Circuit Court for Baltimore City
Case No. 116348008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 602

September Term, 2017

JERAMIAH BEAMON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Rodowsky, J.

Filed: June 25, 2018

Appellant, Jeramiah Beamon, was convicted on May 3, 2017, following a bench trial in the Circuit Court for Baltimore City, of two counts of unlawful possession of a regulated firearm—one in violation of Maryland Code (2003, Repl. Vol. 2011), § 5-133(c) of the Public Safety Article (PS) and the other in violation of Maryland Code (2002, Repl. Vol. 2012), § 5-622 of the Criminal Law Article (CR)—and one count of unlawfully wearing, carrying, or transporting a handgun in violation of CR § 4-203. The court merged for sentencing purposes appellant's CR § 5-622 conviction with his PS § 5-133(c) conviction, sentencing appellant to eight years' incarceration, all but four suspended, for the latter offense. It also imposed a concurrent three-year sentence for appellant's violation of CR § 4-203.

Appellant noted this timely appeal on May 22, 2017, and presents four issues for our review which we have reordered to reflect the chronology of the proceedings.

> "1. Did the trial court err or abuse its discretion in permitting Captain Herzog to testify as an expert where he was not disclosed as such in discovery?
>
> "2. Did the trial court abuse its discretion, and commit plain error, in permitting a witness not qualified as an expert to testify to his opinion that Appellant exhibited the characteristics of an armed person?
>
> "3. Did the trial court err in admitting hearsay evidence?
>
> "4. Was the evidence legally sufficient to sustain two convictions for possession of a firearm by a disqualified person where only a single weapon was involved?"

Facts

At around 10:25 a.m. on November 17, 2016, Captain John Herzog, III, Officer Benjamin Critzer, and Officer Gary Schaekel were on routine patrol in an unmarked vehicle near the intersection of Rosedale and Baker streets in Baltimore City. Though otherwise dressed in plain clothes, the officers wore black tactical vests bearing the word "Police."

As the officers turned northbound onto Rosedale Street from Baker Street they saw a man whom they later identified as appellant. The officers observed a noticeable bulge in the front right side of appellant's waistband. As appellant walked, Captain Herzog testified, "he was fidgeting with … the front right side of his waistband. [H]e then began holding his arm tight to the front of his body."[1] These characteristics led the officers to suspect that appellant possessed a firearm. They continued to monitor appellant as he walked eastbound into an alley.

Officer Schaekel drove the vehicle to the entrance of the alley into which appellant had walked. Captain Herzog, who had been seated in the front passenger's seat, called out to appellant through his lowered window, "Hey, come here real quick."[2] Appellant responded, "Who? Me?" As Captain Herzog began opening the front passenger-side door, appellant "took off running." Captain Herzog exited the vehicle and "chased [appellant]

[1]Officers Critzer and Schaekel testified that appellant displayed the same characteristics as those described by Captain Herzog.

[2]Captain Herzog acknowledged at trial that he did not identify himself as a police officer during his initial exchange with appellant.

eastbound into the alley." Officers Critzer and Schaekel joined the pursuit, first in the vehicle and then on foot. During the chase, Captain Herzog lost sight of appellant after the latter turned northbound, exiting the alley through a breezeway. As Captain Herzog approached the breezeway, he heard the loud "distinctive sound of metal hitting concrete."

Captain Herzog approached a yard at the corner of the alley and the breezeway where he suspected that appellant had discarded the firearm. Peering through a small opening in a privacy fence surrounding the property, Captain Herzog saw a pistol (later identified as a Ruger .9 mm semi-automatic) lying next to a concrete walkway. Captain Herzog accessed the yard from an adjacent property, remained with the firearm, and radioed fellow officers, requesting gloves with which to secure the weapon. Officer Anthony Taurisano responded to the call. Upon arriving at the scene, he cleared the firearm's chamber and removed its magazine, the rounds in which appeared to have been "scrambled," possibly from the impact after having been thrown. Appellant was ultimately apprehended by Officer Critzer, who testified that he had found appellant hiding beneath a porch.

Additional facts will be stated, as required, for the resolution of particular issues.

Discussion

I

Citing Md. Rule 4-263(d), appellant claims that "the State did not disclose that Captain Herzog would be qualified and testify as an expert, and buried the subject-matter of his testimony among a long list of potential topics, rendering the disclosure

meaningless." Accordingly, appellant contends, the trial court erroneously permitted Captain Herzog to testify as an expert. The State maintains that it "properly disclosed that it intended to call all of the police officers, including Captain Herzog, as experts in their respective fields, which included the characteristics of an armed person."

Discovery

On February 24, 2017, the State certified that it had electronically submitted to appellant's attorney its Initial Disclosures, Notices, and Motions ("the Disclosures") pursuant to Md. Rule 4-263. Therein, under the subheading "Reports and/or Statements of Experts Pursuant to Rule 4-263(d)(8)," the State notified appellant of "its intent to call all of the police officers … disclosed as witnesses in this case to testify as experts in their respective fields." The Disclosures continued:

> "*Any police officers and law enforcement officials called as witnesses will testify as experts in* the identification, packaging, and distribution of controlled dangerous substances; experts in the detection of intoxicated motor vehicle operators; experts in gangs and gang activities; experts in the prevalence of crime in certain areas; and/or experts in *the detection, and characteristics of armed persons*. *The statements and/or reports of such law enforcement experts are those that are contained [in the] Statement of Probable Cause, previously or herein disclosed, and that …* (4) *the observed characteristics and/or activities of the Defendant,* Co-Defendant(s), and/or co-conspirators *are consistent with the characteristics and/or activities of an armed person* …."

(Emphasis added).

The State further certified that it had sent appellant's counsel the documents listed in the Disclosures' "Index of Information Produced in Discovery." Those documents included: (i) the statement of probable cause, (ii) the officers' use of force reports, and (iii)

a request for witness summons, which named Captain Herzog as one of four possible State's witnesses and listed his work address.

Captain Herzog's Testimony

On direct, the State initially examined Captain Herzog as a lay witness. As such, he recounted the events he observed on the morning of appellant's arrest. The State then asked Captain Herzog what had drawn his attention to appellant on the morning in question. The following colloquy ensued:

> "A Well, he was fidgeting with like the front right side of his waistband. He had a clear bulge and as he continued to cross the street, he then began holding his arm tight to the front of his body.
>
> "Q And what did that indicate to you?
>
> "A Those are characteristics of an armed person. And I immediately believed that he was possibly armed with a firearm.
>
> "Q When you say characteristics of an armed person, what do you mean?
>
> "A There are certain characteristics that have been identified -- "

Appellant then objected on the basis of relevance. In overruling appellant's objection, the court suggested that the State "may wish to qualify him as an expert … on this matter." As the State began to do so, appellant again objected, claiming that the State had not disclosed that Captain Herzog would testify as an expert or that the characteristics of an armed person would be the subject of expert testimony. The State responded:

> "The State's response to initial disclosures … noted that 'The State gives notice to the defendant of its intent to call … the police officers, law enforcement officials, firearms examiners, latent print examiners and

> chemists, discloses witnesses in this case to testify as experts in their respective fields.'
>
> "It goes on to say that any police officer and law enforcement officials called as witnesses … 'Will testify as experts in' -- there's a number of things that it specifically states -- 'and/or experts in the detection and characteristics of an armed person.'
>
> "Furthermore, it is noted in the statement of probable cause that it was in accordance with training and expertise of this officer, who was specifically Officer Schaekel, it was believed that Mr. [Beamon] was exhibiting the characteristics of an armed person.
>
> "Other statements from Officer Herzog that were written in relation to a use of force incident report do indicate from Officer Herzog that … Mr. Beamon was walking east into the southeastern alley displaying characteristics of an armed person."

The court overruled appellant's objection, reasoning:

> "[G]iven the nature of this particular offense, that it has to do with -- even in the statement of probable cause, if the person was observed to be exhibiting the characteristics of an armed person, the specific reference to that in the disclosure that was made, I think the defense was properly on notice that that would likely be testimony and that the police officers would be witnesses. So I'm going to overrule the objection."

Standard of Review

"The application of the Maryland Rules … to a particular situation is a question of law, and 'we exercise independent *de novo* review to determine whether a discovery violation occurred.'" *Cole v. State*, 378 Md. 42, 56 (2003) (quoting *Williams v. State*, 364 Md. 160, 169 (2001)). Should we hold that, contrary to the trial court's ruling, the State committed a discovery violation, we will reverse unless we are persuaded beyond a reasonable doubt that such error was harmless. *Williams*, 364 Md. at 178-79.

Rule 4-263(d)

Maryland Rule 4-263 governs discovery in the circuit court, and provides, *inter alia*:

> "(d) … Without the necessity of a request, the State's Attorney shall provide to the defense:
> ….
> "(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[.]"

Appellant contends only that the State inadequately conveyed (i) its intent to qualify Captain Herzog as an expert witness and (ii) the subject-matter of his testimony in that capacity.

The first allegation lacks a legal basis. Contrary to appellant's claim, Rule 4-263 does *not* require the State to characterize its proposed witnesses as "expert" or "lay" witnesses. *Knoedler v. State*, 69 Md. App. 764, 768 (1987) ("Nothing in these sections (or any other sections) of the Rule [*i.e.*, Rule 4-263] requires the State to categorize its proposed witnesses as expert or non-expert.").[3]

[3]As the Court of Appeals noted in *Hutchinson v. State*, 406 Md. 219, 226 n.1 (2008), "[e]ffective July 1, 2008, the Maryland rules governing criminal discovery were significantly amended." None of those amendments, however, impose upon the State an obligation to categorize its witnesses as "experts" and "non-experts."

At the time of our decision in *Knoedler*, Rule 4-263 provided in pertinent part:

(continued …)

The second allegation is also without merit. The State explicitly identified "the detection and characteristics of armed persons" as among five subjects to which "[a]ny police officers … called as witnesses will testify as experts[.]" The State's list of topics on which police offers may testify as experts is hardly a "long list" in which was "buried" the subject of "the detection and characteristics of armed persons."

Particularly when viewed in light of the facts of the case, the nature of the charges, and the content of the documents produced during discovery, the State's disclosures satisfied the letter and purpose of Rule 4-263. *See Cole v. State*, 378 Md. 42, 58 (2003) ("The purpose of Rule 4-263[(d)(8)(B)] is to allow the defense to prepare for expert testimony."). The court did not err in finding that the State had satisfied its Rule 4-263(d) discovery obligations.

(… continued)

> "**(b) Discovery Upon Request.** — Upon request of the defendant, the State's Attorney shall:
>
> "(1) *Witnesses*. — Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;
>
> ….
>
> "(4) *Reports or Statements of Experts*. — Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion[.]"

The current language of the Rule no more requires the State to characterize its witnesses as "experts" and "non-experts" than did the language at the time we decided *Knoedler*.

II

Appellant contends that "the trial court abused its discretion … in permitting a witness not qualified as an expert [(namely, Officer Critzer)] to testify to his opinion that appellant exhibited the characteristics of an armed person." The State counters that appellant failed to preserve this contention for appellate review, and, in the alternative, that any error was harmless.

Officer Critzer's Testimony

During its direct examination of Officer Critzer, the State asked what had drawn his attention to appellant on the morning of November 17, 2016. Officer Critzer answered:

> " … I saw a bulge on the right side of his front waistband which is commonly referred to as the dip area. I also could observe and clearly see that Mr. Beamon was continuing to keep his right arm close to his body.
>
> "[T]hrough my training, knowledge[,] and experience as a police officer, I carry off duty all the time, I carry a gun for a living. I've had training -- "

Defense counsel objected, claiming that the testimony was irrelevant. The court overruled appellant's objection. Officer Critzer proceeded to specify the training to which he was referring, to wit, "training on the characteristics of an armed person." "The characteristics that Mr. Beamon was displaying," Officer Critzer continued, "to me were blatant characteristics -- " Defense counsel again objected, immediately after which Officer Critzer finished his sentence, saying "of an armed person." The court elicited the basis for appellant's objection. Counsel responded that the witness's use of the word "blatant" amounted to an improper characterization. The court sustained appellant's objection, saying "All right. I'll just disregard the word 'blatant.'" The court then asked Officer

Critzer, "You saw the characteristics of an armed person, you felt[?]" Officer Critzer answered in the affirmative, and, at the court's request, proceeded to specify the characteristics to which he had referred.

> "The characteristics that I saw Mr. Beamon displaying were the bulge in the right side of his waistband area, commonly referred to [as] the dip, his right arm tight to his side. Through my training, I know that a person carrying firearms not restricted by a holster will typically keep a left or right arm tight to their body to maintain possession, make sure that the weapon doesn't shift, doesn't fall."

Officer Critzer went on to describe the officers' initial pursuit of appellant, during which, he testified, appellant's right arm was "[n]ot moving at all, just keeping it tight to his body the whole time. Through the training that I've had, my knowledge -- " Appellant interrupted with a general objection, which the court overruled. Thereafter Officer Critzer continued "-- my knowledge and experience with a person who's armed with firearms, like I said, again, it was textbook[.] It's a one-arm run, one arm tight to the body while the other arm was swinging wildly."

Preservation

An exception to the admissibility of evidence is generally waived unless an objection is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Md. Rule 4-323(a). "[W]hen an objector sets forth the specific grounds for his objection … the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." *Brecker v. State*, 304 Md. 36, 39-40 (1985) (citations omitted). *See also Sifrit v. State*, 383 Md. 116, 136 (2004). Objections are similarly waived "if, at another point during the trial, evidence on the same

point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008) (citing *Peisner v. State*, 236 Md. 137, 145-46 (1964)). *See also Wimbish v. State*, 201 Md. App. 239, 261 (2011) ("[T]o preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or … request a continuing objection to the entire line of questioning.'" (citation omitted)), *cert. denied*, 424 Md. 293 (2012).

In a vacuum, appellant's general objection would have preserved for our review the issue of Officer Critzner's expert opinion testimony. That objection, however, was made in the wake of appellant's either having failed to object or else his having objected on entirely different grounds while Officer Critzer testified at length as to his expert opinion. Appellant did not, therefore, comply with Rule 4-323(a)'s requirement that an objection be made "as soon … as the grounds for objection become apparent." Accordingly, this issue is not preserved for appellate review.[4]

Citing *Blanks v. State*, 406 Md. 526 (2008), appellant contends that further objection was unnecessary to preserve his claim of error because "it was clear that the trial court had decided to admit [Officer Critzer's testimony]." Appellant's reliance on *Blanks* is misplaced.

In *Blanks*, the Court of Appeals held that "[t]he purpose of Maryland's preservation rule, Maryland Rule 8-131(a)," was satisfied where defense counsel repeatedly objected to a specific line of questioning of a particular witness. *Id*. at 538. In that case, counsel twice

[4]In a footnote, appellant asks us to notice plain error, without supporting argumentation. In this footnote, we decline to do so, without elaboration.

objected to the State's asking about conversations between the defendant and his counsel in anticipation of trial. After both of those objections were overruled, counsel approached the bench and explained, "'I think one question generally is appropriate, the more we get into this you're getting into privileged communications.'" *Id*. at 533. Following the bench conference, the State posed "[s]everal other questions of the same ilk" to which counsel did not object. *Id*. at 537.

In holding that the petitioner's claims were preserved for the Court's consideration notwithstanding counsel's not having objected to each and every question that ostensibly invaded attorney-client privilege, the Court reasoned:

> "The purpose of Maryland's preservation rule … is '"(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion."' Petitioner satisfied that purpose. He objected to the first question that approached the timing and content of petitioner's communications with counsel, explained at the bench his concern that the questions invaded the attorney-client privilege, and re-objected when the court permitted the inquiry to resume. Under those circumstances, no further objection was necessary."

Id. at 538 (citations omitted).

In this case, counsel's prior objections hardly brought appellant's current contention—to wit, that Officer Critzer had testified as an expert witness without first having been so qualified—to the attention of the trial judge. We agree with the State that "[t]he rationale of *Blanks* does [not] apply … when the grounds for objecting are different than previously addressed to the court."

III

Appellant next contends that the trial court erroneously admitted the firearms examiner's report ("the Report"), claiming that the Report constituted inadmissible hearsay which bolstered the expert testimony of the firearms examiner.[5] The State counters that the Report was properly admitted as a business record under Md. Rule 5-803(b)(6).

We need not reach the merits of appellant's contention as any error in admitting the Report was harmless beyond a reasonable doubt. *Fields v. State*, 395 Md. 758, 759, (2006) ("Because we shall hold that even if the court erred with respect to the evidentiary issue, the error was harmless beyond a reasonable doubt, we do not reach the [merits of the hearsay] issue.").

As the State rightly notes, of the three crimes of which appellant was convicted, the Report was only relevant to one—the unlawful wearing, carrying, or transporting a handgun in violation of CR § 4-203. Neither of the other two crimes of which appellant was convicted required that the firearm at issue had been operable. *See Moore v. State*,

[5]Appellant characterizes the Report as a prior consistent statement introduced to bolster Mr. Meinhardt's in-court testimony. Citing *Holmes v. State*, 350 Md. 412, 417-18 (1998), appellant argues that the Report could only be admitted "for purposes of rehabilitation[.]" This is not so. While prior consistent statements may well be admitted "to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive," Md. Rule 5-802.1(b), such statements, if relevant, may likewise be admitted pursuant to any of the exceptions to the rule against hearsay—including the business records exception. *See* 6A Lynn McLain, Maryland Evidence: State & Federal, § 801(2):1., at 301 (3d ed. 2013) ("Until the adoption of Md. Rule 5-802.1(b), Maryland generally followed the traditional, common law rule that a witness's prior consistent statements were admissible, if at all, only to rehabilitate the witness's credibility and not as substantive evidence, *unless they fell within some other particular hearsay exception*." (emphasis added; footnote omitted)).

424 Md. 118, 140-41 (2011); *Nash v. State*, 191 Md. App. 386, 405 n. 8 ("[T]he State is not required to demonstrate that a firearm is operable to obtain a conviction under P.S. § 5-133(c)." (citation omitted)), *cert. denied*, 415 Md. 42 (2010); *Neal v. State*, 191 Md. App. 297, 313 ("[W]e … read [PS] § 5-101 in *pari materia* with [CR] § 5-621(b)(1) and § 5-622, in order to give the term consistent meaning. In *Hicks* and *Moore*, we concluded that the definition of 'firearm' in [PS] § 5-101 does not include the concept of operability. Logic dictates that we apply the same construction to the term 'firearm' as it is used in [CR] § 5-621 and § 5-622."), *cert. denied*, 415 Md. 42 (2010); *Hicks v. State*, 189 Md. App. 112, 139 (2009).

With respect to appellant's conviction pursuant to CR § 4-203, the Report's admission in evidence was likewise harmless beyond a reasonable doubt. Though the rounds in the magazine were "scrambled," preventing those rounds from being "cycled" into the chamber from which they could be fired, the firearm was nevertheless legally "operable."

We addressed the "operability" of firearms in *Powell v. State*, 140 Md. App. 479, *cert. denied*, 367 Md. 90 (2001). In that case, Powell was convicted of "wearing, carrying, or transporting" a handgun in violation of Maryland Code (1996), Article 27, § 36B(b), recodified in 2002 as CR § 4-203. Citing *York v. State*, 56 Md. App. 222 (1983) (holding that a handgun was legally operable where "a police firearms expert testified that by using a hammer and a screwdriver or a fingernail file he could restore the weapon to operable condition in about a minute's time."), *cert. denied*, 299 Md. 137 (1984), we reiterated that

in order to satisfy the operability requirement of then Article 27, § 36B(b), a weapon must be capable of "be[ing] made to fire with a simple correction or adjustment." *Powell*, 140 Md. App. at 486.

The pistol at issue in *Powell* lacked a magazine. Given that that pistol was designed such that the removal of the magazine "disconnect[ed] the internal firing mechanism," the absence of a magazine prevented the pistol from firing. *Id*. at 483. Powell contended that the absence of a magazine rendered the pistol legally inoperable, and that the pistol did not, therefore, qualify as a handgun within the meaning of Article 27, § 36B(b). Reasoning that "there was evidence that it was possible [for appellant] to obtain a replacement magazine," we held that the weapon readily could be made to fire, and was, therefore, "operable." *Id*. at 487.

The appellant in this case was no less capable of procuring a loaded replacement magazine than was the appellant in *Powell*. In fact, the adjustment necessary to render the pistol capable of being fired was even simpler in this case than in *Powell*. Appellant could have rendered the pistol fireable merely by properly reloading the magazine, as did the firearms examiner, Victor Meinhardt, prior to successfully discharging the weapon. There is, in fact, evidence that the pistol may have fired without any corrections or adjustments whatsoever. Though Mr. Meinhardt testified that it was improbable that the "scrambled" rounds in the chamber would have been able to cycle into the chamber, he testified that "if there's already one in the chamber, it might go[.]" Given that a round had been in the

chamber when Officer Taurisano secured the firearm, the pistol may well have been capable of firing that round without appellant's taking any corrective measures whatsoever.

Given that convictions pursuant to CR § 5-622 and PS § 5-133(c) do not require proof of a firearm's operability, and that Mr. Meinhardt's testimony, in and of itself, furnished sufficient evidence from which to conclude that the pistol satisfied CR § 4-203's operability requirement, any error in admitting the Report was harmless beyond a reasonable doubt.

IV

Appellant's final contention is that, because "the unit of prosecution for possession of a firearm by a disqualified person is the weapon, not the basis (or bases) upon which the accused is disqualified," and the State introduced evidence that appellant possessed a solitary firearm, appellant was erroneously *convicted* of two counts of unlawful possession. He couches the argument as one of insufficient evidence to convict.

The State counters that appellant waived the issue by failing to except at trial. In the alternative, the State maintains that because the merger doctrines protect an individual from being twice *punished* for the same criminal conduct, and the court merged appellant's convictions for sentencing purposes, appellant was properly *convicted* of violating CR § 5-622 and PS § 5-133(c).

Preservation

Absent the imposition of an inherently illegal sentence, a merger claim is only preserved for appellate review where an appellant raises the issue "[u]pon receiving

verdicts of guilty on both counts[.]" *Salzman v. State*, 49 Md. App. 25, 50, *cert. denied*, 291 Md. 781 (1981). *See also* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

The generally applicable requirements of Md. Rule 8-131(a) notwithstanding, Md. Rule 4-345 permits appellate review of an otherwise unpreserved challenge at any time to "correct an illegal sentence." As the Court of Appeals repeatedly has explained "[t]he 'scope of this privilege ... is narrow[.]'" *Johnson v. State*, 427 Md. 356, 367 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466-67 (2007)). "To constitute an illegal sentence under Rule 4-345(a), 'the illegality must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding.'" *Johnson*, 427 Md. at 367 (quoting *Matthews v. State*, 424 Md. 503, 512 (2012)).

"The failure to merge a sentence when it is required is considered an inherently illegal sentence as a matter of law." *Latray v. State*, 221 Md. App. 544, 555 (2015) (citation omitted). *See also Pair v. State*, 202 Md. App. 617, 624-25 (2011), *cert. denied*, 425 Md. 397 (2012); *Britton v. State*, 201 Md. App. 589, 597-99 (2011); *Ingram v. State*, 179 Md. App. 485, 508-11 (2008); *Campbell v. State*, 65 Md. App. 498, 510-11 (1985), *cert. denied*, 305 Md. 599 (1986). In this case, however, the court properly merged appellant's sentence pursuant to CR § 5-622 with that pursuant to PS § 5-133(c), sentencing appellant to eight years, all but four suspended—a penalty falling squarely within the range permitted by PS

§ 5-133(c)(2).[6] Given that no illegality inheres in appellant's sentence, the standard preservation rules apply.

In this case, appellant neglected to raise his instant "unit of prosecution" claim upon his verdicts having been rendered. Accordingly, that contention is not preserved for appellate review.

Merger: A Sentencing Doctrine

Even if this issue had been preserved for appellate review, we would hold that the trial court was not required to vacate one of appellant's convictions, either pursuant to CR § 5-622 or PS § 5-133, as the court properly merged those convictions for sentencing purposes.

In Maryland, merger embraces three distinct doctrines: Double Jeopardy, the Rule of Lenity, and principles of fundamental fairness. Each of these merger doctrines prohibits only the imposition of multiple *punishments* at sentencing. "[M]erger does *not* affect the underlying conviction." *Lovelace v. State*, 214 Md. App. 512, 543 (2013) (emphasis added; citation omitted). We applied this principle in *Moore v. State*, 198 Md. App. 655 (2011), stating, in pertinent part:

[6]PS § 5-133(c)(2) provides:

> "(2)(i) Subject to paragraph (3) of this subsection, a person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for not less than 5 years and not exceeding 15 years."

The court exercised the discretion under § 5-133(c)(3) to suspend part of the otherwise mandatory five year minimum sentence prescribed by § 5-133(c)(2)(ii).

> "[U]nder the required evidence test, *the merger of a conviction* for the lesser included offense into the conviction for the greater offense is *for sentencing purposes only* and results in a single sentence for the greater offense. *The conviction for the lesser included offense survives the merger. Accordingly,* in the case *sub judice, we shall vacate only the sentences, and not the convictions, for those offenses that we determine will merge* under the required evidence test.[9]
>
> ---
>
> "[9] *We would reach the same conclusion when applying the rule of lenity* or fundamental fairness. *Both principles focus on the issue of multiple punishments for a single act or transaction*. *See Clark v. State*, 188 Md. App. 185, 207-208, 981 A.2d 710 (2009); *Marlin v. State*, 192 Md. App. 134, 171, 993 A.2d 1141, *cert. denied*, 415 Md. 339, 1 A.3d 468 (2010)."

Id. at 692 (some emphasis added).

"Conviction" refers both to the verdict with which the "guilt stage" culminates and to the precursor to the "sentencing stage." In the former sense, "conviction" is tantamount to a factual finding of guilt, which "stand[s] inviolate, unaffected by the merger." *Moore*, 198 Md. App. at 688 (citation omitted). It is only in the latter sense that convictions merge. During the "sentencing phase," "'the *conviction* simply flows into the *judgment* entered on the conviction into which it was merged.'" *Id*. at 689 (quoting *In re Montrail M.*, 325 Md. 527, 533 (1992)).

The purpose of the merger doctrine is not to nullify a valid legal conclusion during the "guilt phase" that a defendant has satisfied each of the elements of an offense for which that defendant was tried. It is, rather, to guard against that defendant's being subjected to multiple punishments during the "sentencing phase" when, in the case of the rule of lenity, it is unclear that the legislature so intended, or, in the case of double jeopardy, the

imposition of multiple sentences would be unconstitutional. *See* Richard P. Gilbert & Charles E. Moylan, Jr., Maryland Criminal Law: Practice and Procedure 452-53 (1983).

For the foregoing reasons, we affirm appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.