UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0614

September Term, 2014

MONTAGUE SUTHERLAND

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 16, 2014

Following a trial in the Circuit Court for Washington County, a jury convicted appellant, Montague Sutherland, of first-degree rape, second-degree rape, third-degree sexual offense, first-degree assault, second-degree assault, reckless endangerment, first-degree burglary, third-degree burglary, fourth-degree burglary, openly wearing a dangerous and deadly weapon with the intent to injure, and theft of property with a value less than $1000.[1] The trial court sentenced appellant to life in prison on the first-degree rape charge, after which he filed a timely notice of appeal.[2]

Appellant presents the following questions for our consideration:

1. Did the trial court abuse its discretion by not asking a *voir dire* question proposed by the defense?

2. Was the evidence insufficient to sustain the convictions for first-degree rape and second-degree rape?

3. Did the sentencing court err in imposing separate sentences for reckless endangerment and carrying a dangerous weapon with intent to injure?

Because the State concedes, and we agree, that pursuant to the particular facts of this case, the charge of reckless endangerment should merge into the charge of first-degree assault for sentencing purposes, we vacate the sentence for reckless endangerment. For the reasons that follow, we shall otherwise affirm the judgments of the trial court.

[1] The court granted appellant's motion for judgment of acquittal relating to charges of first-degree sexual offense and second-degree sexual offense.

[2] The sentences on the remaining charges were either merged into other sentences or imposed to run concurrently with the life sentence.

FACTS AND LEGAL PROCEEDINGS

On March 4, 2013, Elsida Molina went to sleep, alone, in her Hagerstown apartment at approximately 11:30 p.m.[3] Sometime later that night, she awoke to see a shadow moving toward her. She realized it was a person when the man, whom she did not know, pulled her out of her bed onto the floor and sat on her back.[4]

The man removed her pajama bottoms, choked her with both hands so she could not breathe, and told her he was going to kill her. Ms. Molina passed out for a few moments; when she regained consciousness, she was lying on her stomach on her bed, with the man kissing her legs, back and "private parts," while holding a knife to her throat. Initially, she said, he tried to "have sex" with her, but was unable to, penetrating her vagina and "behind" with his fingers instead.

The man asked her for bleach, which she obtained, and lubricant, which she did not have. After she retrieved the bleach, the man returned her to her bed, placed her on her hands and knees, and penetrated her, after which he ejaculated onto her lower back.

When he was finished, the assailant added water to the powdered bleach and poured it over Ms. Molina's entire body in an effort to clean her up. He told her she was cut and

[3] Ms. Molina's husband and daughter were in her native Dominican Republic.

[4] Although she did not see the man's face, from his lips and voice, Ms. Molina believed him to be black. She did not recognize his voice. She described him, to the best of her ability, as in his late 20's and a few inches taller than her height of 5'3".

advised her to get medical attention. He then placed alcohol in her nose to try to put her to sleep. Ms. Molina pretended to be asleep so he would leave.

Before he left the apartment, the man told Ms. Molina he knew where she worked and that she had a husband and a daughter, and he threatened to kill her if she called the police. The man took two cell phones from her nightstand and fled.[5]

About five minutes after the man left, Ms. Molina locked her front door and called her husband and her brother, afraid to call the police. Someone, presumably her brother who arrived at her home a short time later, called the police on her behalf.

When Hagerstown City Police officers responded to the 911 call for a sexual offense, they observed Ms. Molina wrapped in a bath towel, with cuts on her arm and a "white substance all over her body." She was crying, upset, and appeared to be in shock. She was taken immediately by ambulance to Meritus Medical Center, where a sexual assault forensic examination ("SAFE") was conducted and her arm laceration sutured.

The assailant's point of entry was later determined to be Ms. Molina's ground floor back window. Ms. Molina's bed was found to contain "jumbled up bed sheets" and was "soaking wet," with red staining consistent with blood.

SAFE nurse examiner Kim Ward, conducting her first solo SAFE, examined Ms. Molina on March 5, 2013. She observed a white substance in Ms. Molina's hair and falling

[5] The two cell phones, along with a brown glove with a white substance on it, were located by police a short time later at two different locations on Hillcrest Avenue in Hagerstown.

off her body. Ms. Molina had two lacerations, one on her forearm and one on the back of her leg, along with multiple marks, cuts, and scrapes on her neck, face, and arms. Nurse Ward observed no actual vaginal injuries, but she did see four reddened areas on Ms. Molina's cervix.[6] As part of the SAFE exam, she swabbed Ms. Molina's lower back for potential DNA evidence.

At trial, the parties stipulated that the swabs taken from Ms. Molina's lower back were examined and found to contain semen. In addition, semen was found on the white tank top Ms. Molina had been wearing at the time she was attacked.

The semen samples were entered into the Combined DNA Information System ("CODIS") database and sent to the Maryland State Police Forensic Sciences Division for DNA analysis. On April 4, 2013, CODIS identified appellant as a person of interest in the crimes against Ms. Molina, based on DNA previously collected from him.

As a result of the CODIS identification of appellant as a person of interest, lead detective Tammy Jurado investigated, and found, a connection between appellant and the apartment complex in which Ms. Molina lived. On April 4, 2013, appellant was arrested; a black folding knife was recovered from his person, but no relevant evidence was recovered from the knife.

[6] Suzanne Rotolo, accepted by the court as an expert in the field of sexual assault nurse examinations, testified for the defense that, in her opinion, Ms. Ward's SAFE report on Ms. Molina disclosed no definitive findings of sexual assault or injuries to the vestibule or hymen. On cross-examination, however, she conceded that some sexual assaults do not leave evidence of trauma on the victim.

Detectives Jurado and Nick Varner interviewed appellant following his arrest, which resulted in a recorded statement that was played for the jury.[7] Therein, appellant initially stated that he and his girlfriend, Chanel Moore, had spent the night of Ms. Molina's rape in a hotel and that he had nothing to do with the attack. In fact, he denied knowing Ms. Molina at all. When the detectives told him his DNA placed him at Ms. Molina's apartment, he claimed that someone was trying to set him up.

Eventually, however, appellant changed his story to assert that Ms. Molina, a neighbor of his ex-girlfriend, Ashley Briggles, had called and invited him to her apartment on the night in question.[8] He accepted her invitation and walked over to her apartment. She let him in, they had "basic foreplay" and then "sex" -- both in the missionary position and from behind -- after which he left, with no one being injured.

When presented with evidence that Ms. Molina had been cut and covered in bleach, appellant again changed his story and said she got upset that he did not want a relationship

[7] Prior to trial, appellant moved to suppress the statement, on the ground that the arrest based solely on the CODIS hit was unlawful. The motions court denied the motion, and, upon defense counsel's noting his objection to the introduction of the statement at trial to preserve his appeal rights, the trial court declined to "revisit that." The recording was transcribed by the court reporter.

[8] At trial, Ms. Briggles, the mother of appellant's son, testified that she lived across the hall from Ms. Molina and that appellant had stayed with her from time to time during their relationship. She denied appellant's acquaintance with Ms. Molina but conceded he had probably seen her and may have spoken to her to exchange pleasantries. She had never heard appellant comment on Ms. Molina's looks or say anything suggestive about her, but he had said to friends who found her pretty, that "[s]he doesn't deal with niggers like that. She does her own thing."

with her and cut herself. That crazy behavior scared him, so he left the apartment, knocking the bleach that she had obtained out of her hand and onto her. He initially denied taking Ms. Molina's cell phones, but when the detectives told him they had recovered the phones, he admitted to throwing them somewhere outside.

Detective Jurado checked Ms. Molina's cell phone records and determined that Ms. Molina had made no phone calls to appellant. The detective also obtained a search warrant for appellant's DNA, which was sent to the crime lab.[9]

Forensic scientist Julie Kempton compared the DNA samples from Ms. Molina's tank top and the swabs from Ms. Molina's lower back to the known standards of DNA from Ms. Molina and appellant. The DNA from the sperm fraction from the lower back swabs indicated that the major contributor of the DNA profile was appellant. The tank top contained a mixture of DNA, consistent with that of Ms. Molina and appellant.[10]

At the close of the State's case, appellant moved for judgment of acquittal. As pertinent to the sufficiency issue he raises on appeal, he argued that the State had presented "absolutely zero testimony" that a penis entered or penetrated a vagina, as required for a

[9] Pursuant to Md. Code (2011 Repl. Vol., 2014 Supp.), §2-510 of the Public Safety Article, the result of a CODIS search gives the police probable cause to obtain a search warrant to get an additional sample to retest the known standard and compare it against the case evidence.

[10] Ms. Kempton stated that it was "approximately 1600 times more likely" that the sample came from Ms. Molina and appellant than from Ms. Molina and an unknown African American.

conviction of first- or second-degree rape. The court denied the motion as to those two counts, given the victim's testimony that appellant penetrated her vagina and appellant's own admission that he had sexual intercourse with the victim.

Appellant's girlfriend, Chanel Moore, testified for the defense that she and appellant were together in Hagerstown from March 3-5, 2013, spending the two nights in a Super 8 Motel. On the night Ms. Molina was attacked, they watched a movie at the motel, with appellant falling asleep 20 minutes into the film. Ms. Moore took a picture of appellant sleeping but conceded there was no date or time stamp on the picture. After the movie ended, she went to sleep, but when she woke up two or three times during the night, she observed appellant beside her each time. She said that she and appellant checked out of the motel at approximately 11:30 on the morning of March 5, 2013 and went to appellant's mother's house.

Ms. Moore was unable to produce a receipt for the motel stay. And, although she was then aware of appellant's statement to police that he had indeed had sexual relations with Ms. Molina on the night of March 4, 2013, she declined to change her recollection of the events of the evening.

At the close of all the evidence, appellant renewed his motion for judgment of acquittal, adopting and incorporating the arguments he had made at the end of the State's case-in-chief and further arguing that the victim's statement that appellant had "penetrated" her was insufficient to prove the required element of penile penetration into a vagina for first-

and second-degree rape. The court again denied the motion, ruling that, based on all the evidence, "it is clear to this Court that it was sexual intercourse, that there was penetration of the penis with the vagina."

DISCUSSION

I.

Appellant first argues that the trial court erred, during *voir dire*, when it declined to ask if the prospective jurors would be likely to conclude that appellant is "probably guilty" because he had been charged with and was being prosecuted for the crimes he had allegedly committed. He contends that the trial court abused its discretion in refusing to ask the question, as the court had "no legitimate basis" for refusing to ask the proposed question meant to reveal "disqualifying bias."

Prior to trial, appellant submitted a written request for *voir dire*. Question number 12 read: "Is there any member of the prospective jury who believes that because a charge is brought by the police and prosecuted by the State's Attorney's Office, the charge is probably correct and the defendant is probably guilty?" The court did not propound the question to the panel.

After the prospective jurors were questioned, the court inquired:

> THE COURT:. . . And anything I didn't ask you want me to ask?"
>
> MR. [Defense Counsel]: I suppose number 12, the one about if charges were brought.

> THE COURT: No. You can have your objection.
>
> MR. [Defense Counsel]: Okay for the record.
>
> THE COURT: I note your objection. I don't think number 12 is necessary.
>
> MR. [Defense Counsel]: Okay.
>
> THE COURT: And it's always asked and I don't think it's necessary so I'm not giving it.
>
> MR. [Defense Counsel]: Noted for the record.
>
> THE COURT: Noted for the record.

Voir dire, the process by which prospective jurors are examined through the use of questions to determine the existence of any bias or prejudice, is critical in assuring that the guarantees of the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights are protected.[11] *Curtin v. State*, 393 Md. 593, 600 (2006). Without an adequate *voir dire*, the trial court cannot fulfill its responsibility to dismiss prospective jurors who "'will not be able impartially to follow the court's instructions and evaluate the evidence.'" *Stewart v. State*, 399 Md. 146, 158 (2007) (quoting *Rosales-Lopez v. United States,* 451 U.S. 182, 188 (1981)).

[11] The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" Article 21 of the Maryland Declaration of Rights provides, in pertinent part, "[t]hat in all criminal prosecutions, every man hath a right to . . .a speedy trial by an impartial jury."

The scope of *voir dire* in Maryland is limited, meaning the questions are restricted to "'ascertaining the existence of cause of disqualification, and for no other purpose[.]'" *Curtin*, 393 Md. at 602 (quoting *Davis v. State*, 333 Md. 27, 37 (1993)). In this state, "the sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of cause for disqualification, and not as in many other states, to include the intelligent exercise of peremptory challenges." *Stewart,* 399 Md. at 158.

The scope of *voir dire* and the form of the questions asked are within the discretion of the trial court. An appellate court reviews the trial court's rulings on the record of the *voir dire* process as a whole for an abuse of discretion, that is, "questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Id.* at 160 In the absence of a *voir dire* that is "cursory, rushed, and unduly limited," the trial court's discretion is entitled to considerable deference, as it is that court that had the opportunity to hear and observe the prospective jurors, assess their demeanor, and make factual findings. *Id.*

With some exceptions, the trial court is not required to ask specific questions requested by counsel. Questions that are not directed at a specific ground for disqualification, that merely fish for information to assist in the exercise of peremptory challenges, that probe the prospective juror's knowledge of the law, that ask a juror to make a specific commitment, or that address sentencing considerations are not proper in *voir dire* and need not be propounded by the trial court. *Id.* at 161-62.

In *Twining v. State*, 234 Md. 97 (1964), relied upon by the State, one issue before the Court of Appeals was the refusal by the trial court to propound to the prospective jurors the question of whether they would give the defendant the benefits of the presumption of innocence and the burden of proof. *Id.* at 100. The *Twining* Court found no abuse of discretion in the trial court's refusal to ask the questions of the panel, as "[i]t is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Id.* Moreover, the Court noted that the rules of law stated in the proposed *voir dire* questions were "fully and fairly covered in subsequent instructions to the jury." *Id.*

In his brief, appellant concedes that, "at first," *Twining* seems to indicate that the trial court did not abuse its discretion in declining to ask his proposed *voir dire* question related to the presumption of innocence and the State's burden of proof. He nonetheless urges us to conclude that *Twining* is not controlling because its holding is inconsistent with subsequent decisions that recognize a defendant's right to a *voir dire* question if the area of inquiry entails potential biases or predispositions that prospective jurors may hold, which would hinder their ability objectively to resolve the matter before them. In addition, he continues, the 1964 holding in *Twining* rested on the premise that jury instructions were advisory, which is no longer the law. We are not persuaded by his claim of inconsistency or his assertion that *Twining* applied only when jury instructions were not binding.

Maryland appellate courts have upheld the validity of *Twining* several times within the past decade, well after jury instructions were determined to be binding, rather than advisory, in *Stevenson v. State*, 289 Md. 167 (1980), and *Montgomery v. State*, 292 Md. 84 (1981). In *Marquardt v. State*, 164 Md. App. 95, 144 (2005), this Court began its discussion "by stating that this Court has not, nor could it, retreat from *Twining.* We have consistently held that *voir dire* need not include matters that will be dealt with in the jury instructions." In *State v. Logan*, 394 Md. 378, 398-99 (2006), the Court of Appeals, citing *Twining*, concluded that "a solicitation of whether prospective jurors would follow the court's instructions on the law. . . is generally disfavored in Maryland." And, as recently as 2011, in *McFadden v. State*, 197 Md. App. 238, 250 (2011), *disapproved of on other grounds by State v. Stringfellow*, 425 Md. 461 (2012), we reaffirmed *Twining* and *Marquardt*, reiterating that "[i]t has been held inappropriate to question the jury [during voir dire] as to whether or not they would be disposed to follow or apply stated rules of law because they are covered in subsequent instructions to the jury." (Internal quotation marks omitted).[12]

Because appellant's proposed question number 12 was merely a rephrasing of questions about the juror's ability to follow the rules of law regarding the presumption of innocence and the burden of proof, the question was unnecessary and improper. In addition,

[12] Even were we so inclined to disagree with the principles set forth in *Twining*, which we are not, we noted in *Marquardt*, 164 Md. App. at 144 (quoting *Baker v. State*, 157 Md. App. 600, 618 (2004), that "'it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is "now outmoded."'"

it sought to question the prospective jurors as to whether or not they would follow stated rules of law and was covered by other of the court's *voir dire* questions and by the court's subsequent jury instructions.[13]

II.

Appellant next contends that the evidence adduced at trial was insufficient to establish first-degree and second-degree rape, as Ms. Molina did not specifically testify that appellant's penis penetrated her vagina, and without specific evidence of penetration, there can be no conviction of rape.

[13] During *voir dire*, the court asked the prospective jurors, "Is there any member of the prospective jury panel who disagrees with the proposition that the State has the obligation to prove the defendant guilty beyond a reasonable doubt and if the State fails to do that, you must find him not guilty?" and "Is there any member of the prospective jury panel who believes that the defendant should be required to prove his innocence?" There was no affirmative response from any member of the panel.

The trial court instructed the jury as follows:

> The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged. . . This burden remains on the State throughout the trial. The defendant is not required to prove his innocence, however the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence.

The appellate standard for reviewing challenges to the sufficiency of the evidence is "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also Bible v. State,* 411 Md. 138, 156 (2009). We give "due regard to the [factfinder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Albrecht*, 336 Md. 475, 478 (1994).

In performing its function, the jury is free "to accept that evidence which it believe[s] and reject that which it [does] not." *Muir v. State*, 64 Md. App. 648, 654 (1985), *aff'd*, 308 Md. 208 (1986). It is not our function to determine the credibility of the witnesses. Instead, our concern is "only with whether the verdicts were supported with sufficient evidence--that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Albrecht*, 336 Md. at 479.

Md. Code (2012 Repl. Vol, 2013 Supp.), §3-303 of the Criminal Law Article ("CL"), defines first-degree rape and provides, in pertinent part:

> (a) *Prohibited*.—A person may not:
>
> > (1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and

> (2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> (ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
>
> (iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;
>
> (iv) commit the crime while aided and abetted by another; or
>
> (v) commit the crime in connection with a burglary in the first, second, or third degree.
>
> * * *
>
> (d) *Penalties*.—(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life.
>
> * * *

Second-degree rape is defined in CL §3-304:

> (a) *Prohibited*.– A person may not engage in vaginal intercourse with another:
>
> > (1) by force, or the threat of force, without the consent of the other;
> >
> > (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should

> know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.
>
> * * *
>
> (c) *Penalty*.–(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment not exceeding 20 years.

There is no question that penile penetration of the victim's vagina is a required element of the crime of rape. *Wilson v. State*, 132 Md. App. 510, 518 (2000). Penetration, however slight, will support a conviction for rape, but the evidence must provide a reasonable basis for an inference that penetration has occurred. *Kackley v. State*, 63 Md. App. 532, 537 (1985). Proof of penetration may be supplied by the testimony of the victim, medical evidence, or a combination of both. *Id.*

When the evidence is offered through the testimony of the victim,

> '. . . it is clear that the victim need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault. Where the key witness to the prosecutor's case rests with the victim's testimony, the courts are normally satisfied with descriptions which in light of all surrounding facts, provide a reasonable basis from which to infer that penetration has occurred.'

Id. (quoting *Simms v. State,* 52 Md. App. 448, 453 (1982)).

In *Wilson,* 132 Md. App. at 521, the victim told the examining nurse at the hospital after her sexual assault that she "honestly didn't know" whether the defendant had penetrated her. At trial, however, the evidence of penetration was held sufficient when the victim testified that she had been raped "back and front many times." When asked to elaborate, she explained, "Well, I mean the front part of me, my vagina, and the back, the rectum." The victim's description of what occurred to her was sufficient to establish, *prima facie*, that penetration occurred. Any equivocation about penetration was found to go "only to the weight of [the victim's] trial testimony and not to its admissibility. It concerns only the burden of persuasion and not the burden of production. The issue of legal sufficiency, of course, has nothing to do with the burden of persuasion." *Id.*

We hold similarly here. Ms. Molina testified, through a Spanish interpreter,[14] that her assailant initially tried to "have sex" with her but was not able to "in that moment," so he inserted his fingers in her vagina and her "behind" instead. Then, he forced her to another part of the apartment in a search for bleach. When he returned her to her bed, Ms. Molina said he "penetrated" her in her vagina, after he had placed her on all fours; her description distinguished the second act from the earlier insertion of the man's fingers into her vagina. She added that he did "finish," ejaculating onto her back, a fact confirmed by the forensic

[14] The prosecutor advised the court that Ms. Molina understands English but because of "the personal nature of what she's going to have to describe" and because she was more comfortable in her native language, she requested the use of an interpreter solely during her testimony.

finding of semen in the swab taken from her back.[15] Finally, when the police arrived, she told them, that "someone had entered my apartment, I was raped, and that he almost killed me." The description by the victim, a grown married woman who worked as a nursing assistant, in light of all surrounding facts, provided a reasonable basis from which to infer that penetration occurred.

We need not rely solely on Ms. Molina's testimony, however. In addition, the SAFE nurse testified that although no vaginal injury was found upon examination hours after the attack, there were four reddened areas on Ms. Molina's cervix. And, of course, appellant himself admitted, in his recorded statement to the police, that Ms. Molina called him and invited him over to her apartment, at which time they had "basic foreplay," after which they "had sex." He did not recall using his fingers to penetrate her, instead saying that they had sex "missionary" and "from behind."

In our view, the jury reasonably could have concluded that Ms. Molina's and the SAFE nurse's testimony and appellant's statement provided sufficient evidence to establish penetration. As such, the evidence was sufficient to sustain the convictions of first- and second-degree rape.

[15] The presence of semen, while not conclusive as to whether penetration occurred is, nevertheless, to be considered along with the other evidence. *Kackley*, 63 Md. App. at 538.

III.

Finally, appellant avers that his conviction for carrying a dangerous weapon openly with the intent to injure should have merged into the conviction for reckless endangerment, and, in turn, the conviction for reckless endangerment should have merged into that of first-degree assault for sentencing purposes. Based on the specific facts of this matter, the State agrees that the reckless endangerment conviction should merge into the first-degree assault conviction but argues that the separate sentence for carrying a dangerous weapon openly with the intent to injure should stand.

As we explained in *Pair v. State,* 202 Md. App. 617, 636 (2011), *cert. denied*, 425 Md. 397 (2012):

> One of the twin evils traditionally guarded against by the prohibition against double jeopardy, pursuant to either the Double Jeopardy Clause of the federal Fifth Amendment or to the common law of Maryland, is that of multiple punishment for the "same offense." The necessary inquiry is that of whether separate punishments are being imposed for the "same offense." In *Monoker v. State,* 321 Md. 214, 219–20, 582 A.2d 525 (1990), Judge Cole set out the required examination:
>
> > The required evidence test focuses on the elements of each crime in an effort to determine whether all the elements of one crime are necessarily in evidence to support a finding of the other, such that the first is subsumed as a lesser included offense of the second. We summarized the test as follows:
> >
> > > The required evidence is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of

> a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes. And of course if both [offenses] have exactly the same elements, the offenses are also the same within the meaning of the prohibition against double jeopardy.

Regarding merger of reckless endangerment, this Court, In *Williams v. State*, 100 Md. App. 468, 490 (1994), observed that the crime of reckless endangerment may move "along the line of an escalating *mens rea*. . .," adding that "[t]o move from reckless endangerment, where one is simply indifferent to the threat to the victim, to one of the more malicious crimes where death or serious bodily harm is affirmatively desired or specifically intended—such as attempted murder, attempted manslaughter, attempted mayhem, assault with intent to murder, assault with intent to maim, etc.—primarily involves racheting the *mens rea* up to the next level of blameworthiness."

The *Williams* Court addressed whether the *mens rea* of reckless endangerment is a lesser included mental state that may merge into the more blameworthy *mens rea* of, *e.g.*, assault, explaining that:

> [T]he subjective *mens rea* of reckless indifference to a harmful consequence at a certain point along the rising continuum of blameworthiness may ripen into the even more blameworthy specific intent to inflict the harm. At that point, the lesser

> included offense of reckless endangerment merged into the greater inclusive offense of assault with intent to maim. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

100 Md. App. at 510. Thus, the *Williams* Court concluded that the defendant "was guilty of a single criminal act in the course of a single criminal episode," and held that the conviction for reckless endangerment merged into the conviction for assault with intent to maim. *Id.* at 472.

Building on our analysis in *Williams*, we later held, in *Marlin v. State*, 192 Md. App. 134, 165, *cert. denied*, 415 Md. 339 (2010), that reckless endangerment "may merge with first degree assault under C.L. § 3–202(a)(1), involving the conduct of causing or attempting to cause serious physical injury to another, when the *mens rea* and the *actus reus* of reckless endangerment ripen into the specific intent to cause or attempt to cause serious physical injury. In that circumstance, reckless endangerment might be a lesser included offense under C.L. § 3–204(a)(1)."

Based on our analysis in *Williams* and *Marlin*, we hold that, for the purpose of sentencing, the convictions for reckless endangerment and first-degree assault in this case should have merged. Because appellant's actions of holding a knife to Ms. Molina's body and then wounding her with the knife supplied the necessary elements of both reckless endangerment and first-degree assault, appellant's actions comprised a single criminal episode such that the conviction of reckless endangerment should have merged into the greater offense of first-degree assault. Therefore, we must vacate the separate five-year

sentence imposed by the trial court for appellant's conviction for reckless endangerment. *See Paige v. State*, 222 Md. App. 190, 207-8 (2015).

With regard to appellant's argument that his conviction of openly carrying a dangerous weapon with the intent to injure should merge into his conviction of reckless endangerment for sentencing purposes, we hold differently.

Pursuant to CL §3-204(a), a person may not recklessly "engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" And, pursuant to CL §4-101(c)(2), a "person may not wear or carry a dangerous weapon, chemical mace, pepper mace, or a tear gas device openly with the intent or purpose of injuring an individual in an unlawful manner." Appellant, apparently conceding that the two crimes would not merge under the required evidence test, argues that they should merge "under the rule of lenity and principles of fundamental fairness."

Indeed, "[w]hen two offenses based on the same act or acts do not merge under the required evidence test, we have applied as a principle of statutory construction the 'rule of lenity.' Under this rule, doubts as to whether the legislature intended multiple punishments for the same act or acts will generally be resolved in favor of merger and against multiple punishments. The rule of lenity, however, like other principles of statutory construction, is neither absolute nor exclusive." *Biggus v. State*, 323 Md. 339, 356 (1991).

The rule of lenity is unavailing to appellant, as this Court made clear in *Burkett v. State*, 98 Md. App. 459, 479-80 (1993):

> With respect to any applicability the rule of lenity might have when dealing with a weapons offense under § 36(a) [the predecessor statute to CL §4-101(c)(2)], the Court of Appeals has laid that ghost to rest in the *Biggus* case. Judge Eldridge stated unequivocally, 323 Md. at 356-357, 593 A.2d 1060:
>
> > [T]he Legislature in § 36(a), after specifying the range of imprisonment for a violation, stated:
> >
> > > [I]n case of conviction, if it shall appear from the evidence that such weapon was carried, concealed or openly, with the deliberate purpose of injuring the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed."[16]
>
> *This expresses a sentiment somewhat inconsistent with merger under the rule of lenity.*
>
> Furthermore, Maryland cases have uniformly refused to merge § 36(a) convictions into convictions for other offenses where such merger was not mandated by the required evidence test. *Brooks v. State, supra*, 284 Md. at 422-424, 397 A.2d at 599-600; *Nance v. State*, 77 Md.App. 259, 267, 549 A.2d 1182, 1185-1186 (1988), *cert. denied*, 314 Md. 629, 552 A.2d 894 (1989); *Selby v. State*, 76 Md.App. 201, 218-219, 544 A.2d 14, 23 (1988), *aff'd*, 319 Md. 174, 571 A.2d 1236 (1990); *Walker v. State, supra*, 53 Md.App. [171] at 204, 452 A.2d [1234] at 1251 [1982]. The General Assembly has taken no action to change the result of those decisions.

[16] CL §4-101(d)(2), the current penalty provision for the crime of carrying a dangerous weapon openly with the intent to injury, states: "For a person convicted under subsection (c)(1) or (2) of this section, if it appears from the evidence that the weapon was carried, concealed or openly, with the deliberate purpose of injuring or killing another, the court shall impose the highest sentence of imprisonment prescribed."

> A primary purpose of statutes proscribing the carrying or employment of dangerous or deadly weapons is to discourage their use in criminal activity. *Where the underlying criminal activity does not itself necessarily involve the carrying or use of dangerous or deadly weapon, the carrying or use of a dangerous or deadly weapon, in violation of a statute like § 36(a), is an aggravating factor warranting punishment in addition to the punishment imposed for the underlying criminal activity.*

(Emphasis in original). Because the underlying crime of reckless endangerment may be committed in a manner that does not involve the carrying or use of a dangerous weapon, appellant's conviction of carrying a dangerous weapon openly with the intent to injure need not be merged therein for sentencing purposes under the rule of lenity.

Appellant's last line of defense relies on the principle of fundamental fairness. Fundamental fairness, however, "is a defense that, by itself, rarely is successful in the context of merger." *Latray v. State*, 221 Md. App. 544, 558 (2015). Indeed, as we pointed out in *Latray*, only two cases in Maryland have required merger based solely on principles of fundamental fairness, *Monoker v. State*, 321 Md. 214 (1990), and *Marquardt v. State*, 164 Md. App. 95 (2005). *Id.* Given our discussion above regarding the General Assembly's

intent to punish the crime of openly carrying a dangerous weapon with intent to injure as a crime separate from reckless endangerment, we decline to add this case to the list.

SENTENCE IMPOSED FOR RECKLESS ENDANGERMENT CONVICTION VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 90% BY APPELLANT AND 10% BY WASHINGTON COUNTY.