Circuit Court for Dorchester County
Case Nos. C-09-CR-18-000258 & C-09-CR-19-000045

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1188
No. 1189

September Term, 2019

WHITNEY DIANE DUPONT

v.

STATE OF MARYLAND

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: October 19, 2020

Appellant Whitney Dupont appeals from her convictions by a jury sitting in the Circuit Court for Dorchester County for influencing a witness, soliciting to influence a witness, and obstruction of justice. She contends that she was denied effective assistance of counsel because her trial counsel failed to object to certain questions during *voir dire*. She also argues that the circuit court should have merged her convictions for influencing a witness and soliciting to influence a witness into her conviction for obstruction of justice. We disagree and affirm.

BACKGROUND

Whitney[1] was charged in two separate cases. The charges in the first case stemmed from a physical fight with her sister-in-law, Travia Dupont ("Travia"), on July 25, 2019. The fight was taped by Jasmine Jones, an associate of Whitney's.

The charges against Whitney in the second case—influencing a witness, soliciting to influence a witness, and obstruction of justice—arose out of her attempt to convince Travia to drop the charges from the first case. The two cases were consolidated for trial. This appeal concerns only the second case.[2]

During jury selection, the court asked the prospective jurors the following questions:

> Okay. So the next question is have you or a member of your immediate family had any experience with the criminal justice system either as the victim of a crime, a witness to a crime, or as a person charged with a crime? So note you used – I used the word charged, I didn't say convicted.

[1] To avoid confusion between the relevant parties, appellant and the other individuals referenced in this opinion are referred to by their first names.

[2] In the first case, Whitney was found guilty of third-degree burglary, conspiring to commit third-degree burglary, fourth-degree burglary, conspiracy to commit fourth-degree burglary, second-degree assault, and conspiracy to commit second-degree assault.

> So it would be important, for instance, if, you know, your spouse had been charged with a crime but maybe they were not found guilty or the charges were dismissed, you should still answer the question. Now we don't need to go back to perpetuity, if Uncle Joe in Wheeling, West Virginia, was drunk and disorderly in 1952, I don't really need to know about that. But obviously you have in your mind what would be important and could impact your judgment in this case.
>
> So again, if you or a member of your immediate family had any experience with the criminal justice system, either as the victim of a crime, a witness to a crime, or as a person charged with a crime, if so please stand.
>
> ****
>
> Again, do you have any religious, philosophical or social views that would prevent you from fairly and impartially sitting in judgment of someone facing these or any criminal charges?
>
> ****
>
> Do any of you have such strong feelings about the amount of crime in our community or about the criminal justice system that would make it difficult for you to give either the Defendant or the State a fair trial.

Defense counsel made no objection to these questions.

Whitney was found guilty of influencing a witness, soliciting to influence a witness, and obstruction of justice. She was sentenced to 10 years for influencing a witness, consecutive to the sentences from the first case, and a consecutive 10 years suspended for soliciting to influence a witness. The court merged the obstruction of justice conviction into the influencing a witness conviction. Whitney made no objection to the sentences.

This timely appeal followed.

DISCUSSION

I.

INEFFECTIVE ASSISTANCE OF COUNSEL

Whitney argues that, in violation of *Dingle v. State*, 361 Md. 1 (2000), the three *voir dire* questions identified above improperly delegated to each juror the responsibility of determining their own biases and potential impartiality—an obligation that should have rested with the court. She contends that her attorney should have objected to each of those questions. If counsel had objected, Whitney contends the trial court would have been required, under controlling precedent, to sustain the objections. Whitney argues that, under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), her counsel's failure to object to these questions deprived her of effective assistance of counsel.[3]

Except in rare circumstances, a claim of ineffective assistance of counsel is brought in a post-conviction proceeding and not on direct appeal. *Mosley v. State*, 378 Md. 548, 558-62. The Court of Appeals has explained:

> The main justification for the rule is that, generally, the trial record does not provide adequate detail upon which the reviewing court could base an assessment regarding whether counsel rendered ineffective assistance because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct in issue.

[3] A defendant claiming the ineffective assistance of counsel must establish (1) counsel's representation fell below an objective standard of reasonableness and (2) "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669.

Smith v. State, 394 Md. 184, 200 (2006). The exception to this rule is "where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." *Mosley*, 378 Md. at 562; *see also In re Parris W.*, 363 Md. 717, 726 (2001) ("[W]here the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.").

Courts have allowed direct challenges when "counsel's effectiveness was compromised by prejudicial conflicts of interest," "when facts related to the claim were heard by the trial court as part of a motion to withdraw a guilty plea," or for death penalty cases. *Mosley*, 378 Md. at 563-64. As stated by the Court of Appeals, "[t]he rare instances in which we have permitted direct review are instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel." *Id.*

This case is not one of those rare exceptions. The record reflects only that the court asked the *voir dire* questions and that defense counsel did not object. There could be reasonable explanations for Whitney's defense counsel's decision not to object. For example, perhaps defense counsel had formed a view that, for reasons specific to this case, he had no concerns about the prospective jurors' religious, philosophical, or social views, as he did not propose any questions aimed at revealing any such problematic views held by the jurors on these topics. And he did not object to the court's question about the jurors'

"strong feelings" about crime in the community presumably because it was essentially the same question that he had requested.[4]

Similarly, regarding the criminal charges question, the court tripped over *Dingle* in attempting to guide the prospective jurors on which criminal charges would be too remote to warrant disclosure. The actual question, which the court posed before its explanation and again immediately after the explanation, did not require the jurors to assess their own ability to remain impartial. Unlike us, Whitney's counsel was the one with boots on the ground and the opportunity to assess the circumstances and the demeanors and reactions of the prospective jurors. Given the example the court gave—the 1952 drunken and disorderly charge against Uncle Joe in Wheeling, West Virginia—we cannot rule out the possibility that defense counsel made a judgment call in not objecting.

Simply put, we don't know—and we can't know from this record—what was in defense counsel's mind during the jury selection process. But, the possibility of a reasonable explanation is enough for us to decline Whitney's request to short-circuit the ordinary process for adjudicating ineffective counsel claims. *See Mosley*, 378 Md. at 561; *see also Bailey v. State*, 464 Md. 685, 705 (2019) ("[T]he trial record does not 'clearly illuminate' why counsel's actions were ineffective," and post-conviction would provide "an opportunity to introduce testimony and evidence directly related to issue.").

II.

[4] Defense counsel's proposed question was: "Do any of you have strong feelings about any of the crimes with which the Defendant is charged?"

MERGER OF SENTENCES

Whitney was sentenced to 10 years for intimidating and influencing a witness under Md. Code Ann. (2002, 2012 Repl. Vol.) Crim. Law ("CL") § 9-305(a).[5] She was also sentenced to a consecutive but suspended 10-year term for *soliciting* the intimidation or influence of a witness under CL § 9-305(b).[6] For the sake of simplicity, we will refer to these two charges as the "intimidation convictions."

Whitney received no sentence for the obstruction of justice conviction under CL § 9-306(a).[7] That's because the court merged her obstruction conviction with her conviction for intimidating or influencing a witness. Whitney claims that the court got it backwards; that it should instead have merged both intimidation convictions into the obstruction conviction. Whitney argues that merger is appropriate under (1) the required evidence test; (2) the rule of lenity; and (3) fundamental fairness. The result under Whitney's theory would have been a single sentence for obstruction, which just happens

[5] CL § 9-305(a) provides: "A person may not, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of a court of the State or of the United States in the performance of the person's official duties."

[6] CL § 9-305(b): "A person may not solicit another person to, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of the court of the State or of the United States in the performance of the person's official duties."

[7] CL § 9-306(a): "A person may not, by threat, force, or corrupt means, obstruct, impede, or try to obstruct or impede the administration of justice in a court of the State."

to be less than the maximum sentences for each of the intimidation convictions.[8] Whitney argues that her convictions as they currently stand violate the Fifth Amendment of the U.S. Constitution's prohibition against double jeopardy.

As noted above, Whitney's counsel did not object to her sentences at trial. Generally, the failure to object is considered a waiver of the objection, and it cannot be raised for the first time on appeal. *See* Md. Rule 8-131(a). Nonetheless, "a court may correct an illegal sentence at any time." Md. Rule 4-345(a). A sentence in violation of double jeopardy is one such form of illegality. *See Randall Book Corp. v. State*, 316 Md. 315, 322 (1989).

As we have previously explained:

> The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law. Merger protects a convicted defendant from multiple punishments for the same offense. Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offences are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.

Paige v. State, 222 Md. App. 190, 206 (2015) (quoting *Brooks v. State*, 439 Md. 698, 737 (2014)). "[W]here merger is required under the required evidence test or the rule of lenity, the issue of merger is properly before us even in the absence of an objection below." *Kyler v. State*, 218 Md. App. 196, 222 (2014).

[8] The maximum sentence for violating either of the intimidation convictions is "10 years or a fine not exceeding $5,000 or both." CL § 9-305(c)(1). The maximum sentence for obstructing justice is "5 years or a fine not exceeding $10,000 or both." CL § 9-306(b).

Thus, notwithstanding Whitney's failure to object, we will consider her merger argument under the required evidence test and the rule of lenity. We will not, however, consider her unpreserved argument of fundamental fairness. *See Pair v. State*, 202 Md. App. 617, 649 (2011) (an argument challenging the fundamental fairness of a sentence must be presented to the trial court in order to be considered on appeal).

A.

THE REQUIRED EVIDENCE TEST

We have previously articulated the required evidence test as follows:

> In Maryland, we generally use the required evidence test to determine if two offenses constitute the same offense for the purposes of sentencing. In applying the required evidence test, we examine the elements of each offense and determine whether each provision requires proof of a fact which the order does not . . . 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. If offenses merge, separate sentences are generally precluded; instead a sentence may only be imposed for the offense having the additional elements or elements.

Paige, 222 Md. App. at 206-207 (cleaned up). There is, however, an exception to this general rule. As the Court of Appeals has stated:

> Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the same conduct, cumulative punishment may be imposed under the statutes in a single trial. The Supreme Court has said that with respect to cumulative punishments imposed in a single trial, the "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." The bottom line in resolving "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose."

Jones v. State, 357 Md. 141, 156 (1999) (citations omitted).

Whitney argues that the elements of the intimidation convictions are "subsumed by the elements of obstructive of justice." According to Whitney, all three crimes require proof of corrupt means, the requisite intent of intimidation and solicitation is to "influence a witness to withhold testimony and to intimidate a witness," and "obstruction of justice requires an intent to obstruct or impede the administration of justice in court." As a result, she argues that "using corrupt means to intimidate a witness or get the witness not to testify is necessarily meant to obstruct the administration of justice in court."

In support of her argument, Whitney relies on *Romans v. State*, 178 Md. 588, 592 (1940), where the Court of Appeals held that threatening a juror or witness merged into obstruction of justice. We need not decide whether *Romans* leads Whitney to her desired result because, after *Romans* was decided, the legislature amended CL § 9-305 to add CL § 9-305(d), which provides: "A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section." Thus, because CL § 9-305(d) specifically allows for separate punishments for the same conduct, neither CL § 9-305(a) nor CL § 9-305(b) must merge into CL § 9-306(a) under the required evidence test.

B.

THE RULE OF LENITY

Whitney's argument that the convictions should have merged under the rule of lenity is unavailing for the same reason.

The Court of Appeals has explained the rule of lenity as follows:

> [W]hen we are uncertain whether the legislative intended one or more than one sentence that we make use of an aid to statutory interpretation known as the "rule of lenity." Under that rule, if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.

Monoker v. State, 321 Md. 214, 222 (1990). The rule of lenity "serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists." *Jones v. State*, 336 Md. 255, 261 (1994); *see also Oglesby v. State*, 441 Md. 673, 681 (2015).

Whitney alleges that "there is no indication that the legislature intended to impose separate sentences for one act." She further claims that this provision is ambiguous because it could be read "to provide for the imposition of consecutive sentences only in a scenario where, for example, a defendant assaults a witness and on the basis of that assault is convicted of both second-degree assault and violating CL § 9-305" and it also could be read "as permitting separate sentences in a case like this one." We disagree.

There is no ambiguity in CL § 9-305(d). This provision expressly allows for multiple sentences for the same act. *See Alexis v. State*, 437 Md. 457, 488 (2014) (analyzing identical language in CL § 9-302(d) and asserting that "[t]he plain language of these subsections indicates that the General Assembly intended punishment for convictions

under either statute **not to merge with a conviction for any other offense**, including a conviction under another statute"). As such, Whitney's merger argument fails under the rule of lenity.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.