UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1689

September Term, 2015

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BASHAWN MONEAK MONTGOMERY

v.

STATE OF MARYLAND

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Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

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Opinion by Salmon, J.

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Filed: August 1, 2016

In 2011, a jury in the Circuit Court for Washington County convicted Bashawn Moneak Montgomery, appellant, of one count of robbery, one count of second-degree assault, two counts of theft, two counts of obtaining property by use of a stolen credit card, and two counts of unauthorized use of a credit card. Appellant was sentenced to a term of 15 years' incarceration, five suspended, on the robbery conviction; a consecutive term of 15 years' incarceration, five suspended, on the first conviction of use of a stolen credit card; a concurrent term of 15 years' incarceration, five suspended, on the second conviction of use of a stolen credit card; and two concurrent terms of 18 months' imprisonment for the two convictions of unauthorized use of a credit card. All other convictions merged for sentencing purposes.

Appellant filed a timely appeal, and this Court reversed appellant's second conviction of theft and the second conviction for obtaining property by use of a stolen credit card. All other sentences and judgments were affirmed. A few years later, appellant filed a motion to correct an illegal sentence, which was denied by the Circuit Court for Washington County. In this appeal, appellant presents one question for our review:

> Did the trial court err in denying [a]ppellant's motion to correct an illegal sentence?

We shall answer that question in the negative.

## BACKGROUND

On June 8, 2008, Kristi Mellott was working as a sales associate at King's Jewelry Store when appellant entered the store with an unidentified man and woman. Appellant told Ms. Mellott, who was standing behind the store's display counter, to keep her hands

above the counter and not to leave the area. Appellant then pointed to a ring, indicated that he wanted it, and ordered Ms. Mellott to enter the credit card number that he had written on a piece of paper into the store's debit machine. Ms. Mellott attempted to comply but typed in the wrong number in the store's debit machine, which caused appellant to personally type in the number himself. During this encounter, appellant was "angry" and "hostile" and Ms. Mellott felt "threatened" and "scared for [her] life."

After his credit card number was declined, appellant chose another ring and Ms. Mellott entered a second card number given to her by appellant. Ms. Mellott ultimately rang up two separate charges for $1,000 each, and appellant left the store with both rings. It was ultimately determined that the credit card numbers used by appellant were numbers from stolen credit cards.

**DISCUSSION**

In this appeal, appellant argues that the trial court erred in imposing separate sentences for robbery and for obtaining property by use of a stolen credit card (hereinafter "obtaining"). Appellant contends that both convictions were "predicated on precisely the same conduct, causing a single loss to a single victim in a single transaction." He asserts that under the rule of lenity, the two convictions should have merged for sentencing purposes. Appellant further contends that, even if merger under the rule of lenity is inappropriate, the two convictions should still merge under the doctrine of fundamental fairness.

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." *Pair v. State*, 202 Md. App. 617, 624 (2011). 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).

"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). "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). 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 (citations and quotation marks 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. Here, appellant does not contend that his convictions should merge under the required evidence test.

The required evidence test, however, "is not the exclusive standard under Maryland law for determining questions of merger, and even 'where two offenses are separate under the required evidence test, there still may be a merger for sentencing purposes based on

considerations such as the rule of lenity[.]'" *McGrath v. State*, 356 Md. 20, 24-25 (1999) (citations and quotation marks omitted). "The rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants." *Alexis v. State*, 437 Md. 457, 484 (2014). Essentially, the rule of lenity provides that two statutory offenses may not be separately punished if the Legislature intended for them to be punished in one sentence. *See id.* at 484-85.

> In deciding whether to apply the rule of lenity, "we look first to whether the charges arose out of the same act or transaction, then to whether the crimes charged are the same offense, and then, if the offenses are separate, to whether the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes[.]"

*Clark v. State*, 218 Md. App. 230, 255 (2014) (citations omitted). Any ambiguity in the Legislature's intent must be construed in favor of the defendant.

In the present case, we hold that appellant's convictions do not merge for sentencing purposes under the rule of lenity. First, we do not agree with appellant's contention that his convictions were predicated on the "same conduct" against "a single victim." The "conduct" that resulted in the robbery conviction was the taking of the rings from Ms. Mellott by force or threat of force, whereas the "conduct" of the obtaining conviction was the procurement of the rings by use of a stolen credit card. Moreover, the "victim" of the robbery conviction was Ms. Mellott, who at the time had "lawful possession or custody of the property at the time of the taking." *Hayes v. State*, 123 Md. App. 558, 565 (1998), *rev'd on other grounds*, 355 Md. 615 (1999)(discussing the fact that robbery is not affected by concepts of ownership). But, the "victims" of the obtaining conviction were King's

Jewelry Store, which was deprived of the value of the rings, and the owner of the stolen credit card, who had her credit card used without her authorization. *See Montgomery v. State*, 206 Md. App. 357, 412 (2012).

Next, in our view, it is clear that the Legislature intended for there to be separate punishments for a conviction of robbery and a conviction of obtaining, even when said convictions arise out of the same incident. Under Md. Code (2012 Repl. Vol.), section 3-402(b) of the Criminal Law Article ("CL"), a person who commits robbery "is guilty of a felony and on conviction is subject to imprisonment not exceeding 15 years." Under CL, section 8-206(c)(1), a person who uses a stolen credit card to obtain property valued in excess of $500 "is guilty of a felony and on conviction is subject to imprisonment not exceeding 15 years or a fine not exceeding $1,000 or both."[1] Most significantly, the Legislature included a provision indicating that CL, section 8-206 "may not be construed to preclude the applicability of any other provision of the criminal law of this State that applies or may apply to any transaction that violates [§8-206] of this subtitle, unless that provision is inconsistent with §§ 8-203 through 8-209 of this subtitle." CL, § 8-202(b). Although not a typical anti-merger statute, this section at the very least suggests that the Legislature was aware that § 8-206 may implicate other criminal laws and that such implication was not to be construed so as to prevent the other laws' applicability.

[1] At the time that appellant committed the instant crimes, the statute read as quoted. In 2013, the statute was amended to its current form. *See* CL, section 8-206(c)(1)(i) ("If the value of all money, goods, services, and other things of value obtained in violation of this section is at least $1,000 but less than $10,000, a person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $10,000 or both.").

Appellant argues that, based on this Court's prior jurisprudence in similar cases, his convictions should nevertheless merge under the rule of lenity. Appellant first notes that, "although theft and robbery (or armed robbery) do not merge under the required evidence test, they do merge under the rule of lenity." Citing *Moore v. State*, 198 Md. App. 655 (2011) and *Stewart-Bey v. State*, 218 Md. App. 101 (2014), appellant further notes that, "this Court has held that offenses involving committing theft by other modes, such as counterfeiting or uttering, merge at sentencing with convictions for general theft." Appellant concludes, therefore, that his "theft-alternative offense" of obtaining must merge with his conviction of theft, which in turn merges with his conviction of robbery.

Although appellant's arguments have some superficial appeal, they nevertheless must fail because the language of the statutes at issue in the cases cited by appellant do not indicate that the Legislature intended separate punishments when an individual commits one of those offenses and a theft in the same transaction. *See Moore*, 198 Md. App. at 704; *Stewart-Bey*, 218 Md. App. at 129. In contrast, the Legislature expressly states in Md. Code, Criminal Law § 8-202(b) that the statute governing obtaining **may not** be interpreted to preclude the applicability of any other Maryland criminal law, unless said law is inconsistent with the obtaining statute. (Emphasis added). Moreover, the Legislature makes clear that this restriction on the construction of the obtaining statute applies to **any transaction** that violates the obtaining statute. *Id.* (emphasis added). Therefore, because "any other provision of the criminal law of this State" includes robbery, and because robbery is not inconsistent with the obtaining statute, we must defer to the Legislature's choice and allow separate punishments. *Id*. *See Jones v. State*, 336 Md. 255, 261 (1994)

(noting that the rule of lenity is designed to resolve ambiguities and "may not be used to create an ambiguity where none exists.").

Finally, we reject appellant's claim that his convictions should merge for sentencing purposes based on the principle of fundamental fairness. Merger based on the principle of fundamental fairness is essentially a question of equity; however, "[i]t is a defense that, by itself, rarely is successful in the context of merger." *Latray v. State*, 221 Md. App. 544, 558 (2015). Only two Maryland cases – *Monoker v. State*, 321 Md. 214 (1990) and *Marquardt v. State*, 164 Md. App. 95 (2005) – have resulted in the merger of two offenses based entirely on the principles of fundamental fairness. *See Latray*, 221 Md. at 558. Not surprisingly, appellant relies on both cases in support of his argument.

In *Monoker*, the Court of Appeals considered whether "the crime of soliciting one to perform a criminal act should merge into the subsequent crime of conspiracy to commit that same act." *Monoker*, 321 Md. at 216. In that case, the defendant asked an individual if he would break into someone's home and "steal everything he could." *Id.* After the individual enlisted the aid of several other individuals, the defendant "briefed the would-be burglars on the layout of the [victim's] household and the location of the valuables therein." *Id.* Before the burglary could be committed, the individuals were apprehended. *Id.* at 217. The defendant was charged and convicted of solicitation and conspiracy to commit daytime housebreaking. *Id.*

On appeal, the Court of Appeals held that, although the two convictions did not merge under either the required evidence test or the rule of lenity, it would be "unfair to uphold convictions and sentences for both crimes." *Id.* at 223. The Court explained that

"because the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it, it would be fundamentally unfair to [the defendant] for us to require him to suffer twice, once for the greater crime and once for the lesser included offense of that crime." *Id.* at 223-24.

In *Marquardt*, this Court considered whether malicious destruction of property merged with fourth-degree burglary (breaking and entering). *Marquardt*, 164 Md. App. at 148. In that case, the defendant entered an apartment building looking for his wife. *Id.* at 110-11. The defendant then proceeded to break and enter the front doors of an apartment only to discover that his wife was not present in that apartment. *Id.* at 111. The defendant went to a different apartment, broke and entered that apartment's front door, and found his wife. *Id.* The defendant was ultimately charged and convicted of two counts of malicious destruction of property and two counts of breaking and entering. *Id.* at 118-19.

On appeal, this Court determined that neither the required evidence test nor the rule of lenity necessitated merger of malicious destruction and breaking and entering. *Id.* at 148-52. Nevertheless, we held that, under *Monoker*, fundamental fairness required merger of the two offenses. *Id.* Although this Court provided little explanation for its decision, we did note that "the malicious destruction of property was clearly incidental to the breaking and entering[.]" *Id.* at 152.

The two cases relied upon by appellant are distinguishable from the case at hand. First, in the cases appellant relies upon, neither this Court nor the Court of Appeals was asked to merge two convictions based on fundamental fairness when the Legislature had expressly authorized separate punishments, as it has in this case. In *Monoker*, the Court of

Appeals declined merger under the rule of lenity because "[s]olicitation and conspiracy are both common law offenses." *Monoker*, 321 Md. at 223 (noting that "[w]e have never applied the rule of lenity to two common law crimes[.]"). In *Marquardt*, this Court determined that malicious destruction and breaking and entering did not merge under the rule of lenity because we could not find "any ambiguity or other indication that the General Assembly did not intend separate punishments[.]" 164 Md. App. at 152. In short, neither of the cases appellant relies upon involved a statute containing any rule of construction, let alone one akin to that found in CL, section 8-202(b), which governs the construction of the obtaining statute.

Moreover, Maryland precedent demonstrates that one of the principal justifications for rejecting a fundamental-fairness claim is "that the offenses punish separate wrongdoing." *Latray*, 221 Md. App. at 558. In both *Monoker* and *Marquardt*, the "wrongdoing" at the heart of each offense was essentially the same: burglary in *Monoker* and breaking and entering in *Marquardt.* In the present case, however, appellant committed two distinct acts that the Legislature intended to punish separately. Appellant committed robbery by placing Ms. Mellott reasonably in fear of imminent bodily harm and taking the rings from her rightful possession; appellant committed obtaining by pretending to purchase the rings using the numbers from stolen credit cards.[2]

[2] This Court has been reluctant to apply the principles championed by *Monoker* and *Marquardt*. As we explained in *Latray*, *supra*:

(continued…)

Finally, the offenses at issue in *Monoker* and *Marquardt* either resulted in or would have resulted in a crime against the same individual and the same property. As previously discussed, the offenses at issue in the present case were predicated on distinct conduct against different victims. Moreover, robbery and obtaining are codified under separate sections of the Criminal Law Article, with robbery falling under Title 3, "Other Crimes Against the Person," and obtaining falling under Title 8, "Fraud and Related Crimes." *See* CL, sections 3-402 and 8-206. That the offenses occurred during the same criminal episode is of little consequence. *See State v. Boozer*, 304 Md. 98, 105 (1985) ("The courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction.").

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(…continued)

> [I]n *Monoker*, the Court created a logical fallacy when it held, on one hand, that the solicitation and conspiracy charges did not merge under the required evidence test, but later stated that merger is appropriate for fairness purposes because it would be unfair for [the defendant] to suffer twice, once for the greater crime and once for the lesser included offense of that crime….*Monoker*'*s* inconsistent reasoning has not gone unnoticed by this Court. In *Williams* [*v. State*, 100 Md. App. 468 (1994)], Judge Moylan noted that "the *Monoker* principle is by no means free of doctrinal ambiguity." It is perhaps in light of this doctrinal ambiguity that only one case, *Marquardt*, has followed *Monoker* and found merger solely on fundamental fairness grounds.

*Latray*, 221 Md. App. at 561 (internal citations omitted).

In sum, we hold that appellant's convictions for robbery and obtaining do not merge for sentencing purposes under either the rule of lenity or fundamental fairness.

**JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**