UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1915

September Term, 2014

DANA WRIGHT a/k/a DANIEL WRIGHT

v.

STATE OF MARYLAND

**Zarnoch,
Leahy,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 1, 2016

**Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

Daniel Wright was convicted by a jury sitting in the Circuit Court for Baltimore City of theft of property with a value less than $1,000, and wearing, carrying, or transporting a handgun. The court imposed consecutive sentences of one year of imprisonment for the theft and three years' imprisonment for the wearing, carrying, or transporting a handgun.

In his brief, Wright presents the following questions for our review:

> I. Did the lower court err in restricting Mr. Wright's ability to confront his accuser with prior inconsistent statements memorialized in the Statement of Charges executed by investigating police officers?
>
> II. Did the lower court err in failing to merge Mr. Wright's sentences for theft and wearing, carrying, or transporting a handgun?

We shall affirm the judgments of the trial court.

FACTS and PROCEEDINGS

At trial, the State's only witness was Faith Campbell, Wright's mother. Campbell had previously worked in "security for Social Security and United States Customs[.]" In 1981 she purchased a "Rossi snub nose .357 Magnum" handgun to use for "target practice" at "the range[.]" She kept the weapon in her home in a place known to Wright. Campbell asserted that the last time she saw the weapon was "[t]he early part of June."[1]

Campbell explained that on June 6th or 7th she had a dinner party at her home, which Wright attended. When questioned about an interaction she had with Wright, Campbell testified as follows:

[1]Although Campbell did not specify a year, the charging document notes that the charged offenses occurred "on or about 06/10/2014." We presume that Campbell meant that she had last seen her gun earlier in June, 2014.

> [STATE'S ATTORNEY]: Okay. And what were you guys talking about, how did the topic come up of your weapon?
>
> [CAMPBELL]: It was always a thing with him, it's like he was always mad or angry with something. I don't even know why it came up, I don't have no idea.
>
> [STATE'S ATTORNEY]: And so you were talking to him and what did he say to you?
>
> [CAMPBELL]: "That's why I sold your weapon and I'm going to have you set up" * * * "with your own weapon."

After Wright made that statement, Campbell checked to see if her gun was in the place where she stored it. It was not. She "contacted the police, and . . . took out a protective order." A police officer responded to her home on June 10th and, after interviewing her, advised that he would obtain a warrant for Wright's arrest. The officer drafted an application for statement of charges to support his request for an arrest warrant.[2]

On cross-examination, Campbell testified that she did not see Wright take her gun from her house, and had no contact with him since he told her that he had taken and sold the gun. She agreed that she told the officer that the last time she saw her gun was on the 5th or 6th of June and that Wright had been in her home when he told her he had taken it. It is the latter testimony that gives rise to Wright's confrontation question.

The following colloquy occurred with respect to the application:

[2]For brevity, we shall continue to refer to the application for statement of charges as "the application."

[DEFENSE COUNSEL]: Do you remember the police officer's name?

[CAMPBELL]: No. I have the [application] here.

[DEFENSE COUNSEL]: Okay.

[DEFENSE COUNSEL]: May I approach the witness, Your Honor?

[THE COURT]: Yes.

[STATE'S ATTORNEY]: Your Honor, I'll object to this document.

[THE COURT]: You haven't seen it[.]

[STATE'S ATTORNEY]: Actually, I know what it is.

> (Counsel and [Wright] approached the bench, and the following occurred:)

[STATE'S ATTORNEY]: Your Honor, basically, it's hearsay. It's the police officer's application and statement of charges and [Campbell] didn't write it. And it's just an adoption of her statements and I'm going to object to –

[THE COURT]: Can I see it?

[DEFENSE COUNSEL]: Yes, Your Honor.

* * *

[THE COURT]: Okay. So you want to use this for what purpose?

[DEFENSE COUNSEL]: Impeachment, Your Honor.

[THE COURT]: And what are you trying to impeach?

[DEFENSE COUNSEL]: Well, she's testified that she – that [Wright] told her the gun was stolen in front of her at the house, in the police report she said he told her over the phone. . . . in her testimony she said it was . . . missing in the beginning of June, in the report it's testifying in this statement that she made

to the officer where that she had been gone for several weeks and she didn't know when it was taken.

[STATE'S ATTORNEY]: I think he can ask her those questions.

[THE COURT]: Yeah, I agree. I'm just trying to figure out – so can you get her to give inconsistent statements and then use that for impeachment, if necessary? So for this –

[DEFENSE COUNSEL]: At this point –

[THE COURT]: – time, it's sustained.

[DEFENSE COUNSEL]: Okay.

Subsequently, the application was marked for identification. When defense counsel asked Campbell to read from it, the following occurred:

[DEFENSE COUNSEL]: Okay. Now, read here in the statement where it states –

[STATE'S ATTORNEY]: Objection, Your Honor. This is not her writing, it's hearsay.

(Counsel and [Wright] approached the bench, and the following occurred:)

* * *

[THE COURT]: What are you having her read?

[DEFENSE COUNSEL]: Just what she stated, what she told the officer.

[THE COURT]: Well, she didn't –

[STATE'S ATTORNEY]: That's what the officer wrote.

[THE COURT]: – write it –

[DEFENSE COUNSEL]: Right.

* * *

[THE COURT]: Sustained.

On redirect examination, Campbell clarified that on the occasion when Wright told her he had taken her gun and sold it, he was the only person present who knew that she owned a gun.

As stated above, Wright was ultimately convicted of theft of property with a value less than $1,000 and wearing, carrying, or transporting a handgun. At sentencing, the court imposed consecutive sentences of one and three years'.

DISCUSSION

I - Confrontation

The seemingly minor discrepancy that underlies Wright's first issue is whether Wright told Campbell in her presence, or during a telephone conversation, about his theft of the gun from her home. Campbell testified that Wright told her that while present in her home; the application reflects that she learned of the theft during a phone call from Wright.

Wright contends that defense counsel presented Campbell with the application in order to "draw her attention to various statements . . . which were inconsistent with her trial testimony." He asserts that such was permissible under Md. Rules 5-613 and 5-616. Accordingly, he insists that the court erred by sustaining the State's objection, on the basis of hearsay, to defense counsel asking Campbell to read from the application because: (1)

"the statement [of charges] was not offered for the truth of the matter asserted, but only for its non-substantive value as a prior inconsistent statement"; and (2) "[Wright] was entitled to refresh [Campbell's] recollection of her prior statements with any tangible item, even a police report she did not author." Wright claims that the error in question was not harmless and requires a new trial.

Preliminarily, we do not review Wright's claim that defense counsel was improperly prohibited from using the application "to refresh [Campbell's] recollection of her prior statements[.]" Defense counsel never stated that the intended use of the application was for that purpose. Not only was the issue not preserved, there was simply no record created from which we might have been able to review that issue. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

As to our standard of review of a trial court's decision to restrict the defense's cross-examination of a witness, we have explained:

> A criminal defendant's right to confront witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Pantazes v. State*, 376 Md. 661, 680 (2003). "Central to that right is the opportunity to cross-examine witnesses." *Id*. However, the defendant's right to cross-examine is not limitless, as judges "have wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id*. Thus, the scope of the cross-examination lies largely within the discretion of the trial judge. *Id*. at 681. Whether the trial court abused its discretion depends on the individual circumstances of the

> case. We must determine "whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial." *Id*. at 681-82.

Ashton v. State, 185 Md. App. 607, 621 (2009) (internal parallel citation omitted).

The application, generated by the police officer who responded to Campbell's report of Wright's admission of the theft of her handgun, was marked for identification, but not admitted into evidence. When defense counsel asked Campbell to "read here in the statement where it states . . ." her response was interrupted by the State's hearsay objection. The prosecutor argued that the application was not a document written by Campbell, thus it was not her own statement.

The application would, by definition, have been hearsay if read by Campbell without qualification as to it being offered for some purpose other than to prove the truth of the matter asserted. Md. Rule 5-801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Although defense counsel had indicated earlier in the cross-examination of Campbell that he wished to "use" the application to impeach Campbell, counsel did not raise that argument in response to the State's hearsay objection, nor did counsel ever make such argument.

Because defense counsel sought to elicit the testimony in question for purposes of impeachment, we look to Md. Rule 5-613, which provides:

> **Rule 5-613. Prior statements of witnesses.**
>
> (a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statements of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

"The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at: (1) [p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony[.]" Md. Rule 5-616(a)(1); *see also* Md. Rule 5-616(b)(1) ("Extrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b)."). In *Hardison v. State*, 118 Md. App. 225, 237-38 (1997), we explained:

> Maryland Rule 5-616 permits extrinsic evidence of prior inconsistent statements to be used for the purpose of impeachment, in accordance with Maryland Rule 5-613(b). Under Rule 5-613(b), for extrinsic evidence of a witness's prior inconsistent *oral* statement to be admissible for impeachment, the following foundation must be laid: 1) the contents of the statement and the circumstances under which it was made, including the person to whom it was made, must have been disclosed to the witness during his trial testimony; 2) the witness must have been given the opportunity to explain or deny the statement; 3) the witness must have failed to admit having made the statement;

> and 4) the statement must concern a non-collateral matter. *Before the requirements of Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his trial testimony*. *See Stevenson v. State*, 94 Md. App. 715, 721 (1993).

(Emphasis added) (internal parallel citation omitted).

The cross-examination of Campbell established that: (1) she told the police officer, on June 10, that the last time she saw her gun was on the 5th or 6th of June; (2) she told the officer that Wright was in her home when he told her that he had taken her gun; and (3) to the best of her knowledge, the information in the application was correct. That testimony was not inconsistent with the account of events to which Campbell had previously testified. Accordingly, the threshold requirement for the use of extrinsic evidence to impeach Campbell with her own prior inconsistent statements was not met.[3]

[3]The application for statement of charges, drafted by the police officer, recited:

> [O]n or about 6/10/14 at 1228 W. Pratt St[.] Baltimore[,] MD, [Wright] took his mother[']s handgun from the upstairs bedroom. I spoke to . . . his mother[,] who stated she was not sure when [Wright] took the handgun that is registered to her. She stated [Wright] told her on the phone he took the handgun[.] [Wright's mother] then checked and the gun was gone. The gun was a Rossi [.]357 revolver with a [serial number] of F018771. [Wright's mother] advised [that] she let her son into the house several time[s] in the last few weeks and he could [have] took it any of those days. She stated the gun is valued at under 500 dollars. [Wright's mother] advised she already obtained an EP order on [Wright] EP01172014 and a protective order under 0101SP048492014.

Although the information in that statement was not entirely consistent with the account of events to which Campbell testified, the document was not admitted into evidence and no testimony was elicited which addressed a potential inconsistency.

The trial court did not err by sustaining the State's objection to defense counsel's attempt to have Campbell read some portion of the application into the record. The court's ruling on the State's objection was correct on the grounds argued - hearsay. Moreover, it would have been correct even if defense counsel had argued only that the testimony was sought for impeachment purposes, as extrinsic evidence of a prior inconsistent statement.

II - Merger

Wright contends that the court erred by imposing separate, and consecutive, sentences, "because each crime was predicated on the unitary act of taking the handgun." He asserts that his sentences should have been merged under either the rule of lenity, or the principle of fundamental fairness. Accordingly, he requests a remand for resentencing, and "respectfully suggests" that his sentence for wearing, carrying, or transporting a handgun be merged into his sentence for theft "because the wearing, carrying, or transporting of the handgun was an incidental element of the theft of that gun[.]".

Although Wright's sentences were imposed without objection, "when a court imposes a sentence that 'is not authorized by law, the sentence is illegal,' and an illegal sentence claim 'is not subject to waiver.'" *Kyler v. State*, 218 Md. App. 196, 222 (quoting *Waker v. State*, 431 Md. 1, 7 (2013)), *cert. denied*, 441 Md. 62 (2014). Moreover, Md. Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of [Rule 4-345]." *Pair v. State*, 202 Md. App. 617, 624 (2011) (citation omitted).

We recognize three grounds on which a defendant's convictions may be merged for sentencing purposes: "(1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693-94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222-23 (1990)). Given that Wright does not argue that merger of his sentences was appropriate under the required evidence test, we shall review his sentences in light of the rule of lenity.

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

> "Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. It is when we are uncertain whether the legislature intended one or more than one sentence that we make use of an aid to statutory interpretation known as the 'rule of lenity.' Under that rule, if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge."

Clark v. State, 188 Md. App. 185, 207-08 (2009) (quoting *Monoker*, 321 Md. at 222).

The General Assembly has made clear that it intended for the crime of wearing, carrying, or transporting a handgun to be viewed as separate from, and "additional" to, other offenses:

> **§ 4-202. Legislative findings.**
>
> The General Assembly finds that:
>
> (1) the number of violent crimes committed in the State has increased alarmingly in recent years;

> (2) a high percentage of violent crimes committed in the State involves the use of handguns;
>
> (3) the result is a substantial increase in the number of deaths and injuries largely traceable to the carrying of handguns in public places by criminals;
>
> (4) current law has not been effective in curbing the more frequent use of handguns in committing crime; and
>
> (5) additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public.

Md. Code Ann. (2012 Repl Vol.), § 4-202 of the Criminal Law Article.

Given those legislative findings, we find no reason to conclude that the trial court erred in imposing distinct sentences for wearing, carrying, or transporting a handgun and the theft of that same weapon. The rule of lenity does not require merger of Wright's sentences.

Even though issues related to a purportedly illegal sentence are reviewable even when no objection was raised at sentencing, such latitude is not afforded to claims that sentences should have merged under the doctrine of fundamental fairness. Preservation of a claim pursuant to fundamental fairness is necessary because such claims are "heavily and intensely fact-driven[,]" unlike the other grounds for merger which can be "decided as a matter of law." *Pair*, 202 Md. App. at 645. We have explained that "[w]e do not believe that a non-merged sentence pursuant to such a fluid test depend[e]nt upon a subjective evaluation of the particular evidence in a particular case is an inherently 'illegal sentence' within the tightly limited contemplation of [Rule 4-345]." *Id*. at 649. Because Wright did not raise this

issue at sentencing, it was waived and we decline to review it. ("We decline . . . to review the issue of merger pursuant to the so-called 'fundamental fairness' test because we do not believe that it enjoys the procedural dispensation of Rule 4-345(a)."). *Id*.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.