Circuit Court for Anne Arundel County
Case No.: C-02-CR-15-000160

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 705

September Term, 2016

FOSTER RICHARD BROWN, JR.

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: August 2, 2018

*Davis, Arrie W., J., did not participate in the adoption of this opinion. See, Md. Code, Courts and Judicial Proceedings Article, § 1-403(b).

A jury in the Circuit Court for Anne Arundel County convicted Foster Richard Brown, Jr., appellant, of assault in the first and second degree, burglary in the first degree ("home invasion"), reckless endangerment, and carrying a dangerous weapon openly with intent to injure ("carrying"). Brown was acquitted of attempted first-degree murder, and sentenced to twenty-five years for the home invasion, a consecutive twenty-five years for first-degree assault, plus a consecutive three years for carrying.

QUESTIONS PRESENTED

Brown presents two questions for our review, which we have refined as follows: [1]

I. After the victim volunteered that appellant had assaulted her on a previous occasion, did the trial court abuse its discretion in denying a mistrial?

II. Did the trial court err in imposing separate sentences for first-degree assault and carrying a deadly weapon openly with intent to injure?

We conclude that the trial court did not abuse its discretion in denying Brown's motion for a mistrial after the victim made a reference to a prior assault. And we shall hold that the consecutive three-year sentence imposed for carrying a dangerous weapon openly with intent to injure, under Maryland Code (2002, 2012 Repl. Vol.), Criminal

[1] In appellant's brief, he frames these questions as follows:

1. Did the trial court err in admitting prior bad acts evidence?

2. Are separate sentences for assault and carrying a weapon openly with intent to injure improper when the act of carrying a weapon is incidental to assault?

Law Article ("Crim. Law") § 4-101(c)(2), does not merge into his 25-year sentence for first-degree assault.

FACTUAL AND PROCEDURAL BACKGROUND

The State established that Brown broke into his recently estranged girlfriend's residence, armed himself with two steak knives, broke through her locked bedroom door, and brutally assaulted her until she was rescued by police. Through defense counsel, Brown admitted breaking in and committing second-degree assault, but he claimed the house was his residence, and he denied that he intended to kill his girlfriend or cause her serious physical injury. (For shorthand, we shall refer to the former girlfriend as "the victim.")

The victim testified that shortly after she and Brown began seeing each other in the summer of 2014, he moved into her single family home. She attempted to break off the relationship on July 25, 2015, after some sort of altercation the previous night. When the victim drove Brown to his workplace that morning, she told him to not return to her house.

The next night, while the victim was in bed during the early morning hours of July 27, she heard "a big bang on her back door." Investigating, she saw her kitchen window shatter and Brown "coming through" the smashed window. After telling Brown to leave, she ran back into her bedroom, locked the door, and tried to call 911.

In the kitchen, Brown armed himself with two of the victim's steak knives. He then went to the bedroom door and began beating on it. Before the victim could speak with a 911 operator, Brown "punched a big hole through the door" and attacked her.

Threatening that he would kill her after first making her "suffer," Brown "pounded" her "like a punching bag" in her face, back, and ribs. He "stuck" a knife in her forehead and on top of her head, "over, and over again." He choked her to the point she could not breathe. He inserted a knife in her mouth, cutting a chunk from the inside of her cheek, which caused profuse bleeding. As a result of this assault, the victim suffered a broken lumbar bone, two broken ribs, contusions, and numerous lacerations and stab wounds.

Although the victim had been unable to speak with a 911 operator, her address was provided to the county police department as the location of a 911 "hang up" call. Approximately ten minutes after being dispatched to investigate the 911 "hang up," Anne Arundel County Police Corporal Brian Williams and other police officers arrived at the victim's residence while the assault was ongoing. When Brown saw patrol lights through the window and heard police knocking at the door, he held a knife to the victim's throat and instructed her not to respond. Eventually, she persuaded him to let her answer the door in order to send the officers away. When she opened the door, however, she ran outside to safety. Distraught and covered in blood, the victim told the police that Brown tried to kill her and was still inside.

In the victim's house, police found her kitchen window broken, her bedroom door with a hole in it, and two knives in the bedroom. When Corporal Williams shouted for Brown to come out, he exited from the closet, with blood stains on his shirt and lacerations on one hand.

DISCUSSION

I. Motion for Mistrial Based on Blurt Disclosing Prior Assault

Prior to trial, defense counsel prepared (but apparently did not file) a motion in limine to exclude evidence that, before the events of July 27, 2015, for which Brown was on trial, Brown assaulted the victim on another occasion, which led to the breakup on July 25. During discussions with the trial judge before trial, the prosecutor proffered that the State did not intend to elicit evidence of that prior assault. The following colloquy appears in the record:

> [DEFENSE COUNSEL]: And there is one final matter
>
> THE COURT: Sure.
>
> [DEFENSE COUNSEL]: — which I have conferred with the State, I just wanted to alert the Court. I was — I had a Motion in Limine prepared about prior bad acts. I have — was planning on filing it in an abundance of caution. However, I have conferred with Ms. [Prosecutor], and they don't intend on introducing any bad act evidence.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: And so I would just make that noted for the record.
>
> THE COURT: Is that correct?

[PROSECUTOR]: Yes, Your Honor, that's correct. I mean, unless Defense were to ask the victim certain questions. I don't intend on getting any testimony —

THE COURT: Okay.

[PROSECUTOR]: — from her as to prior bad acts on his part.

THE COURT: All right.

[PROSECUTOR]: The only question — I'm going to ask her if they broke up. I think if she were asked the reason Why they broke she is going to say that it's prior – so –

THE COURT: Well —

[DEFENSE COUNSEL]: I don't plan on asking that question. But –

UNKNOWN MALE VOICE: Good morning, Judge.

THE COURT: — you open the door then.

[PROSECUTOR]: Um —

THE COURT: The State has indicated that —

[DEFENSE COUNSEL]: And —

THE COURT: — they don't intend to use it or bring it up.

[DEFENSE COUNSEL]: Yeah, and I —

THE COURT: So, but if you open the door I would ask the parties to approach the bench, and then I could have a hearing on that, okay?

[DEFENSE COUNSEL]: And I —

[PROSECUTOR]: And Your Honor — I was going to —

[DEFENSE COUNSEL]: — okay, yeah, sure.

After jury selection, trial counsel made opening statements. The prosecutor told the jury that the victim "had to fight for her life because the Defendant broke into her house so that he could kill her." The prosecutor described the break in, the beating, the knife cuts, and the fortunate arrival of police officers.

In defense counsel's opening statement, he described the wounds as mere "superficial stab wounds" and "a shallow laceration." Defense counsel then said to the jury:

> Now, I mentioned the objective medical records in this case because **the issue that you all will have to determine is not whether [the victim] was assaulted. She was.** It's how serious the injuries were in this case.
>
> Now, you are going to hear about a very graphic, a graphic set of events that occurred on there, but I ask you to keep in mind what the objective medical evidence tells you throughout the course of this trial. And you are going to see and hear about that through the medical records in this case.
>
> And, once more, in determining how serious these assault, and these injuries were, you have to look upon it from an objective viewpoint, not a subjective viewpoint.
>
> **And I want to make some things completely clear**, if they weren't already clear during the course of my opening statement. **No one here is saying that Mr. Brown did not assault her in the second degree. And no one here, is up here saying that these things are at all okay, they are not. Absolutely not okay.** But that's not the issue in the case.
>
> The issues in this case are, was there an attempt to kill her, how serious were the injuries in this case? Was there a home invasion? But I ask you to keep in mind that — and I have mentioned this phrase a couple of time before, serious physical injury, and serious injury, and this is one of those words which I would ask you to keep in mind throughout the course of this trial.

> Because at the end of it, Judge Mulford is going to instruct you upon what actually constitutes a serious physical injury.
>
> And I ask you to keep in mind about the substantial risk of death, that's another word that I would ask you — phrase or words that you should keep in mind during the course of this trial.
>
> And once more, for the actual issue in the case, you are going to learn about this stay in the hospital that was at -- in the morning from July 27th up until about six to eight hours, and then there was a discharge. You are not going to hear about any surgery. You are not going to hear about [the victim] being on life support. But you are going to hear about the fact that she was discharged that same day, and she was discharged to her, to her family.
>
> Now, these are additional clues that you have things with — in assessing how serious these injuries were and whether or not there was an intent to actually, to kill or seriously physically harm [the victim].
>
> Now, I also want to provide a little bit of background. There was a dating relationship, and at some point in time though, it's clear that Mr. Brown was residing at that address, [redacted]. And once more, this is additional evidence you will have in assessing whether the outsized claims by the State are true or not.

(Emphasis added.)

After opening statements, the victim was called as the State's first witness. Within minutes, she mentioned the previous assault, and defense counsel moved for a mistrial. The transcript reflects:

> Q [PROSECUTOR]. [W]hat month was it when you broke up?
>
> A [THE VICTIM]. We broke up in July.
>
> Q. July was it? Do you remember if it was the beginning or the end of July?
>
> A. It was towards the end of July.

Q. And while you were dating, was he ever living with you at [your home]?

A. Yes, he was.

* * *

Q. And when did he stop living there?

A. July 25th, I believe.

Q. July 25th? And, um, **how did you tell him that he —how did it come that he wasn't living there anymore?**

A. **He assaulted me the night before,** and I took him to work —

Q. **Objection, objection**.

A. And dropped him off.

THE COURT: Hold on, **overruled.**

[DEFENSE COUNSEL]: Your honor, if we may approach?

THE COURT: **Overruled, objection is noted for the record**.

[DEFENSE COUNSEL]: If I may just approach —

THE COURT: All right. Come on up.

(Counsel and Defendant approached the bench and the following occurred:)

[DEFENSE COUNSEL]: Your [H]onor, I need to — this is one of the preliminary matters I made with the State about getting into prior bad acts. **I'm going to (inaudible few words) a mistrial, at this moment in time, because the State has not held up their end of the bargain by eliciting testimony about** –

THE COURT: All right.

[DEFENSE COUNSEL]: — **about these assaults, and prior bad acts.**

THE COURT: **The Court denies a mistrial, okay? All right.**

> (Counsel and Defendant returned to trial tables [and the examination resumed].)

(Emphasis added.)

The prosecutor next asked the witness: "When you broke up, did you ask the defendant to leave?" She responded: "I took him to work, and dropped him off, and told him not to come back."

Brown argues that the victim's mention of the assault that led to the break up was highly prejudicial "propensity" evidence, which the trial court should have excluded under both Maryland Rule 5-404(b) and "the [S]tate's promise to not elicit evidence of a prior assault if Mr. Brown withdrew a motion in limine to exclude such evidence."

The State "does not disagree that evidence about [the prior assault] was inadmissible based on the record developed below." But the State argues that Brown "uses the wrong framework to analyze the court's ruling," because the challenged testimony was an unsolicited "blurt" for which the only remedy requested was a mistrial. There was no motion to strike or request for a curative or limiting instruction. The State contends that the trial court did not abuse its discretion in denying a mistrial because the testimony was inadvertent, isolated, and harmless because Brown had already admitted (in counsel's opening statement) the assault for which he was on trial.

We agree that the challenged testimony was a non-responsive blurt that was not intentionally or irresponsibly elicited by the State. *See, e.g., Washington v. State*, 191 Md. App. 48, 100 (2010) (challenged "testimony was a 'blurt' or a 'blurt out' – an abrupt and inadvertent nonresponsive statement made by a witness during his or her

testimony"). When viewed in context, the prosecutor's question, though awkwardly phrased, indicates that she merely sought to establish the admissible and critical fact that, on July 25, the victim had told Brown their relationship was over and he was no longer permitted to be in her residence.

As soon as the witness gave the answer referring to the prior assault, defense counsel objected. Although the trial court overruled that general objection, defense counsel persisted, and, at the bench conference that was partially inaudible to the court reporter, moved for a mistrial. Brown does not contend that, during the brief portion that is unavailable for appellate review, defense counsel moved to strike the testimony and/or sought a curative instruction. Moreover, as the transcript shows, before the court had an opportunity to reconsider its decision to overrule the objection in light of defense counsel's supplemental argument, counsel demanded a mistrial.

Given that the challenged testimony was a spontaneous blurt by a witness, we conclude that the issue before this Court is not whether the trial court erred in admitting evidence of the prior assault. We need not review whether the court erred in overruling Brown's objection because defense counsel superceded that objection by moving for a mistrial. Accordingly, the issue presented for appellate review is whether the trial court abused its discretion in denying a mistrial as a remedy for the blurt regarding Brown's prior assault of the victim.

Standards Governing Mistrial

Appellate review of a decision to deny a mistrial is conducted "under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67, *cert. denied*, 135 S. Ct. 284 (2014). Because "'a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling[,]'" courts reviewing the denial of a mistrial afford trial judges "a wide berth." *Id*. at 67, 68 (citation omitted). Moreover, we are mindful that "declaring a mistrial is an extreme remedy not to be ordered lightly." *Id*. at 69.

Assuming, without deciding, that evidence of the prior assault was not admissible, we note that, when a mistrial request stems from the exposure of inadmissible evidence to the jury, "[t]he trial judge must assess the prejudicial impact[.]" *Carter v. State*, 366 Md. 574, 589 (2001). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (citation omitted).

> Courts typically consider the following factors in evaluating such prejudice:
>
> > "whether the reference to [the inadmissible information] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]"

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). The *Rainville* factors provide an "analytical framework for determining whether the prejudice to a defendant resulting from a 'blurt-out' is 'real and substantial

enough' to warrant a mistrial," although "'these factors are not exclusive and do not themselves comprise the test.'" *Washington*, *supra*, 191 Md. App. at 100 (quoting *Kosmas v. State*, 316 Md. 587, 594 (1989)).

Rainville is frequently cited as an example of a single, non-responsive, unintentional "blurt" that was so incurably prejudicial that a mistrial was required. In that case, the defendant was on trial for sexually assaulting a seven-year-old girl. *Rainville*, 328 Md. at 409. When the prosecutor asked the victim's mother to describe the child's "demeanor when she told you about the incident[,]" the witness unexpectedly responded that her daughter "'was very upset'" but "'came to me and she said [because the defendant] was in jail for what he had done to [the victim's brother] that she was not afraid to tell me what happened.'" *Id*. at 401. The trial court denied a mistrial, and instead instructed the jury to disregard the mother's testimony regarding the alleged separate incident of abuse involving the victim's brother. *Id*. at 402.

The Court of Appeals reversed, *id*. at 411, ruling that, even though both the prosecutor's question and the trial judge's curative instruction were "appropriate," *and* the inadmissible information was not solicited or repeated by the prosecution, *and* the mother was not the State's primary witness, "informing the jury" about the defendant's incarceration for a prior crime against the alleged victim's sibling "almost certainly had a substantial and irreversible impact upon the jurors" so that "no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." *Id*. at 410-11.

Mistrial Analysis

Applying the *Rainville* factors to this record, we conclude that Brown was not so prejudiced that the trial court's denial of a mistrial was an abuse of discretion. As in *Rainville*, the victim's testimony in this case that Brown assaulted her was an unsolicited blurt that revealed a prior crime but included no details and was not repeated. Although the victim was a critical prosecution witness, the State presented ample other evidence of Brown's guilt, including the broken kitchen window and bedroom door, Brown's surrender at the scene, his blood-stained clothing and lacerated hand, hospital records, and, most importantly, Brown's own concession at trial that he committed an assault upon the victim on July 27, 2015.

Indeed, because of that admission, the central question was not whether Brown had committed an assault, but was limited to whether Brown had the intent to kill necessary to convict him of attempted murder or the intent to inflict serious physical injury necessary to convict him of first-degree assault. We agree with the State that Brown's failure to contest the second-degree assault charge materially distinguishes this case from *Rainville.*

The issue in *Rainville* was whether the accused sexually assaulted a seven-year-old girl, which Rainville did not admit. The inadmissible evidence that Rainville had been jailed for "what he did to" her nine-year-old brother suggested a propensity to commit the same type of assault that he was on trial for committing against the sister.

Consequently, evidence of the prior assault directly undermined Rainville's defense that he did not sexually assault the sister.

Here, in contrast, Brown did not dispute that he assaulted the victim on July 27, 2015. Consequently, even if the jury inferred from the victim's revelation of the prior assault on July 24 or 25 that Brown had a propensity to assault, such evidence did not prejudice his defense because Brown admitted the assault for which he was on trial. Moreover, because the victim's blurt provided no details about the prior assault, such evidence did not undermine Brown's defense that he had no intent to kill or seriously injure the victim on July 27, 2015.

We conclude the trial court did not abuse its discretion in denying a mistrial and proceeding without a curative or limiting instruction. As may be indicated by defense counsel's failure to request such an alternative remedial measure, directing the jury to disregard the victim's reference to the prior assault could have focused the jury's attention upon a passing comment that was not relevant to the central issue of whether Brown's admitted attack amounted to attempted murder or first-degree assault. Under the circumstances, we are satisfied that Brown was not so prejudiced that a mistrial was necessary.

II. Sentences for First-Degree Assault and Carrying a Dangerous Weapon Openly with Intent to Injure

Brown contends that the trial court erred in failing to merge his sentences for first-degree assault and carrying a dangerous weapon openly with intent to injure. He asserts that his movement of the two steak knives from the victim's kitchen was "merely

incidental" to the assault. Relying on this Court's decisions in *Thomas v. State*, 143 Md. App. 97 (2002), and *Chilcoat v. State*, 155 Md. App. 394 (2004), in which we held the evidence was insufficient to support a separate conviction for carrying the weapon in question, Brown argues that the result and rationale of those decisions supports merger of his carrying sentence under both the rule of lenity and the doctrine of fundamental fairness. (He does not contend the sentences should merge under the required evidence test.)

We review *de novo* the legality of a sentence, including whether it must be merged. *See Blickenstaff v. State*, 393 Md. 680, 683 (2006); *Latray v. State*, 221 Md. App. 544, 555 (2015). For the reasons explained below, we agree with the State that Brown "is not entitled to the benefit of either [merger] doctrine."

Rule of Lenity Challenge

"Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence." *Monoker v. State*, 321 Md. 214, 222 (1990). We apply the rule of lenity only when there is uncertainty as to whether the legislature intended separate sentences to be imposed for the two offenses. *See Alexis v. State*, 437 Md. 451, 485 (2014). To determine whether such uncertainty exists, we examine the plain language, legislative history, and purpose of the two statutes in question, asking whether the General Assembly "intended punishment for convictions under either statute not to merge with a conviction under the other statute." *Id*. at 488.

Although the crime of "assault" is now codified, it encompasses "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Crim. Law § 3-201(b). "The statutory offense of second-degree assault encompasses three modalities: (1) intent to frighten, (2) attempted battery, and (3) battery." *Snyder v. State*, 210 Md. App. 370, 382 (2013). "The intent to frighten variety [of assault] requires," among other things, "that the defendant commit an act with the intent to place another in fear of immediate physical harm." *Id.* In general, an assault, without more, is an assault in the second degree. *See* Crim. Law § 3-203(b).

An assault in the first degree, on the other hand, entails either "commit[ting] an assault with a firearm" or "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another." Crim. Law § 3-202(a)(1)-(2). "Serious physical injury" means physical injury that "creates a substantial risk of death" or "causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Crim. Law § 3-201(d). In cases like this one, that do not involve a firearm, first-degree assault is essentially a second-degree assault *plus* a specific intent to inflict serious physical injury. *See Snyder v. State*, 210 Md. App. 370, 385-86 (2013). "[A] jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury. Also, the jury may infer that one intends the natural and probable consequences of his act." *Chilcoat*, 155 Md. App. at 403.

"Carrying" is also a statutory offense. Under Crim. Law § 4-101(c)(2), "[a] person may not wear or carry a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner." For a misdemeanor conviction under this provision, the penalty is up to three years' imprisonment. Crim. Law § 4-101(d)(1). "[I]f 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." Crim. Law § 4-101(d)(2). The language of this statute is substantively identical to its immediate predecessor, former Md. Code, Art. 27, § 36(a). *See* Crim. Law § 4-101, Revisor's Note.

With respect to the carrying charge, the trial court instructed the jury, in accordance with the pattern jury instruction, in part:

> The Defendant is charged with the crime of carrying a dangerous weapon openly with the intent to injure. You have seen and heard that the object alleged to be dangerous is a knife, two knives. In order to convict the Defendant, the State must prove that the Defendant carried the knife, or bore the knife, it was on his person. That the knife was carried openly with the intent to injure another person and that the knife was a dangerous weapon under the circumstances.

See MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS, MPJI-Cr. 4:35.

During deliberations, the jury sent a note asking: "If the Defendant picked up a knife in the house would he be carrying it within the meaning of the instruction[?]" and "If the Defendant took the knife away from [the victim], would he be carrying it within the meaning of the instruction[?]" The trial court responded, with agreement of counsel,

that it could not "answer these questions," and instructed the jury to "decide the facts and . . . apply the law to the facts as you find the facts to be[.]"

After the verdicts were announced, the trial court asked counsel to research "whether the weapons charge merges" for sentencing purposes. At sentencing, the court considered, and rejected, Brown's argument urging such merger.

Brown renews that argument in this Court, relying on our decisions and rationale in *Thomas v. State*, 143 Md. App. 97 (2002), and *Chilcoat v. State*, 155 Md. App. 394 (2004), two sufficiency cases interpreting former § 36(a). In those cases, this Court addressed the same carrying language at issue in current § 4-101(c)(2), concluding that there must be enough movement of the weapon, independent of the *actus reus* of an ensuing assault, that the "carrying" is not "merely incidental to" the assault. Citing that precedent, Brown asks us to hold that his carrying of the knives was so incidental to the assault that there is uncertainty as to whether the General Assembly intended separate and consecutive punishments for both the carrying and the assault.

Before examining *Thomas* and *Chilcoat*, we look to a prior Court of Appeals decision interpreting the prohibition in § 36(a) against "wearing or carrying" a concealed dangerous weapon. In *In re Colby H.*, 362 Md. 702 (2001), the Court held that "carrying" did not require any movement of the weapon, explaining:

> [T]he person must be wearing or carrying a weapon. "Carry," taken in its plain meaning, is defined as "to move while supporting; convey; transport" or "to wear, hold, or have around one." *The Random House Dictionary of the English Language* 227 (1983). Similarly, "wear" is defined as "to carry or have on the body or about the person as a covering, equipment, ornament, or the like." *Id.* at 1616. Recently, the Supreme Court of the

> United States utilized *Black's Law Dictionary's* definition of "Carry arms or weapons" as "[t]o wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Muscarello v. United States*, 524 U.S. 125, 130, 118 S.Ct. 1911, 1915 (1998), quoting *Black's Law Dictionary* 214 (6th ed.1990). However, the Supreme Court in *Muscarello* also recognized another "form of an important, but secondary, meaning of 'carry,' a meaning that suggests support rather than movement or transportation, as when, for example, a column 'carries' the weight of an arch. In this sense a gangster might 'carry' a gun (in colloquial language, he might 'pack a gun') even though he does not move from his chair." *Id.* at 131, 118 S. Ct. at 1915–16 (citation omitted). The statute plainly states that it is a violation for a person to "*wear or carry*" a concealed deadly weapon. The weapon must be concealed *and* it must be either worn or carried. If it is neither worn nor carried, it is not illegal to conceal it. We hold that the Legislature merely intended that the weapon needed to be on the body or about the person and concealed. It is not necessary that the weapon actually be transported from place to place.

Applying that definition, the *Colby* Court held that merely concealing a loaded shotgun under a mattress did not constitute "wearing or carrying." *Id*. at 715.

In *Thomas*, the accused, during the course of an altercation with the victim, struck her with a hammer and a knife that were present in the room where the altercation and assault occurred. *Thomas*, 143 Md. App. at 105-06. We cited *Colby H.* in support of the proposition that the mere presence of a dangerous weapon in the home was not sufficient to establish "wearing or carrying" within the meaning of the concealed carry provision in section 36(a). *Id*. at 122-23. Focusing on a lack of evidence that the accused brought the weapons into the fight, this Court held that the evidence was insufficient to convict him of carrying a dangerous weapon openly with intent to injure under section 36(a). *Id*. We explained that "the State was required to prove more than mere use of the weapons by

Brown or recovery of them in his one-room residence in the vicinity of the victim." *Id*. at 123. In doing so, we pointed out that a contrary holding "would mean that almost any time a person commits an offense with a dangerous weapon, he or she could also be convicted of having carried the weapon openly, with intent to injure." *Id.*

In *Chilcoat*, 155 Md. App. at 407-08, the accused "merely pick[ed] up a beer stein that was convenient to him and walk[ed] a few steps with it to reach the victim," whom he immediately struck four or five times with the stein. Acknowledging the holding in *Colby H*. (that movement of the weapon is not necessary to prove carrying of a concealed dangerous weapon), this Court did not discuss why a different interpretation of "carrying" might be warranted for the corollary prohibition against "wearing or carrying" a weapon openly with intent to injure. Instead, we simply noted the "restriction in *Thomas* on the nature of the movement that would qualify as carrying" in a case involving a dangerous weapon carried openly with intent to injure. *See id*. at 409.

Writing for this Court, Judge Sally D. Adkins contrasted the fleeting and opportunistic movement of Chilcoat's beer stein to the extended movements involving multiple weapons that occurred in *Harrod v. State*, 65 Md. App. 128, 131 (1985). In *Harrod*, we had affirmed separate carrying and assault convictions based on evidence that the accused "came out of the bedroom with a hammer in his hand, swinging it around, coming after" the victims, then threw the hammer, "reentered the bedroom, and returned with a five-inch blade hunting knife" that he used to commit another attack. *Id*. In *Chilcoat*, we explained that

> *Harrod* differs from this case because Harrod carried the hammer from the bedroom to the living room and then made another trip to the bedroom to retrieve the hunting knife and bring it back. These actions contrast with Chilcoat's action in merely picking up a beer stein that was convenient to him and walking a few steps with it to the victim.

Id. at 408.

In *Chilcoat*, we also compared the carrying element in § 36(a) to the carrying element of kidnapping. *See id*. at 412. We relied on the Court of Appeals's recognition in *State v. Stouffer*, 352 Md. 97, 113 (1998), that merely moving a victim a short distance during the course of an assault may be so incidental to the assault that it would not establish the "carrying" element necessary to support a separate kidnapping conviction. In holding the evidence was sufficient to establish that element of Maryland's kidnapping statute, the *Stouffer* Court aligned this State's jurisprudence

> with the majority approach that examines the circumstances of each case and determines from them whether the kidnapping — the intentional asportation — was merely incidental to the commission of another offense. We do not adopt, however, any specific formulation of standards for making that determination, but rather focus on those factors that seem to be central to most of the articulated guidelines, principally: How far, and where, was the victim taken? How long was the victim detained in relation to what was necessary to complete the crime? Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime? Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

Stouffer, 352 Md. at 113.

Applying these precedents, the *Chilcoat* Court concluded that there was insufficient movement in that case to support a separate conviction of "carrying" the dangerous weapon:

> Chilcoat carried the beer stein only a short distance and he had no purpose other than to injure the victim. Indeed, most assaults of the battery type involve at least a few steps or other advancement toward the victim. Chilcoat's movement while holding the beer stein was necessary to commit the assault because the beer stein was located on a table several steps away from where [the victim] was standing. Although use of the beer stein did subject [the victim] to more severe injuries than he might otherwise have suffered, the seriousness of the injuries is redressed by Chilcoat's conviction for first degree assault. Applying the rationale of *Stouffer*, we see nothing in section 36(a) that suggests the legislature intended that moving toward the victim holding a beer stein in this incidental manner would constitute the additional crime of carrying a weapon openly with intent to injure. Accordingly, we hold that the evidence was insufficient to sustain Chilcoat's conviction under section 36 for carrying a dangerous weapon openly with intent to injure.

155 Md. App. at 412-13.

Although *Thomas* and *Chilcoat* reversed carrying convictions based on a lack of evidence, Brown does not seek reversal of his carrying conviction on that basis, and, indeed, he did not preserve a sufficiency challenge for appellate review. Instead, Brown relies on the rationale of those two cases to support his argument for merger under the rule of lenity, and he argues that the legislature did not intend to impose separate sentences for both the assault of the victim and his "merely incidental" act of carrying the steak knives.

We are not persuaded that either *Thomas* or *Chilcoat* supports merger of Brown's sentences. As noted, those cases both addressed sufficiency challenges. The lesson we glean from *Thomas* and *Chilcoat* is that movement of a dangerous weapon is "merely incidental" to the ensuing assault only when such movement occurs over mere seconds in time and a few steps in distance. In addition, such minimal movement of the weapon

must be followed immediately by an assaultive crime committed, either exclusively or primarily, with that weapon. Only in such limited circumstances could movement of the weapon arguably be so "incidental to" the assault that we may question whether the legislature intended to authorize separate punishments for both the carrying and the assault.

Brown's actions do not fit that model. The evidence established that, after he literally broke through the victim's kitchen window, Brown armed himself with two steak knives while still in the kitchen. He then moved those weapons to the bedroom door, a route that required him to travel across the kitchen and the dining room of the single family home. Brown kept the knives in hand or nearby while breaking through the locked bedroom door, a process that the victim estimated took two to three minutes. He then brought the weapons into the bedroom, where, over a period of at least ten minutes, he committed a first-degree assault until police arrived. As testimony, photos, and medical records established, Brown not only used those steak knives to cut, stab, and threaten the victim, he also used his bare hands to punch, beat, and choke her.

On this record, Brown's carrying of the knives was not so "incidental to" his first-degree assault of the victim that his sentences for those two crimes must be merged under the rule of lenity. In contrast to Mr. Chilcoat's few steps across the room with a beer stein to land four or five quick blows, and Mr. Thomas's similarly limited movement of a hammer and cheese knife within the one-room apartment where he fatally assaulted his victim, here, there was a greater distance traveled, more time before contact with the

victim, and a more sustained assault, both with and without the weapons. As in *Harrod*, Brown brought dangerous weapons to the fight, while pursuing his victim through the house. That was enough "carrying" to justify a separate sentence.

Furthermore, we note that neither party's brief makes any reference to *Biggus v. State*, 323 Md. 339, 356-57 (1991), a case in which the Court of Appeals rejected an analogous merger contention involving carrying and a sexual assault. Indeed, we have recognized that the *Biggus* decision, in ruling that carrying does not merge with sexual assault offenses, "laid that ghost to rest[.]" *See Burkett v. State*, 98 Md. App. 459, 479 (1993), *cert. denied*, 334 Md. 210 (1994). For the reasons explained below, we conclude that the rationale articulated in *Biggus* applies equally to assaults like the one committed by Brown.

The pertinent issue in *Biggus* was whether, under the rule of lenity, a sentence for carrying a knife in violation of § 36(a) merged into a sentence for third-degree sexual assault against a victim under age 14, where there was "a single incident of sexual contact." *See Biggus*, 323 Md. at 345. Referring to language identical to the current penalty provision of the carrying statute, the Court of Appeals observed that the legislature's mandate to impose the "highest sentence of imprisonment prescribed" expresses "a sentiment somewhat inconsistent with [sentencing] merger under the rule of lenity." *Id*. at 357.

Of more importance, the *Biggus* Court explained that the purpose of the carrying statute is to prohibit and punish, as a separate offense, the aggravating act of bringing a dangerous weapon into an altercation:

> 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 [a] 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. When someone commits a crime such as [a sexual assault] . . . , and also employs a dangerous or deadly weapon in violation of Art. 27, § 36(a), there is no unfairness associated with the imposition of separate sentences for each offense.

Id. at 357.

Writing for a unanimous Court in *Biggus*, Judge John Eldridge pointed out that Maryland courts "have uniformly refused to merge § 36(a) convictions into convictions for other offenses where such merger was not mandated by the required evidence test." *Id*. at 357. In support of this assertion, the Court cited cases declining to merge a sentence imposed under § 36(a) with sentences imposed for a broad range of other assault-based offenses. *See id., citing Brooks v. State,* 284 Md. 416, 422-24 (1979) (no merger with assault with intent to murder); *Nance v. State,* 77 Md. App. 259, 266-67 (1988) (no merger with first-degree rape or first-degree sexual offense); *Selby v. State,* 76 Md. App. 201, 218-19 (1988) (no merger with robbery), *aff'd on other grounds,* 319 Md. 174 (1990); and *Walker v. State,* 53 Md. App. 171, 203-04 (1982) (no merger with attempted first-degree rape). Moreover, the *Biggus* Court observed that the General

Assembly, aware of those decisions, "ha[d] taken no action to change the result of those decisions." *Biggus*, 323 Md. at 357.

Brown's lenity argument ignores the *Biggus* Court's conclusion that the General Assembly authorized separate punishments for the act of carrying a dangerous weapon with the intent to injure and an assaultive crime committed with that weapon, and imposing separate punishments further the policy of discouraging the use of dangerous weapons in criminal activity.

The sentencing court did not violate the rule of lenity by imposing a separate sentence for the carrying conviction.

Fundamental Fairness Challenge

Brown contends, in the alternative, that, if "merger is not required under the rule of lenity, merger is required as a matter of fundamental fairness." In support, he cites *Monoker v. State*, 321 Md. 214 (1990), and *Marquardt v. State*, 164 Md. App. 95 (2005).

In *Monoker*, 321 Md. at 223-24, the Court of Appeals held that, because the defendant solicited others to commit a burglary, that offense was "part and parcel of the ultimate conspiracy" to commit burglary, and "thereby an integral component" of that offense, so that it would be "fundamentally unfair . . . to require [the accused] to suffer twice, once for the greater crime and once for a lesser included offense of that crime." Fifteen years later, our decision in *Marquardt*, 164 Md. App. at 109, 152-53, rested on an analogous conclusion that the malicious destruction of two glass window panes "was clearly incidental to the breaking and entering" of two residences, so that the sentences

for "malicious destruction of property . . . should have been merged into" the fourth-degree burglary sentences. As Judge Charles E. Moylan has observed, these may be the only two reported Maryland cases "wherein a merger was actually dictated by 'fundamental fairness' as an autonomous criterion." *Pair v. State*, 202 Md. App. 617, 644 (2011).

Brown argues that he is entitled to merger of his sentences as a matter of fundamental fairness because, in the words of *Monoker*, "the carrying of the weapon was 'part and parcel' of the first-degree assault and thereby an 'integral component' of it." Similarly, "[a]s in *Marquardt*, the carrying of the weapon was 'clearly incidental' to the stabbing."

As we explained in rejecting Brown's rule of lenity challenge, the evidentiary record does not support Brown's characterization of his carrying of the knives as "incidental to" the assault. But, even if Brown's conduct in bringing the knives into the bedroom had been "part and parcel" or "integral" to the eventual assault and battery of the victim, as the Court of Appeals said in *Biggus*, "there is no unfairness associated with the imposition of separate sentences for each offense." *See Biggus*, 323 Md. at 357. For that reason, Brown's sentences do not merge as a matter of fundamental fairness.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.