UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2770

September Term, 2014

ABUDALLAH HANNIBAL OAKLEY

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 20, 2016

A jury in the Circuit Court for Baltimore County convicted Abudallah Hannibal Oakley, Appellant, of human trafficking (or "pandering") and contributing to the conditions of a minor (hereinafter "contributing"). Appellant was sentenced to a term of 25 years' imprisonment for pandering and a concurrent term of three years' imprisonment for contributing. In this appeal, Appellant presents the following questions for our review:

1. "Was the circuit court unable to maintain the appearance of impartiality?"
2. "Did the circuit court err in admitting portions of cell-phone extraction reports for phones recovered by police?"
3. "Did the circuit court err in admitting impermissible lay opinion [testimony]?"
4. "Did the circuit court err in ordering separate sentences for pandering and contributing to the delinquency of a minor?"

We determine that Appellant's second contention is unpreserved, and even if the first contention was preserved, the record does not support Appellant's challenge to the trial court's appearance of impartiality. As to Appellant's third question, we conclude that the circuit court did not err in admitting impermissible lay opinion testimony because the witness in question did not offer a substantive opinion requiring specialized knowledge, skill, or experience. Finally, we conclude that the merger of Appellant's sentences is not required because each offense that Appellant was convicted of includes an element that the other does not; nor does the rule of lenity or doctrine of fundamental fairness require merger in this circumstance.

BACKGROUND

In June of 2014, Special Agent Matthew Vilcek of the Federal Bureau of Investigation's Crimes Against Children Task Force received a tip that "K.L.," then sixteen years old, was involved in prostitution in the Baltimore area. The information came from the website "Backpage.com," which featured a classified advertisement containing several photographs of K.L. and a heading that read: "Ebony Goddess, want the best? Forget the rest." The advertisement also included a picture of "a female in panties," with a caption that read: "Paris coming to rock your world. Very experienced. Discrete and clean. No rush….80 dollars S-S, 150 H-H, 200 H….Serious inquiries. Call me, baby. I'm waiting."[1]

From this advertisement, Agent Vilcek obtained a phone number, which he called. A female answered, and Agent Vilcek "acted as if [he] wanted to make a date with the female caller." After arranging and then confirming the meeting time and place, Agent Vilcek, along with Baltimore County Police Detective Scott Manz, traveled to the prearranged location. Once there, the officers witnessed a taxicab pull up, after which the officers received a call that "she was there." The officers approached the taxicab and located two passengers, Appellant and K.L, who were eventually taken into custody and searched.[2] K.L. had her purse with her in the taxicab, and from her purse the police were able to recover, among other things, two Vanilla Visa cards. On the way to the police

[1] At trial, an expert on prostitution and human trafficking explained that "S-S stands for short stay, which is 15 minutes of time . . . 150 H-H is 150 per half hour of time. And 200H is $200 for an hour of time."

[2] The taxicab driver was also present.

station, the police went to the Appellant's house and allowed K.L to pick up the rest of her belongings.

Among the items seized from the taxicab were four cellular phones: Phone #1 was found in K.L.'s purse and attributed to K.L; Phone #2 was found in the taxicab and attributed to Appellant; Phone #3 was found in the taxicab and attributed to the taxicab driver; and Phone #4 was found in the taxicab and attributed to K.L. Using a mobile-device extracting tool called "Cellebrite," the police were able to obtain certain data from the phones, including call logs, text messages, pictures, and contact information. For each phone, the police generated an "extraction report." Those reports were later introduced by the State into evidence at trial as State's Exhibit 6 (Phone #1), Exhibit 7 (Phone #2), Exhibit 8 (Phone #3), and Exhibit 15 (Phone #4).

Prior to trial, defense counsel filed a motion *in limine* seeking to exclude the extraction reports. Defense counsel argued that the information in the reports was not "self-authenticating" and that the proper foundation could not be laid.[3] Defense counsel also argued that, because the information could not be authenticated, it would be prejudicial to allow the police to testify as to what the information "means." After ensuring that one of the testifying police officers would be qualified as an expert, the court denied defense counsel's motion.

At trial, the State introduced three of the extraction reports (Exhibits 6, 7, and 8) during the testimony of Baltimore County Police Detective Blackburn. Det. Blackburn,

[3] K.L. could not be located and did not testify at trial.

who upon examination established his training and experience using the Cellebrite technology, gave general information regarding the cell phones that were recovered in this case and the kind of information obtained from the phones through the Cellebrite technology.[4] Defense counsel renewed her objection to the admission of the evidence, again arguing that the proper foundation had not been laid because there had not been testimony establishing how the cell phones were recovered. The trial court admitted the evidence, subject to the State's assurances that the necessary foundation would be adduced later at trial.

Later, Detective Manz, who was found qualified to testify as an expert in the areas of prostitution and human trafficking, explained the circumstances under which the cell phones were recovered, and again the State introduced the extraction reports, but this time all four reports were introduced (Exhibits 6, 7, 8, and 15). Defense counsel lodged a general objection to the admission of each report, all of which were denied.

In conjunction with Detective Manz's testimony, the State used some, but not all, of the information contained in the cell-phone reports to establish that Appellant was involved in the prostitution of K.L. The evidence adduced from the phones also established that Appellant and K.L. had an ongoing relationship. Appellant was ultimately convicted. We will provide additional facts as they pertain to the issues examined next.

[4] Detective Blackburn's first name was not included in the trial transcript.

DISCUSSION

I.

Appearance of Impartiality

Appellant first argues that the trial court "impermissibly assisted the State" in two separate instances during the State's questioning of Detective Manz. The first instance occurred during Detective Manz's testimony about the advertisement on Backpage:

[STATE]: Okay. Did the advertisement have photographs on it?

[DET. MANZ:] Yes.

[STATE]: What were the photographs of?

[DET. MANZ:] Of [K.L.]

[DEFENSE]: Objection.

THE COURT: Sustained as --

[DEFENSE]: Move to strike.

THE COURT: It's needs -- sustained. We'll disregard that answer. Come up please.

(Whereupon, a bench conference was held.)

THE COURT: He's testifying to a fact that hasn't been established, sir.

[STATE]: Okay.

THE COURT: For instance, she's going to object, but you got to lay some more foundation as to his knowledge -- [of K.L.]

(Whereupon, the bench conference was concluded.)

THE COURT: Sustained

[STATE]: Detective, do you know what [K.L.] looks like?

[DET. MANZ:] Yes.

[STATE]: Were there photographs on the Backpage ad?

[DEFENSE]: Objection.

THE COURT: Sustained.

[STATE]: Did you see the Backpage ad?

[DET. MANZ:] Yes.

[DEFENSE]: Objection.

THE COURT: Overruled as to that. Detective, how did you know what [K.L.] --

[DEFENSE]: Objection.

THE COURT: Overruled. How did you know what [K.L.] looked like?

[DET. MANZ]: I saw photographs of her.

THE COURT: Where did you get those photographs?

[DEFENSE]: Objection.

THE COURT: Overruled.

[DET. MANZ]: Through another detective.

THE COURT: All right.

[DEFENSE]: Your Honor, may we approach the bench?

THE COURT: You may.

(Whereupon, a bench conference was held.)

[STATE]: Is this really an issue in this case?

THE COURT: Shhh. Keep it down. Go ahead.

[DEFENSE]: Your Honor, I want on the record that I object to your assisting the prosecutor in laying crucial foundation for information . . . that is absolutely crucial . . . for him to prove his case.

THE COURT: The Court -- Court views that as a non-contested issue in this case and is just trying to establish some background information to move this case along. So I'm going to overrule your objection, but I will note it for further consideration. A, B, C, 1, 2, 3, sir. Each step. Don't skip steps. Move along.

[STATE]: All right.

THE COURT: If it takes -- if it takes forever, it just takes forever. You do what you got to do. But she's . . . going to keep lodging objections, which she's -- has an absolute -- absolute right and duty to her client to do so. So now you know where we're going.

At this time the bench conference concluded, and the State resumed its examination of Detective Manz. The State then questioned the detective about how he acquired Appellant's address. During this portion of the State's examination, Appellant alleges the second instance of "assistance" occurred:

[STATE]: How is it that you obtained the personal information from [Appellant]?

[DEFENSE]: Objection.

THE COURT: Overruled.

[DET. MANZ:] I obtained like his address or -- or --

[STATE]: Yeah. How did you get all that stuff?

[DEFENSE]: Objection.

THE COURT: Overruled.

[DET. MANZ:] [K.L.]

[DEFENSE]: Objection.

THE COURT: Sustained. Come up.

* * *

(Whereupon, a bench conference was held.)

[STATE]: Judge, I assumed [Appellant] -- well, I know [Appellant] was arrested. He would have been booked and they would have obtained personal information to -- to charge him. I can ask the witness about that. I don't think the defense attorney would want me to ask those questions and try to get some basic information out of the witness.

THE COURT: Well, I -- I was expecting that he was going to say, you know, he ascertained his information from [Appellant]. But -- but that caught me by surprise when he said he got it from [K.L.]

[STATE]: -- (inaudible) [Appellant's] criminal record --

THE COURT: Well, he doesn't . . . have to say that, doesn't have to say criminal record. He can say based on . . . the information I received from [Appellant], I did some -- I investigated --

[DEFENSE]: I'm going to object.

THE COURT: -- prior -- there's . . . ways to do it. I mean, there's -- you don't -- don't have to say criminal record. There's such things as motor vehicle . . . information, there's other identifying --

[DEFENSE]: Again, I'm going to object.

[STATE]: Right now the only thing I haven't gotten in is -- from him is the alias of "Ham."[5]

[5] Appellant went by the nickname "Ham."

> THE COURT: Well, but you got to establish where that information comes from. You can't just jump into it. I haven't -- how were you able to gather that information? I mean, I -- you can't just have him pulling it out of the sky. Yes, I came up with an alias. Well, where? I mean . . . you got to be careful.

The court then sustained defense counsel's objection, and the bench conference was concluded. The State resumed his questioning of Detective Manz, indicating that it planned to "move on."

Based on these two instances of "assistance," Appellant insists that the trial court "failed to maintain the appearance of impartiality and disinterestedness." Appellant maintains that "a disinterested and impartial judge would not have intervened to assist the State in eliciting such critical [foundation] evidence," nor "interjected to ask questions of its own that were more artfully worded than the prosecutor's." Due to the court's improper "assistance," Appellant avers that his right to a fair trial was infringed.

The State responds by arguing that a trial court has wide discretion in questioning a witness to clarify issues or to make sure that the facts are fully developed, and allows that the trial court must still preserve its role as an impartial arbiter. The State maintains that here "[t]he court's participation in the trial was limited and did not betray a lack of impartiality or even the appearance of a lack of impartiality." The State contends that the testimony set out above reflects that the trial court was simply attempting to move the case along in an expedient fashion. Moreover, the State maintains that the court's limited participation did not assist in developing any critical missing elements of the State's case. For example, with respect to the judge's question aimed at clarifying how Det. Manz knew

what K.L. looked like in order to identify the person depicted in the Backpage.com advertisement, the State points out that K.L.'s mother had already testified that it was K.L. who was depicted in the advertisement.

Appellant relies on *Jefferson-El v. State,* for the long recognized principle that "[i]t is well settled in Maryland that fundamental to a defendant's right to a fair trial is an impartial and disinterested judge." 330 Md. 99, 105 (1993). And we do recognize that a judge's "opinion or manifestations thereof usually will significantly impact the jury's verdict." *Id.* at 106. Still, "there is a strong presumption in [Maryland], and elsewhere . . . that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Id.* at 107 (internal citations omitted). Accordingly, "[a] party attempting to demonstrate 'that a judge is not impartial or disinterested has a high burden to meet.'" *Chapman v. State,* 115 Md. App. 626, 631 (1997) (quoting *Scott v. State*, 110 Md. App. 464, 486 (1996)). In short, "the party requesting recusal must prove that the trial judge has 'a personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings.'" *Jefferson-El,* 330 Md. at 107 (quoting *Boyd v. State*, 321 Md. 69, 80 (1990)).

"On the other hand, the [Maryland Code of Judicial Conduct] recognizes that the *appearance* of impropriety ought to be avoided as well." *Id.* (emphasis added). "A party attempting to demonstrate that a judge does not have the appearance of disinterestedness or impartiality carries a 'slightly lesser burden' [than those attempting to show actual bias]." *Chapman,* 115 Md. App. at 632 (internal citation omitted). In these instances,

"'the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts*.'" *Jefferson-El,* 330 Md. at 108 (emphasis in original) (quoting *Boyd*, 321 Md. at 86). "'Like all legal issues, judges determine the appearance of impropriety . . . by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'" *Id.* (alteration added) (quoting *Boyd*, 321 Md. at 86). "The recusal decision, therefore, is discretionary . . . and the exercise of that discretion will not be overturned except for abuse." *Id.* at 107 (internal citation omitted).

Appellant acknowledges that the cases upon which he relies involve instances where the defense counsel asked for recusal of the trial judge—something that Appellant concedes was not done in this case.[6] Appellant insists, however, that we should still apply the principles expressed in these cases to examine whether or not a judge improperly assisted a party under the same standards. Still, without having asked the Judge to recuse himself, it is not clear the issue is preserved. *See, e.g.*, Md. Rule 8-131(a); *Traverso v. State,* 83 Md. App. 389, 394 (1990). Although defense counsel did object to the trial court's imposition during the State's questioning of Detective Manz, at no time did defense counsel ask the trial judge to recuse himself.

[6] Whether a party seeks recusal by showing actual bias or the appearance of bias, the party is required to file a timely motion "with the trial judge that the party seeks to recuse." *Conwell Law LLC v. Tung,* 221 Md. App. 481, 516 (2015). "A timely motion is one that is 'filed as soon as the basis for it becomes known and relevant[.]'" *Id.* (quoting *Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003)). "Therefore, 'a litigant who fails to make a motion to recuse before a presiding judge in circuit court…waiv[es] the objection on appeal.'" *Id.* at 516-17 (alterations in original) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 232, 255 n.6 (2008)).

Even assuming the issue is preserved for review, we agree with the State and conclude that the trial court maintained the appearance of impartiality. During the first instance of "assistance," the trial court simply informed the State, out of the ear-shot of the jury, that it needed to "lay some more foundation as to [Detective Manz's] knowledge." After the examination resumed and the trial court recognized that defense counsel was going to continue to object to "a non-contested issue," the trial court intervened and asked two innocuous questions to "move [the] case along," which the court had every right to do. *See Smith v. State,* 182 Md. App. 444, 480 (2008) ("It is well-settled that a presiding judge in a jury trial has discretion to question witnesses in order to ensure that the facts of the case are fully developed."). At no time during its questioning did the trial court indicate its opinion as to the facts of the case, nor did the trial court convey the impression that it was assessing Detective Manz's testimony or commenting on his credibility. *See Id.* at 483 (discussing circumstances under which a trial court's questioning of a witness may compromise the appearance of impartiality).

The second instance of "assistance" was equally uneventful. The trial court, again out of the ear-shot of the jury, merely had a discussion with the State about how the State intended to introduce Appellant's address, a discussion that came on the heels of the court's sustaining of defense counsel's objection. The court did not, as Appellant suggests, "hold the hand of the prosecutor during key stages of its case-in-chief." In fact, the court ended up chastising the State for its inability to follow proper evidentiary procedures, and the State responded by moving on to a different line of questioning. Any "assistance," therefore, was moot, as the State abandoned that particular area of inquiry. In sum, the

trial court did not exhibit any appearance of impropriety, let alone the sort of egregious behavior that warrants reversal of Appellant's convictions. *See id.* (recognizing that, absent egregious behavior on the part of the trial court, "a conviction is rarely reversed on the grounds that the judge has compromised his or her impartiality by intervening in a case[.]").

II.

Admission of the Extraction Reports

A. Admission of "Portions" of State's Exhibits 6, 7, and 8

Appellant next argues that the trial court erred in admitting certain portions of the extraction reports generated from the four cell phones recovered by the police. Appellant contends that these select portions were inadmissible, either because the portions were irrelevant or because they were hearsay.[7,8] Appellant also contends that, if admissible, the

[7] Appellant alleges that the following information was inadmissible as irrelevant:

- From State's Exhibit 7: two text messages ("Woodlawn, my homegurl told me some shit bout u" and "U got drugs for sale bro tatas"); some explicit photographs
- From State's Exhibit 8 – web searches at Backpage.com; web searches for Baltimore escorts
- From State's Exhibit 15 – web searches on treatment for yeast infections and related conditions; photographs of a scantily clad woman

[8] Appellant alleges that the following information was inadmissible as hearsay:

- From State's Exhibit 7: Five text messages ("I'm from dropped off on greenmount nd federal," "Come get me I'm truck get sum $$," "Find out who make ids," "He gave me extra for the 45," and "Pay for my hack?")
- From State Exhibit 15: Seven text message ("Stop missing out on business by listing your profile at the fastest growing escort directory. See www.AdultWay.com," "I was gttn $$ tonight anyways," "Pay for my hack?," "1607 wolfe street," "He gave me extra for the 45," "I'm from dropped off on greenmount nd federal," and "Come get me I'm trunk get sum $$"); web searches for missing woman and children

evidence's probative value was outweighed by unfair prejudice. The State contends that this issue is not preserved.

We conclude that Appellant's arguments with respect to this issue to be waived. Although defense counsel filed a timely motion *in limine* seeking to exclude the reports, she did so on the grounds that none of the four reports could be authenticated. At trial, defense counsel renewed her objection when three of the reports were introduced into evidence as Exhibits 6, 7, and 8, again arguing that the proper foundation had not been laid for the reports' admission. Because these grounds differ from those raised by Appellant in this appeal, Appellant's claims as to these three exhibits were waived. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'") (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979)).

B. State's Exhibit 15

Regarding the final report, which was introduced by the State as Exhibit 15, although defense counsel did include this report as part of her motion *in limine*, she did not state specific grounds when she objected to the exhibit's introduction at trial. Ordinarily, such a general objection is sufficient to preserve all claims of error. *See* Md. Rule 4-323(a)

- From State's Exhibit 6: "numerous" text messages regarding "prices for service, locations and plans to meet others on a variety of dates (including June 20), condoms, and a desire to avoid law enforcement;" "several" messages to and from the phone "used by Agent Vilcek when he was undercover."

("The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs."). On appeal, Appellant now contends that Exhibit 15 should have been excluded because it included *portions* that included inadmissible hearsay

When, as is the case here, a piece of evidence is generally admissible but may contain objectionable material, trial counsel has an obligation to bring such objectionable material to the trial court's attention, which defense counsel failed to do in the instant case. In *Belton v. State*, a victim of a shooting identified his shooter two days after the shooting, while he was still in the hospital. 152 Md. App. 623, 627 (2003). At the shooter's trial, however, the victim recanted his previous identification while on the stand. *Id.* at 628. The State then offered the victim's taped statement identifying the shooter, the shooter objected, and the circuit court denied the objection. *Id.* at 629. On appeal, this Court stated:

> [A]fter the circuit court overruled appellant's general objection to admission of the tape, appellant did not request a redaction or limitation of the portion of the tape to be played to the jury. Appellant contended at oral argument that it was the State's obligation to limit or redact portions of the tape that exceeded Thomas's identification. This contention is without merit, for it is the obligation of the party seeking redaction to raise the issue to the judge.

Id. at 634 (citing Joseph F. Murphy, Jr., Maryland Evidence Handbook 20 (3rd ed. 1999).

Further, in *Haile v. Dinnis,* 184 Md. 144, 151-54 (1944), the Court of Appeals considered a situation in which the trial court had sustained the appellee's objection to the admission into evidence of two account books in their entirety when it was alleged that *some portions* of the account books were inadmissible, whereas other portions were admissible. In reversing the trial court, the Court of Appeals instructed:

> "After evidence has been admitted, and an application is made to the court to exclude it, then the onus rests upon the party making the application, to

> confine his objection to that portion of the evidence which is illegal. And the same rule applies when an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to. In such case, if any part of it be admissible, it is error to exclude the whole. . . ." The application of this rule to the instant case would require the plaintiff to confine her objection to those entries, if any, in the account books which were inadmissible. To object generally to the books was insufficient. If there were inadmissible entries in the books they should have been pointed out to the Court, at the time of the objection thereto, so that in admitting the books as evidence for the jury the inadmissible entries could have been deleted, or obscured from the jury's view.

Id. at 153 (internal citations and quotation marks omitted). As a result, it would be improper for this Court to assess error when the trial court was not given the appropriate opportunity to address the objectionable material. *Cf. State Roads Commission v. Creswell,* 235 Md. 220, 229 (1964) (When a piece of evidence is admissible in part, a trial court is "neither expected nor required to search the testimony and sift out the objectionable material."). For these reasons, Appellant's claims regarding any inadmissible hearsay contained in all four extraction reports, including Exhibit 15, are waived. *See* 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[.]").

III.

Admission of Lay Opinion

Appellant asks us to examine whether the trial court erred in admitting impermissible lay opinion testimony. The alleged error occurred during Agent Vilcek's testimony:

> [STATE]: Now, Agent, I'd like to direct your attention to June 20th, 2014. Did there come a time that day . . . when you

were working with [Detective Manz] and you were working on locating a juvenile by the name of [K.L.]?

[WITNESS]: Yes, sir. Again that was part of the operation cross-country initiative for this year . . . . We had prior information that [K.L.] was involved in -- in prostitution in the area. She was known to --

[DEFENSE]: Objection.

THE COURT: Sustained.

[STATE]: Tell us about your -- investigation.

[WITNESS]: We had information regarding a --

[DEFENSE]: Objection.

THE COURT: Overruled. Go ahead.

[STATE]: What information did you have?

THE COURT: Information regarding an individual --

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: -- that we knew was a minor involved in prostitution. There was analysts and officers assigned to the operation who were out on the Internet looking at classified postings on both Craigslist websites like Craigslist and Backpage.com. In looking at these --

[STATE]: And, Agent, let me just -- what do you mean by classified?

[WITNESS]: Classified ads. So for instance on Craigslist, you can --

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: -- you can post an ad to sell your lawn mower, or you can post an ad offering landscaping services. And in a lot of cases, what we found is there are areas of these pages where escorts or prostitutes will post ads for -- for their services on those websites and -- well, and so these sites are known to law enforcement --

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: -- and we will scour these sites for postings of -- of escorts or individuals that we suspect are involved in prostitution for anyone appearing to be under the age of -- of 18.

Appellant argues that Agent Vilcek's testimony about K.L.'s "activities" was improper because he "did not have personal knowledge about K.L.'s prostitution." Appellant also claims that Agent Vilcek's testimony regarding prostitution and human trafficking, specifically his contention that Backpage and Craigslist are used to advertise prostitution, was improper because he was never accepted as an expert in these areas. Accordingly, Appellant maintains that the trial court erred in allowing this testimony.

The State responds first by contending that this issue has not been preserved. On the merits, the State contends that Agent Vilcek did not offer opinion testimony. The State maintains that Agent Vilcek's testimony only "explain[ed] why the police looked on those websites for clues as to how they might locate K.L."

We first address the State's contention that this issue was waived. According to the trial transcript, defense counsel lodged several general objections during Agent Vilcek's testimony. After the fifth or sixth objection, the court called a bench conference and indicated that it was "overruling the objections" on the grounds that the testimony was not

hearsay. Defense counsel did not correct the court when it made this characterization. From this, the State concludes that the present issue was waived because all of defense counsel's objections were based on hearsay, rather than lay opinion testimony.

Although the transcript does reflect that the court initially indicated it was overruling defense counsel's "objections," the court concluded the conference by asking defense counsel if she wanted "to put anything else on the record about the reason for [her] *objection*[.]" (Emphasis added). The court then stated, "I'll take it you take it for hearsay," to which defense counsel responded, "Yes," indicating that her last objection was on hearsay grounds, but at no time affirmatively stating that such grounds applied to all her objections. In short, the record is unclear. Therefore, we will give Appellant the benefit of the doubt and address his claims on the merits.

"It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) (quoting *Merzbacher v. State*, 346 Md. 391, 404–05 (1997)). "Similarly, the decision to admit lay opinion testimony lies within the sound discretion of the trial court." *Thomas v. State*, 183 Md. App. 152, 174 (2008). "In either case, the trial court's decision to admit such evidence will not be overturned unless it is shown that the trial court abused its discretion." *Id.*

Generally, a non-expert witness is "not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or

which are peculiarly within the specialized knowledge of experts." *King v. State,* 36 Md. App. 124, 135 (1977). In certain circumstances, however, a non-expert witness may give "lay opinion" testimony, provided such testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. Thus, in order for lay opinion testimony to be admissible, "such testimony must derive from personal knowledge, be rationally connected to the underlying facts, helpful to the trier of fact, and not prohibited by any other rule of evidence." *Rosenberg v. State,* 129 Md. App. 221, 255 (1999). On the other hand, "opinions or inferences that rely on scientific, technical, or specialized knowledge must be excluded unless the witness is qualified as an expert." *Ragland v. State,* 385 Md. 706, 721 (2005).

We start by observing that Appellant's argument is based on the erroneous assumption that there is "simply no indication that the agent's conclusions about K.L. stemmed from personal knowledge." When questioning Agent Vilcek about his investigation and the circumstances that led to his meeting with K.L., the State asked: "What information did *you* have?" (Emphasis added). Agent Vilcek then responded that he obtained information from certain websites and from other officers that suggested that K.L. was involved in prostitution.[9] In short, any "opinion" expressed by Agent Vilcek was

[9] Appellant seems to take umbrage with Agent Vilcek's use of the word "we," implying that Agent Vilcek's failure to answer in the first-person singular meant that he did not have personal knowledge. This implication is unsubstantiated, as there is nothing to indicate that Agent Vilcek's use of the word "we" did not include himself. Moreover, it was clear from the record that this practice (using the word "we" when discussing an

rationally related to the information he received, first-hand, regarding K.L. Moreover, this information was not offered to establish that K.L. was, in fact, involved in prostitution, but instead to show how Agent Vilcek's investigation unfolded and to establish the events that led to his meeting with K.L. Consequently, this information was rationally related to the underlying facts and helpful in understanding his testimony.

Likewise, Agent Vilcek's comments regarding Backpage and Craigslist being used to advertise prostitution was permissible lay opinion testimony, as they also were based on his personal observation of these sites and were offered to explain how he came across K.L.'s classified advertisement. Agent Vilcek was not offering a substantive opinion requiring specialized knowledge, skill, or experience; instead, Agent Vilcek was merely espousing the reasons why he perused these sites prior to finding K.L.'s advertisement and contacting her to arrange a meeting.[10] Accordingly, we hold that the trial court did not err in admitting Agent Vilcek's testimony.

investigation or action by the police) was common among the law enforcement officials who testified at Appellant's trial.

[10] Although Agent Vilcek did comment that "these sites are known to law enforcement…," defense counsel objected before he could finish his sentence. When his testimony resumed, Agent Vilcek immediately began discussing his reasons for investigating these websites. As such, Appellant's contention that Agent Vilcek testified that "Craigslist and Backpage.com are known to law enforcement as websites advertising prostitution by minors" was factually erroneous.

IV.

Merger

Appellant's final argument is that the trial court erred in ordering separate sentences for pandering and contributing. Appellant maintains that these two offenses were the "same" under the required evidence test, and, therefore, the two offenses should have merged for sentencing purposes. Appellant further maintains that, even if the two offenses did not satisfy the required evidence test, they should have merged under either the rule of lenity or fundamental fairness.

The State responds that each of the two crimes for which Appellant was convicted requires proof of an element that the other crime does not. The State contends that Appellant is applying the "actual evidence" test, which the Court of Appeals has expressly rejected, rather than the "required evidence" test. The State further maintains that Appellant's contentions do not merge under either the rule of lenity or the doctrine of fundamental fairness.

We agree with the State. "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) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Gavieres v. United States*, 220 U.S. 338, 342 (1911)). 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 (quoting *Gavieres*, 220 U.S. at 342). 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*.

In the present case, Appellant was convicted of pandering, the elements of which—applied in this case—were that Appellant "knowingly caused [K.L.], a minor, to be taken to 7102 Burford Court for the purposes of prostitution."[11,12] Appellant was also convicted of contributing, the elements of which—applied in this case—were that Appellant was "an adult who willfully contributed to, encouraged, caused or tended to cause any act, omission or condition which rendered a child [K.L.] delinquent or in need of supervision."[13] A "child

[11] 7102 Burford Court was where Agent Vilcek arranged to meet K.L. and where Appellant was arrested.

[12] *See* Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 11-303(a)(1)(i), which reads:

> (a) *Prohibited — In general.* — (1) A person may not knowingly:
> (i) take or cause another to be taken to any place for prostitution . . .

After this proscribed conduct for which Appellant was convicted, CL 11-303(a)(1) then lists four other instances of conduct that are prohibited under the statute.

[13] *See* Maryland Code (1973, 2013 Repl. Vol), Courts and Judicial Proceedings Article ("CJP"), § 3-8A-30(a) ("It is unlawful for an adult willfully to contribute to, encourage, cause or tend to cause any act, omission, or condition which results in a violation, renders a child delinquent or in need of supervision.":

in need of supervision" was defined as "a child who requires guidance, treatment or rehabilitation and is required by law to attend school and is habitually truant, habitually disobedient, ungovernable and beyond the control of the person having custody of her[.]"

Based on the above elements, we hold that the two offenses do not meet the required evidence test. Pandering required proof that Appellant caused K.L. to be involved in prostitution, whereas contributing required proof that Appellant caused or contributed to K.L.'s delinquency or need for supervision, which does not necessarily include prostitution. In short, both offenses include an element that the other does not, which renders merger under the required evidence test inappropriate.[14]

We likewise find merger inappropriate under the rule of lenity. "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, 484-85 (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.* This Court has previously explained that

> [i]n 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[.]'

[14] As the State correctly points out, Appellant seems to blur the distinction between the "required evidence test" and the "actual evidence test." Appellant argues that the two offenses should merge because the prostitution was the "condition" that served as the basis for his conviction of contributing. This, however, is immaterial, as the required evidence test "refers to that evidence needed, as a matter of law, to prove the crimes." *Brooks v. State,* 284 Md. 416, 420 (1979). In other words, "this test focuses upon the Elements of the two crimes rather than upon the actual evidence adduced at trial." *Id.*

Clark v. State, 218 Md. App. 230, 255 (2014) (quoting *Alexis*, 437 Md. at 484-85). Any ambiguity in the legislature's intent must be construed in favor of the defendant. *Id.*

At the outset, we do not find that the two charges in the present case, pandering and contributing, were part of the same "act or transaction." Although Appellant's role in the incident of prostitution certainly "contributed" to K.L.'s delinquency and/or need for assistance, the evidence adduced at trial established that Appellant's "contribution" occurred on at least several other occasions that were separate and distinct from the prostitution. As the State pointed out several times in its closing:

> K.L. texted [Appellant] . . . "Why don't you hit me up no more?" That also implies that he used to hit her up . . . prior to June 5th, 2014 . . . . [Appellant] replies . . . Where you at? . . . Appellant then calls [K.L.] . . . So the content here shows a relationship, shows the contributing . . .
>
> * * *
>
> [F]rom June 5th, 2014. [K.L.] texted [Appellant], "Hey, find out who makes fake IDs." I mean, is that contributing to her delinquency or -- or making her in need of assistance?
>
> * * *
>
> And this -- this is another one that really stuck out to me. [Appellant], 31 years old, texts [K.L.], "X-O-X-O-X-O-X-O," and then all these smiley faces . . . . So all that content in the phone again shows a relationship, shows -- shows the knowledge, shows the contributing to the condition of a child.

Not only did the State make clear that the offense of contributing was separate and distinct from the offense of pandering, but the trial court stated as much in its instructions to the jury. The court delineated that the charge of pandering was specific to the incident of prostitution at 7102 Burford Court, whereas the charge of contributing could be based

on "any act" that rendered K.L. delinquent or in need of assistance. *See Snowden v. State,* 321 Md. 612, 619 (1991) (whether two offenses are separate can be gleaned from jury instructions). In short, Appellant contributed to K.L.'s delinquency and/or need of assistance by engaging in an ongoing relationship with her, during which he encouraged her to participate in behavior that required guidance, treatment, or rehabilitation; on the other hand, Appellant committed pandering when he knowingly caused K.L. to go to Burford Court on June 20th to commit prostitution. *See Alexis,* 437 Md. at 486 ("The 'same act or transaction' inquiry often turns on whether the defendant's conduct was 'one single and continuous course of conduct,' without a 'break in conduct' or 'time between acts.'") (internal citations omitted).

Furthermore, there is no indication that the legislature intended for convictions of contributing and pandering to merge for sentencing purposes. Under CJP § 3-8A-30(c), a person convicted of contributing is "subject to a fine of not more than $2,500 or imprisonment for not more than 3 years, or both." Under CL § 11-303(c)(2), a person convicted of pandering is "guilty of the felony of human trafficking and on conviction is subject to imprisonment not exceeding 25 years or a fine not exceeding $15,000 or both." Most significantly, the legislature included a provision regarding the effect of the pandering statute on other laws, which states that "[a] person charged with a crime under this subtitle may also be prosecuted *and sentenced* for violating any other applicable law." CL § 11-302 (emphasis added). Because the pandering statute expressly authorizes separate punishments, and because the contributing statute does not expressly forbid it, "we defer

to that legislated choice." *Walker v. State,* 53 Md. App. 171, 201 (1982). Thus, Appellant's convictions do not merge for sentencing purposes under the rule of lenity.

Finally, Appellant's argument that "it would be fundamentally unfair to impose separate sentences" is unpersuasive. Merger based on the principle of fundamental fairness is essentially a question of equity and "depends on the circumstances surrounding the convictions, not solely on the elements of the crimes." *Latray v. State*, 221 Md. App. 544, 558 (2015). "It follows then that our inquiry on appeal will be fact-intensive." *Id.*

As noted above, the circumstances of Appellant's relationship with K.L. provided sufficient basis for the charge of contributing, and these circumstances culminated in a separate and distinct harm, namely the trafficking of K.L. for purposes of prostitution. Under these circumstances, punishing Appellant for both harms was not only fair, but appropriate. *See id.* ("The principal justification for rejecting a claim that fundamental fairness begs merger in a given cases is that the offenses punish separate wrongdoing.").

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.