UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1474

September Term, 2015

RONALD W. HAMMOND

v.

STATE OF MARYLAND

Meredith,
Leahy,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: June 29, 2016

Following a one-day jury trial in the Circuit Court for Baltimore City on July 23, 2015, Ronald Hammond, appellant, was convicted of offenses arising out of the theft of a motor vehicle. Appellant was convicted of motor vehicle theft in violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 7-105 (Count 1); unauthorized removal of a motor vehicle, CL § 7-203 (Count 2); two counts of fleeing and eluding law enforcement, Maryland Code (1977, 2012 Repl. Vol.), Transportation Article ("TA"), § 21-904 (Counts 10 and 11); and several traffic offenses.[1] The trial judge sentenced appellant to four years' imprisonment for motor vehicle theft, and three years to be served concurrently on the count of unauthorized removal of a motor vehicle. On July 28, 2015, appellant filed a motion for a new trial, asserting that the State failed to disclose a statement made by appellant at the time of his arrest. On September 11, 2015, following a hearing, the trial judge denied the motion for a new trial. Appellant noted this appeal.

QUESTIONS PRESENTED

Appellant presents five questions for our review:

> I. Did the court err in striking two jurors for cause when both jurors stated that they could be fair and impartial?
>
> II. Did the trial court abuse its discretion in permitting the [S]tate to argue a statement by Mr. Hammond that was not in evidence?
>
> III. Did the court err in denying Mr. Hammond's motion for a new trial based on *Brady* and discovery violations?

[1] Appellant was convicted of two counts of failure to stop at a steady signal; driving in the wrong direction on a one-way road; failure to stop at a stop sign; failure to signal; driving without a license; and reckless driving. The court imposed a $1 suspended fine for each of these traffic violations.

IV. Must Mr. Hammond's sentence for unauthorized use be vacated?

V. Must one of Mr. Hammond's convictions for fleeing and eluding be vacated?

We answer "no" to questions one, two, and three. With respect to questions four and five, we shall vacate the sentences imposed on Counts 2 and 11.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of January 15, 2015, Amy Bopp notified the police that her Dodge camper had been broken into while it was parked on the street in front of her home. The ignition and steering column were damaged and personal items were missing. Bopp contacted the Baltimore City Police Department and her insurance carrier. A police report was taken and her insurance company declared the camper a total loss.

Having lost the use of her camper, Bopp's son drove her to Catonsville where she retrieved another vehicle she owned, a white 1991 Mazda Miata. When she returned to her home, Bopp parked the Mazda on the opposite side of the street from her house. Later that day, she discovered that the Mazda was missing. She had not given anyone permission to use her vehicle and did not see who took it. She reported the apparent theft to the police, who issued a police report.

The following day, when Bopp returned home from work, she found that the Miata had been returned, but was in poor physical condition. At trial, Bopp testified that the Miata was "returned but damaged, covered with mud, door jarred, tires jammed and I was like

[‘]it’s back but it’s all damaged.[’]” She notified the police again, who returned and issued another police report.

Later that night, at approximately 2:00 a.m., Bopp decided to check on the Mazda. She testified: “I thought I’d just look out the window and check,” and “I said, [‘]I can’t believe this.[’]” The Mazda was gone. Bopp testified that, while the police were taking a report from her that night, one of the officers said: “‘I think we got him,’” whereupon Bopp walked approximately two blocks from her house and saw the Mazda “[m]ore smashed up” than before.

Officer John Ryce, III, was assigned to patrol the vicinity where the thefts occurred, and took the initial police reports from Bopp. At trial, Officer Ryce testified that, on January 16, 2015, he returned to Bopp’s house, having received another report of a stolen vehicle. Officer Ryce reported a description of the stolen vehicle over his police radio. Shortly thereafter, Officer Charles Smith, III, responded by radio that he observed a vehicle matching the description of Bopp’s Mazda in the parking lot of the Horseshoe Casino in Baltimore.

At trial, Officer Ryce testified that, after he reported the Mazda Miata stolen, his police vehicle was parked at the intersection of Annapolis Road and Manokin Street. Ryce testified that he observed a white Mazda Miata exit Route 295 and travel toward him “at a very high rate of speed.” Ryce pursued the Miata along Annapolis Road, while another police officer followed approximately 100 feet behind Officer Ryce’s vehicle. Officer Ryce

testified that, when the Mazda attempted to turn right onto Waterview Avenue at a high rate of speed, the driver "appeared to lose control of the vehicle, spun, did a 180, [and] jumped the curve [sic] onto the opposite side of Annapolis Road." After proceeding on Annapolis Road, the vehicle made several turns and proceeded the wrong way down Sidney Avenue, a one-way street. Officer Ryce testified that he slowed his vehicle out of a concern for safety, which caused him to lose sight of the stolen Miata. Finally, at the intersection of Kent and Cedley Streets, the driver "bailed out" of the vehicle, and fled on foot. Officer Ryce observed "the flash of the person" to his left and "immediately took off down the street" in his police cruiser. Officer Ryce then continued his pursuit on foot down an alley. Ryce entered the fenced-in backyard of a house, where he found appellant hiding beneath a porch. Appellant was placed under arrest. At trial, Officer Ryce identified appellant as the suspect.

Ryce testified that, when he handcuffed appellant, appellant said: "[L]et me go, Ryce." Regarding appellant's statement, the following exchange occurred at trial during appellant's cross-examination of Officer Ryce:

> [COUNSEL FOR APPELLANT]: All right. And when you grabbed him, did you see — when you grabbed him, he said to you, "You're locking me up for a blunt, Ryce?"
>
> [OFFICER RYCE]: **No. He said, "Come on Ryce. Let me go."**

(Emphasis added.)

On redirect examination, the following dialogue occurred:

> Q. [BY PROSECUTOR]: And you indicated that the defendant said, "Come on Ryce, let me go." Are you familiar with the defendant?

A. [BY OFFICER RYCE]: Yes.

Q. And to your knowledge, he is familiar with you?

A. Absolutely.

Q. And do you know the defendant to live in that area where you apprehended him?

A. In the West[p]ort area.

Officer Smith also testified at trial. At 2:00 a.m. on January 16, 2015, Officer Smith was working overtime in the parking lot of the Horseshoe Casino. He testified that, shortly after hearing a report on his police radio of a stolen white 1991 Mazda Miata, he observed a vehicle matching that description in his rearview mirror. He testified that the vehicle "veered around[] stopped traffic at the light, and proceeded onto Russell Street and ma[d]e a right turn." These maneuvers indicated to Officer Smith that "it was a stolen vehicle and it was trying to flee." Officer Smith described the weather that night as "sleeting outside and . . . The roads were very slick." Smith pursued the Mazda in his vehicle. Smith testified that, after the suspect exited the Mazda at Kent and Cedley Streets, the suspect fled on foot. Officer Smith pursued the suspect on foot for approximately four city blocks. He testified that the area was "dark but [the] street lights were lit," and he described the suspect as a black male with short hair, with a height of approximately 5 feet, 5 or 6 inches. According to Officer Smith, the suspect wore a green rain jacket or trench coat, which he shed during the foot chase. In court, Officer Smith identified appellant as the driver of the vehicle.

Regarding statements made to Officer Ryce by appellant, Officer Smith testified as follows on cross-examination:

> Q. [BY COUNSEL FOR APPELLANT]: You were asked on redirect whether the defendant mentioned a blunt. What, if anything else, did the defendant mention when you were with him?
>
> A. [BY OFFICER SMITH]: The reason he mentioned Officer Ryce was because he asked, he said, "**Ryce, come one [sic] let me go.**"

(Emphasis added.)

Following Officer Smith's testimony and the close of the State's case-in-chief, appellant moved for a judgment of acquittal on all charges. Based on the lack of evidence regarding the monetary value of the 1991 Mazda Miata, the trial judge granted appellant's motion as to the charge of theft between $1,000 to $10,000 (Count 2). The trial judge denied appellant's motion as to the other counts.

Appellant then presented his case, calling Michael McGee, a private investigator, as his only witness. McGee testified about the condition of the alley where appellant was found, and the defense rested. At the close of appellant's case, the trial judge denied appellant's renewed motion for a judgment of acquittal.

Following jury instructions, the State presented its closing argument, during which the prosecutor made the following comments:

> [PROSECUTOR]: Now, ladies and gentlemen of the jury, you may be thinking in your mind, how do you know that the defendant was the one who got out of that car? How could officers – and it was dark. It was sleeting. I mean, maybe the adrenalin[e] was running high. How do we know?

> We know by this. When Officer Ryce apprehended the defendant, the defendant didn't say, ["][Y]ou have the wrong person.["] He said, ["]Ryce, come on, let me go.["] **Let me get away with this one.**

(Emphasis added.)

Counsel for appellant objected, but the trial judge overruled appellant's objection, stating: "It's argument."

Appellant made no request for a curative instruction, nor did he make any other motions at that time. In appellant's closing argument, the defense responded to the prosecutor's argument as follows:

> And the State said something in their closing. They said that my client said, ["][C]ome on Ryce, don't arrest me. Let me go.["] I never, he said, what she say? ["]He said, ['][L]et me get away with this one.['"] **He never said ["][L]et me get away with this one.["] Nobody ever testified that he said ["]Let me get away with this one.["]** Officer Ryce didn't say he said ["][L]et me get away with this one.["] He just said ["]Officer Ryce come on let me go.["] **That does not say, ["]I'm guilty of this crime, let me get away with a crime.["]** He's saying ["]Officer Ryce, you've got your knee on my back, man. Let me go.["]

(Emphasis added.)

Appellant also asserts in his brief that, after the jury returned its verdict, when counsel for appellant was leaving the courthouse, the prosecutor related to defense counsel a previously undisclosed statement by appellant that Officer Ryce had disclosed to the prosecutor moments before. Officer Ryce disclosed to the prosecutor that appellant stated at the time of his arrest: "I did not steal the car, that person who had stolen the car was still at the casino, and that I was just taking it back." Appellant filed a motion for a new trial,

asserting that the prosecutor violated Maryland Rule 4-262(d)(1), which requires the State's Attorney to disclose exculpatory material to the defense.

After a hearing, the trial judge denied appellant's motion for a new trial in an order entered on September 10, 2015. This appeal followed.

DISCUSSION

I. Jury Selection

Appellant contends that the trial judge abused his discretion in striking two jurors without finding on the record that those jurors could not be fair and impartial, and in the face of those potential jurors' statements to the contrary. It appears that Jurors Nos. 6029 and 6094 were struck because they had relatives who were incarcerated.

"[T]he trial judge is charged with the impaneling of the jury and must determine, in the final analysis, the fitness of the individual venire persons." *Dingle v. State*, 361 Md. 1, 8 (2000); *see also State v. Logan*, 394 Md. 378, 396–97 (2006) ("[T]he trial court has very wide discretion in conducting voir dire, and the court's rulings will not be disturbed on appeal unless it constitutes an abuse of discretion."); *Hunt v. State*, 321 Md. 387, 415 (1990) ("The trial judge's factual determinations about the extent of a juror's bias must be given deference.").

Juror No. 6094 responded affirmatively to a question seeking to identify those potential jurors who were the victims of crime, or who had family members who had been convicted of a crime. The following dialogue occurred:

THE COURT: What relative?

THE JUROR: My son.

THE COURT: Your son. And what happened to him?

THE JUROR: He was convicted of murder.

THE COURT: He was convicted of murder?

THE JUROR: Yes.

THE COURT: All right.

THE JUROR: And an uncle.

THE COURT: Well is your son serving time now?

THE JUROR: Yes, sir.

THE COURT: Do you think he got a fair trial? Not sure.

THE JUROR: Not sure.

THE COURT: All right. Do you think you could give this gentleman and the State a fair trial in this case if you had to?

THE JUROR: I believe so.

* * *

THE COURT: Yeah. Do you want us to have her stricken?

[PROSECUTOR] Yes.

THE COURT: We've got enough.

[COUNSEL FOR APPELLANT]: I'm sorry. You want to have her stricken for what reason?

[PROSECUTOR]: She'd agree that she – even though she could –

THE COURT: She's got a relative serving a life sentence.

[COUNSEL FOR APPELLANT]: She also said she could be fair so I would object.

THE COURT: **I know she did but I don't need her. We don't need her. I'm going to strike her.**

(Emphasis added.)

The following dialogue occurred when Juror No. 6029 approached the bench:

THE COURT: Member of your family been a victim or convicted of something.

THE JUROR: Convicted

THE COURT: (Inaudible)?

THE JUROR: Uncle.

THE COURT: And what was he convicted of?

THE JUROR: Murder.

THE COURT: Did you attend his trial?

THE JUROR: Yes.

THE COURT: Do you know if he got a fair trial?

THE JUROR: Well he was sentenced to two life sentences but he came (inaudible).

THE COURT: Okay. Do you think you could be fair in judging this case?

THE JUROR: Yes.

Later, the record reflects the following exchange:

[PROSECUTOR]: The State would like to strike Juror No. 6029.

(Note: Papers being shuffled directly overtop the microphone while at the bench.)

THE COURT: Okay. I'm going to strike. Jackson?

[PROSECUTOR]: Yes.

[COUNSEL FOR APPELLANT]: And, Your Honor, I object. They also said they could be fair and impartial.

THE COURT: **I understand but we don't need him and we've got plenty of jurors.** Okay. So let's go. Four and four.

(Emphasis added.)

In *Wyatt v. Johnson*, 103 Md. App. 250, 263 (1995), we explained:

> There are two situations in which a trial court's exercise of discretion may constitute reversible error. First, a party may allege that the trial judge failed to make an adequate inquiry into the likelihood of bias before electing to strike the juror. *King v. State*, 287 Md. [530,] 537 [1980]; *Stokes v. State*, 72 Md. App. 673, 677, 532 A.2d 189 (1987). Second, a party may allege that there was no reasonable basis from which the court could conclude that the juror was incapable of giving fair consideration to the evidence. *See Stokes*, 72 Md. App. at 677–78, 532 A.2d 189 (holding that the mere exchange of smiles between the juror and appellant, without more, did not amount to a showing of bias).

In contrast to the trial court's cursory inquiry of jurors in *King v. State*, 287 Md. 530, 537 (1980), the trial judge in the present case inquired of each juror whether they were satisfied with the manner in which the courts had treated relatives. The answers did not reveal unqualified satisfaction.

Although Jurors Nos. 6094 and 6029 averred that they could be fair and impartial, "[t]hat . . . does not mean that the court is bound by the answers or is relieved of its responsibility to make the ultimate decision as to the effect of an answer or of a prospective juror's fitness to serve." *Dingle*, *supra*, 361 Md. at 19. Jurors Nos. 6094 and 6029 did have family members serving life sentences, and appellant has cited no case that precludes a trial judge from excusing potential jurors who fall within that category if the judge is concerned about their ability to be fair. And, in *Edmonds v. State*, 372 Md. 314, 333 (2002), the Court of Appeals held that a uniform policy of using a peremptory challenge on jurors who had family members who had been convicted of a crime was not objectionable under *Batson v. Kentucky*, 476 U.S. 79 (1986). Accordingly, we perceive no abuse of discretion in the court's decision to excuse these two prospective jurors. And in any event, there has been no suggestion that these strikes resulted in an objectionable jury being seated. *See Hunt v. State*, 321 Md. 387, 420 (1990) (even if judge abuses discretion in striking a juror for insufficient cause, it is not reversible error if an unobjectionable jury is afterwards obtained).

II. Closing Argument

Appellant contends that the trial court committed reversible error in permitting the State to argue facts not in evidence in its closing argument. Specifically, appellant contends that the trial judge erred in overruling appellant's objection when the prosecutor characterized appellant's comment to the arresting officer as saying: "Let me get away with this one." Appellant asserts that, "by attributing to Mr. Hammond a confession that he did

not make, the prosecutor's argument was an egregious assertion of a fact not in evidence," and the alleged error was prejudicial because "[i]dentity was a critical and fiercely litigated issue."

In response, the State maintains that the prosecutor's argument was permissible rhetoric suggesting one reasonable interpretation of appellant's plea for Office Ryce to "Let me go." The State argues that "[a] fair interpretation of Hammond's comment . . . is that Hammond was asking Officer Ryce to set him free or to not arrest him despite the fact that he had been caught red-handed driving a stolen car and attempting to free from the police . . . ." The State contends that the prosecutor was not arguing that appellant in fact said, "[l]et me get away with this one," but that that is what appellant *meant* when he made the statement that was admitted into evidence: "Come on, Ryce. Let me go." The State argues that there was no error in permitting the prosecutor to argue a "fair and reasonable inference from the evidence." Finally, the State argues that any error was harmless beyond a reasonable doubt.

In *Whack v. State*, 433 Md. 728 (2013), the Court of Appeals explained the limits on the prosecutor's use of rhetorical flourishes in closing argument:

> Closing arguments serve an important purpose at trial. Counsel use that portion of the trial to "sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and "present their respective versions of the case as a whole." *Lee v. State*, 405 Md. 148, 161, 950 A.2d 125 (2008) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Lee*, 405 Md.

> at 162, 950 A.2d 125 (quoting *Herring*, 422 U.S. at 862, 95 S.Ct. 2550). Accordingly, we grant attorneys, including prosecutors, a great deal of leeway in making closing arguments. "**The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.**" *Spain v. State*, 386 Md. 145, 152, 872 A.2d 25 (2005) (quoting *Degren v. State*, 352 Md. 400, 429–30, 722 A.2d 887 (1999)).
>
> This "liberal freedom" has limits, but "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm v. State*, 272 Md. 404, 415, 326 A.2d 707 (1974). Whether a reversal of a conviction based upon improper closing argument is warranted "depends on the facts in each case." *Id*. Generally, the trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument. *Ingram v. State*, 427 Md. 717, 726, 50 A.3d 1127 (2012). "As such, **we do not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party**." *Id*. (citing *Grandison v. State*, 341 Md. 175, 225, 670 A.2d 398 (1995)). **In deciding whether there was an abuse of discretion, we examine whether the jury was actually or likely misled or otherwise "influenced to the prejudice of the accused" by the State's comments**. *Wilhelm*, 272 Md. at 415–16, 326 A.2d 707 (quoting *Reidy v. State*, 8 Md. App. 169, 172, 259 A.2d 66 (1969)). Only where there has been "prejudice to the defendant" will we reverse a conviction. *Rainville v. State*, 328 Md. 398, 408, 614 A.2d 949 (1992) (quoting *State v. Hawkins*, 326 Md. 270, 276, 604 A.2d 489 (1992)).

433 Md. at 742–43 (emphasis added).

Unlike in *Whack, supra*, where the prosecutor misled the jury by mischaracterizing the DNA evidence against the defendant, the prosecutor's argument in this case was a fair comment on the meaning that could reasonably be drawn from the appellant's "let me go" statement that was in evidence before the jury. Accordingly, the trial judge did not abuse his discretion in overruling appellant's objection.

III. Discovery Violation

Appellant contends that the trial judge erred in denying appellant's motion for a new trial. Appellant argues that a new trial was required based upon the State's failure to disclose an exculpatory statement made by appellant. Maryland Rule 4-262(d)(1); *State v. Williams*, 392 Md. 194, 198 (2006); *Brady v. Maryland*, 373 U.S. 83 (1963). In *Argyrou v. State*, 349 Md. 587 (1998), the Court of Appeals explained:

> It may be said that the breadth of the trial court's discretion to grant or deny a new trial is not fixed and immutable, it will expand or contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impression in determining the questions of fairness and justice.

349 Md. at 600.

As noted above, the statement at issue is appellant's belatedly disclosed post-arrest statement to Officer Ryce that "I did not steal the car, that person who had stolen the car was still at the casino, and that I was just taking it back." The statement was allegedly disclosed by Officer Ryce to the prosecutor after the trial. The prosecutor then disclosed the statement to appellant's trial counsel.

In order to fall within the disclosure requirements of *Brady* and its progeny, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Williams, supra*, 392 Md. at 199 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). In the case before us, the

evidence did not furnish grounds for a new trial because appellant's statement is neither favorable to the accused nor material.

Appellant was convicted of, among other offenses, motor vehicle theft and the unauthorized removal of a motor vehicle, as proscribed by CL §§ 7-105(b) and 7-203 respectively. In *In re Landon G.*, 214 Md. App. 483 (2013), a juvenile who was adjudicated involved in the delinquent acts of motor vehicle theft and the unauthorized use of a motor vehicle challenged the sufficiency of the evidence adduced at trial to support his convictions. He contended that the evidence showed that he was merely a passenger in the vehicle, and that he did not know that the car was stolen. We affirmed the trial court's finding that appellant knew the car was stolen, citing evidence before the fact finder that the defendant knew that the driver did not own a car, and that the driver's explanation for how he came to possess the vehicle prompted appellant to ask the driver if the car was stolen. 214 Md. App. at 506. Affirming his conviction for unauthorized use, we explained that "[a] conviction under § 7-203 does not require evidence that the accused was involved in the original taking of the vehicle out of the custody or use of its owner." *Id.* at 512 (citing *Anello v. State*, 201 Md. 164, 167–68 (1952)) ("[P]articipation in the continued use of the car after the original taking" is sufficient to render one guilty of the crime); *accord Johnson v. State*, 2 Md. App. 486, 490 (1967) (stating that: "[I]n order to convict for larceny of use it is not essential to prove that the accused took the property from the owner."). *See also* CL § 7-203(c), providing: "It is not a defense to this section that the person intends to hold or

keep the property for the person's present use and not with the intent of appropriating or converting the property."

Here, appellant's statement that he was returning the car to its true owner is not favorable to appellant because that statement supports a finding that appellant "participat[ed] in the continued use of the car after the original taking." *Anello*, 201 Md. at 167–68. Unlike in *Landon G.*, a case in which the fact finder had before it only circumstantial proof of Landon G.'s knowledge that the car was stolen, the appellant's statement in this case is an admission that he actually knew that the car was stolen. In *Landon G.* we held: "C.L. § 7-105(b) and 7-203(a) proscribe the same conduct when the subject property is a motor vehicle . . . Consequently, . . . the State need not prove that appellant was involved in the original taking of the vehicle out of the custody or use of its owner." 214 Md. App. at 512. Accordingly, appellant's statement that he was returning the car was not exculpatory as to the charges under CL §§ 7-105 and 7-203.

Moreover, the statement is not "material" as defined by *Brady*. *Brady* evidence is material if "the evidence presents a reasonable probability that, had it been disclosed, the result of the proceeding would have been different." *Grandison v. State*, 390 Md. 412, 428 (2005). "Various courts have recognized that the materiality prong is the gravamen of analysis under *Brady*." 390 Md. at 432 (citations omitted). Here, even if the statement that appellant was returning the vehicle could somehow be construed as favorable to appellant,

in light of the other evidence presented, the statement did not raise a reasonable probability that the result of the proceeding would have been different.

IV. Merger of Sentences for Unauthorized Use and Motor Vehicle Theft

Appellant contends that the trial judge imposed an illegal sentence when he failed to merge appellant's sentence for unauthorized removal of a motor vehicle into his sentence for motor vehicle theft. In support of this contention, appellant cites *In re Lakeysha P.*, 106 Md. App. 401, 447 (1995), where we held that "[t]he conviction for Unauthorized Use, as a lesser included offense, merged into the conviction for automobile Theft in the case of each appellant."

"The merger doctrine, which is derived from both federal and Maryland common law double jeopardy principles, 'provides the criminally accused with protection from, *inter alia, multiple punishment stemming from the same offense*.'" *Moore v. State*, 198 Md. App. 655, 684–85 (2011) (quoting *Purnell v. State*, 375 Md. 678, 691 (2003)) (emphasis added in *Moore*). A failure to merge a sentence results in an illegal sentence, which may be corrected at any time, despite trial counsel's failure to raise the issue in the circuit court. *See* Maryland Rule 4-345(a) ("The court may correct an illegal sentence at any time."); *Pair v. State*, 202 Md. App. 617, 624 (2011). We review *de novo* appellant's contention that the sentence was illegal. *Bishop v. State*, 218 Md. App. 472, 504 (2014).

The State agrees with appellant that "Hammond's conviction for unauthorized use, under Criminal Law Article, Section 7-203, merges with his conviction for motor vehicle taking, under Criminal Law Article, Section 7-105." The State observes:

> [W]hen the subject property is a motor vehicle, motor vehicle taking proscribes the same conduct as unauthorized use. *Landon G.*, 214 Md. App. at 512. Because these provisions proscribe the same conduct and the purpose of the legislature in enacting Section 7-105 was to enhance the statutory classification to a felony and to increase the statutory penalty to five years when the property taken or used is a motor vehicle, *id.* at 509, it appears that the legislature did not intend for these offenses to be punished separately. **Whether the offenses merge under the required evidence test or the rule of lenity, the sentence for unauthorized use must be vacated.**

(Emphasis added; footnote omitted.)

"The principal test for determining the identity of offenses is the required evidence test." *Dixon v. State*, 364 Md. 209, 236 (2001). In *State v. Lancaster*, 332 Md. 385 (1993), the Court of Appeals explained that, "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." 332 Md. at 391–92. If the merger is required under the required evidence test, the lesser included offense merges into the greater offense, and a sentence is imposed only for the offense having an additional element or elements, regardless of the penalties carried by the respective offenses. *Dixon*, 364 Md. at 238 (and cases cited therein); *McGrath v. State*, 356 Md. 20, 24 (1999); *Cortez v. State*, 104 Md. App. 358, 369 (1995).

We conclude that these offenses do not merge under the required evidence test because neither offense is simply a lesser-included variation of the other. Under CL § 7-105(b), "[a] person may not knowingly and willfully take a motor vehicle out of the owner's lawful custody, control, or use without the owner's consent." In contrast, "[CL § 7-203] does not have 'any larceny-like mental requirement of an intent to deprive permanently,' or, for that matter, an intent to deprive temporarily." *Allen v. State*, 171 Md. App. 544, 560–61 (2006) (citing *In re Lakeysha P.*, 106 Md. App. at 144) (intent to temporarily deprive owner of use of vehicle not an element of offense of unauthorized removal). A conviction under CL § 7-203(a) requires the taking away of one of four specified classes of chattels.

As the State suggests, however, the required evidence test "is not the exclusive standard" for determining merger of offenses. *Brooks v. State*, 284 Md. 416, 423 (1979). "The rule of lenity, applicable to statutory offenses only, provides that where there is no indication that the legislature 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." *McGrath*, 356 Md. at 25 (holding that sentences for theft and unlawful taking of a motor vehicle under Art. 27, § 342(A), later CL § 7-105 merge based on the rule of lenity) (citations omitted).

The rule of lenity requires that "doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction will be resolved

against turning a single transaction into multiple offenses." *Miles v. State*, 349 Md. 215, 227 (1998) (internal quotations and citations omitted). Under the 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 applies only when the statute is ambiguous as to whether the legislature intended to impose multiple punishments, and it may not be used "to create an ambiguity where none exists." *Id.*; *Jones v. State*, 336 Md. 255, 261 (1994).

In contrast to the rule applicable to mergers under the required evidence test, in determining which count merges into the other in cases where the merger is required by the rule of lenity, the Court of Appeals has focused on the maximum penalty associated with the two offenses rather than the number of elements of each. When the rule of lenity applies, the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty. *Miles v. State*, 349 Md. 215, 229 (1998). The *Miles* Court explained, *id.* at 221:

> When merger is not based upon the required evidence test, and therefore neither offense is the greater in terms of elements, the offense carrying the highest maximum authorized sentence is ordinarily considered to be the greater offense. Thus, "the offense carrying the lesser maximum penalty merges into the offense carrying the greater penalty." *Williams v. State, supra*, 323 Md. at 322, 593 A.2d at 676.

349 Md. at 221.

Under the rule of lenity, the offense carrying the smaller maximum penalty (here, unauthorized use as charged in Count 2) merges into the offense carrying the greater maximum penalty (here, motor vehicle theft as charged in Count 1). *See Miles*, *supra*, 349 Md. at 229. Under CL § 7-105(d), a person found guilty of CL § 7-105(b) (as charged in Count 1) is convicted of a felony, and the sentencing court may impose a term of imprisonment not greater than 5 years. A person found guilty of a violation of CL § 7-203 (as charged in Count 2) is convicted of a misdemeanor, and is subject to imprisonment for no more than 4 years. CL § 7-203(b)(1). Accordingly, the General Assembly intended a violation of CL § 7-105(b) to carry a greater sentence than does a violation of CL § 7-203(a), and the unauthorized removal sentence merges into the sentence for motor vehicle theft.

Consequently, we will vacate the sentence imposed on Count 2.

V. Merger of Sentences Entered on Counts 10 and 11

Raising a second merger issue, appellant contends that he was "improperly convicted twice of the offense of fleeing and eluding a police officer arising from a single, continuing course of his flight from police, first by car and then by foot." *See* TA § 21-904. The Verdict Sheet indicates that the jury returned a guilty verdict on both Count 10 ("Attempt by Driver to Elude Police in Official Police Vehicle by Fleeing on Foot") and Count 11 ("Attempt by Driver to Elude Police in Official Police Vehicle by Failing to Stop.").

In *Washington v. State*, 200 Md. App. 641, 652 (2011), we considered an appeal from multiple convictions under TA § 21-904 and explained:

> The "fundamental act the appellant [was] charged with having committed" was the act of trying to get away from Officer Weaver. To be sure, he did so by more than one means—first by not stopping his car when being signaled to do so and then by ditching the car and fleeing on foot when being signaled to stop. But **those discrete actions added up to an uninterrupted and unbroken act of eluding the police**.

Id. at 653 (quoting *Jones v. State*, 357 Md. 141, 158 (1999)) (emphasis added).

As in *Washington*, appellant's attempt to elude police while driving the stolen vehicle and subsequently while on foot after leaving the vehicle, although two separate offenses, were part of a single course of conduct. There was "no lapse in time in which [the police officers] ceased trying to apprehend the appellant and the appellant ceased trying to get away, only to have the attempt to stop and attempt to get away later resume." 200 Md. App. at 653. Nevertheless, we agree with the State that, although only one sentence should have been imposed for fleeing and eluding a police officer, the convictions underlying the sentences will remain. "In criminal prosecutions, one of the protections the doctrine of merger affords goes to the preclusion of multiple **punishments** for the same offense." *In re Montrail M.*, 325 Md. 527, 534 (1992) (emphasis added). The underlying adjudication of guilt is not affected. 325 Md. at 533. In *Montrail M.*, the Court of Appeals explained, *id.* at 533–34:

> A merger does not serve to wipe out a conviction of the merged offense. The *conviction* simply flows into the *judgment* entered on the conviction into which it was merged.

(Emphasis in original.)

Accordingly, we shall vacate the sentence imposed on Count 11.

SENTENCES ARE VACATED AS TO COUNTS 2 AND 11; OTHERWISE, ALL JUDGMENTS AFFIRMED; COSTS TO BE PAID THREE-FIFTHS BY APPELLANT AND TWO- FIFTHS BY MAYOR AND CITY COUNCIL OF BALTIMORE.