

Circuit Court for Baltimore City
Case No. 118312013

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1088

September Term, 2019

REGINALD ALLEN

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 17, 2020

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

Appellant Reginald Allen was convicted in the Circuit Court for Baltimore City of attempted first-degree murder, use of a handgun in the commission of a crime of violence, second-degree assault, wearing, carrying, or transporting a handgun, and reckless endangerment. He presents the following questions for our review:

- “1. Did the trial court abuse its discretion in admitting into evidence recorded video surveillance footage without proper authentication?
2. Should the conviction for second-degree assault have been merged with the conviction for attempted first-degree murder for purposes of sentencing?”

We shall hold that the circuit court did not abuse its discretion in admitting the video, but erred when it did not merge for sentencing purposes appellant’s convictions of second-degree assault and attempted first-degree murder.

I.

Appellant was indicted by the Grand Jury for Baltimore City of attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, use of a firearm in the commission of a crime of violence, wearing, carrying, or transporting a handgun, and reckless endangerment. The jury convicted him of attempted first-degree murder, second-degree assault, use of a handgun in the commission of a crime of violence, wearing, carrying, or transporting a handgun, and reckless endangerment. The court sentenced appellant to a term of incarceration of forty years for attempted first-degree murder, all but twenty-five years suspended, followed by five years probation; ten years

for second-degree assault to be served concurrently; and ten years for use of a handgun, to be served concurrently with the attempted first-degree murder and second-degree assault convictions.

Appellant's charges arose from the shooting of Shyheim Spence on July 30, 2018 on the 900 block of Stoll Street in Baltimore. Mr. Spence was walking to his car parked in front of 948 Stoll Street when he observed a man, whom he later identified as appellant, arguing with a woman. He testified that while going through his trunk he looked up and saw appellant begin to shoot at him. Uninjured, Mr. Spence ran away, hid, and called 911. He told the 911 operator that the shooting had taken place on the 1000 block of Jeffrey Street and that the shooter was black, male, 5'10", and weighed 200 lbs. Officer Colin Perry took Mr. Spence back to Stoll Street, where Mr. Spence identified appellant, still at the scene, as the shooter. Captured on Officer Perry's body camera, appellant denied that he was the shooter and stated that there were other people present on the street who were responsible for the shooting. The police arrested appellant at the scene.

Detective Annmarie DiPasquale arrived at the scene and observed .45 caliber shell casings on the street and sidewalk in front of 948 Stoll Street, where appellant was living at the time. The police processed Mr. Spence's car parked in front of that residence, taking photographs of bullet holes in its windshield and hood.

The police transported appellant to the City Wide Shootings Office. Detective DiPasquale advised appellant of his *Miranda* rights, and after waiving his rights, appellant made a statement to her. In his statement, captured on Detective DiPasquale's body camera, appellant stated that he was walking toward 948 Stoll Street with his girlfriend

when an unknown man began shooting. Appellant stated that he had seen two men, one in a green shirt and one in a white shirt, and that one of them had been the shooter.

Detective DiPasquale obtained a search warrant for 948 Stoll Street and executed it with other officers. Detective DiPasquale also obtained video surveillance of the Stoll Street area around the time of the shooting, which the court admitted into evidence at trial over appellant's objection.¹ During the State's direct examination of Detective DiPasquale, defense counsel objected to the State's question regarding Detective DiPasquale's experience in obtaining video surveillance footage. At a hearing outside the jury's presence, Detective DiPasquale stated that she had downloaded videos "over a dozen times." She described her general "procedure" for obtaining video as follows:

"I just go onto their system, see if it's working for like what I'm seeing right now in front of me and then I'll go back to the date and time of when the incident occurred . . . Once I put in the date and time, it just goes on a flash drive and that's it."

During this hearing, Detective DiPasquale stated that she followed this procedure when obtaining the video in question from "the office" where the surveillance system was operated and that she "made sure their cameras were working." She entered the date and time of the incident and downloaded the footage onto her flash drive. The State asked her

¹ On the first day of trial, appellant moved *in limine* to exclude the surveillance video based upon an alleged discovery violation. Defense counsel argued that the State had violated its continuing obligation to provide discoverable material by failing to produce the surveillance footage until "the literal eve of trial" and asked the court to exclude the video as a sanction. The trial court agreed with defense counsel that the untimely disclosure of the video was a violation of Maryland Rule 4-262. Nonetheless, the court found that appellant was not prejudiced because counsel had time to review the footage and to defend the case properly. Appellant has not raised this issue in this appeal.

if she verified that the flash drive contained what was in the system. Defense counsel objected to this question on the ground that the State failed to lay a foundation for the admissibility of the video because no foundation had been laid as to the detective's skills or descriptions of the system. The trial court overruled this objection. Detective DiPasquale testified that she reviewed the flash drive footage to see that it matched the system's video and then put it on a disc. She testified that she did not tamper with the video and that it was a fair and accurate depiction of Stoll Street.

The trial court admitted the video into evidence, ruling that the authentication requirement had been met and that it was for the jury to determine if the video was what the State purported it to be. The court explained as follows:

“In this case, the detective has certainly not told me the name of the system because she wasn't asked, but she testified that she went to the area, checked for surveillance cameras, learned there was a surveillance camera, was given access to the information, checked the date and time, rewound the tape to see whether it depicted the time and location of the incident, determined that it did, copied the information onto her flash drive, and verified that what she saw on the tape was, in fact, what landed on the flash drive.

The Court finds that, based on the testimony offered here, the slight requirement has been met and it becomes up to the jury to decide whether the evidence in question is what it purports to be, even with all its dots, skips, wrinkles, whatever the case may be.”

Appellant was convicted and sentenced as noted, and this timely appeal followed.

II.

Before this Court, appellant argues that the trial court abused its discretion by

admitting into evidence the recorded video without proper authentication. In appellant’s view, Detective DiPasquale’s testimony did not provide a sufficient foundation to assure the reliability or accuracy of the surveillance video or the process that produced it. Detective DiPasquale’s testimony lacked information regarding the nature of the equipment or as to how the cameras were “used, how they operated, or their reliability, or the reliability of the surveillance system generally.” A proper showing of the reliability of the video was crucial because the video was suspect and videos are easily manipulated. Specifically, appellant argues that the video footage was problematic because the footage consisted of twenty-one separate video files that came from an unknown system in some unknown office location operated by some unknown person. There were significant and unexplained time gaps, speed fluctuations, and other distortions. Because the State relied heavily on the erroneously admitted video, the error was not harmless.

As to the sentence, appellant argues that the trial court erred by failing to merge, for sentencing purposes, the conviction for second-degree assault into attempted first-degree murder. In appellant’s view, the two offenses are the same for double jeopardy purposes under “the required evidence” test—both convictions were based on the same act, and all elements of second-degree assault of the attempted battery variety are included in the offense of attempted first-degree murder. Appellant contends also that second-degree assault is a statutory offense and therefore that the rule of lenity applies as a basis for merger. In the alternative, appellant contends that the convictions should merge based on fundamental fairness as the assault was part and parcel to the circumstances of the shooting.

In response, the State argues that the video was authenticated properly by Detective

DiPasquale, in particular by her testimony describing her process of obtaining the video. According to the State, relying upon *Washington v. State*, 406 Md. 642 (2008), this video was offered under the “silent witness” theory of video admissibility. Under this theory, a photograph or video can be authenticated as a “mute” or “silent” independent photographic witness because it speaks with its own probative effect. The State points out that the silent witness method of authentication, lacking any rigid, fixed foundational requirements for admissibility of evidence, allows for authentication by the presentation of evidence describing a process or system that produces an accurate result. In sum, the State argues that the standard is whether the proffered evidence is sufficient for the jury to find that the evidence is what it claims to be. Any suspect quality of the video is a question of weight for the jury as opposed to an issue of admissibility.

As to the issue of merger, the State maintains that the two convictions do not merge under the required evidence test because all the elements of second-degree assault are not included in the elements of attempted first-degree murder. As to the rule of lenity, the State argues that it is not applicable because both second-degree assault and attempted first-degree murder are common law crimes. Finally, the State argues that appellant did not argue below for merger under the principle of fundamental fairness and, therefore, that this ground is waived.

III.

We review a trial court’s ruling on the admissibility of video surveillance evidence for abuse of discretion. *Metheny v. State*, 359 Md. 576, 604 (2000). An abuse of discretion

occurs where “no reasonable person would take the view adopted by the court.” *Id.*

Maryland Rule 5-901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” When making an authenticity determination, the court “need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.” *Jackson v. State*, 460 Md. 107, 116 (2018). The quantum of evidence needed for admissibility under Rule 5-901(a) is slight. *Id.*

Videotapes and photographs are subject to the same authentication requirements for the purposes of admissibility. *Washington*, 406 Md. at 651. Parties may authenticate a videotape or photograph either through the testimony of a witness with first-hand knowledge of the events in question or as a “silent” witness. *Id.* at 652. Authentication, as a preliminary fact determination by the trial court, requires the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine. *Id.* at 651–52. The “silent witness” theory of admissibility authenticates a video “as a ‘mute’ or ‘silent’ independent photographic witness because the photograph speaks with its own probative effect.” *Id.* Under this theory, a video may be admissible “so long as sufficient foundational evidence is presented to show the circumstances under which it was taken and the reliability of the reproduction process.” *Id.* There is no rigid or fixed foundational requirements for the admission of evidence under the silent witness theory. *Dep’t of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996) (“The facts and circumstances surrounding the making of the photographic evidence and its intended use at trial will vary

greatly from case to case, and the trial judge must be given some discretion in determining what is an adequate foundation.”).

A trial court’s authentication finding is a threshold determination; it does not require exhaustive testimony bearing on technical matters if the moving party presents other foundational proof sufficient to enable the court to find that the video is what it purports to be. *See Washington*, 406 Md. at 654–55 (noting that the concerns as to the surveillance procedures, the method of storing, and reproducing the video went to the weight, not to the admissibility, of the CD). We hold that Detective DiPasquale’s testimony as to the reliability of her reproduction process and her confirmation that the downloaded video matched the system’s video established sufficient foundational proof for authentication. The circuit court did not abuse its discretion in admitting the video surveillance footage.

Detective DiPasquale testified to her process of reproducing the video and the reliability of that process. She stated that she verified the surveillance cameras were currently working, that she downloaded the video onto a flash drive, that this downloaded video matched the system’s video, and that she did not tamper with or edit the video. The detective’s testimony provided sufficient foundational evidence to enable a jury to find that the video depicted the victim being shot at on Stoll Street.

Appellant relies primarily on *Washington* as support for his argument that the admission of the video footage was reversible error. In that case, the victim was shot outside a bar, and the defendant was arrested for the shooting. The State introduced into evidence video surveillance footage from surveillance cameras inside and outside the bar. Over defense counsel’s objection that the State failed to lay a foundation for the admission

of the tape, the trial court admitted the tape into evidence. The Court of Appeals reversed, holding that the State did not lay an adequate foundation to enable the jury to find that the videotape depicted reliably the events leading up to the shooting and its aftermath. *Id.* at 655–56. The video was created by some unknown person, who, through some unknown process, compiled footage from eight security cameras onto a CD and then onto a videotape. “There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures.” *Id.* at 655. The Court of Appeals explained as follows:

“A videotape is considered a photograph for admissibility purposes. It is admissible in evidence and is subject to the same general rules of admissibility as a photograph. Photographic manipulation, alterations and fabrications are nothing new, nor are such changes unique to digital imaging, although it might be easier in this digital age Movies and tapes are easily manipulated, through such means as editing and changes of speed, to produce a misleading effect. Courts therefore require authentication of photographs, movies, or videotapes as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine.”

Id. at 651–52 (internal citations omitted).

Quoting the Court of Special Appeals’ analysis with approval, the Court discussed the difference between (1) photographs that may be admissible when a witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or the object that it purports to depict as it existed at the relevant time and (2) photographs that may be admissible through the second authenticating method, known commonly as the “silent witness” method. Under the silent witness theory, a photograph may be

admissible as a mute or silent independent photographic witness because the photograph speaks with its own probative effect. *Washington*, 406 Md. at 652. So long as the witness testifies to a process or system that produces an accurate result, the photograph may be admitted. *Cole*, 342 Md. at 20–22. Importantly, the Court noted that “[g]enerally, surveillance tapes are authenticated under the silent witness theory, and without an attesting witness.” *Washington*, 406 Md. at 653.

The foundational deficiency in *Washington* was as follows:

“The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath.”

Id. at 655. The case at bar is more comparable to *Jackson*, 460 Md. at 117, where the Court held that the video footage at issue was authenticated properly as a silent witness through the following testimony of a Bank of America’s manager:

“Mr. Cunningham described the process he used to access the ATM video footage, which entailed accessing a Digital Video Recording ‘program and pull[ing] up the . . . branch for that date and time and the cameras that [he] was looking for.’ . . . [H]e then ‘exported the images into a digital file and emailed them to [the detective]. Mr. Cunningham was not able to modify, cut, paste, or enhance the video in any way. . . . Once Mr. Cunningham received confirmation from the detective, he was then required to submit a specific request with date, time, location and camera specifications to a Bank of America team located in North Carolina, who would ‘download the requested video and mail it directly to the detective.’”

The Court held that Mr. Cunningham’s testimony as to “the process of reproduction, the reliability of that process, and whether the reproduction was a fair and accurate representation of what the witness had viewed when he submitted a request for the video footage to the Bank of America team in North Carolina” established the foundation for the video’s authenticity. *Id.* at 119–20.

In the instant case, as the State points out, the surveillance video was not created by some unknown person or through some unknown process. Detective DiPasquale testified to her regular process in obtaining video surveillance footage and explained what she did in this case. She observed that the system was operating properly, searched for the right time and date, downloaded a copy, and reviewed it. She made no edits or changes. Appellant’s arguments that the State did not authenticate the video properly goes to the weight of the video, not to its admissibility.

IV.

We turn to the issue of merger. We review a trial court’s ruling to not merge sentences *de novo*. *Clark v. State*, 246 Md. App. 123, 131 (2020). The initial test for determining whether one offense merges into another is the “required evidence test” or the “Blockburger test.” The Court of Appeals explained this test in *State v. Jenkins*, 307 Md. 501, 517 (1986) as “focus[ing] upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.” The required

evidence test, while the most common basis for merger, is not the exclusive standard. The rule of lenity may compel merger even when the required evidence test does not. “The rule of lenity is a matter of legislative intent, which applies only where at least one of the two offenses subject to the merger analysis is a statutory offense.” *Latray v. State*, 221 Md. App. 544, 555 (2015).

Appellant contends that these convictions should have been merged under either the required evidence test or the rule of lenity. In the alternative, appellant argues that the convictions should merge under the principle of fundamental fairness.

In *State v. Holmes*, the Court of Appeals examined whether assault with intent to murder and attempted murder in the first-degree have the same elements. 310 Md. 260, 262 (1987). The Court stated that “the elements of attempted murder in the first degree are the [willful, deliberate, and premediated] intent to commit murder in the first degree and some overt act towards the crime’s commission.” *Id.* at 271–72. Assault consists of three varieties with different elements; however, each variety requires an intent to bring about physical harm to the victim. *Snyder v. State*, 210 Md. App. 370, 380–82 (2013). The Court held that the crimes did not merge under the required evidence test because each of the offenses required an element that the other did not. *Holmes*, 310 Md. at 272. Specifically, the Court found that “[a]ssault with intent to murder requires an assault, while attempted murder in the first degree does not.” *Id.*

Following *Holmes*, attempted first-degree murder does not require an assault. Assault does not require a willful, deliberate, and premediated intent to commit murder in the first-degree or some overt act toward the crime’s commission. Each of the offenses

requires an element that the other does not. Accordingly, second-degree assault does not merge with attempted first-degree murder for sentencing purposes under the required evidence test.

Even if merger is not required under the required evidence test, we hold, based upon the rule of lenity, that second-degree assault merges for sentencing purposes into attempted first-degree murder. Appellant argues that his convictions should merge under the rule of lenity because second-degree assault is a statutory offense. Surprisingly, the State argues that second-degree assault is a common law crime.² The State is wrong. Assault is a statutory crime in Maryland, even though it retains its common law meaning.

In *Robinson v. State*, 353 Md. 683, 701 (1999), the Court of Appeals made crystal clear that “as of October 1, 1996, the common law crimes of assault and battery are no longer cognizable in this State” and are replaced by the statutory offenses found in sections 3-202 and 3-203 of the Criminal Law Article of the Maryland Code. The Court reasoned that “the legislative history of the 1996 assault statutes leads us to conclude that the General Assembly clearly intended the [assault] statutes to encompass the entire subject of assault and battery and to abrogate the common law on the subject.” *Id.* at 698–99; *see, e.g., Watts v. State*, 457 Md. 419, 438 (2018); *Nicolas v. State*, 426 Md. 385, 403 (2012); *State v. Duran*, 407 Md. 532, 551 (2009); *Christian v. State*, 405 Md. 306, 319 (2008); *Edmund v.*

² The State relies on *Pair v. State*, in which the Maryland Court of Special Appeals held that “[a]ssault, whatever its degree or statutorily prescribed punishment, remains a common law crime.” 202 Md. App. 617, 642 (2011). *Pair* is simply wrong on that issue and is an outlier. After October 1996, all other Maryland cases held that second-degree assault is a statutory offense; those cases are precedential and binding authority. *See, e.g., Fisher v. State*, 367 Md. 218, 243–44 (2001).

State, 398 Md. 562, 569 (2007); *Cain v. State*, 386 Md. 320, 338 (2005); *State v. Green*, 367 Md. 61, 77 (2001); *Quansah v. State*, 207 Md. App. 636 (2010), *cert denied*, 430 Md. 13 (2013); *Snyder v. State*, 210 Md. App. 370, 381 (2013); *Marlin v. State*, 192 Md. App. 134, 157 (2010).

“The rule of lenity—a principle of statutory interpretation—can require the merger of sentences even when the required evidence test has not been satisfied.” *Clark*, 246 Md. App. at 135. The rule of lenity is only applicable where at least one of the two offenses at issue is a statutory offense. *Id.* Under the rule of lenity, appellant’s convictions of second-degree assault and attempted first-degree murder merge for sentencing purposes because assault is a statutory crime, the same conduct formed the basis of both convictions, and there is no indication that the Legislature intended separate penalties. Accordingly, we hold that the trial court erred and vacate appellant’s sentence for second-degree assault.

**SENTENCE IMPOSED FOR
SECOND-DEGREE ASSAULT
PURSUANT TO CRIMINAL LAW §
3-203 VACATED. JUDGMENTS OF
THE CIRCUIT COURT FOR
BALTIMORE CITY OTHERWISE
AFFIRMED. COSTS TO BE
DIVIDED EQUALLY BETWEEN
APPELLANT AND THE MAYOR
AND CITY COUNCIL OF
BALTIMORE.**