Circuit Court for St. Mary's County
Case No. C-18-CR-21-000092

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1931

September Term, 2021

JOSEPH MARVIN SWANN

v.

STATE OF MARYLAND

Arthur,
Reed,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 6, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On October 12, 2021, a St. Mary's County jury found appellant Joseph Swann guilty of an array of offenses relating to a fatal automobile accident,[1] as well as resisting arrest and assaulting the law enforcement officers who arrested him. On February 2, 2022, the circuit court sentenced Swann to 33 years of imprisonment, but suspended all but 14 and imposed five years of probation after his release.

He appealed. We hold that the court erred in not merging the convictions for assault into the conviction for resisting arrest, but we affirm the judgments in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

The Collision and the Arrest

Just after midnight on Sunday, December 20, 2020, Swann crashed his Cadillac CTS into the rear of a Jeep that was travelling on Maryland Route 5, a four-lane divided highway, in Charlotte Hall. The Jeep exploded, spun, and crashed into the guardrail. The Jeep's driver died from the extensive injuries that he suffered in the crash.

According to the "Event Data Recorder" in his Cadillac, Swann was travelling at 116 miles per hour – more than twice the speed limit – just before the collision. He did not apply his brakes.

[1] Those offenses were grossly negligent manslaughter by vehicle; criminally negligent manslaughter by vehicle; negligent homicide by motor vehicle while under the influence of alcohol per se; negligent homicide by motor vehicle while under the influence of alcohol; homicide by motor vehicle while impaired by alcohol; driving or attempting to drive a vehicle while under the influence of alcohol per se; driving or attempting to drive a vehicle while under the influence of alcohol; and driving or attempting to drive a vehicle while impaired by alcohol.

At the time of the collision, the road was dry and otherwise in good condition. Swann's blood contained an alcohol concentration of 0.19 grams per 100 milliliters of blood, twice the legal driving limit. An open can of Monaco, an alcoholic drink, was inside of Swann's car.

Another driver saw the collision and stopped. Both cars, he said, were "engulfed in flames." He saw Swann crawling out of the window of the Cadillac. According to the other driver, Swann staggered, his speech was slurred, and he "seemed like he wasn't all the way there."

First responders were dispatched to the scene. While fire and rescue personnel extinguished the fire that was consuming the Jeep, Swann attempted to walk away.

Deputy Tyler Westphal was the first law enforcement officer to respond. He testified that, in order to reach the scene of the collision, he had to drive through fire and debris in the roadway. Both vehicles were still "engulfed in flames" when he arrived.

Deputy Westphal followed Swann to try to get him to return to the scene. After Deputy Westphal asked Swann to turn around multiple times and told him that he was "not free to go," Swann attempted to punch the deputy in the face. Deputy Westphal took Swann to the ground and tried to place him in handcuffs. Swann continued to struggle with Deputy Westphal, who was assisted by Deputy Jessica Wilson, Sergeant Todd Fleenor, and Deputy Michael Gardiner. Swann kicked and spat at the officers. The officers eventually subdued Swann with a taser, placed him in the back of a patrol car, and transported him to the hospital.

Trial

At trial, the State called Sergeant Christopher Beyer of the Accident Reconstruction Unit of the St. Mary's County Sheriff's Office. Testifying as a lay witness, over Swann's objection, Sergeant Beyer described the process by which he downloaded data from the Event Data Recorder or "EDR" in Swann's Cadillac into a software program. The program generated a report that incorporated the data from the EDR. The court admitted the report, State's Exhibit 8, into evidence.

Over Swann's objection, the State also called Corporal Jason Smith of the St. Mary's County Sheriff's Office as an "expert in the field of motor vehicle collision reconstruction." Corporal Smith had been dispatched to the scene of the collision within an hour of when it occurred. He testified that when he arrived he observed debris, gasoline spillage, and skid marks, gouges, and yaws in the roadway. He recalled that the temperature was in the 30s, that it had not rained, and that the roadway was in good condition.

According to Corporal Smith, the damage to the front end of Swann's Cadillac indicated that it had struck the Jeep, while the damage to the Jeep indicated that it had been struck from behind. Corporal Smith observed that "the rear cargo compartment of the Jeep" had been "pushed all the way to where the back seat was." The fire had "moved from the rear to the front" of the Jeep. The driver of the Jeep had suffered extensive injuries. Corporal Smith noted damage to the guardrail and paint transfer from

the Jeep vehicle to the guardrail itself. He found an alcoholic beverage can on the driver's seat of Swann's car.

Corporal Smith testified briefly about State's Exhibit No. 8, the EDR report that Corporal Beyer had created. According to Corporal Smith, the report showed that Swann's car was travelling at 116 miles per hour five seconds before the collision. The report also showed that Swann did not depress the brake pedal. Although the court had admitted the report during Corporal Beyer's testimony, it admitted the report again during Corporal Smith's.

On the basis of his analysis of the data, including the EDR report, Corporal Smith opined that the collision resulted from "driver error" on Swann's part. The corporal explained that Swann rear-ended the Jeep while travelling at twice the speed limit, thereby causing the Jeep's fuel tank to rupture and ignite.

The State also called Deputy Westphal as a witness. Deputy Westphal had deployed a body-worn camera during his interaction with Swann. The State played the recording from his camera for the jury and introduced it into evidence. The recording ended when the deputy's camera "was knocked off" during his "struggle with Mr. Swann." Swann tried to punch the deputy, but he was able to block the punch. At that point, Deputy Westphal "took him to the ground and put him in handcuffs." Even then, Swann continued to struggle, kicking and spitting at Deputy Westphal and the other officers who came to assist him.

The State called Deputy Jessica Wilson as well. Deputy Wilson and Deputy Gardiner had responded to Westphal's request for assistance "because [Swann] was fleeing the scene." Deputy Wilson explained that while Swann was handcuffed, on his belly, and on the ground, he kicked her and other officers. She testified: "I was trying to hold him down. That's when I came into contact with his legs."

The State also called Sergeant Fleenor. Sergeant Fleenor testified that Swann spat in his face, that Swann was kicking at the officers, and that Swann kicked him in the leg. The sergeant ordered the other officers to tase Swann, so that they could get his legs into a car without being kicked.

Deputy Gardiner did not testify. Nonetheless, Deputy Wilson responded affirmatively when asked whether she observed "any occurrences where contact was made by the Defendant to Deputy Gardiner."

Verdict and Appeal

The jury convicted Swann of grossly negligent manslaughter by vehicle, criminally negligent manslaughter by vehicle, negligent homicide by motor vehicle while under the influence of alcohol per se, and a number of related offenses. *See supra* n.1. The jury also convicted Swann of resisting arrest and four counts of second-degree assault against Sergeant Fleenor, Deputy Westphal, Deputy Wilson, and Deputy Gardiner, respectively. Swann filed a timely appeal to this Court.

We shall introduce additional facts as necessary to our discussion.

QUESTIONS PRESENTED

On appeal, Swann presents four questions:

1. Did the court err in admitting the testimony of a State's witness regarding the "Event Data Recorder" report and the report itself?

2. Did the court err in ruling that the State did not violate its discovery obligations with respect to expert testimony?

3. Was the evidence insufficient to sustain two second-degree assault convictions?

4. Did the court err in failing to merge the four sentences for second-degree assault into resisting arrest?

For the reasons discussed in this opinion, we shall affirm the judgments in all respects but one: Because the circuit court erred in not merging Swann's convictions for second-degree assault into his conviction for resisting arrest, we shall vacate all four of Swann's second-degree assault convictions.

DISCUSSION

I

Lay Witness Testimony and Admission of the Event Data Recorder Report

A. *Proceedings Below*

At trial, the State called Corporal Beyer as a lay witness to testify about downloading the EDR data from Swann's car. Swann's counsel objected and moved to exclude Corporal Beyer's testimony on the ground that he was an expert witness, but that the State had not disclosed him as an expert. Defense counsel contended that, to download the EDR data, Corporal Beyer needed expertise in accident reconstruction.

The State responded that Corporal Beyer would testify only about the process by which he downloaded the data from the EDR, which, the State said, did not involve expert testimony. According to the State, Corporal Beyer would not testify about how the computer program worked, but only about what he did with the program.

The court agreed to hear Corporal Beyer's testimony without the jury to determine if he needed to be designated as an expert witness.

Corporal Beyer testified that an EDR or "'black box'" is a device that controls vehicle safety features, such as airbags and seatbelt pretensioners, and collects data from collisions. He took a one-week course, in which he learned how to download and review data from an EDR. About half of the course involved the process for downloading data.[2]

Corporal Beyer's computer has an EDR software program called "Bosch CDR." Before using the program, he ascertains whether the EDR comes from a vehicle from which the program can extract data. If it can, he uses a "Bosch box," which he described as a "suitcase" with "cables for different types of vehicles." He connects the Bosch box to an EDR, using a cable; connects the Bosch box to a power source; and connects the Bosch box to his computer. He calls up the Bosch CDR program and enters the make, model, and model year of the vehicle from which the EDR came. Then he hits "run," and the technology extracts the data and creates a printout. "If everything is connected

[2] The State called Corporal Beyer to explain the process by which he downloaded the data because the State's accident reconstruction expert, Corporal Smith, did not have the training to download the data. The State appears to have used Corporal Smith as its accident reconstruction expert because he was the officer who received the call to respond to the scene of the collision early on a Sunday morning.

properly, then it just runs itself." "[I]f anything is not connected properly, it . . . will give you an error message." Corporal Beyer does not perform any calculations in this process.

After hearing both direct-examination and cross-examination of Corporal Beyer, the court found that, although Corporal Beyer had some training, he did not require any special expertise to testify about downloading data from the EDR.

During Corporal Beyer's trial testimony, the court directed the State to lead the officer and to limit his testimony to the process of downloading the EDR data. The court ruled that Corporal Beyer could not testify about his knowledge about accident reconstruction or his analysis of the report.

On direct-examination before the jury, Corporal Beyer testified that Corporal Smith had given him the EDR or "event data recorder" from Swann's car. He explained that he has a device that downloads data from an EDR. He attached the EDR to that device, to his computer, and to the cigarette lighter in his vehicle (apparently as a power source). He told the jury that, once he had connected the EDR to his computer, he could retrieve data from the EDR onto his computer through a computer program called "Bosch." The Bosch program produced "a readable formatted report" of the data retrieved from the EDR. Corporal Beyer gave this report to Corporal Smith.

On cross-examination, defense counsel asked Corporal Beyer more technical questions. Counsel drew the corporal's attention to two entries on the third page of the report:

Ignition Cycles at Deployment 4383

Ignition Cycles at Investigation 4386.

Counsel asked for an explanation of the "gap in those numbers." Corporal Beyer explained that when he started the program, there was a problem with the connection, which turned out to be related to one of the USB ports in his computer. While he was trying to diagnose the problem, he unplugged the device. When he reactivated the device, another "ignition cycle" was registered.

After this opaque line of questioning, the court permitted the State to elicit further testimony on redirect about "ignition cycles" and the distinction between a "deployment event" and a "non-deployment event."

B. ***Admissibility of Corporal Beyer's Lay Testimony and the EDR Report***

Swann contends that the court erred as a matter of law when it permitted Corporal Beyer's lay testimony about downloading data from the EDR and when it admitted the report that the software generated. Swann maintains that the State should have designated Corporal Beyer as an expert witness.

"The rules of evidence distinguish between the types of opinions and inferences that can be expressed by a lay witness and those for which the witness must be qualified as an expert." *State v. Galicia*, 479 Md. 341, 389 (2022). Pursuant to Maryland Rule 5-701, lay witness opinion or inference testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." "By

contrast, 'when the subject of the inference is so particularly related to some science or profession that is beyond the ken of the average lay[person],' it may be introduced only through the testimony of an expert witness properly qualified under Maryland Rule 5-702." *State v. Galicia*, 479 Md. at 389 (quoting *Johnson v. State*, 457 Md. 513, 530 (2018)). "'If a court admits evidence through a lay witness in circumstances where the foundation for such evidence must satisfy the requirements for expert testimony under Maryland Rule 5-702, the court commits legal error and abuses its discretion.'" *Id.* (quoting *Johnson v. State*, 457 Md. at 530); *see also Ragland v. State*, 385 Md. 706, 726 (2005).

"When a court considers whether testimony is beyond the 'ken' of the average lay[person], the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding." *State v. Galicia*, 479 Md. at 394. "[E]xpert testimony is not required simply because one can explain a matter scientifically." *Johnson v. State*, 457 Md. at 516.

In this case, the circuit court did not err or abuse its discretion in admitting Corporal Beyer's testimony. At the court's direction, that testimony was limited to the steps that Corporal Beyer followed in extracting data from the EDR in Swann's car and downloading it to a software program that created a report. Corporal Beyer did not express any opinions, expert or otherwise. Nor did he analyze any data. Simply put, Corporal Beyer did not testify as an expert.

It makes no difference that Corporal Beyer had received some technical training about how to extract the data from the EDR. He did not have to understand or explain the arcane details about how the technology worked in order to inform the jury about what he did to download the data and print a report.

In advocating for a contrary conclusion, Swann cites *Easter v. State*, 223 Md. App. 65 (2015). In that case, a police officer testified as an expert witness in "crash data retrieval and air bag control module analysis." *Id.* at 76. Using technology similar to what Corporal Beyer used, the officer had retrieved data from the module and downloaded it to his computer, which employed a software program that generated a readable report. *Id.* at 77. The officer relied on the report in expressing his expert opinion that the defendant was traveling at 89 miles per hour just before a collision and that he did not apply the brakes. *Id.* at 78.

In *Easter*, the defendant contended that the court erred in allowing the expert to rely on data from the air bag module because, he said, the State had not established that the system that recorded the data was sufficiently reliable. *Id.* at 78-79. This Court rejected his contention, citing cases from other jurisdictions that had held that similar data is reliable and admissible. *Id.* at 80-81.

Swann recognizes that *Easter* concerns a challenge to a reliability of the data from a car's black box and that it does not concern whether witnesses must be named and qualified as experts before they can recount what they did to extract data from a black box and to generate a report. Nonetheless, Swann seems to argue that because an expert

extracted the data and generated the report in *Easter*, the State needed an expert here as well. He fails to recognize that in *Easter* the expert offered opinions about the reliability of the data and used the data as a basis for his expert opinion. *Id.* at 77-78. Here, by contrast, Corporal Beyer did nothing of the sort.

In our judgment, this case is more akin to *Johnson v. State*, 457 Md. at 532, in which the Court held that "the times and locations reflected in GPS data in a business record do not necessarily require expert testimony to be admissible." Thus, the GPS data in that case "was admissible without need for expert testimony to explain the operation of, and science underlying, GPS devices." *Id.* at 537. In reaching that decision, the *Johnson* Court reasoned that courts do not require expert testimony as a precondition for the admission of many types of computer-generated records, such as reports from ankle-monitoring devices, employee access cards, hotel key cards, or toll transponders. *Id.* at 532. Swann has given us no reason to treat the computer-generated EDR report in this case any differently from the GPS geolocation data that was held to be admissible, without expert testimony, in *Johnson*.

Furthermore, Swann was "free to cross-examine [Corporal Beyer] concerning any defects in the data." *Id.* at 533. In fact, Swann did cross-examine Corporal Beyer and did highlight a potential defect in the report, though the questioning shed more heat than light.

Swann goes on to contend that Corporal Beyer's testimony was not sufficient to authenticate the EDR report. The State responds preliminarily that Swann has not preserved this contention for appellate review.

Pursuant to Maryland Rule 4-323(a), an objection to the admission of evidence "shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." "Otherwise, the objection is waived." *Id.* Parties are thus limited on appeal to those specific grounds on which they objected at trial. *Klauenberg v. State*, 355 Md. 528, 541 (1999).

At trial, defense counsel failed to object to Corporal Beyer's testimony on authentication grounds. Defense counsel offered one specific ground for the objections – improper lay testimony – and did not offer any other reasons. Therefore, Swann has not preserved this question for appeal.

Even if his appellate contention were before us, Swann would not prevail. Under Maryland Rule 5-901, which governs authentications of exhibits, "the burden of proof for authentication is slight, and the 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.'" *Dickens v. State*, 175 Md. App. 231, 239 (2007) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)) (emphasis added in *Dickens v. State*); *accord Jackson v. State*, 460 Md. 107, 116 (2018) (recognizing that under Rule 5-901 "[t]he threshold of admissibility is [] slight").

The State relied on Corporal Beyer's testimony to authenticate the EDR Report. Corporal Beyer testified that State's Exhibit No.8 was the EDR Report because it had the case number for this case, the VIN or vehicle identification number of Swann's car, the date of the collision, and the date when he downloaded the data. Corporal Beyer also testified that the report listed his username, C-Beyer, and that he completed the download of the report on January 28, 2021. A reasonable juror could conclude from Corporal Beyer's testimony that the EDR report was drawn from the EDR in Swann's car and downloaded through the Bosch computer program on Corporal Beyer's computer.

C. *Admissibility of the EDR Report*

Swann contends that the EDR report is inadmissible hearsay. Defense counsel, however, did not raise this issue at trial. Accordingly, Swann did not preserve this issue for appellate review. *See Klauenberg v. State*, 355 Md. at 541.

Even if he had preserved this issue, Swann would not prevail. Maryland Rule 5-801(c) defines hearsay as "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." Pursuant to this rule, evidence does not constitute a "statement" (and thus cannot constitute hearsay) unless it is made by a "declarant." The term "declarant," in turn, is defined as "a person who makes a statement." Md. Rule 5-801(b).

In this case, the EDR report did not constitute hearsay because it was entirely "self-generated by the internal operations of the computer." *Baker v. State*, 223 Md. App. 750, 762 (2015). The report does not implicate the general prohibition against the

introduction of hearsay because the report "do[es] not constitute a statement of a 'person.'" *Id*.

II

Expert Testimony

A. Proceedings Below

On April 8, 2021, the State filed its initial disclosures pursuant to Maryland Rule 4-263, which governs the parties' pretrial discovery obligations. In its disclosures, the State named Corporal Smith as a witness. At that time, the State indicated that it had not engaged any expert witnesses in this case.

On July 26, 2021, the State provided notice to the defense of a report prepared and signed by Corporal Smith.[3] The 13-page report, which is dated May 11, 2021, has all the hallmarks of an expert witness's report. It is titled "Final Collision Reconstruction Report." It includes three pages of detailed observations from the scene of the collision; a paragraph concerning the weather at the time of the collision; two paragraphs detailing the measurements of the roadway, including the width of the shoulders and the distance between the shoulder and the guard rail; photographs from the scene of the collision; a page of observations concerning the physical evidence at the scene; interviews with witnesses; information concerning the vehicles involved; a paragraph concerning the injuries that the deceased victim suffered; and a paragraph concerning the EDR report

[3] Defense counsel asserted that she did not receive a physical copy of the collision report until August 20, 2021.

that Corporal Beyer generated. The report concludes with a section titled "Investigator's Summary," which announces the following conclusion:

> It was clear through the course of the investigation [that the victim] died as a result of injuries sustained from this crash. The crash was caused by the reckless driving of Joseph Swann as he was traveling in excess of twice the posted Speed Limit and with a blood alcohol content 3 times the legal limit.[4] None of the roadway evidence indicates the Jeep had changed lanes or moved into the way of the Cadillac. There were no traffic controls that effected [sic] the crash, and no roadway issues were observed that could have contributed to the crash.

The trial began on October 6, 2021. On the first day of trial, defense counsel asked the court to exclude Corporal Smith's expert testimony. Swann's counsel argued that, although the State had disclosed Corporal Smith as a witness and provided his collision report, the State did not identify him as an expert witness. In response, the State admitted that because of a clerical error, it did not send "conventional notice" that it intended to call Corporal Smith as an expert. Nonetheless, the State argued that it adequately informed the defense of the corporal's expected testimony, including his expert opinions, because it had disclosed him as a witness and produced his report.

The court overruled defense counsel's objections. It found that the State had complied with its obligation to disclose its witnesses under Maryland Rule 4-263(d)(3) because the State had disclosed Corporal Smith as a witness and provided his name and address. Additionally, the court found the State complied with its obligation to disclose

[4] Corporal Smith appears to have based this assertion on evidence from a breathalyzer, which showed that Swann's blood had an alcohol concentration of 0.25, which is more than three times the legal limit. At trial, the State proved Swann's blood-alcohol level through a test of blood drawn at the hospital. The test yielded a lower number (.19).

expert testimony under Md. Rule 4-263(d)(8) because the State had produced Corporal Smith's collision report, which, the court said, was obviously the report of an expert. The court concluded that, by disclosing Corporal Smith as witness and producing his report, the State provided defense counsel with notice that it intended to offer Corporal Smith as an expert. Finally, the court recognized that even if a discovery violation had occurred, it had discretion to decide whether to impose a sanction – and it opted not to impose the sanction of excluding the testimony.

B. Admissibility of Corporal Smith's Expert Testimony

This Court conducts a *de novo* review of whether a discovery violation has occurred. *Thomas v. State*, 168 Md. App. 682, 693 (2006), *aff'd*, 397 Md. 557 (2007). But because a "circuit court is vested with broad discretion in administering discovery" (*Alarcon-Ozoria v. State*, 477 Md. 75, 90 (2021)), we employ the deferential abuse of discretion standard to review the decision to impose, or not impose, a sanction for a discovery violation. *Id.* at 91.

Maryland Rule 4-263(d) governs the State's discovery obligations in criminal cases. It obligates the State to provide to the defense without the necessity of a request:

> (3) State's Witnesses. As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony:
>
> > (A) the name of the witness; (B) . . . the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged;
>
> ***

> (8) Reports or Statements of Experts. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert.

In interpreting an earlier version of this same rule, this Court observed that "[n]othing in these sections (or any other sections) of the Rule requires the State to categorize its proposed witnesses as expert or non-expert." *Knoedler v. State*, 69 Md. App. 764, 768 (1987). Thus, in that case, this Court held that even though the State did not explicitly name a fire captain as an expert witness, the State had satisfied its discovery obligations under Md. Rule 4-263 because it disclosed that he would testify as a witness at the defendant's trial and disclosed a "Fire Incident Report" that contained his expert opinions. *Id.* at 768-69.

Although the rule has changed in some immaterial respects since 1989, we see no reason to reach a different result today. Rule 4-263, as it stands today, does not require the State to formally designate a witness as an expert witness. Instead, the rule requires the State to designate witnesses and to disclose expert reports.

Here, the State named Corporal Smith as a potential witness, provided his address, and disclosed his report, which is obviously an expert's report. Therefore, although the

State did not explicitly categorize Corporal Smith as an expert witness, it provided adequate notice to defense counsel that Corporal Smith would testify as an expert witness. As the circuit court recognized, no competent attorney could read Corporal Smith's report without understanding that it expressed the factual basis for an expert witness's opinion, the analytical foundation for the opinion, and the opinion itself.

Furthermore, even if the circuit court had erred in finding no discovery violation, which it did not, we would hold that the error was harmless. The court itself recognized that, when a discovery violation has occurred, a court has discretion in selecting the appropriate sanction. *See Thomas v. State*, 397 Md. 557, 570 (2007). Indeed, a court has the discretion to decide whether any sanction is at all necessary. *Id*.

"In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasability [sic] of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id*. at 570-71 (footnote omitted). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id*. at 571. "Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Id*. at 572. "[B]ecause the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Id*. at 573.

Where the State commits a discovery violation, but (as in this case) has acted in good faith, "the proper focus and inquiry is whether [appellant] was prejudiced, and if so, whether he was entitled to have the evidence excluded." *Id.* at 572. Defendants suffer prejudice only when they are "unduly surprised and lack[] adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id*. at 574.

Here, Swann knew well in advance of trial that Corporal Smith would be called to testify as an expert, because Swann received a document that could not have been mistaken for anything other than the report of an expert witness. Under the circumstances, Swann was not unduly surprised and had sufficient time to prepare his defense.

Although the lower court (correctly) found that no discovery violation had occurred, the court made it clear that even if a violation had occurred, it would, in its discretion, have admitted Corporal Smith's testimony. In the circumstances of this case, the court did not abuse its discretion in making that determination. Therefore, even if the court somehow erred in finding that no discovery violation had occurred, which it did not, that error was harmless.

III

Sufficiency of the Evidence

Swann argues that the evidence was insufficient to support two of his convictions for second-degree assault.[5] Specifically, Swann contends that there was insufficient

[5] Swann was convicted of four counts of second-degree assault. He does not challenge his assault convictions as to Deputy Westphal or Sergeant Fleenor.

evidence to prove that he assaulted Deputy Wilson and Deputy Gardiner. In support of that contention, Swann argues that Deputy Wilson's testimony failed to establish that he caused any contact with those law enforcement officers and that, if he did, he did so either intentionally or recklessly.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *accord Stanley v. State*, 248 Md. App. 539, 564 (2020). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *McClurkin v. State*, 222 Md. App. at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)); *accord Stanley v. State*, 248 Md. App. at 564. On appellate review of evidentiary sufficiency, a court will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010); *accord Stanley v. State*, 248 Md. App. at 564. The relevant question is not "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Fraidin v. State*, 85 Md. App. 231, 241 (1991) (emphasis in original); *accord Stanley v. State*, 248 Md. App. at 564-65.

The varieties of second-degree assault include common-law battery (*Snyder v. State*, 210 Md. App. 370, 380 (2013)), which "is the unlawful unjustified, offensive and non-consensual application of force to the person of another." *Hickman v. State*, 193 Md. App. 238, 256 (2010). Swann was charged with this variety of second-degree assault.

In Maryland, a defendant commits assault of the battery variety by causing offensive physical contact with another person. *Nicolas v. State*, 426 Md. 385, 403 (2012). To convict a defendant of second-degree assault of the battery variety, the State must prove that: (1) the defendant caused offensive physical contact with, or physical harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified. *Id.* at 403-04.

Deputy Wilson testified that Swann made physical contact with her and Deputy Gardiner. She specifically testified that while she, Deputy Gardiner, and the other law enforcement officers attempted to place Swann in the patrol vehicle, he "refused" and "was just jerking his body around and basically trying to get us off of him." Deputy Wilson also testified that Swann kicked her in the chest and spat on her and other law enforcement officers. Additionally, when specifically asked whether Swann made contact with Deputy Gardiner, Deputy Wilson answered in the affirmative.

All the evidence, if believed by the jury, was sufficient to prove that Swann touched both Deputy Wilson and Deputy Gardiner at least recklessly, if not intentionally, in an offensive manner and without their consent. Therefore, the evidence was sufficient

to support Swann's convictions for committing second-degree assaults on Deputy Wilson and Deputy Gardiner.

IV

Merger

Swann's final contention is that all four of his convictions for second-degree assault (Counts 16, 17, 18, and 19) should merge with his conviction for resisting arrest (Count 15).[6] He contends that his use of force against the four officers occurred while he was resisting arrest.

The State concedes that three of the convictions for second-degree assault should merge with the conviction for resisting arrest.[7] The State argues, however, that Swann's conviction for second-degree assault against Detective Westphal was a distinct and separate act that happened before the officers' attempted to arrest him. Consequently, the State argues that that conviction should not merge with the offense of resisting arrest.

Swann did not object to his sentence. Nonetheless, under Maryland Rule 4-345(a) a "court may correct an illegal sentence at any time." Thus, a challenge to an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it[.]'" *Johnson v. State*, 427 Md. 356, 371

[6] The conviction for second-degree assault on Deputy Westphal is Count 16. The sentencing court did not specify which officers were the victims for Counts 17, 18, and 19. The indictment listed the victims as Deputy Wilson for Count 17, Sergeant Fleenor for Count 18, and Deputy Gardiner for Count 19.

[7] The State agrees that Swann's convictions for second-degree assault against Sergeant Fleenor, Deputy Wilson, and Deputy Gardiner should merge with Swann's resisting arrest conviction.

(2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Whether a sentence is illegal is a question of law. *Bonilla v. State*, 443 Md. 1, 6 (2015).

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects a defendant from multiple punishments for the same offense." *Morgan v. State*, 252 Md. App. 439, 459 (2021). "Although the Constitution of Maryland does not contain a counterpart to the Double Jeopardy Clause, the common law of Maryland provides for a prohibition on double jeopardy." *Scott v. State*, 454 Md. 146, 167 (2017).

"Merger is the common law principle that derives from the protections afforded by the Double Jeopardy Clause." *State v. Frazier*, 469 Md. 627, 641 (2020). In other words, merger "is the mechanism used to 'protect[ ] a convicted defendant from multiple punishments for the same offense.'" *Id.* (quoting *Brooks v. State*, 439 Md. 698, 737 (2014)). Maryland courts require merger "'when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.'" *Id.* (quoting *Brooks v. State*, 439 Md. at 737).

Under the required evidence test (which is also known as the "same evidence" or "*Blockburger*" test), "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *State v. Jenkins*, 307 Md. 501, 517 (1986). On the other

hand, if each offense contains an element that the other does not, the offenses do not merge. *See, e.g.*, *Lancaster v. State*, 332 Md. 385, 391 (1993).

Second-degree assault merges into resisting arrest under the required evidence test if the two offenses are based on the same act of force by the defendant against a law enforcement officer. *Nicolas v. State*, 426 Md. at 407. The Court explained:

> All of the elements of second-degree assault are included within the offense of resisting arrest. The "force" that is required to find a defendant guilty of resisting arrest is the same as the "offensive physical contact" that is required to find a defendant guilty of the battery variety of second[-]degree assault. Furthermore, there is no element required to satisfy the offense of second[-]degree assault that is different from or additional to the elements required to satisfy the offense of resisting arrest.

Id.

Thus, the question in this case is whether Swann's convictions for resisting arrest were based on the same acts – the same uses of force – as his convictions for second-degree assault.

As a preliminary matter, we agree that the second-degree assaults against Sergeant Fleenor, Deputy Wilson, and Deputy Gardiner occurred while Swann resisted arrest. As discussed above, Deputy Wilson testified that Swann used force on her and Deputy Gardiner while the officers attempted to arrest Swann. Additionally, Sergeant Fleenor testified that Swann kicked him and spat on him while the officers were placing Swann in handcuffs. Therefore, these three convictions for second-degree assault (Counts 17, 18, and 19) merge into Swann's conviction for resisting arrest.

Swann and the State diverge on whether the convictions for second-degree assault of Deputy Westphal and resisting arrest were based on the same conduct. The State argues that Swann's assault against Deputy Westphal was a separate and distinct act that occurred before the officers attempted to arrest Swann. Swann responds that Deputy Westphal initiated the arrest before Swann threw a punch at the deputy. In addition, citing *Nicolas v. State*, 426 Md. at 400, Swann argues that, to the extent that the record is ambiguous as to whether the assault on Deputy Westphal occurred as part of the arrest, the ambiguity should be construed in favor of merger.

In *Nicolas*, the police responded to a 9-1-1 call and asked Nicolas to step outside of a house for questioning. *Id*. at 391. Nicolas brushed past one of the officers and pushed him with his arm, an action that the officer considered an assault. *Id*. Nicolas then hit a second officer in the face. *Id*. The first officer "repeatedly told" Nicolas that he was under arrest, and when Nicolas attempted to re-enter the house, grabbed him and tried to keep him outside. *Id*. at 391-92. Nicolas assaulted the officer several more times, hitting him, as the officer attempted to arrest him. *Id*.

On appeal from his convictions for second-degree assault and resisting arrest, Nicolas argued that the record was 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 the ambiguity must be resolved in his favor. *Id*. at 411. Reasoning that a reasonable jury could have found that the arrest began before or after the assaults, the Court ruled in Nicolas's favor and merged the convictions. *Id*. at 412-15.

Here, it is unclear when Deputy Westphal initiated Swann's arrest. Deputy Westphal testified that, after he was notified Swann had fled the scene of the accident, he located Swann and told him he could not leave. The following interaction between Deputy Westphal and Swann ensued:

> MR. SWANN: You what [sic] me to get up?
>
> DPT. WESTPHAL: Turn around.
>
> MR. SWANN: What, what?
>
> DPT. WESTPHAL: Get up. Turn around.
>
> MR. SWANN: [Chill, chill, chill].
>
> DPT. WESTPHAL: 369, can you come down where my vehicle is?
>
> MR. SWANN: I'll beat your little ass up. Touch me. Touch me.
>
> DPT. WESTPHAL: Turn around.
>
> MR. SWANN: Touch me.
>
> DPT. WESTPHAL: I will [tase] you. Turn around.
>
> MR. SWANN: Man. Shit man. Come on.
>
> DPT. WESTPHAL: Turn around. You're not free to go.
>
> MR. SWANN: I'll punch your face.

As Deputy Westphal testified, Swann then committed the assault by throwing a punch at Deputy Westphal, and Deputy Westphal brought Swann to the ground to handcuff him. Yet, before the punch, Deputy Westphal repeatedly asked Swann to "turn around" and told him he was "not free to go." As in *Nicolas v. State*, therefore, a

reasonable jury could have found that Deputy Westphal was effectuating an arrest even before Swann committed the assault.[8]

We have looked not only to the trial testimony, but also to the prosecutor's closing arguments, the charging document, the jury instructions, and the verdict sheet to determine whether the convictions for resisting arrest and second-degree assault were based on the same act or acts or were discrete acts. *Johnson v. State*, 228 Md. App. 27, 47 (2016) (citing *Morris v. State*, 192 Md. App. 1, 39-44 (2010)).

Here, the judge did not instruct the jury to consider whether the charges of resisting arrest and second-degree assault were based on separate and distinct acts. The verdict sheet also provides no clarity. Nor did the verdict sheet require the jury to determine whether the charges were based on separate and distinct acts. Thus, this case is unlike *Butler v. State*, 255 Md. App. 477, 504 (2022), where the verdict sheet "provided further clarity regarding whether the jury's verdict was based on separate conduct" because it "included a special interrogatory asking the jurors, *if* they found [appellant] guilty of either charge of simple second-degree assault, whether 'the assault was a separate act or acts from the act or acts of resisting arrest?'" (Emphasis in original.)

[8] Because the State proceeded on the theory that the assault against Deputy Westphal was a battery or attempted battery, we need not consider whether the result might have been different had the State proceeded on the theory that this was an assault of the "attempt to frighten" variety, based on Swann's verbal threats.

Additionally, the State did not explicitly argue in closing that the second-degree assault on Deputy Westphal was based on anything other than the act of resisting arrest. The prosecutor stated:

> From several viewpoints, you saw that the Defendant resisted arrest by hitting and kicking to resist.
>
> ***
>
> By striking out with his hands and feet while trying to resist custody, he did make contact with all four of those police officers.

Thus, the prosecutor folded the second-degree assaults against the four officers into the resisting arrest offense. Accordingly, as in *Nicolas v. State*, 426 Md. at 412, we conclude because the record is, at a minimum, ambiguous, Swann's sentence for second-degree assault against Deputy Westphal merges with the sentence for resisting arrest.

SENTENCES FOR SECOND-DEGREE ASSAULT CONVICTIONS IN COUNTS 16, 17, 18, AND 19 VACATED. JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ST. MARY'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THE OPINION. APPELLANT SHALL BEAR 80 PERCENT OF THE COSTS; ST. MARY'S COUNTY SHALL BEAR 20 PERCENT OF THE COSTS.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1931s21cn.pdf