UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0785

September Term, 2015

ANTONIO B. JACKSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 19, 2016

In 1993, a jury in the Circuit Court for Baltimore City convicted Antonio Jackson, appellant, of first-degree murder, attempted second-degree murder, two counts of use of a handgun in the commission of a felony, and two counts of wearing, carrying, or transporting a handgun. Appellant was sentenced on all counts. Approximately 20 years later, appellant filed a motion to correct an illegal sentence which was denied. In this appeal, appellant presents three questions for our review, which we rephrase:[1]

1. Did the circuit court err in denying appellant's motion to correct an illegal sentence on the grounds that his murder convictions should have merged for sentencing purposes with his convictions for use of a handgun in the commission of a felony?

2. Did the circuit court err in denying appellant's motion to correct an illegal sentence on the grounds that the jury was not properly polled or hearkened?

3. Did the circuit court err in denying appellant's motion to correct an illegal sentence on the grounds that his convictions for wearing, carrying, or transporting a handgun should have merged for sentencing

[1] Appellant phrased the questions as:

1. "The circuit court abused its discretion in denying Appellant's motion to correct an illegal sentence without a hearing based upon claims that his conviction for first degree murder and attempted second degree murder merge with his conviction for use of a handgun in commission of a felony or crime of violence under the required evidence test."

2. "The circuit court abused its discretion in denying Appellant's motion to correct an illegal sentence without a hearing based upon his claims that the jury was neither properly polled or the verdict hearkened."

3. "The circuit court abused its discretion in denying Appellant's motion to correct an illegal sentence without a hearing based upon his claims that the sentence for wear, carry, or transport a handgun merge with the offense of use of a handgun in commission of a felony or crime of violence."

purposes with his convictions for use of a handgun in the commission of a felony?

For the following reasons, we answer questions 1 and 2 in the negative. As to question 3, we find the record insufficient to make a determination, so we remand the case to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

Appellant was tried before a jury on several charges stemming from his involvement in a shooting of two individuals. Following deliberations, the jury announced its verdict:

THE CLERK:	Members of the jury, have you agreed upon a verdict? Madame Forelady, will you please stand? [Appellant], will you please stand . . . . Under indictment 1931061007, Count One, unlawfully did commit first-degree murder of Wilson Staples, your answer?
[FORELADY]:	Jury finds guilty.
THE CLERK:	On Count Two, unlawfully did use a handgun in commission of a crime of violence, your answer?
[FORELADY]:	Jury finds guilty.
THE CLERK:	Count Three, unlawfully did wear, carry, transport a handgun?
[FORELADY]:	Guilty.
THE CLERK:	Under indictment 193106008, Count One, unlawfully did attempt to kill and murder in the second-degree Andre Ford?
[FORELADY]:	Jury finds guilty.
THE CLERK:	Under Count Two . . . unlawfully did . . . wear, carry or transport a handgun?

[FORELADY]: Jury finds guilty.

THE CLERK: Count Five, unlawfully did use a handgun in commission [of] a crime of violence?

[FORELADY]: Guilty.

The jury was then polled, at which time the clerk asked: "You have heard the verdict of your forelady, is your verdict the same?"[2] Beginning with Juror Number 2 and ending with Juror Number 12, each juror responded: "Yes" or "It is." The forelady was not polled. Finally, the verdict was hearkened:

THE CLERK: Thank you, hearken to the verdict as the court has recorded it. You say under Indictment 193106007, Count One, Guilty; Count Two Guilty; Count Three, Guilty; Under Indictment 193106008, Count One Guilty; Count Four Guilty; Count Five Guilty and so say you all?

Thank you.

STANDARD OF REVIEW

Maryland Rule 4-345(a) allows a trial court to "correct an illegal sentence at any time." A sentence is considered "illegal" if the sentence itself is not permitted by law, such as when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]" *Chaney v. State,* 397 Md. 460, 466 (2007). "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule."

[2] For several of the jurors, the clerk phrased the question as: "You've heard the verdict, is your verdict the same?"

Pair v. State, 202 Md. App. 617, 624 (2011) (citations omitted). Generally, we review the legality of a defendant's sentence under a *de novo* standard of review. *See Blickenstaff v. State*, 393 Md. 680, 683 (2006).

DISCUSSION

I.

Appellant first argues that the charges of first-degree murder and attempted second-degree murder were "lesser-included offenses" to their respective charges of use of a handgun in the commission of a felony. Appellant maintains that, under the Double Jeopardy Clause, his convictions for first-degree murder and attempted second-degree murder should have merged for sentencing purposes with his convictions for use of a handgun in the commission of a felony. We disagree.

"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." *Brooks v. State*, 439 Md. 698, 737 (2014) (citation omitted). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* "[T]he general rule for determining whether two criminal violations . . . should be deemed the same . . . is the so-called 'same evidence' or 'required evidence' test[.]" *Whack v. State*, 288 Md. 137, 141 (1980) (citations omitted). Under this test, two criminal violations are separate, and thus multiple punishments are permitted, when each violation "requires proof of an additional fact which the other does not[.]" *Id.* at 142 (internal citations omitted). On the other hand, if one of the offenses contains all of the

elements of the other offense, that is, if only one of the offenses has a distinct element, the two offenses are deemed to be the same under the required evidence test and multiple punishments are prohibited. *Id*.

This does not mean, however, that a defendant convicted of two offenses deemed to be the same under the required evidence test is automatically entitled to only one punishment. "The imposition of multiple punishment . . . is often particularly dependent upon the intent of the Legislature." *Id.* at 143. As a result, "even though two offenses may be deemed the same under the required evidence test, separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent." *Id*. (footnote omitted).

At the time appellant committed the subject crimes, Section 36B of Article 27 of the Maryland Annotated Code proscribed the use of a handgun in the commission of a felony or crime of violence. Under the statute, the Legislature clearly intended to impose a separate penalty for such an offense:

> Any person who shall use a handgun in the commission of any felony or any crime of violence as defined in § 441 of this article, shall be guilty of a separate misdemeanor and on conviction thereof shall, **in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor**, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years.

Art. 27, § 36B (emphasis added); *see also Whack,* 288 Md. at 147-48.

In *Whack,* the Court of Appeals established that the language of the statute "confirms that there was no intent to delete by implication penalties provided by other

statutes, and confirms that the penalties set forth in the handgun act were intended to be imposed, in addition to the penalties under other applicable statutes." *Whack,* 288 Md. at 147. Moreover, the Court noted that a review of the legislative history "discloses that the Legislature viewed handguns as a particularly aggravating problem, and one not effectively controlled by the laws applicable to weapons generally." *Id.* When viewed in conjunction with the plain language of the statute, "[n]othing could more plainly show an intent to impose whatever punishment is provided for the felony plus the punishment set forth in § 36B(d)." *Id.* at 148.

In the present case, appellant was convicted of first-degree murder and attempted second-degree murder, both of which qualify as "any felony" under Art. 27, § 36B(d). Therefore, the trial court did not err in failing to merge appellant's convictions for sentencing purposes, as a separate penalty for the handgun offense was required under the statute. Accordingly, appellant's sentences for first-degree murder and attempted second-degree murder were legal, and the circuit court did not err in denying appellant's motion to correct an illegal sentence on these grounds.

Although appellant acknowledges the existence of the above exception to the general bar on multiple punishments, appellant contends that it is applicable "only if the imposing punishment is for two or more separate statutory offenses." Appellant concludes, therefore, that this exception was inapplicable in his case because "both first-degree and attempted second-degree murder [remain] common law offenses."

Appellant is mistaken. First, appellant's contention that separate punishments are permissible only for statutory offenses is a misquote of footnote 4 of the Court of Appeals' holding in *Newton v. State,* 280 Md. 260 (1977).[3] The footnote actually reads, in pertinent part: "[T]he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test." *Newton,* 280 Md. at 274 n.4 (citations omitted). Clearly, there is nothing in the actual footnote to suggest that a court can impose multiple punishments *only* when two or more separate statutory offenses are involved. *Id.*

In fact, the Court of Appeals cited this footnote in support of its holding in *Whack,* which, as discussed above, directly refutes appellant's argument. *Whack,* 288 Md. at 143. In doing so, at no time did the Court indicate that successive punishments were barred when a common law offense was involved. On the contrary, the Court held that the offense at issue in that case, armed robbery, should not merge with the related handgun offense, despite the fact that, as the Court recognized, armed robbery was a common law offense. *Id.* at 140. In short, appellant's contention that merger is inappropriate in cases involving a common law offense is based on an erroneous reading of *Newton* and is not supported by any case law. *See, e.g., id.; Garner v. State,* 442 Md.

[3] Appellant misquotes the footnote as follows: "[E]ven if offenses are deemed the same under the required evidence test, the Legislature may punish certain conduct more severely if particular aggravating circumstances are present but only if the imposing punishment is for two or more separate statutory offenses."

226, 249 (2015) (attempted first-degree murder conviction did not merge with handgun conviction); *State v. Lancaster,* 332 Md. 385, 414 (1993) ("The exception noted in *Newton* . . . has been found applicable by this Court only in one circumstance, namely **where one of the offenses was proscribed by the Handgun Act of 1972.**") (Emphasis added).

Appellant attempts to discount the Court of Appeals' holding in *Whack* by arguing that the Court's ruling "has been abrogated by judicial implications." Appellant avers that subsequent opinions by the Court of Appeals, namely *State v. Ferrell,* 313 Md. 291 (1988), and *Ferrell v. State,* 318 Md. 235 (1990), held that "the offense of armed robbery merge into the greater offense of use of a handgun in the commission of a felony or crime of violence."

Appellant's reliance on those cases is misplaced, as they were decided in the context of successive prosecutions, not multiple punishments. *See, e.g., Ferrell v. State,* 318 Md. at 237 ("This criminal case involves the applicability of the doctrine of collateral estoppel . . . **where the defendant was subsequently retried**[.]") (Emphasis added); *State v. Ferrell,* 313 Md. at 292 ("The issue in this case is **whether the defendant's prosecution . . . is barred**, under double jeopardy principles, by the defendant's prior conviction[.]") (Emphasis added).

As we explained in *Fields v. State,* 96 Md. App. 722, 725 (1993), "[t]he broad umbrella term we call 'double jeopardy' today embraces . . . four distinct species[.]" These include: "1) classic former jeopardy, arising out of the common law pleas at bar of

autrefois convict and *autrefois acquit*; 2) simultaneous jeopardy, involving largely issues of merger and multiple punishment . . . ; 3) the problem of retrial following mistrial; and 4) collateral estoppel." *Id.* As a result, "[w]hen dealing with a generic category . . . such as double jeopardy, it is indispensable at the outset to identify the particular species of double jeopardy being invoked . . . . Each carries with it a different history; each serves a different purpose; each has different implementing rules." *Id*. Accordingly, the Court of Appeals' holdings in the two *Ferrell* cases are inapplicable in the context of multiple punishments. Instead, the instant case is governed by the double jeopardy principles as outlined in *Whack, supra,* which remain good law.

Finally, appellant insists that, if all else fails, we should apply the rule of lenity because "it cannot be legally determined that the Legislature intended to authorize the imposition of an enhanced punishment for a conviction of first-degree murder and a second enhanced punishment for those crimes" when a handgun is involved. Without belaboring the point, we decline appellant's invitation. "The rule of lenity . . . is a maxim of statutory construction which 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) (citations omitted). As noted above, there is no ambiguity in the handgun statute – the legislature clearly and expressly intended to create a distinct statutory punishment separate from the felony or crime of violence that serves as the basis for the handgun conviction. Consequently, applying the rule of lenity in this context would be inapt.

II.

Appellant's second contention is that the jury was neither polled nor hearkened which rendered the verdict defective. Specifically, appellant argues that the jury was improperly polled because the clerk failed to poll the forelady. Appellant also argues that the verdict was improperly hearkened because there was no verbal response from the jury following the hearkening. Appellant, therefore, concludes that the verdicts were improperly recorded and any sentence imposed was illegal. We disagree.

"By its Declaration of Rights, common law, and procedural rules, Maryland continues an English tradition dating from the Middle Ages in requiring that criminal jury verdicts be unanimous." *Lattisaw v. State,* 329 Md. 339, 344 (1993) (citation omitted). "A jury verdict that is not unanimous is defective and will not stand." *Caldwell v. State,* 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636 (citations omitted). "This potential incongruity in the verdict usually results from the conduct, verbal or otherwise, of one of the jurors that signals to the court that some ambiguity exists – *i.e.* there was something short of unanimous agreement among the jurors." *Colvin v. State,* 226 Md. App. 131, 141 (2015) (citation omitted), *cert. granted*, ___ Md. ___, No. 598, Sept. Term 2015 (March 25, 2016).

As part of its unanimity requirement, the Maryland Rules specify that the verdict "shall be returned in open court." *Lattisaw,* 329 Md. at 345 (internal citations and footnote omitted). This involves three distinct procedures: (1) the foreman, speaking for

the jury, states the verdict on the record; (2) on request by the defendant, the jury is polled, and each juror announces his verdict on the record; and (3) the jury is hearkened. *Jones v. State,* 384 Md. 669, 682-84 (2005). "Whether a verdict satisfies the unanimous consent requirement is a question . . . we review *de novo*, considering the totality of the circumstances." *Caldwell,* 164 Md. App. at 643 (citations omitted).

Polling of the jury is governed by Md. Rule 4-327(e), which states, in part: "On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict but before it is discharged." *Id.* The right to polling, however, may be waived by a defendant, "either affirmatively or by inaction." *Jones v. State,* 173 Md. App. 430, 454 (2007). Moreover, any alleged deficiencies in the polling process must be raised at the time of trial. *See Alford v. State,* 202 Md. App. 582, 616 (2011) (issue of deficient polling was waived after defendant failed to object to juror's inaudible response).

In the present case, appellant did not object, either when the jury was polled or when the verdict was accepted by the court. Consequently, this issue was not preserved for our review.

Even so, the clerk's alleged failure to poll the forelady did not render the polling deficient. In fact, we rejected an identical argument in *Colvin, supra.* In that case, the foreperson, speaking for the jury, returned a verdict of "guilty" on several charges. *Colvin,* 226 Md. App. at 136-37. The jury was then polled, and the remaining jurors, but not the foreperson, were asked if their verdict was the same. *Id.* On appeal, the

defendant argued that the verdict was not unanimous because the foreperson, in announcing the verdict, was speaking for the jury panel and not for herself personally. *Id.* at 141. The defendant maintained that the clerk should have polled the foreperson so that she could state whether her verdict was the same as the jury's. *Id.*

We ultimately held that the clerk's failure to poll the foreperson was not fatal to the verdict. *Id*. at 147-48. Although we recognized that it would have been prudent for the clerk to poll the foreperson, we nevertheless concluded that, absent some evidence to indicate that the foreperson's announced verdict was not her own, "polling the jurors and not expressly including the foreperson is permissible and constitutes a unanimous verdict." *Id.* at 145. Moreover, in distinguishing that case from cases in which our courts have found a lack of unanimity following a poll, we noted:

> [T]here was a compelling reason [in those cases] to distinguish the verdict as announced by the foreperson from the verdict given individually by the foreperson or another juror upon polling; *i.e.* the foreperson expressed his or her reservations with the verdict – indicating clearly that the verdict just announced was not his or her own. *See* [*Lattisaw*, 329 Md. at 341, 343-44] (juror responding, "Yes with reluctance," when asked if her verdict was the same as the verdict of the jury as a whole); [*Smith v. State*, 299 Md. 158, 178 (1984)] (foreperson, when polled for the first time, stating uncertainly, "that the verdicts as she announced them were her verdicts," and when polled a second time, declaring that her verdict was not the same as the panel's verdict); [*Rice v. State*, 124 Md. App. 218, 223 (1998)] (foreperson announcing the verdict of the jury as "guilty with reservations"); [*Fowlkes v. State*, 53 Md. App. 39, 40 (1982)] (foreperson announcing the verdict as, "They say guilty" and indicating uncertainty as to whether she was required to vote on the verdict)[.]

Id. at 142.

Likewise, the verdict in the instant case is devoid of any indication that the forelady's verdict was reluctantly given or not her own. When the clerk asked the forelady for the jury's verdict as to each charge, the forelady responded with either "Jury finds guilty" or "Guilty." Then, when the clerk polled the remaining jurors, she asked if their verdict was the same as the verdict "of your forelady," and at no time did the forelady indicate that the clerk's characterization of the verdict in this way was erroneous. Finally, the verdict was hearkened, and again the forelady gave no indication of her averseness to the verdict as stated. Accordingly, we hold that, based on the totality of the circumstances, the verdict was unanimous.

Lastly, we find no error in the manner in which the clerk hearkened the verdict. "Essentially, hearkening requires the trial court to inquire in open court, before the jurors are discharged, whether the jury agrees with the verdict just announced by the foreperson." *Brightwell v. State,* 223 Md. App. 481, 491 (2015) (internal citations omitted). As part of this process, "it is the duty of the clerk to direct the jury to 'hearken to their verdict as the court hath recorded it, and if none of the jury **express their dissent** their verdict stands as recorded[.]" *Id.* (internal citations omitted) (emphasis added).

In the present case, although we agree with appellant that the transcript did not reflect any verbal response from the jurors, we disagree that this fact is fatal. As noted above, the verdict was repeated to the jury as it was announced by the forelady and recorded by the clerk. At no time did any of the jurors express their dissent to the verdict as recorded. Moreover, at no time did the court, the clerk, or defense counsel indicate

that the jurors expressed any disagreement with the verdict as hearkened by the clerk. *Id.* at 492 ("Even though the transcript does not reflect a response from the jury, it is clear from the subsequent actions of the trial court, as well as the silence of defense counsel, that the jury either expressed their unanimous agreement in a non-verbal way or failed to indicate any dissent[.]"). Accordingly, we hold that there was no error in the clerk's hearkening of the verdict.

III.

Appellant's final contention is that his convictions for wearing, carrying, or transporting a handgun should have merged for sentencing purposes with his convictions for use of a handgun in the commission of a felony. The State concedes that such convictions generally merge for sentencing purposes, but only when they are based upon the same acts. The State notes that appellant has "failed to provide a sufficient record in order to enable this Court or the State to determine whether those sentences are 'based upon the same acts.'" Because the onus for providing an adequate record rests with appellant, the State argues that we should decline to consider appellant's claim.

Although Art. 27, § 36B(d) expressly allows multiple punishments for both use of a handgun and the underlying felony or crime of violence, no such language was included in the statute prohibiting the wearing, carrying, or transporting of a handgun. *See* Md. Code (2002), Criminal Law ("CL") §§ 4-203 and 4-204.[4] Consequently, "[i]t is well

[4] CL § 4-203(a) (previously codified as Art. 27, § 36B(b)) states, in pertinent part, that "a person may not . . . wear, carry, or transport a handgun, whether concealed or open, on or about the person[.]"

settled that when convictions for use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun are based upon the same acts, separate sentences for those convictions will not stand." *Holmes v. State*, 209 Md. App. 427, 456 (2013) (citations omitted). In such instances, the doctrine of merger by legislative intent (the rule of lenity) provides that the punishment for wearing, carrying, or transporting a handgun should merge into the offense of use of a handgun in the commission of a felony. *Hunt v. State*, 312 Md. 494, 510 (1988). If, however, the two offenses do not arise out of the same criminal conduct, then the rule of lenity is inapplicable and a defendant may be convicted and sentenced for both offenses. *See Wiredu v. State*, 222 Md. App. 212, 220 (2015).

In the present case, we are unable to make a determination whether appellant's convictions on these charges should merge because, as the State correctly notes, appellant has not furnished an adequate record. Aside from appellant's brief, the only document contained in the record from which we may glean the necessary facts is appellant's motion to correct an illegal sentence.[5] Unfortunately, neither document provides much factual information beyond the fact that appellant was convicted following the shooting of two individuals. Consequently, we have no way of discerning whether the two offenses resulted from the same criminal conduct, namely the shooting, or whether they were based on separate criminal acts. If they were based on the same criminal conduct,

[5] Appellant's motion to correct an illegal sentence was denied by the court without a hearing or written opinion.

then the convictions should have merged for sentencing purposes; if not, then the sentences should stand.

With that being said, we do not find that dismissal is appropriate, despite the fact that appellant was responsible for furnishing an adequate record. *See* Md. Rule 8-501(c). Not only is appellant *pro se,* but a factual finding in his favor would render his sentence for wearing, carrying, and transporting a handgun clearly illegal under the case law cited above. *See In re Joshua W.,* 94 Md. App. 486, 491 (1993) (dismissal of an appeal for nonconformity with the Maryland Rules is discretionary and should be exercised in light of the relevant circumstances). Therefore, we remand appellant's case to the circuit court for the limited purpose of engaging in the necessary factual inquiry to render a finding on this issue that is consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED, IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.