Circuit Court for Washington County
Case No.: C-21-CR-19-000177

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1277

September Term, 2021

JIMMY ANTHONY TEJADA

v.

STATE OF MARYLAND

Graeff,
Zic,
Tang,
JJ.

Opinion by Tang, J.

Filed: March 8, 2023

*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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Jimmy Anthony Tejada, was indicted in the Circuit Court for Washington County and charged with first- and second-degree arson, malicious burning of personal property, malicious destruction of real property, and reckless endangerment. Appellant elected a bench trial, and the court, after granting his motion for judgment of acquittal on the charge of malicious burning of personal property, convicted appellant on the remaining counts.

Appellant was thereafter sentenced to 30 years' incarceration with all but 20 years suspended for first-degree arson; three years consecutive, all suspended, for malicious destruction of property; and five years consecutive, all suspended, for reckless endangerment. The court merged the second-degree arson sentence and imposed five years of supervised probation upon release. On this timely appeal, appellant asks us to address the following questions:[1]

1. Did the variance between the identity of the victim alleged and proven amount to insufficient evidence of reckless endangerment?

2. Did the trial court err by failing to merge appellant's sentence for malicious destruction of property into his sentence for first-degree arson?

[1] The questions presented by appellant in his brief are:

1. Where the evidence established that the alleged victim of reckless endangerment, as named in the indictment, was in a different county at the time of the offense, was the evidence insufficient to convict [appellant] of that offense?

2. Must [appellant]'s sentence for malicious destruction of property merge into his sentence for first degree arson?

For the following reasons, we shall affirm appellant's conviction for reckless endangerment and vacate his sentence for malicious destruction of property.

BACKGROUND

In the afternoon of August 27, 2018, thirteen-year-old K.G.[2] was home alone at her residence, an end unit townhouse, located in Hagerstown, Washington County, Maryland, when she noticed a car parked outside. A man was sitting in the car, looking at her residence. K.G. observed the man get out of the car, retrieve a gas can from the trunk, and then walk behind the townhouse. She went to another window and saw the man pour gasoline on the back of the dwelling. When flames followed, she immediately exited and ran next door for help.

While K.G. was knocking on her neighbor's door, she observed the man flee from the scene. She then called her mother and told her "the house is on fire." Following her mother's advice, K.G. called 911.

K.G. testified that she "got a good look" at the man's face and gave a description of the man and his attire to law enforcement. Months later, in February 2019, K.G. saw a picture of the same man in an online news article. She then reported it to her mother, who subsequently contacted police. K.G. identified appellant in a photo array, as well as in court, as the man she saw at her house on August 27, 2018, testifying that she was "[v]ery certain" it was the same man.

[2] Under Maryland Rule 8-125, which took effect on April 1, 2022, this Court shall not identify the victim of a crime, except by his or her initials, if the victim was a minor child at the time of the crime. Consistent with this Rule, we identify this victim by her initials.

Diann D. Slaughter, K.G.'s mother and owner of the townhouse, testified that she was at work in Gaithersburg (located in Montgomery County) when her daughter called to tell her the house was on fire. Ms. Slaughter told her to call 911 and then drove home. She testified that, when she arrived, she saw smoke and noticed that the back of the house had "basically melted."

Ms. Slaughter had no idea who started the fire. Testifying concerning K.G.'s identification of appellant in a photo array, Ms. Slaughter stated she did not know the person K.G. identified but believed her son and appellant had been friends and coworkers.

Additional information will be supplemented, as necessary, in the discussion.

DISCUSSION

I.

Appellant contends that the evidence was insufficient to sustain his conviction for reckless endangerment because the indictment charged him with recklessly endangering "Diann D. Slaughter," where the evidence established that she was not present at the time of the offense. He argues that reversal of his reckless endangerment conviction is required because there was a material and fatal variance between the allegata (the allegations in the pleading) and the probata (the proof at trial).

The State responds that appellant's variance argument was not preserved and should not be considered by this Court. Even if preserved, the State argues, the name of the victim was not essential to the offense charged and did not amount to a material variance. We agree with the State on both points.

A.

Although appellant frames the issue in terms of "sufficiency of the evidence," the crux of his argument is premised on variance. "A variance has been defined as 'a difference between the allegations in a charging instrument and the proof actually introduced at trial.'" *Crispino v. State*, 417 Md. 31, 51 (2010) (quoting Black's Law Dictionary 1692 (9th ed. 2009)). In general, "matters essential to the charge must be proved as alleged in the indictment. The evidence in a criminal trial must not vary from those allegations in the indictment which are essential and material to the offense charged." *Smith v. State*, 232 Md. App. 583, 594 (2017) (cleaned up). If such variance exists, we must reverse the judgment. *Green v. State*, 23 Md. App. 680, 685 (1974).

In *Green v. State*, we held that, "[t]o preserve [the claim of variance] on appeal, . . . it must be seasonably raised below." *Id*. (noting that a variance claim may be raised by a timely motion for judgment of acquittal; "[t]he point then becomes a matter of the sufficiency of the evidence."). Citing Maryland Rule 1085, the predecessor to Maryland Rule 8-131(a),[3] the Court, in *Green*, declined to consider the variance claim on appeal because the question was not raised in the trial court. *Id*. at 686. "The question of variance between the allegata and the probata was not otherwise raised below. The short of it is that the court was not called upon to rule on the point and it simply was not tried and decided at the trial." *Id*.

[3] Rule 1085 is currently encompassed in Maryland Rule 8-131(a). *Taylor v. State*, 381 Md. 602, 620 n.4 (2004); *see* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

In *Jackson v. State*, after a bench trial, the trial court found the defendant guilty of receiving stolen goods. 10 Md. App. 337, 346 (1970). On appeal, the defendant argued that "a conviction of receiving stolen goods under the value of $100 on a charge wherein it was alleged that designated goods were over the value of $100 was improper." *Id*. at 347. He also attacked the conviction "on the ground that the indictment charged that the goods received were the property of Evelyn Taylor while the evidence established that they were the goods of Alvin Taylor." *Id.* at 348. Again, citing to Maryland Rule 1085, we concluded that the variance claims were not preserved because they were "not tried and decided below." *Id*. at 347, 348. "In order to raise the [variance] objection[,]" "it is essential that the question be seasonably raised during the trial." *Id*. at 349 (citation omitted) (quoting, with respect to variance in names, 5 Wharton's Criminal Law and Procedure (Anderson), § 2065, p. 219).

Here, the variance claim was not raised by appellant before the trial court in a motion for judgment of acquittal, closing argument, or otherwise. Accordingly, appellant's variance claim is not preserved for our review. *See* Maryland Rule 8-131(a).

B.

Alternatively, the State argues that, even if the variance claim is preserved and considered by this Court, "the variance was not fatal because the name of the person endangered by [appellant]'s reckless conduct is not essential or material to the charge of reckless endangerment." We agree.

As to variance of the name of the victim, one secondary source has explained:

> Where it is necessary to state the name of a person other than the accused as a part of the description of the offense, the name must be correctly stated and a material variance is fatal. However, where the identity of the person named in the indictment with the one named in the evidence is established, or where the inaccuracy is not misleading or substantially injurious to the accused, the variance is not fatal. It is sufficient if the record is such as to inform the accused of the charge and to protect him or her against another prosecution for the same offense.

42 C.J.S. Indictments and Informations § 295 (2017, 2023 update) (footnotes omitted and emphasis added). "If a variance . . . is immaterial, it is not fatal; immaterial variances between the allegations in the indictment and the evidence introduced are to be disregarded when considering the sufficiency of the evidence to support a conviction." 41 Am. Jur. 2d, Indictments and Informations § 244 (2d ed., 2022 update) (footnotes omitted).

The Supreme Court of Maryland[4] has similarly advised that "the object and purpose of describing a person by his name is to identify him sufficiently so that the defendant may be apprised of the person whom the charge of crime concerns." *Hutson v. State*, 202 Md. 333, 338 (1953) (quoting 2 Wharton, Criminal Evidence (11th ed.) § 1048, p. 1845). Generally, "a variance in names, between that alleged and that proven, is not fatal where it does not mislead the defendant so that he cannot make an intelligent defense, or expose

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

him to double jeopardy."[5] *Dotson v. State*, 234 Md. 333, 336 (1964) (citing 1 Underhill, Criminal Evidence (5th ed.), § 86; 2 Wharton, Criminal Evidence (12th ed.) § 653)).

i.

The reckless endangerment statute provides, in relevant part, that "[a] person may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" Md. Code Ann. (2002, 2021 Repl. Vol.), § 3-204(a)(1) of the Criminal Law Article ("CR"). Thus, the elements of a *prima facie* case of reckless endangerment, as set forth by our Supreme Court, are: "1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly." *Hall v. State*, 448 Md. 318, 329 (2016) ("The Maryland Criminal Pattern Jury Instruction on reckless endangerment, Section 4:26[B], embodies those same elements.").

The statute "is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs." *State v. Pagotto*, 361 Md. 528, 549 (2000). It

[5] The safeguard against material variance corresponds with the constitutional protections in Article 21 of the Maryland Declaration of Rights, which provides that the accused has "a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence[.]" Md. Const. Declaration of Rights, art. 21. The purposes served by Article 21 are to, *inter alia*, "put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct;" "to protect the accused from a future prosecution for the same offense;" and "to enable the defendant to prepare for his trial[.]" *Counts v. State*, 444 Md. 52, 57-58 (2015) ("[W]here a statutory offense is alleged, it has generally been held in Maryland that, at least where the terms of the statute include the elements of the criminal conduct, the crime may be sufficiently characterized in the words of the statute.").

was enacted "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person. It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Minor v. State*, 326 Md. 436, 442 (1992); *see also State v. Albrecht*, 336 Md. 475, 500 (1994) ("[T]he crime of reckless endangerment does not require that the defendant actually cause harm to another individual."); *Williams v. State*, 100 Md. App. 468, 480 (1994) ("Reckless endangerment is quintessentially an inchoate crime."). "Thus, the focus is on the conduct of the accused." *Pagotto*, 361 Md. at 549.

"Although the Legislature has, with respect to certain crimes, crafted a form indictment that it regards as sufficient and most of those form indictments charging crimes against a person do call for the victim to be identified," it has not chosen to prescribe such a form for reckless endangerment.[6] *Denicolis v. State*, 378 Md. 646, 662 (2003). The Legislature established a general form of charging the offense of reckless endangerment as follows:

[6] The Court noted that the form indictment for the following statutory offenses calls for a victim to be identified, "but not reckless endangerment": conspiracy to murder (CR § 1-203); murder or manslaughter (CR § 2-208); manslaughter by vehicle or boat (CR § 2-209); rape, sexual offense (CR § 3-317); and assault (CR § 3-206(a)). *Denicolis*, 378 Md. at 662. Although identifying the victim may not be required, "in cases where there is a known victim . . . it is certainly a useful thing to do and may, in some circumstances, be required in order to satisfy the defendant's Federal and State Constitutional rights to fair notice." *Id*. For instance, we can envision a scenario in which identifying the victim, if known, might be important where, under the reckless endangerment statute (CR § 3-206(d), *infra*), the State elects to charge a count for each of several individuals endangered by a defendant's conduct. *See* n.10, *infra*. We need not expound because such a case is not before us.

> A charging document for reckless endangerment under § 3-204 of this subtitle is sufficient if it substantially states:
>
> > "(name of defendant) on (date) in (county) committed reckless endangerment in violation of § 3-204 of the Criminal Law Article against the peace, government, and dignity of the State."

CR § 3-206(d)(2).

Under CR § 3-206(d), the State can elect the unit of prosecution, charging reckless endangerment based on either the number of persons endangered or on the occurrence:

> (3) If more than one individual is endangered by the conduct of the defendant, a separate charge may be brought for each individual endangered.
>
> (4) A charging document containing a charge of reckless endangerment under § 3-204 of this subtitle may:
>
> > (i) include a count for each individual endangered by the conduct of the defendant; or
> >
> > (ii) contain a single count based on the conduct of the defendant, regardless of the number of individuals endangered by the conduct of the defendant.

In other words, a charge for reckless endangerment may *either* include a count for each individual endangered *or* generally allege the crime in a single count, regardless of the number of individuals endangered.[7] CR § 3-206(d)(4).

[7] As explained in a Committee Note, the 1996 amendment to the reckless endangerment statute was:

> intended to clarify that the appropriate unit of prosecution may be based on the number of individuals in danger. For example, a single act endangering 20 individuals could result in 20 convictions. Alternatively, the State may choose to charge only one count for an occurrence, even though many persons were endangered. It is up to the State to decide how to charge and

(continued)

Where the State elects the occurrence-based unit of prosecution, identification of the victim's name in the indictment may be surplusage. We consider *Albrecht v. State*, 105 Md. App. 45 (1995), instructive in this regard.[8] In that case, Officer Albrecht stopped a vehicle transporting individuals believed to be involved in a reported stabbing. *Albrecht*, 336 Md. at 479-80. During the stop, Officer Albrecht retrieved a loaded shotgun from his vehicle and pointed it at Rebecca Garnett. *Id*. at 481. Once he determined she was not a threat, he began to point the shotgun at the other occupants of the vehicle; however, the shotgun discharged and killed Ms. Garnett. *Id*. at 481-82. After a bench trial, Officer Albrecht was convicted of manslaughter and reckless endangerment of Ms. Garnett, as well as reckless endangerment of other individuals. *Id*. at 482-85.

Officer Albrecht was initially charged in the third count of the indictment with the reckless endangerment of "other person(s) present" at the scene of the shooting. *Albrecht*, 105 Md. App. at 48. At the end of the State's case-in-chief, that count was amended, over objection, to name seven specific persons. *Id*. The trial court found Officer Albrecht guilty under that count of recklessly endangering four of those individuals. *Id*. at 49. Officer

> for the court to decide the appropriate punishment if a large number of individuals are endangered by the same act. See also § 12A-4(d) [the predecessor to CR § 3-206(d)] concerning charging documents for reckless endangerment.

1996 Laws of Maryland, Ch. 632, at 3620-21.

[8] On appeal, we reversed Officer Albrecht's convictions of involuntary manslaughter and reckless endangerment in a reported opinion, *see Albrecht v. State*, 97 Md. App. 630, 688 (1993). Our Supreme Court reversed and remanded compelling us to consider issues raised but not decided in our first opinion, *see Albrecht*, 336 Md. at 505-06.

Albrecht maintained that the original count was inadequate for failing to name a specific victim. *Id*. In the alternative, he claimed that, assuming the unit of prosecution for the crime of reckless endangerment was each person recklessly endangered, the amended count was duplicitous for charging him with seven offenses in a single count. *Id*.

We first considered whether the unit of prosecution in a reckless endangerment case was either "1) the reckless *act* of the defendant creating a substantial danger of harm or 2) *each person* endangered by such reckless act." *Id.* at 55-56 (emphasis added). We theorized,

> *If the unit of prosecution is the reckless act itself,* there is a single crime whether one person or a hundred persons are endangered by that act. Although it would be indispensable that at least one human being be recklessly endangered, *the identification of a particular victim or victims would be surplusage*.

Id. at 56 (emphasis added). Ultimately, we held that the unit of prosecution is each person who is recklessly exposed to the substantial risk of death or physical injury, explaining that the crime "is quintessentially a crime against persons."[9] *Id*. at 58. We did not decide the question of whether the third count of the indictment failed to properly charge an offense

[9] The *Albrecht* opinion prompted the Legislature, in 1996, to clarify the "unit of prosecution" issue in reckless endangerment cases in what is now embodied in CR § 3-206(d), *supra*. *See* Senate Judicial Proceedings Committee Floor Report, H.B. 749, 410th Sess. (Md. 1996) (citing *Albrecht v. State*, 105 Md. App. 45 (1995)) ("The bill codifies [the Court's] holding" that "a charge may be brought against a defendant for each person endangered by the defendant's act, or in the alternative, one charge may be brought for the defendant's act, regardless of the number of persons endangered[.]"). *See* n.7, *supra*.

by initially failing to identify a specific victim, because another issue, whether the amended count was fatally duplicitous, amounted to reversible error.[10] *Id.* at 67.

ii.

In the instant matter, the State charged a single count of reckless endangerment as follows:

> The JURORS of the State of Maryland, for the body of Washington County, do on their oaths and affirmations present that Jimmy Anthony Tejada, late of said County, on or about the 27th day of August, 2018, A.D., in the County aforesaid, did recklessly engage in conduct, to wit: deliberately lighting a fire to the rear of [the address for the townhome] Hagerstown, Maryland, an occupied end unit townhome in a row of four, by pouring gasoline on the house from a can and lighting the gasoline causing the fire to burn up the rear of the house, that created a substantial risk of death and serious physical injury to Diann D. Slaughter, against the peace, government, and dignity of the State.

This singularly charged count indicates that the State elected the occurrence-based unit of prosecution. The claimed variance is that the State alleged the wrong victim. Clearly, Ms. Slaughter was not recklessly endangered by appellant's conduct. The question is whether the variance in names, between that alleged and that proven, was fatal.

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[10] Although we left the question unresolved, we hypothesized, in our initial appellate review of the case, that if

> the unit of prosecution is each endangered victim rather than the mere act itself, then the third count in this case would present numerous problems. The naming or otherwise identifying of the victim would be a critical element. Permitting the State at the end of the State's case to amend the third count by adding for the first time the names of victims, where theretofore none had been named, would seem to represent an amendment going to actual substance and not to mere form.

Albrecht, 97 Md. App. at 686 n.4, *rev'd on other grounds*, 336 Md. 475 (1994).

We conclude, under the circumstances here, that the variance in the names alleged and proven was immaterial. First, there is nothing to indicate that appellant was surprised, misled, or prejudiced in his defense by the variance in the identity of the victim. *See, e.g.*, *Hutson v. State*, 202 Md. 333, 339 (1953). The primary focus of appellant's arguments before the trial court was on K.G.'s identification of appellant as the criminal agent. There was no suggestion that appellant was concerned that the victim alleged (Ms. Slaughter) varied from the one proven (K.G.). *See, e.g.*, *Ham v. State*, 7 Md. App. 474, 480 (1969) (the defendant did not contend that he was not sufficiently apprised by the indictment of the charge against him with respect to the victim of robbery, nor did he raise any objection at trial to the alleged variance between indictment and proof); *United States v. Moore*, 198 F.3d 793, 796 (10th Cir. 1999) (no prejudice found when the defendant was aware of the charges and presented his defense with knowledge that "Anne Byers" was the alleged victim even though the indictment named her husband, "Brent Byers," as the victim).

Second, the indictment for reckless endangerment specified the date, the place, and the manner in which the offense was committed in sufficient detail such that there is no concern of appellant being prosecuted for the same offense. *See, e.g.*, *Hamilton v. State*, 12 Md. App. 91, 95 (1971) (no conceivable question of confusion or double jeopardy could have arisen where defendant was informed of the exact accusation against him); *Mazer v. State*, 231 Md. 40, 51 (1963) (no double jeopardy concern where indictment clearly identified the offense involved "and hence this prosecution will be an effective bar to any subsequent prosecution for that offense.").

On this record, the evidence sufficiently proved that appellant recklessly endangered "another." *See* CR § 3-204(a)(1) (requiring proof that a defendant recklessly endangered "another"); *see, e.g.*, *Burgess v. State*, 89 Md. App. 522, 540-41 (1991) (rejecting the defendant's variance argument, explaining that, with malicious destruction of property, "[p]roof that the subject property is that of 'another' is all that is required). For the reasons stated, we conclude that there was no material and fatal variance between the allegation and the State's proof of the essential elements of the charge.

II.

Appellant asserts that his sentence for malicious destruction of property merges into his sentence for first-degree arson, under either the required elements test or the rule of lenity.[11] The State disagrees, arguing that each crime includes distinct elements and separate sentences are permitted.

Merger "derives from the protections afforded by the Double Jeopardy Clause" of the Fifth Amendment to the United States Constitution. *State v. Frazier*, 469 Md. 627, 641 (2020) (quoting *Brooks v. State*, 439 Md. 698, 737 (2014)). Merger protects "a convicted defendant from multiple punishments for the same offense." *Id.* "Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the

[11] Although appellant did not argue below that his sentences should merge, pursuant to Md. Rule 4-345(a), a court "may correct an illegal sentence at any time." We consider *de novo* whether the trial court's determination regarding sentencing was legally correct. *Clark v. State*, 246 Md. App. 123, 131 (2020), *aff'd*, 473 Md. 607 (2021); *accord State v. Crawley*, 455 Md. 52, 66 (2017). And, if merger is required, it is only as to the sentence, not the underlying conviction. *See Twigg v. State*, 447 Md. 1, 19 n.10 (2016).

rule of lenity; and (3) 'the principle of fundamental fairness.'"[12] *Carroll v. State*, 428 Md. 679, 693-94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222-23 (1990)).

A.

As for the first ground, our Supreme Court explained that merger is required "when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Frazier*, 469 Md. at 641 (citation omitted). There is no dispute that the two convictions at issue are based on the same act of burning the townhome. Turning then to the required elements, "we examine the elements of each offense and determine 'whether each provision requires proof of a fact which the other does not[.]'" *Paige v. State*, 222 Md. App. 190, 206 (2015) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In other words:

> If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Twigg v. State, 447 Md. 1, 13 (2016) (quoting *Nightingale v. State*, 312 Md. 699, 703 (1988)).

The crime of first-degree arson provides that "[a] person may not willfully and maliciously set fire to or burn: (1) a dwelling; or (2) a structure in or on which an individual who is not a participant is present." CR § 6-102(a). And it is not a defense that "the person

[12] Appellant does not assert that merger is required under fundamental fairness principles. *See generally, Clark*, 246 Md. App. at 139 (observing that, unlike other merger theories, an argument under fundamental fairness must be preserved).

owns the property." CR § 6-102(c). The crime of malicious destruction of property provides that "[a] person may not willfully and maliciously destroy, injure, or deface the real or personal property of another." CR § 6-301(a).

Although both crimes require willful and malicious intent, the intent to burn is different from the intent to destroy. *See, e.g.*, *Christian v. State*, 65 Md. App. 303, 309 (1985) (distinguishing the intent to commit the criminal acts with respect to malicious destruction and burglary). First-degree arson requires the burning of a dwelling or structure, whereas malicious destruction of property does not require that the act of destruction be incendiary in nature. Moreover, malicious destruction of property requires that the property belong to "another" whereas first-degree arson is not so limited. Because each crime has elements that the other does not, we are persuaded that the offenses do not merge under the required elements test.

B.

Appellant also asks us to consider the rule of lenity. "[T]he rule of lenity applies where both offenses are statutory in nature or where one offense is statutory and the other is a derivative of common law." *Khalifa v. State*, 382 Md. 400, 434 (2004). The rule of lenity is applicable "only when the [sentencing] statute is ambiguous as to whether the Legislature intended to impose multiple punishments" for violations of two or more statutes arising out of a single act or transaction. *Alexis v. State*, 437 Md. 457, 485 (2014). "[I]f 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*, 321 Md. at 222 (citations omitted).

The State argues that merger under the rule of lenity is not required because first-degree arson "is a crime against habitation," citing *Holbrook v. State*, 364 Md. 354, 372 (2001), whereas malicious destruction is a crime against property. Notably, the *Holbrook* Court was comparing first-degree arson to reckless endangerment, "a crime against persons, not habitation or property." *Id.* While arson is conceptualized as a crime against habitation, the offense is *directed* against property and has been treated that way for merger purposes. *See, e.g.*, *Price v. State*, 261 Md. 573, 580 (1971) (describing arson as an offense "directed against property" in comparison to murder, a crime against an individual); *Pryor v. State*, 195 Md. App. 311, 339-40 (2010) (describing first-degree arson as "a crime against property" in comparison to first-degree assault, a crime against a person).

Next, the State asserts that merger is not required because the offenses are located under different subtitles, and the punishments and penalties are different. First-degree arson, a felony punishable by up to 30 years' imprisonment, is included in a subtitle concerned with arson and burning, *see* CR §§ 6-101 to 6-111, while malicious destruction, a misdemeanor punishable by up to 60 days or three years, depending on the value of the property damaged, is included among offenses that also include interference with public utilities and alteration of manufacturer's serial numbers. *See* CR §§ 6-301 to 6-307. Although the crimes are in different subtitles, they are both located under the overall title for crimes against property. In addition, although the punishments and penalties are different, we are not persuaded that the difference is determinative, especially where, under the rule of lenity, the offense carrying the lesser maximum penalty merges into the offense

carrying the greater maximum penalty in any event. *See Miles v. State*, 349 Md. 215, 229 (1998).

"[W]here there is no indication that the [L]egislature intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other." *Abeokuto v. State*, 391 Md. 289, 356 (2006) (quoting *McGrath v. State*, 356 Md. 20, 25 (1999)). There is no dispute that the malicious destruction caused in this case was entirely incidental to the burning. Based on the circumstances, we are unable to conclude that the Legislature intended to punish first-degree arson and malicious destruction of property, based on the same conduct, as distinct offenses. We shall give appellant "the benefit of the doubt" and vacate his sentence for malicious destruction of property. *Monoker*, 321 Md. at 222.

CONVICTION FOR RECKLESS ENDANGERMENT AFFIRMED; SENTENCE FOR MALICIOUS DESTRUCTION OF PROPERTY VACATED. COSTS TO BE ASSESSED ONE HALF TO APPELLANT AND ONE HALF TO WASHINGTON COUNTY.