent with being bound.

money in there" -- and his cell phone. Ralosky took five bundles of heroin she found in his pockets.

Amanda Ralosky testified that she and Dorman, her boyfriend, had supplied heroin to Grimes and appellant for approximately two years. In February 2015, Freeman had stolen approximately 20 bundles of heroin from her, with a street value of more than $1000. On the morning of February 28, 2015, she, Dorman, and Grimes left a friend's house and picked up appellant from his trailer park to attend the meeting Grimes had arranged with Freeman at the Royal Farms Store.

Once there, Ralosky confronted Freeman about the drugs he had stolen from her. Appellant also confronted Freeman, patting him down and finding three bundles of heroin from the theft that Freeman had on him. Appellant put Freeman in Grimes's car. Grimes purchased duct tape and drove around while appellant and Freeman yelled and argued about the remaining missing drugs. Appellant hit Freeman "a few times" and bound Freeman's hands and mouth with the tape. When the group stopped in Delaware, Ralosky said, appellant was "angry at the whole situation" and threatened to kill Freeman, proclaiming that he "wasn't going to jail for the rest of his life over Kyle."

Ralosky, Dorman, and Grimes later dropped appellant and Freeman off at appellant's trailer and left. Dorman and Ralosky went to Thomas Nelson's house, where

Freeman had told them he had left the stolen heroin. They searched the home, but the drugs were not there.[4]

Angela Grimes, also charged for her part in the February 28, 2015 incident, invoked her Fifth Amendment privilege against self-incrimination and declined to testify. The court admitted TFC Schillaci's interview of her as an exception to the hearsay rule.[5]

During the interview, Grimes told the trooper that Freeman had robbed Ralosky, and Ralosky "just wanted to get her stuff back." When Ralosky found out that Grimes was meeting Freeman at the Royal Farms Store, Ralosky decided to accompany her. When they encountered Freeman, Ralosky and appellant yelled at him, asking where the drugs were, and searched his jacket and pockets, eventually recovering some of the drugs. Thereafter, they decided to go to Thomas Nelson's house where Freeman said he had stored the remaining drugs. During the ride on "a bunch of back roads," Freeman's hands were duct taped and was hit a few times, but Grimes denied any kidnaping or the use of a gun.

Maryland State Police TFC Mark Miller interviewed appellant upon his arrest for the kidnapping of Freeman and related charges. During that interview, appellant professed not to know why he was at the police station. When Miller informed him it related to the

[4] At the time of trial, charges were pending against Ralosky for her part in the incident involving Freeman. The State offered to reduce her charges to the misdemeanor of conspiracy to commit armed robbery and to recommend local incarceration in exchange for her testimony against appellant. Ralosky said she also chose to testify because "nothing was supposed to go the way it did," and appellant took it "to another level."

[5] The transcript of the interview was not admitted into evidence at trial. The pertinent portion of the transcript was included in the record pursuant to an unopposed motion to correct the record, which was granted by this Court on May 11, 2016.

incident with Freeman on February 28, 2015, appellant said he had not seen or spoken to Freeman in at least six months. He denied having seen Freeman on February 28, 2015 or going to the Royal Farms Store on that date.

Upon appellant's arrest on March 2, 2015, officers seized the cell phone he was carrying. The phone was introduced into evidence at trial as State's exhibit 9. Miller stated that he searched the cell phone, pursuant to a March 21, 2015 warrant, and observed text messages sent from that phone on February 28, 2015, which he photographed. The photographs of the text messages were introduced into evidence, over defense objection.[6]

After the court granted appellant's motion for judgment of acquittal in part, appellant elected to testify. He stated that on the afternoon of February 28, 2015, Grimes, his ex-girlfriend, and Dorman and Ralosky, his heroin suppliers, came over to the trailer park where he was staying. He purchased some heroin from Ralosky while Grimes went to McDonald's, where she was supposed to meet Freeman and bring him back to the trailer to get back the drugs stolen from Ralosky. She returned alone, however, because Freeman would not get into the car.

After receiving a phone call from Freeman and arranging a ruse of a purchase of eight bundles of heroin from him, the group went to the Royal Farms Store. Ralosky exited the car to speak with Freeman, and appellant accompanied her to ensure Freeman did not hit her.

[6] The text messages are at the heart of one of the issues appellant raises in this appeal and will be discussed in greater detail, *infra*.

Ralosky opened the van door and demanded her dope and money, but Freeman claimed he did not know what she was talking about; eventually, he admitted that the stolen drugs were at Thomas Nelson's house. According to appellant, Freeman willingly offered to go in Grimes's car to Nelson's house to get the drugs. Ralosky went through Freeman's jacket pockets and found five bundles of heroin.

Waiting for Nelson to get home from work, the participants first went to Delaware, where Ralosky lived so she could sell drugs, including the bundles she had retrieved from Freeman's pockets. Appellant admitted to smacking Freeman with an open hand while the participants were in Delaware. They continued to drive around thereafter, and later that afternoon, Grimes dropped appellant off at his trailer. Freeman got out with him because his stepfather lived in the same trailer park.

Once at appellant's trailer, Ralosky gave Freeman three bags of heroin. Ralosky, Freeman and appellant got high from those drugs and from the residue left in bags from appellant's earlier heroin use. Once high, appellant decided to do some chores. As he washed dishes, he offered Freeman something to eat. He went into the back of the trailer to do laundry, and when he emerged, Freeman was gone. Approximately two hours later, two police officers arrived at the trailer asking for Angela Grimes. Appellant was arrested on March 2, 2015. He said his mother called a bail bondsman on his behalf because he had no minutes on his cell phone.

Appellant denied arguing with Freeman, as Ralosky's fight with him did not pertain to him. Appellant denied having a gun during the encounter with Freeman. He further

denied burning Freeman with a cigarette or restraining him in any way from leaving his trailer.

DISCUSSION

I.

Appellant contends that the trial court abused its discretion in admitting into evidence photographs of text messages obtained from a cell phone purported to belong to him. The State's failure to establish a proper chain of custody of the cell phone and properly to authenticate the text messages pursuant to Maryland Rule 5-901, he concludes, rendered the admission of the photographs improper.

TFC Miller testified that a cell phone was seized from appellant incident to his arrest on March 2, 2015. Miller stated that he knew the cell phone, marked as State's exhibit 9, was the one seized from appellant, by virtue of his signature on the chain of custody.

Miller searched the cell phone pursuant to a warrant that was approved by the court on March 21, 2015. He observed several text messages sent from the phone on February 28, 2015 and deemed them significant in terms of his investigation. He photographed the text messages, and the photographs were marked as State's exhibits 10 through 16.

When the prosecutor attempted to move exhibits 10 through 16 into evidence, the court granted defense counsel's request to *voir dire* Miller. The following colloquy ensued:

> Q. Trooper, you said that this phone was found in Mr. Porter's possession by the—but you weren't part of the, I don't want to call it SWAT team, but part of the seizing team, is that correct?
>
> A. I was not part of that team, no, sir.

Q. Do you know whether or not there were other phones found, I guess—was that phone taken from Mr. Porter's person when he was arrested?

A. Yes, sir, that's my understanding.

Q. That's your understanding?

A. Yes, sir.

Q. Was it your understanding that other phones were taken, as well?

A. Not at that time, no, sir.

Q. But it's your understanding that that was taken from the apprehension team?

A. Yes, sir.

Q. Now was there any information supplied to you via subpoena or otherwise by Verizon, AT&T or any of the cell carriers that link that cell phone number to Mr. Porter or his account?

A. I'm sorry, can you ask me one more time, sir?

Q. I'm sorry.

A. That's okay.

Q. Was there any information provided to you by any cell phone carriers, such as Verizon, AT&T that linked Mr. Porter's cell phone to that specific account and number?

A. There was no information that was provided by one of the service companies or anyone like that, no, sir.

Q. There was not?

A. No, sir.

> [DEFENSE COUNSEL]: Thank you. That's all the questions I have.
>
> THE COURT: Any objections?
>
> [DEFENSE COUNSEL]: I'll object on that ground, Your Honor.
>
> THE COURT: I'll overrule the objection and admit the documents.

The prosecutor then published the documents to the jury.

The State first raises a preservation argument with regard to this issue. At trial, appellant objected to the admission of the text messages on the ground that no information provided by a cell phone carrier linked appellant's phone to a specific account and number. On appeal, however, he claims error in the admission of the messages because exhibits 10 through 16 were "not 'sufficient to support a finding that the matter in question is what [the State] claims,' namely text messages sent by Appellant." Furthermore, he concludes, the evidence is not even sufficient to support a finding that the cell phone was taken from appellant, as Miller's testimony as to the chain of custody was "absurdly lacking."

We agree with the State regarding preservation. "'It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal.'" *Ayala v. State*, 174 Md. App. 647, 665 (2007) (quoting *Klauenberg v. State,* 355 Md. 528, 541 (1999)). *See also* Md. Rule 8–131(a). In objecting at trial that the text messages should not be admitted into evidence because no cell phone provider had verified that the phone seized from appellant was linked to him by account and phone number, defense counsel

waived any other grounds, including the ones he raises on appeal, that the text messages were not sufficiently shown to have been sent by him and that the chain of custody regarding the cell phone was lacking.

In any event, appellant's argument is without merit. Md. Rule 5-901 sets forth several ways in which documents can be authenticated. The Rule provides, in pertinent part:

> (a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.
>
> * * *
>
> (4) Circumstantial Evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.
>
> * * *

The burden of proof for authenticating evidence under Rule 5-901 is slight. *Dickens v. State*, 175 Md. App. 231, 239 (2007). Indeed, the trial court "'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Id*. (quoting *U.S. v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006)) (Emphasis in original).

The text messages comprising State's exhibits 10 through 16 were sufficiently authenticated as having been authored by appellant by circumstantial evidence. Miller testified, without dispute, that the text messages were sent on February 28, 2015, the date of the incident involving Freeman. The messages were sent by appellant or someone using the phone seized from appellant's person when he was arrested two days later. The text messages read:

> Exhibit 10: "They didn't give you anything tell them thanks risk jail time for nothing that cool"
>
> Exhibit 11: "Tell them I said that bull shit dont ask me to help them agin i im the one who did all the work and took all the risk thanks"
>
> Exhibits 12 and 13: "To: Manda 2 You guys Arunt Going to look out for us after all the risk we took and time but its cool"
>
> Exhibit 14: "Cop are here"
>
> Exhibit 15: "I need to get out off here"
>
> Exhibit 16: "To: Manda 2 The boy called the cop."

The messages make clear that the sender believed he had done all the work and taken all the risk on an endeavor that could result in jail time for more than one person. They further reveal that the police had arrived at the sender's location on February 28, 2015, and appeared to express surprise or dismay that "the boy," as appellant referred to Freeman at trial, had called the police.

The circumstantial evidence of the timing and content of the text messages, coupled with the fact that the phone was seized from appellant two days after the events at issue,

would permit a reasonable jury to infer that appellant sent the messages relating to the group kidnaping and assault of Freeman on February 28, 2015.

Because appellant did not argue below that the photographs did not accurately reflect text messages made by that particular cell phone, the State was not required "'to produce a witness to explain how the information came to be stored in the phone,'" or any other "'expert information technology evidence,'" in order to authenticate the messages. *Carpenter v. State*, 196 Md. App. 212, 230 (2010) (quoting *Griffin v. State,* 192 Md. App. 518, 544 (2010), *rev'd*, 419 Md. 343 (2011)). The circumstantial evidence presented by the State was sufficient to authenticate the text messages sent from the cell phone, and the court did not abuse its discretion in admitting the photographs of them. *See Griffin* 192 Md. App. at 532-33 ("[w]hether there is sufficient authenticating evidence to admit a proffered document is a preliminary question to be decided by the court," which "[w]e review . . . for abuse of discretion").

Even if the issue were preserved, and if the court erred or abused its discretion in admitting Miller's photographs of the text messages, we would conclude that the error or abuse of discretion was harmless. At trial, Freeman, Stubbs, and Ralosky all testified consistently that appellant and Ralosky confronted Freeman at the Royal Farms Store, demanding the return of the stolen drugs or money. Freeman, Ralosky, and Grimes agreed that appellant bound Freeman with duct tape and hit him repeatedly while driving around

through Maryland and Delaware.[7] Even appellant conceded that he hit Freeman a few times as the man was driven for hours between two states. The cumulative effect of this evidence so outweighs the allegedly prejudicial nature of the text messages that there is no reasonable possibility that the decision of the jury would have been different had that evidence been excluded. *See Ross v. State,* 276 Md. 664, 674 (1976) (an error in the admission of evidence is harmless when "the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded").

II.

Appellant also argues that the trial court erred in imposing separate sentences for his convictions of first-degree assault and kidnaping. In his view, because the act of force effectuating the kidnaping of Freeman was the first-degree assault committed by the use of a firearm, the rule of lenity or the doctrine of fundamental fairness requires that the first-degree assault and the kidnaping convictions merge for sentencing purposes.[8]

In *Moore*, we explained the rule of lenity and the principle of fundamental fairness:

> If the principles of double jeopardy are not implicated because the offenses at issue do not merge under the required evidence test, merger may still be required under the rule of lenity or the

[7] Grimes' agreement was entered into evidence through her statement to TFC Schillaci.

[8] Appellant makes no argument that the offenses should merge under the required evidence test, nor could he, as each contains elements the other does not. *See Moore v. State*, 198 Md. App. 655, 685 (2011) (quoting *State v. Lancaster*, 332 Md. 385, 391-92 (1993)).

> principle of fundamental fairness. *Abeokuto* [v. State], 391 Md. [289,] 355–56, 893 A.2d 1018 [(2006)]. This Court stated the rule of lenity as follows:
>
> "Even though two offenses do not merge under the required evidence test, there are nevertheless times when the offenses will not be punished separately. Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. It is when we are uncertain whether the legislature intended one or more than one sentence that we make use of an aid to statutory interpretation known as the 'rule of lenity.' Under that 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."

Clark v. State, 188 Md. App. 185, 207–08, 981 A.2d 710 (2009) (quoting *Monoker v. State,* 321 Md. 214, 222, 582 A.2d 525 (1990)).

In *Marlin v. State,* 192 Md. App. 134, 993 A.2d 1141, *cert. denied,* 415 Md. 39, 1 A.3d 468 (2010), this Court set forth the principle of fundamental fairness:

> Considerations of fairness and reasonableness reinforce our conclusion [to merge]. . . . We have . . . looked to whether the type of act has historically resulted in multiple punishment. The fairness of multiple punishments in a particular situation is obviously important.
>
> * * *
>
> Implicit in this reasoning is the idea that when 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.

Id. at 169, 171, 993 A.2d 1141 (quotations and citations omitted).

198 Md. App. at 686–87.

Neither the rule of lenity nor the principle of fundamental fairness compels a finding that appellant's convictions of first-degree assault and kidnaping should merge for sentencing purposes. Indeed, the crimes committed against Freeman were separate and distinct.

As we noted in *Pair v. State*, 202 Md. App. 617, 627, (2011), *cert. denied*, 425 Md. 297 (2012), "[u]nder certain circumstances, a particular assault might be nothing more than a lesser included offense with the greater inclusive offense of kidnapping." Citing *Hunt v. State,* 12 Md. App. 286, 310 (1971), however, we explained how an assault could enjoy "an autonomous and non-merging status of its own:"

> But here *there was evidence from which the jury could have found that Hunt assaulted Barbara independent of any assault incident to the kidnapping itself.* Barbara testified that while in Hunt's apartment he was importuning her to have sexual relations with him. "I told him to leave me alone, to get away from me and I was pushing him and he was pushing me and he struck me." He grabbed her arm and pulled her in the bedroom and threw her down on the bed. *These acts of assault and battery were not an element of the kidnapping but a separate and distinct offense.* We hold that there was no merger of the [assault] into the convictions under the [kidnapping] counts. (Emphasis supplied).

Pair, 202 Md. App. at 627. *See also Midgett v. McClelland*, 422 F. Supp. 82, 87 (D.Md. 1975), *rev'd*, 547 F.2d 1194 (4th Cir. 1977) ("There was ample evidence of a separate assault and disarming of the police officer at gun point before he was actually kidnapped, transported and left tied to a tree in a rural area in mid-winter.").

Here, the jury was instructed that in order to convict appellant of first-degree assault, the State had to prove that appellant caused intentional offensive physical contact or

physical harm to Freeman by the use of a firearm with the intent to cause serious physical injury. Stubbs testified that as he and Freeman sat in Stubbs's minivan at the Royal Farms Store, appellant approached, pointed a gun at Freeman, demanded something, and, unable to find what he was looking for, "ripped [Freeman] out of the car and threw him in the back of the van. . . and started smacking him around" before putting him into another vehicle. Freeman agreed that appellant pointed a gun at him and smacked him before forcing him into a second vehicle.

Appellant's "ripping" of Freeman out of the van while pointing a gun at him, "throwing" him into the back of the van, and "smacking him around" in an effort to coerce him to tell appellant and Ralosky the location of the stolen drugs could have supported the conviction of first-degree assault. Had Freeman divulged the location of the drugs at that point, the incident likely would have ended at that time. It was only when Freeman feigned a lack of knowledge as to what appellant and Ralosky wanted that appellant tried another method to induce Freeman to talk, forcing him into another vehicle and driving him around in Maryland and Delaware, that is, kidnaping him, until he revealed that the drugs were at Thomas Nelson's house. The assault was a separate offense from the kidnaping, and the court did not err in imposing separate sentences for each offense.

JUDGMENTS OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.