UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2253

September Term, 2015

DAQUAN LEE TYLER

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: November 3, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Daquan Lee Tyler, was tried and convicted in the Circuit Court for Montgomery County (McCally, J.) of obstruction of justice and solicitation to intimidate a witness. He was thereafter sentenced to a term of five years' imprisonment for obstruction of justice and to five years' imprisonment for solicitation to intimidate a witness, the latter sentence to be served consecutively. From these convictions and sentences, appellant filed the instant appeal in which he raises the following question:

> Must appellant’s sentences for obstruction of justice and solicitation to intimidate a witness be merged?

FACTS AND LEGAL PROCEEDINGS

S., a high school student, testified that, in the early morning hours of February 10, 2013, he was playing video games at a friend's house. He had planned to spend the night, but his plans changed. S. left his friend's house to walk to his mother's house, which was approximately seven minutes away. He was wearing a Helly Hansen brand jacket. He also had his wallet and an iPhone 5 smartphone, which had an OtterBox brand phone case. On his way home, S. stopped at the 7-Eleven located at the intersection of Flower and Piney Branch, in Silver Spring, and bought some gummy worms candy. As S. left the store, he noticed a car that was twenty to thirty feet away, in which he observed two figures. The person in the passenger seat had a "high top fade haircut."

S. turned left on Piney Branch and then, he turned right onto Manchester Street. After he took a couple of steps, he saw a vehicle that looked like the one he saw at the 7-Eleven. A man wearing a ski mask exited the passenger side of the car and put a gun to

S.’s head and said, "Give me your shit." The man reached into S.’s pocket and took his iPhone, with the Otterbox phone case. The man then went behind S., put the gun to the back of his head and said, said, "Give me your Helly too." The man forced S. to the ground, whereupon he took his jacket. The man then returned to the car and drove off.

After the incident, S. continued walking to his mother's house. His mother called the police and S. spoke to the emergency dispatcher, recounting that the person who got out of the car was "kind of dark skinned or brown skinned," and had a "long high top fade." He also told the dispatcher that the gun was small and black and looked like a revolver. A few days later, S. went to the police station and looked at a photo array. He identified a photograph of a man named George Pickett.

Detective Adam Hart executed two search warrants on February 25, 2013. In the course of the first search at 816 Easley Street, Detective Hart located appellant and his cousin, Pickett, inside the premises, with Deante Tyler and Michael Tyler. Pickett, who had a "tall high top fade Afro," was arrested and charged in connection with the robbery of S.

Appellant, who was sleeping in the living room on top of a pair of pants was also arrested. The detectives searched the pants and recovered keys to the basement bedroom at 632 Potomac Avenue. A few feet away from appellant, the police also recovered a red Helly Hansen ski jacket, which S. later identified as his.

The second search occurred at 632 Potomac Avenue. In the basement bedroom, police found an iPhone 5 Otterbox phone case, which S. identified as his, as well.

Additionally, police found appellant's identification and an original birth certificate with his name on it. Police searched a dog house, located in the back yard of the residence, and recovered a .38 caliber hand gun and .38 caliber ammunition.

"Maybe a month or a couple of weeks" after the incident, S. was walking in downtown Silver Spring when two men approached him. The men asked S. if he "snitched on their man." S. said that he had not. The men then told S. that he was "lying" because they had seen his name "in the paperwork." The men did not threaten, hit or shove S. S. walked away and contacted the police.

Appellant and the State stipulated that appellant and Pickett were together on February 10, 2013 at 12:22 a.m. at 525 Thayer Avenue, which is seven-tenths of a mile from the location of the robbery. Also stipulated was that appellant made two telephone calls, one on March 15, 2013 and one on March 19, 2013. The calls were played for the jury.

The following conversation occurred during the March 15th telephone call:

> Speaker No. 1: Yeah. Yeah. He's still out there running around you dig? Me almost shit get high. Motherfucking, it's another n****r. Motherfucking, you know Sam, man?
>
> Speaker No. 2: Yeah, I know Sam.
>
> Speaker No. 1: Yeah. Yeah. He's snitching on my cousin.
>
> Speaker No. 2: Oh, he's snitching on your cousin?
>
> Speaker No. 1: Yeah.
>
> Speaker No. 2: Oh, man.

> Speaker No. 1: Yeah. You know what I'm talking about?
>
> Speaker No. 2: Yeah, I know, I know what you're talking about.
>
> Speaker No. 1: Yeah. Yeah. He freaked about that shit. You heard when all the middies left proximately call the get here you.
>
> Speaker No. 2: Oh man.
>
> Speaker No.1: Yeah, he called the police, right. This is—this is him. They said not too far away, in the same area that night, they say a n****r—the n****r Sam must have boldly got a roll. And they say he identified my cousin as the n****r that got him, and then he said that the n****r was driving it. (Indiscernible), but he didn't identify me. He didn't say I was anything I was driving, you know what I'm saying.
>
> Speaker No. 2: Yeah.
>
> Speaker No. 1. Yeah, but yeah. So if you see that n****r, tell that n****r yeah any time just tell the n****r think of telling—just don't even come to court, that shit done, you know what I'm saying? Can't get reimbursed, you know what I'm saying?
>
> Speaker No. 2: You know that n****r you think he'd have cover me to come to court. Uh, I don't really know then that he'd have like that.
>
> Speaker No. 1: Yeah, me either, you know what I mean? So popped hard over a n****r, you know what I'm saying?

Finally, the parties stipulated that, on August 7, 2013, appellant was "found in possession of a notebook journal" that he admitted was his. In the journal was "a sentence that reference[d] this trial and state[d], 'Get cuz to deny your involvement.'"

DISCUSSION

Appellant contends that, because he was convicted of both obstruction of justice and solicitation to intimidate a witness and because his convictions merge under the required evidence test, this Court must vacate his sentence for obstruction of justice. Alternatively, appellant contends that, if his convictions do not merge under the required evidence test,

his convictions merge under the rule of lenity and, if not under the rule of lenity, then under the principles of fundamental fairness.

The State responds that, as a preliminary matter, appellant's fundamental fairness argument is not preserved for our review because he failed to raise the claim in the lower court. The State maintains that, even if the argument is preserved, merger is not required under any theory advanced by appellant.

As the Court of Appeals has recently reiterated:

> 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. Merger protects a convicted defendant from multiple punishments for the same offense. Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.

Paige v. State, 222 Md. App. 190, 206 (2015) (quoting *Brooks v. State*, 439 Md. 698, 737 (2014).

Furthermore, the Court has reiterated that "[t]here are three grounds on which an individual'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.'" *Johnson v. State*, 228 Md. App. 27, 46 (2016) (quoting *Carroll v. State*, 428 Md. 679, 693–94 (2012)).

> In Maryland, we generally use the required evidence test to determine if two offenses constitute the same offense for the purposes of sentencing. In applying the required evidence test, we examine the elements of each offense and determine whether each provision requires proof of a fact which the other does not . . . . [I]f 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. If offenses merge, separate sentences are generally precluded; instead a

> sentence may only be imposed for the offense having the additional element or elements

Paige v. State, 222 Md. App. 190, 206–07 (2015) (some citations omitted) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Accordingly, we must analyze the elements of each offense and determine whether "the elements of one offense are included in the other offense[.]"

Md. Code Ann., Crim. Law (C.L.) § 9–306(a) provides that "[a] person may not, by threat, force, or corrupt means, obstruct, impede, or try to obstruct or impede the administration of justice in a court of the State." Md. Code Ann., C.L. § 9–305(b) provides, in pertinent part, that "[a] person may not solicit another person to, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of the court of the State or of the United States in the performance of the person's official duties."

In the instant case, appellant argues that the required evidence test has been met because "it is apparent that the elements of the two crimes are essentially the same. One who solicits another person to try to influence, intimidate or impede a witness by threat, force or corrupt means has in effect tried to obstruct or impede the administration of justice by threat, force or corrupt means." Appellant characterizes "solicitation to intimidate a witness" as "simply a more specific version of . . . obstruction of justice." The Court of Appeals decision in *Romans v. State*, 178 Md. 588, 592 (1940) (holding that threatening a witness and obstructing justice merge because they are the same offense) compels us to agree with appellant that, under the required evidence test, the elements of appellant's conviction of solicitation to intimidate a witness are necessarily included in the greater

offense of obstruction of justice.

However, our analysis of the merger of appellant's convictions does not end by virtue of said inclusion; meeting the required evidence test is not the final step in determining whether convictions merge for purposes of sentencing. The Supreme Court has held that

> Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Missouri v. Hunter, 459 U.S. 359, 368–69 (1983). "The same principle applies under Maryland common law double jeopardy and merger doctrines." *Fisher v. State*, 367 Md. 218, 288 (2001). "Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, *unless the legislature clearly intended to impose multiple punishments.*" *Wiredu v. State*, 222 Md. App. 212, 219 (2015) (Emphasis supplied) (quoting *Jones v. State*, 357 Md. 141, 156 (1999).

> The 'cardinal rule' of statutory interpretation, is to ascertain and effectuate legislative intent. Therefore we look first to the words of the statute, giving them their natural and ordinary signification, bearing in mind the statutory aim and objective. If possible, a statute is to be read so that no word, phrase, clause or sentence is rendered surplusage or meaningless. Moreover, we must always be cognizant of the fundamental principle that statutory construction is approached from a commonsensical perspective. Thus, we seek to avoid constructions that are illogical, unreasonable, or inconsistent with common sense. We also avoid constructions that would lead to absurd [results]. [I]f the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature.

Testerman v. State, 170 Md. App. 324, 338–39 (2006) (citations and quotations omitted)

(alterations in original).

In the instant case, statutory interpretation illustrates that the Maryland Legislature intended to permit cumulative sentences for these convictions. Md. Code Ann., § 9–305(d) provides that "[a] sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section."

Although the Court of Appeals in, *Romans, supra,* held that solicitation of witness intimidation "must necessarily be" included in the offense of obstruction of justice, thereby meeting the required evidence test, the ruling in *Romans* was bound by a version of the Code from 1939.[1] As the statute now reads, the General Assembly clearly included language to permit multiple sentences, as evinced by § 9–305(d), permitting separate and consecutive or concurrent sentences "with a sentence for *any crime based on the act establishing the violation of this section.*" (Emphasis supplied). Appellant's violation of § 9–306, obstruction of justice, was based on the act that also established his violation of § 9–305, solicitation of witness intimidation. Accordingly, the Legislature's intent controls and the required evidence test does not compel merger of the convictions for purposes of sentencing.

Appellant also contends that his convictions merge under the rule of lenity and/ or the principles of fundamental fairness. Typically, "[b]ecause the convictions merge under the required evidence test, examination of merger under the rule of lenity and principles of

[1] Section 30 of Art. 27 of the Code (1939).

fundamental fairness are unnecessary. *See State v. Lancaster*, 332 Md. 385, 394 (1993) (holding that, if the required evidence test is met, "merger follows as a matter of course," further explicating that "[i]t is only when there is no merger under the required evidence test that other criteria are considered," *i.e.,* rule of lenity and principles of fundamental fairness). However, because legislative intent permits multiple sentences and merger will not follow "as a matter of course," we examine appellant's alternative arguments.

> The 'rule of lenity' is not a rule in the usual sense, *but an aid for dealing with ambiguity in a criminal statute.* Under the rule of lenity, a court confronted with an otherwise unresolvable *ambiguity in a criminal statute* that allows for two possible interpretations of the statute will opt for the construction that favors the defendant. For a court construing *a statute*, the rule of lenity is not a means for determining—or defeating—legislative intent. Rather, it is a tie-goes-to-the-runner device that the court may turn to when it despairs of fathoming how the General Assembly intended that *the statute* be applied in the particular circumstances. It is a tool of last resort, to be rarely deployed and applied only when all other tools of *statutory construction* fail to resolve an ambiguity.

Oglesby v. State, 441 Md. 673, 681 (2015) (Emphasis supplied).

In the case *sub judice*, appellant alleges no ambiguity with the criminal statute; rather, appellant argues that there is ambiguity with his *charges* and the *jury verdict*. That is clearly not anticipated under the rule of lenity and appellant does not direct this Court's attention to contemporaneous objections made at trial regarding the ambiguity of the charges or jury instructions that may have preserved this as a *different issue* for our review. Furthermore, appellant argues that the "next step" in a rule of lenity analysis is "to discern whether the General Assembly intended that a defendant receive multiple punishment for the same act." Appellant contends, in his alternative argument concerning the rule of lenity, that the Maryland Legislature did not intend multiple punishments for the same act under

§§ 9–305 and 9–306 of the Criminal Law Article. As discussed, *supra*, we disagree. We are not persuaded by any argument, made by appellant, that there is any ambiguity in the statute and, accordingly, we hold that appellant's convictions do not merge under the rule of lenity.

Finally, appellant urges us to examine whether his convictions merge, for sentencing purposes, under the principles of fundamental fairness. Although a defendant may attack an illegal sentence "by way of direct appeal," *Bishop v. State*, 218 Md. App. 472, 504 (citing *Chaney v. State*, 397 Md. 460, 466 (2007), *cert. denied*, 441 Md. 218, 107 A.3d 1141 (2015), this Court has held that the fundamental fairness test does not enjoy the same "procedural dispensation of Rule 4–345(a)"[2] that permits correction of illegal sentences without a contemporaneous objection. *Pair v. State*, 202 Md. App. 617, 649 (2011) (noting that it a "non-merged sentence" based on a "fluid test dependent upon a subjective evaluation of the particular evidence in a particular case" is not an inherently 'illegal sentence' within the tightly limited contemplation of the rule"). In the instant case, appellant did not make a contemporaneous objection in the trial court regarding a fundamental fairness argument. Accordingly, review of the merger of appellant's convictions under the fundamental fairness test has not been preserved for our review.

Assuming, *arguendo*, that a fundamental fairness analysis has been preserved for our review, we are nevertheless unpersuaded that it compels merger of appellant's

[2] Md. Rule 4-345(a) Illegal Sentence. "The court may correct an illegal sentence at any time."

convictions.

> 'Fundamental Fairness is one of the most basic considerations in all our decision in meting out punishment for a crime. In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are part and parcel of one another, such that one crime is an integral component of the other. This inquiry is fact-driven because it depends on the considering of circumstances surrounding a defendant's conviction, not solely the mere elements of the crimes. Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences.'

Garner v. State, 442 Md. 226, 248–49 (2015) (quoting *Carroll v. State*, 428 Md. 679, 695 (2012)). Despite the fact that the "two crimes are part and parcel of one another," we are still bound by the Maryland Legislature's intent to permit multiple sentences for the same act. *See supra*. Therefore, assuming, *arguendo*, that the issue is before us, we hold that appellant's separate sentences for obstruction of justice and solicitation of witness intimidation are not fundamentally unfair.

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