Circuit Court for Montgomery County
Case No. 124784C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1085

September Term, 2016

JOSE C. BACON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: August 24, 2017

Following a bench trial in the Circuit Court for Montgomery County, appellant Jose C. Bacon was convicted of theft and other crimes against a vulnerable, 95-year-old woman. The court imposed the following sentences:

> **Count 1:** For abuse or neglect of a vulnerable adult, in violation of Md. Code (2002, 2012 Repl. Vol.), § 3-605(b)(1) of the Criminal Law Article, five years;
>
> **Count 2:** For theft of property valued between $10,000 and $100,000, pursuant to one scheme and continuing course of conduct, in violation of Crim. Law § 7-104(b) and Crim. Law § 7-103(f), seven years to be served concurrently;
>
> **Count 3:** For theft of property of a vulnerable adult, in violation of Crim. Law § 8-801(b), five years to be served concurrently; and
>
> **Counts 4-19:** For uttering 16 separate counterfeit checks, in violation of Crim. Law § 8-602, six years for each count, to be served concurrently.

In this appeal, Bacon presents three questions, which we quote:

> 1. Did the trial court err when it denied defense counsel's motion to strike a witness's response to a cross-examination question, when the response included inadmissible hearsay?
>
> 2. Did the trial court abuse its discretion when it permitted the State to introduce evidence about Mr. Bacon's history of drug use through Mr. Bacon's statement to police?
>
> 3. Must Mr. Bacon's sixteen sentences for issuing a counterfeit check be merged into his sentence for theft scheme?

We hold that the trial court did not err in denying the motion to strike and that the court did not abuse its discretion in overruling Bacon's limited objection to a portion of his statement. Applying the rule of lenity, we conclude that Bacon's 16 sentences for

issuing a counterfeit check merge with his sentence for a theft scheme to obtain property with a value of at least $10,000. Otherwise, we affirm the judgments.

FACTS AND LEGAL PROCEEDINGS

The State presented evidence that, in the course of assisting Helen May Bloedorn with her daily needs, Bacon took advantage of her physical and financial vulnerability by cashing unauthorized checks that he had made out to himself, using debit cards to withdraw funds and make purchases for himself, and charging her credit card with unauthorized purchases.

At trial, Ms. Bloedorn testified for the prosecution, as did an acquaintance who assisted her, a bank officer, emergency responders, social services workers, a physician, and police officers. Bacon testified in his defense. In this Court, he does not challenge the sufficiency of the evidence supporting his convictions, which we summarize below with a focus on the evidence pertinent to the issues presented in this appeal.

In October 2013, Ms. Bloedorn was living by herself in her single-family home in Rockville. She was 95 years old and had no known relatives.

On October 8, 2013, an ambulance was called to Ms. Bloedorn's residence by an acquaintance who found her in physical distress. Ms. Bloedorn was taken to a hospital, where she was treated, diagnosed with vascular dementia,[1] and determined to be unable

[1] "Vascular dementia is a decline in thinking skills caused by conditions that block or reduce blood flow to the brain, depriving brain cells of vital oxygen and nutrients." http://www.alz.org/dementia/vascular-dementia-symptoms.asp (last viewed Aug. 14, 2017).

to care for herself, physically or financially. A guardian was appointed for her person and property. She was transferred to a nursing home, where she was wheelchair-bound and physically dependent on others for much of her care.

An investigation determined that Ms. Bloedorn's residence was "filthy," roach- and mite-infested, garbage-strewn, and without hot water. One witness described it as a "hoarder's area." Ms. Bloedorn had been living in a bed on the first floor and using a wheelchair and motorized scooter to get around. Unable to use the toilet by herself, she relied on adult diapers and a portable bedside commode.

Investigators discovered that since late 2012 Ms. Bloedorn had been relying on Jose Bacon to assist her. Bacon lived with his mother about two blocks away, in the family home where he grew up. Then aged 56, Bacon had known Ms. Bloedorn since his childhood.

After helping her with some yardwork and painting earlier in 2012, Bacon had begun coming to the house on a daily basis in late 2012. He assisted Ms. Bloedorn every morning, moving her from the bed, onto the commode, and onto her scooter so that she could go out to McDonald's. He was responsible for changing her diapers, giving her sponge baths, doing her laundry, and providing some meals. The two would communicate about her needs by cell phone and in person.

Despite her physical frailty, Ms. Bloedorn, a former attorney, was frequently observed riding her scooter to restaurants and to her Bank of America branch on Rockville Pike. At the bank, where she appeared alone on her scooter several times a

week, she always went inside the building and obtained assistance from a teller. Her utility bills were automatically deducted from her account. She had a debit card for her account, but used only checks and cash. On a monthly basis, her withdrawals were typically limited to a few hundred dollars for her personal expenses, and her purchases by check were typically small. For example, in the period from October 19, 2012, through November 16, 2012, none of her grocery expenditures exceeded $21.00. She regularly received quarterly deposits of approximately $6,800.00 from a trust account into her checking account.

Ms. Roccio Castillo Foconi was an assistant manager at the bank branch where Ms. Bloedorn was a regular customer. At the end of 2012, Ms. Castillo Foconi observed that Ms. Bloedorn's banking patterns changed: Ms. Bloedorn "was requesting more money," the volume of deposits into her account began to increase, and she was spending up to $9,000.00 in less than three weeks. The manager suspected "that there was something going on."

On January 30, 2013, Ms. Bloedorn did not have enough money in her account for a withdrawal that she was attempting to make. In response, Ms. Castillo Foconi reviewed the account and compared the signature card on file at the bank to the signatures on a series of 16 checks, totaling $11,100.00, which were dated between November 16 and December 24, 2012, and were payable to Jose Bacon. As a result of what the bank manager learned, she initiated an internal claim with the bank's fraud department, closed Ms. Bloedorn's checking account, and opened a new checking account.

After the fraud investigation, the bank credited Ms. Bloedorn's new account with the full amount of the $11,100.00 in checks. But because of concerns about the security of Ms. Bloedorn's account, Ms. Castillo Foconi did not order any checks or issue a debit card for the new account. Consequently, to make withdrawals and arrange for other payments, Ms. Bloedorn had to come into the bank branch, where bank employees helped her.

In January 2013, a social worker from Adult Protective Services went to Ms. Bloedorn's house. She asked Ms. Bloedorn if Jose Bacon was exploiting her. Ms. Bloedorn answered that if he was, "she wouldn't do anything about it because he was helping her, and she didn't have anybody else to help her."

Despite the bank's security precautions, Ms. Castillo Foconi discovered that on May 6, 2013, Ms. Bloedorn's new account had a balance of only $4.21 because of recent debit-card activity, including purchases and ATM withdrawals. When Ms. Castillo Foconi investigated the account, she learned that, as a result of a telephone order, a debit card had been mailed to Ms. Bloedorn's address about a month after she had opened Ms. Bloedorn's new account. In the ensuing months, money was regularly withdrawn from Ms. Bloedorn's bank account with that debit card.

A financial examiner, certified in internal audits, information systems, and fraud, reviewed Ms. Bloedorn's bank and credit card accounts. The review established that from January through June of 2012 Ms. Bloedorn's average account balance had been between $23,000.00 and $28,000.00, and the average total of her monthly withdrawals

was $2,470.00. By contrast, from November 2012 until the account was closed on January 30, 2013, the total monthly amount withdrawn "increased significantly": it was $13,625.49 in November 2012; $8,892.03 in December 2012; and $14,647.73 in January 2013.

The financial examiner determined that, in the period before Ms. Bloedorn's original account was closed on January 30, 2013, a debit card was used only once – on November 16, 2012. After the creation of the new account, debit card use began on March 7, 2013, with a purchase, and it escalated with ATM withdrawals beginning on April 12, 2013, and continuing into May 2013. Many of the ATM transactions were at banks other than Bank of America, which resulted in $2.00 or $3.00 surcharges.

In summary, the State established the following debit card purchases and ATM withdrawals in Ms. Bloedorn's accounts:

> November 2012: $3,500.00 in cash withdrawals, and $209.00 for groceries;
>
> December 2012: $400.00 in cash withdrawals, $357.00 for groceries;
>
> January 2013: $25.00 in cash withdrawals, $2,224.00 for groceries (with multiple purchases made on single days), $275.49 to a bicycle shop, and $935.88 to a drug store;
>
> February 2013: $1,000.00 in cash withdrawals;
>
> April 2013: $1,006.00 in cash withdrawals;
>
> May 2013: $1,312.00 in cash withdrawals; and
>
> June 2013: $507.00 in cash withdrawals.

Video surveillance photographs taken during ATM cash withdrawals showed Bacon using a debit card to withdraw cash from Ms. Bloedorn's accounts on both

November 16, 2012, and May 3, 2013. The latter withdrawal was made just two days after a $4,000.00 deposit into Ms. Bloedorn's account, and it was followed by more ATM withdrawals:

May 3, 2013: $403.00, from a Citibank ATM;

May 4, 2013: $503.00, from an M&T Bank ATM; and

May 5, 2013: $303.00, from a Citibank ATM.

The financial examiner found that, in addition to the checks written on the first account and the debit card transactions on both the first and second accounts, more than $2,000.00 in purchases were charged on Ms. Bloedorn's Sears credit card between January 9 and January 23, 2013. The total of these purchases exceeded the credit limit on the account. No payments had been made on the account through November 2013. As a consequence, the account had incurred late fees and interest charges that increased the balance due to $2,913.18.

On December 5, 2013, the police searched Bacon's residence pursuant to a search warrant. In his bedroom, they recovered a variety of bank envelopes and money straps, correspondence and prescriptions in Ms. Bloedorn's name, and a Bank of America receipt dated May 1, 2013, for a wire transfer of $4,000.00 into Ms. Bloedorn's account.

At the time of the search, Montgomery County Police Detective Mark Norris interviewed Bacon. An audio recording of that complete interview was played at trial.

At the time of the trial, in March 2016, Ms. Bloedorn, then 97 years old, testified that she gave Bacon cash to pay her "utilities" when they were overdue. According to Ms. Bloedorn, Bacon told her that she did not have to pay him for helping her, and she

insisted that she never agreed to pay him a specific amount of money for helping her. She said that he never went to the bank with her. Nor did she authorize him to write checks on her bank account. Ms. Bloedorn identified State's Exhibits 1-16, the $11,100.00 in checks payable to Bacon from November 16 through December 24, 2012, as instruments that were not in her handwriting and were not signed by her. She testified that she did not make those payments to Bacon and that she did not "write checks that big."

Bacon testified in his own defense, repeating what he told the police, which was that Ms. Bloedorn was "confused" and that the disputed checks were payment for work he performed, for which she promised him $300 every two weeks or $800 each month. He filled out the "paychecks" for $400, $600, or $800, and she signed them. If he ever needed money, he could just ask her for it.

Bacon testified that he paid some of Ms. Bloedorn's bills with money orders that he obtained for her. He also testified that the bank envelopes in his room belonged to him. He said that he cashed the 16 checks at Ms. Bloedorn's request and that she gave him his portion and kept the remainder. He denied signing Ms. Bloedorn's name on those checks.

Bacon also denied using Ms. Bloedorn's debit card without her being present. Although he told the police that at one point she "cut off" her bank cards because she "lost them," he claimed that he used her card at the bank and stores when Ms. Bloedorn was with him. At trial, he acknowledged that Ms. Bloedorn did not accompany him

when he made a $400.00 withdrawal at a Citibank branch on May 3, 2013, but he claimed that he immediately turned the money over to her when she met him for dinner.

The trial court, sitting as the factfinder, did not believe Bacon's account of the disputed transactions: "What is clear to the Court, from all of the testimony in this matter, and from all of the exhibits, the financial exhibits included, is that Mr. Bacon saw an opportunity, and that he took advantage of that opportunity."

We shall add facts in our discussion of the issues raised by Bacon.

DISCUSSION

I. Motion to Strike

Bacon contends that the trial court abused its discretion in denying his motion to strike certain cross-examination testimony by Ms. Castillo Foconi, the assistant bank manager who helped Ms. Bloedorn after her accounts had been emptied. This assignment of error stems from a colloquy regarding State's Exhibit 37, a bank-generated list of transactions in Ms. Bloedorn's checking account between April 2 and May 5, 2013. On cross-examination, defense counsel questioned Ms. Castillo Foconi:

> [DEFENSE COUNSEL]: . . . Making reference here to this Exhibit No. 37 that you've previously identified, some of these items look like they're highlighted and some are not, is that right?
>
> [MS. CASTILLO FOCONI]: Yes.
>
> [DEFENSE COUNSEL]: Who did the highlighting?
>
> [MS. CASTILLO FOCONI]: I did. That was when I was going over –
>
> DEFENSE COUNSEL: So you went –

> [MS. CASTILLO FOCONI]: – the transaction history with the client, **and she was identifying that she had not done these transactions, so I was highlighting it.**
>
> DEFENSE COUNSEL: **Move to strike the answer, Your Honor.**
>
> PROSECUTOR: I object to striking the answer.
>
> COURT: I'm sorry, what's the basis for –
>
> DEFENSE COUNSEL: **Well, she went on. I just asked whether she's the one who did the highlighting, that's all.**
>
> COURT: **Well, I'm not going to strike it. I think she's trying to explain why.**

(Emphasis added.)

According to Bacon, when Ms. Castillo Foconi said that Ms. Bloedorn "was identifying that she had not done" the highlighted transactions, her statement was "clearly hearsay . . . offered to prove that someone other than Ms. Bloedorn had completed the withdrawals." He argues that the trial court abused its discretion in denying his motion to strike the witness's statement.[2]

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Hearsay, under our rules, *must* be excluded as evidence at trial, unless it

[2] In general, when a party volunteers or the court requests particular grounds for an objection, the party is limited to those grounds on appeal. *See, e.g.*, *Washington v. State*, 191 Md. App. 48, 91 (2010). Here, defense counsel appeared to object because the witness "went on" and therefore her response exceeded the scope of the question. Defense counsel did not specifically object on the ground that the response included hearsay. Nevertheless, the State does not contend that Bacon failed to preserve an objection on hearsay grounds.

falls within an exception to the hearsay rule . . . or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. 1, 8 (2005) (quoting Md. Rule 5-802) (emphasis in *Bernadyn*). We conduct a de novo review of whether a challenged out-of-court statement is hearsay. *Gordon v. State*, 431 Md. 527, 533 (2013); *Bernadyn v. State*, 390 Md. at 8; *see also Parker v. State*, 408 Md. 428, 436 (2009).

"[A] relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994). When the probative value of the out-of-court statement "*does not depend on either the declarant's sincere meaning or her having been factually correct*[,]" it may be admitted as nonhearsay. *See* 6A Lynn McLain, *Maryland Evidence, State & Federal* § 801:1, at 173 (3d ed.) (emphasis in original). "Many statements falling under this category of nonhearsay are offered to show . . . why [a] person took actions in view of her learning of the statement[.]" *Id*. § 801:10, at 244-45 (footnotes omitted).

To the extent that Ms. Castillo Foconi's testimony reflected Ms. Bloedorn's out-of-court statements, the trial court correctly pointed out that the witness was simply answering defense counsel's inquiry about who had highlighted certain transactions. The court recognized that the witness was explaining why she had highlighted certain transactions. Thus, the court accepted Ms. Castillo Foconi's answer for the non-hearsay purpose of explaining why she had highlighted those transactions. The highlighted

document itself, Exhibit 37, was admitted, pursuant to the hearsay exception for regularly-conducted business activity. *See* Md. Rule 5-803(b)(6).

Because this was a bench trial, we presume the trial judge did not infer from Ms. Castillo Foconi's testimony that what Ms. Bloedorn told her about the transactions itemized on that document was true. "The assumed proposition that judges are men [and women] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system." *State v. Babb*, 258 Md. 547, 550 (1970). We accept that in a bench trial a judge can hear evidence that is highly prejudicial to a defendant (such as a confession), determine that it is inadmissible and must be excluded, and still disregard that evidence in reaching a guilty verdict. *State v. Hutchinson*, 260 Md. 227, 236 (1970). Yet, if we accept that judges can completely ignore evidence that they have ruled inadmissible, we should also accept that they can consider evidence solely for the limited purposes for which it could properly be offered, and not for some other, improper purpose. It follows that in this bench trial the court did not err in declining to strike the answer in which Ms. Castillo Foconi explained to defense counsel why she had highlighted certain entries on the exhibit.

Furthermore, Ms. Bloedorn herself had already testified that she had no agreement to pay money to Bacon; that Bacon himself had said that she did not have to pay him any money; and that Bacon was authorized to pay overdue utility bills, but not to do any other banking on her behalf. From that testimony, it is quite obvious that Ms. Bloedorn did not authorize the highlighted transactions on Exhibit 37, which consist of debit card

purchases, ATM withdrawals, and related fees. In these circumstances, the court neither erred in overruling the defense objection to harmlessly cumulative evidence that was accepted for a nonhearsay purpose, nor abused its discretion in denying Bacon's motion to strike that evidence.

II. Relevancy Objection

Bacon argues that the trial court abused its discretion in admitting evidence of his history of drug use, through his recorded statement to police. His argument involves two portions of the December 5, 2013, interview with Detective Norris, which are excerpted below:

> DETECTIVE NORRIS: Because, I mean, I don't think you're living an extravagant lifestyle here, but that takes me back to, you do have a history of drug addiction.
>
> MR. BACON: Uh-huh.
>
> DETECTIVE NORRIS: And I'm not judging. That's like an illness, and once you get that –

At that point, defense counsel objected to evidence about Bacon's history of drug addiction. The State responded that evidence of a drug habit would counter one of Bacon's likely defenses, which was that he could not have stolen thousands of dollars from Ms. Bloedorn, because the search of his residence turned up little of value. The court overruled the objection, and the playing of the audiotape resumed:

> DETECTIVE: It's hard to shake it.
>
> MR. BACON: Oh, yeah.

As the interview continued, Bacon told the officers that he was taking 15 prescription medications for "a terminal illness," which he declined to identify. The detective asked Bacon how the use of illegal drugs could affect his drug-treatment regimen:

> DETECTIVE NORRIS: Let's say you were taking all the medicines you're taking, and you smoked crack, or you took powdered cocaine. Would it like, kill you?
>
> MR. BACON: It would have side effects.
>
> DETECTIVE NORRIS: It would make you very sick?
>
> MR. BACON: Uh-huh.
>
> DETECTIVE NORRIS: So does that just make it so unpleasant you would never do that now?
>
> MR. BACON: I mean, like I said, I've done it in the past.
>
> * * *
>
> DETECTIVE NORRIS: When was the last time you'd say you used it?
>
> MR. BACON: Power [sic] probably like about six months ago. I mean, I take a couple weed here and there, but, you know.
>
> DETECTIVE NORRIS: How often were you using (unintelligible) weed? Would you like, hit it hard and then take a break?
>
> MR. BACON: No, I'd hit it. Only hit it.
>
> DETECTIVE NORRIS: No, no, no. I'm not saying would you use it hard, use it frequently and then –
>
> MR. BACON: Oh, no, no, not at all.
>
> DETECTIVE NORRIS: It's expensive.
>
> MR. BACON: I mean, it doesn't bother me. Just like cigarettes, you know, I can –

DETECTIVE NORRIS: So you can use it frequently?

MR. BACON: Yeah (intelligible).

DETECTIVE NORRIS: Build up a tolerance to it.

MR. BACON: No, it's not a tolerance. It's just, you know –

Citing *Vitek v. State*, 295 Md. 35 (1982), Bacon contends that the court should have excluded evidence of his history of drug use, because, he says, it was not relevant. Alternatively, Bacon argues that even if "evidence of past drug use was marginally relevant, it nonetheless was not admissible as its probative value was outweighed by its potential for unfair prejudice."

The State counters that Bacon did not preserve these challenges. For the most part, we agree.

After the trial court overruled defense counsel's objection to Bacon's statement that he had "a history of drug addiction," counsel for Bacon did not obtain a continuing objection under Md. Rule 4-323(b). When the State played the next portion of the statement, counsel registered no additional objection as Bacon detailed his history of drug use. In that portion of the statement, Bacon revealed that he had participated in drug court, used cocaine, and smoked "weed here and there" within the same time frame as some of the bank transactions at issue in this case. In addition, Bacon related, without objection, that he was taking 15 prescription drugs to treat his terminal illness and that his treatment regimen was "very expensive." Because counsel did not request or obtain a continuing objection, made no other contemporaneous objection to the statements revealing Bacon's history of illegal and legal drug use, and did not ask the court to

exclude any evidence on the ground that it was more prejudicial than probative, the only complaint preserved for our review is whether the trial court erred or abused its discretion in overruling the relevance objection to Bacon's initial statement that he had a history of drug *addiction*, rather than drug use. *See Wimbish v. State*, 201 Md. App. 239, 261 (2011); *Fowlkes v. State*, 117 Md. App. 573, 587-88 (1997); *Snyder v. State*, 104 Md. App. 533, 557 (1995); *Brown v. State*, 90 Md. App. 220, 223-25 (1992).

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. "Evidence that is not relevant is not admissible." Md. Rule 5-402. "In reviewing a trial court's determination that evidence is relevant and admissible, we apply the 'de novo' standard of review to the court's 'conclusion of law that the evidence at issue is or is not "of consequence to the determination of the action."'" *Wagner v. State*, 213 Md. App. 419, 453 (2013) (quoting *State v. Simms*, 420 Md. 705, 725 (2011), *which quoted Parker v. State*, 408 Md. at 437).

In *Vitek*, 295 Md. at 37, the defendant had taken the stand to deny the robbery charges against him. On cross-examination, the trial judge permitted the State, over objection, to establish that the defendant was unemployed and had recently been released from jail. *Id.* at 37-38. The Court of Appeals reversed the conviction on the ground that "evidence of [the defendant's] financial status was irrelevant under the facts of this case and that its prejudicial effect far outweighed any probative value." *Id.* at 40.

In reaching its decision, the Court reasoned that "the fact that the appellant was unemployed and recently had been released from jail was irrelevant to the main issue of guilt or innocence and could not be used to infer motive." *Id.* "Most importantly," the Court continued, "it was prejudicial because once the inference was brought out, the burden shifted to the appellant to show that he did not need money and, therefore, had no motive." *Id.* at 40-41.

"This is not to say," however, "that evidence of an accused's financial situation is never admissible." *Id*. at 41. Still, "for such evidence to be admissible, there must be something more than a 'general suspicion' that because a person is poor, he is going to commit a crime." *Id.* Hence, the Court held that, "while normally it is not allowable to show impecuniousness of an accused, such evidence would be admissible under special circumstances." *Id.*

As an example of "special circumstances," the *Vitek* Court cited *Gross v. State*, 235 Md. 429, 444 (1964), in which the trial court properly admitted testimony that the accused had a specific financial motive for a robbery and murder – she had told her employer "she was looking for 'live wires,' i.e., 'men with money' and that she 'would take them to [her] hotel and let them get a room, and then [she] would later visit them.'" *Vitek*, 295 Md. at 42 (quoting *Gross*, 235 Md. at 444). Applying that distinction, this Court has upheld the admission of evidence of a financial motive when it amounted to "more than 'a general suspicion' that because appellant needed money, he was about to commit a crime." *Kanaras v. State*, 54 Md. App. 568, 595-96 (1983) (distinguishing

Vitek based on evidence "that appellant had sought to borrow money, seemed excited at the prospect of earning it illegally, and may have considered robbing [the victim] for money[,]" so that "[t]he underlying motivation evidence of drugs and money was properly admitted"); *see also Bellard v. State*, 229 Md. App. 312, 344 n.9 (2016) (distinguishing *Vitek* based on evidence of defendant's history of drug trafficking, which was admissible to show his motive for the charged murders), *aff'd on other grounds*, 452 Md. 467 (2017).

Here, as in *Gross*, the challenged evidence was relevant to the prosecution's theory regarding Bacon's motive to steal, as well as its theory for why Bacon had little of value when the police searched his residence. Indeed, the court's remarks at sentencing, observing that Bacon might have been "taking the money that Ms. Bloedorn had to support [his] own habit[,]" indicate that evidence of Bacon's history of drug addiction was relevant to the court's verdict. Based on this record, the trial court did not err in overruling Bacon's limited objection to evidence that he had a history of drug addiction.[3]

III. Sentencing Merger

Bacon argues that his sentences for uttering (Counts 4-19) should merge into his sentence for theft of property pursuant to a scheme or course of conduct (Count 2). Although Bacon did not raise this merger argument in the trial court, an erroneous

[3] Even if the initial reference to Bacon's drug addiction were irrelevant (which it was not), any error would have been rendered harmless by the subsequent admission, without objection, of evidence regarding his drug use. *See Yates v. State*, 429 Md. 112, 124 (2012).

"failure to merge a sentence is considered to be an 'illegal sentence'" (*Pair v. State*, 202 Md. App. 617, 624 (2011)), which we may correct "at any time." Md. Rule 4-345(a). Accordingly, we must decide whether Bacon's uttering sentences should be merged into his theft-scheme sentence.

Bacon tacitly concedes that his uttering convictions do not merge with the theft-scheme conviction under the required evidence test, because the elements of the statutory crime of uttering differ from the elements of theft by deception. *See Moore v. State*, 198 Md. App. 655, 703 (2011) (holding that uttering and attempted theft by deception did not merge under the required evidence test). Instead, his merger claim relies on the rule of lenity, which "is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants." *Alexis v. State*, 437 Md. 457, 484-85 (2014).

The rule of lenity mandates that two statutory offenses may not be punished separately if the legislature intended for them to be punished in one sentence. *See id.* at 485. "To evaluate the legality of the imposition of separate sentences for the same act," under the rule of lenity, we look to "whether 'the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes.'" *Morris v. State*, 192 Md. App. 1, 39 (2010) (quoting *Jones v. State*, 357 Md. 141, 163 (1999)) (internal citation omitted); *accord Alexis v. State*, 437 Md. at 485-86; *see Clark v. State*, 218 Md. App. 230, 255 (2014).

In *Moore* the defendant was convicted of three counts stemming from a single attempt to cash two forged checks at a bank. She received three separate sentences, one for one count of attempted theft and two for two counts of issuing a counterfeit check (or uttering). This Court held that the offenses did not merge under the required evidence test, but that the two uttering convictions merged with the theft conviction under the rule of lenity. *Id.* at 703. We reasoned that all three convictions "arose out of the same transaction, namely, appellant's attempt to cash two forged checks at the M&T Bank on September 6, 2006." *Id.* at 703-04. "Because there is no indication in the language of the statutes governing theft and uttering that the legislature intended separate punishments for these offenses arising out of the same transaction, the rule of lenity require[d] a merger of the conviction for the offense carrying the lesser potential penalty into the conviction for the offense with the greater possible penalty." *Id.* at 704.

Similarly, in *Stewart-Bey v. State*, 218 Md. App. 101 (2014), the defendant had used counterfeit checks to obtain goods in seven discrete transactions. For each of the seven transactions, the State obtained separate convictions for counterfeiting, issuing a counterfeit document (i.e. uttering), and either theft or attempted theft. *See id.* at 128. Following *Moore*, this Court recognized that "[e]ach set of three convictions – counterfeiting, issuing a counterfeit document, and theft or attempted theft – arose out of the same transaction." *Id.* at 129. "As in *Moore*, 'there [was] no indication in the language of the statutes governing theft and uttering that the legislature intended separate

punishments for these offenses arising out of the same transaction." *Id.* Accordingly, we vacated two of the three sentences in each of the seven transactions. *Id.* at 130.

Bacon contends that, as in *Moore* and *Stewart-Bey*, his uttering convictions should merge into his theft conviction because all of those convictions *could* have been premised upon the same criminal acts of "cashing the forged checks." He acknowledges that the theft-scheme conviction could also have been premised on his unauthorized debit and credit card transactions. He maintains, however, that "merger is . . . required because when the trial court rendered its verdict, it did not indicate that the theft scheme conviction was limited to the latter acts."

The rule of lenity may benefit a defendant *both* when it is clear that the separate convictions arose out of the same act (as in *Moore* and *Stewart-Bey*) *and* when it is unclear whether the separate convictions arose out of the same act or out of separate acts. If an appellate court has to guess whether the separate convictions arose out of the same act or out of separate acts, the defendant may be entitled to "the benefit of the doubt" under the rule of lenity. *Snowden v. State*, 321 Md. 612, 619 (1991).

In *Snowden* it was unclear whether the defendant's assault and battery conviction was separate from his robbery conviction: in a single transaction, he had committed a battery (by shooting the victim in the arm) and a robbery (by forcing the victim, at gunpoint, to turn over money). On those facts, the Court could not tell "whether the robbery charged was based on battery as a lesser included offense or on assault as a lesser included offense with the battery [the shooting] considered separate." *Id*. Because the

trial "judge's rationale for the convictions" was "not readily apparent" to the Court of Appeals, the Court was "constrained to give [Snowden] the benefit of the doubt and merge his sentence for and conviction of assault and battery into those for the robbery charge." *Id.*

The record here shows that the theft-scheme conviction was premised upon criminal acts in addition to the cashing of the forged checks. Although each of the uttering convictions under Counts 4-19 is premised on a single forged check, the theft scheme conviction under Count 2 is based on one, continuing scheme of deception that also enabled Bacon to obtain transfers of money from another account held by Ms. Bloedorn into her Bank of America accounts, to make unauthorized debit card transactions via ATM withdrawals and purchases, and to incur charges on Ms. Bloedorn's credit card. The prosecutor argued in closing that the course-of-conduct charge in Count 2 included the counterfeit checks as well as those other unauthorized transactions. The trial court expressly found "that there was a continuing course of conduct," citing its review of "all the financial records, the ATM pictures, the withdrawals, the transfers of money." On that basis, the court found Bacon guilty of theft of property with a value of at least $10,000.

The ambiguity here lies in the court's application of the continuing-course-of-conduct provision of the theft statute. Section 7-103(f) of the Criminal Law Article provides: "When theft is committed . . . under one scheme or continuing course of conduct, whether from the same or several sources: (1) the conduct *may be considered as*

one crime; and (2) the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor." (Emphasis added.) The statute gives no clear indication of whether the legislature intended to authorize multiple punishments when some of the discrete acts in a continuing course of conduct also violate a separate statute (such as the uttering statute). At the very least, the provisions authorizing the court to consider the course of conduct "as one crime" for the purpose of determining the value of the stolen property create an ambiguity as to whether the legislature intended to permit the court to treat the conduct as separate crimes for punishment purposes.

Here, the judge's rationale for the continuing-course-of-conduct conviction is "not readily apparent to us." *Snowden*, 321 Md. at 619. We do not know which transactions the trial court used to determine that the value of the stolen property exceeded $10,000. The trial judge did not specify that she had concluded beyond a reasonable doubt that, independent of his issuance of the 16 counterfeit checks, Bacon had committed other acts of deception to obtain property with an aggregate value of at least $10,000.00. Under these circumstances, "we are constrained to give [Bacon] the benefit of the doubt" (*id.*) and to merge his 16 sentences for issuing counterfeit checks into the sentence for theft of property with a value of at least $10,000.00.[4]

[4] The rule of lenity requires the "merger of the conviction for the offense carrying the lesser potential penalty into the conviction for the offense with the greater possible penalty." *Moore*, 198 Md. App. at 704. Theft of property with a value of at least $10,000 but less than $100,000 is punishable by imprisonment of up to 15 years, a fine of up to $15,000, and an order to make restitution. Crim. Law § 7-104(g)(1)(ii). The

SENTENCES ON COUNTS 4 THROUGH 19 VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED AS TO ALL OTHER COUNTS. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR THAT COURT TO MERGE THE SENTENCES FROM COUNTS 4 THROUGH 19 INTO THOSE FOR COUNT 2 AND TO ISSUE AN AMENDED COMMITMENT RECORD CONSISTENT WITH THIS OPINION. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY MONTGOMERY COUNTY.

(continued)
offense of issuing a counterfeit check is punishable by imprisonment of up to 10 years and a fine of up to $1,000. Crim. Law § 8-602(b).