UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0382

September Term, 2013

GENESIS COLLINS

v.

STATE OF MARYLAND

Meredith,
Graeff,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: January 23, 2015

After a jury trial in the Circuit Court for Baltimore City, Genesis Collins, appellant, was convicted of involuntary manslaughter, first and second-degree assault, and reckless endangerment. He was sentenced to incarceration for a term of 15 years for first-degree assault and a concurrent term of 10 years for involuntary manslaughter. The convictions for second-degree assault and reckless endangerment merged with the conviction for first-degree assault for sentencing purposes. This timely appeal followed.

QUESTION PRESENTED

The sole question presented for our consideration is:

> Did the trial court err in not merging appellant's conviction for first-degree assault into his conviction for involuntary manslaughter or, alternatively, did the trial court err in not merging his conviction for involuntary manslaughter into his first-degree assault conviction?

For the reasons set forth below, we shall hold that appellant's sentence for involuntary manslaughter should have merged into his sentence for first-degree assault.

FACTUAL BACKGROUND

This appeal arises out of the death of appellant's mother, Audrey Collins. There is no dispute that Ms. Collins died from complications resulting from burns she suffered on May 5, 2011. On that date, Jeremy Reed, who had been taken in by Ms. Collins when he was 10 years old and lived with her, saw appellant taking Ms. Collins's medicine and drinking rubbing alcohol. Reed then left the house and went to a corner store. When he returned, he heard Ms. Collins screaming. When he ran upstairs to her bedroom, he saw her and appellant with "blue fire" on them. Appellant was on top of Ms. Collins "like smashing her." Reed ran out of the house with his one-year-old nephew and called 911. While outside, Reed observed appellant run out of the house and fall on the grass.

When first responders arrived, they found appellant "staggering around the sidewalk." After putting out the fire that was on him, paramedic Shameera House-Massie

noticed 3 fresh one-inch stab wounds on the middle of appellant's back and burns on his face and chest. Police Officer Kevin Roeser found Ms. Collins in her bedroom being treated by medics. When asked what happened, Ms. Collins responded, "he jumped on me." In the ambulance on the way to the hospital, Ms. Collins told paramedics that she had had an argument with appellant, after which he "doused himself with . . . alcohol or some sort of flammable fluid, set himself on fire and jumped on her." According to paramedic Amanda Stevenson, Ms. Collins stated that the blood in the bedroom came from her "son" whom she "had to stab" to get off of her.

Appellant testified on his own behalf. Although he admitted that he set himself on fire, he claimed that he never intended to hurt his mother. He stated that he had asked his mother for money to cover a drug debt and that she had refused to give it to him. He told his mother that he "might as well go and kill [himself]," and she responded that he should "go ahead and do it outside somewhere. Don't do it in here." At that point, appellant poured alcohol over his head and lit the side of his head with a lighter. According to appellant, as soon as he lit the alcohol, he tried to "pat it down." His mother came over to him and tried to "pat it down on my head, too." At some point, Ms. Collins, who suffered from shortness of breath, "got tired" and turned away from appellant. In an attempt to turn her around, appellant touched her shoulder with both of his hands. Appellant recalled that his mother then sat on the bed and he sat on the floor, still on fire. He asked his mother if she was okay and she said "no" and "kept hollering oh, oh, oh." Appellant then called 911 and went outside to await help.

DISCUSSION

Appellant contends that the trial court erred in failing to merge his conviction for first-degree assault into his conviction for involuntary manslaughter. Alternatively, he

argues that his conviction for involuntary manslaughter should have merged into his conviction for first-degree assault.

"Maryland recognizes three grounds for merging a defendant's convictions: (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)(internal quotation marks omitted). The parties concede, and we agree, that merger is not required in this case under the required evidence test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). Under that test,

> [i]f each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same and separate sentences for each offense are prohibited.

Dixon v. State, 364 Md. 209, 237 (2001). In cases involving a statute that defines more than one modality for committing a crime, such as assault, the court must consider the elements within the statute particular "to the formulation that applies to the case at hand," and "rid the statute of alternative elements that do not apply." *Id.* at 243 (quoting *Nightengale v. State*, 312 Md. 699, 706-07 (1988)).

Assault in the first degree is defined in §3-202(a) of the Criminal Law Article as intentionally causing or attempting to cause physical injury to another.[1] Md. Code (2012 Repl. Vol.), §3-202(a) of the Criminal Law Article ("CL"). To establish first-degree assault, the State must prove all of the elements required to prove assault in the second degree and at least one of the statutory aggravating factors. Second-degree assault requires the State to prove "that (1) the defendant caused offensive physical contact with,

[1] Section 3-202(a)(1) of the Criminal Law Article provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another."

or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified." *Nicolas v. State*, 426 Md. 385, 403-04 (2012)(and cases cited therein). First-degree assault, in this case, required all of those factors and the additional factor that the physical injury caused be serious. CL §3-202. Serious physical injury is defined as an injury that "creates a substantial risk of death." CL §3-201(d)(1).

In Maryland, involuntary manslaughter is a common law felony, generally defined as an unintentional killing done without malice, by doing some unlawful act endangering life but which does not amount to a felony, by negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. *State v. Kanavy*, 416 Md. 1, 10 (2010); *State v. Pagotto*, 361 Md. 528, 548 (2000); *State v. Albrecht*, 336 Md. 475, 499 (1994).

Appellant's convictions do not merge under the required evidence test because involuntary manslaughter requires the death of the victim and first-degree assault does not. Moreover, first-degree assault requires an intent to cause serious physical injury which involuntary manslaughter does not. Although merger is not called for by the required evidence test, appellant contends that merger is required under either the rule of lenity or the principle of fundamental fairness. The State agrees that merger is required under the rule of lenity, but argues that it is not required by the principle of fundamental fairness.

"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). As it deals only with legislative intent, it applies to situations where both offenses are statutory in nature or where one is statutory and the other is derivative

of common law. *Khalifa v. State*, 382 Md. 400, 434 (2004); *Marquardt v. State*, 164 Md. App. 95, 150 (2005). In *Monoker v. State*, 321 Md. 214 (1990), the Court of Appeals explained:

> The rule of lenity, formulated as an aid to statutory construction, applies to statutory offenses. In *White*, we applied the rule where one offense was statutory and the other common law. Solicitation and conspiracy are both common law offenses. We have never applied the rule of lenity to two common law crimes, nor do we so extend the scope of that rule here.

Id. at 223.

Under the rule of lenity, "if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Monoker*, 321 Md. at 222. The rule applies only when the statute is ambiguous as to whether the Legislature intended to impose multiple punishments. *Id.* If the rule applies, the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty. *Abeokuto v. State*, 391 Md. 289, 356 (2006); *Miles v. State*, 349 Md. 215, 229 (1998); *Williams v. State*, 323 Md. 312, 322 (1991).

In this case, appellant was convicted of involuntary manslaughter, a common law offense with a statutory penalty, and first-degree assault, which has been described as a statutory crime that retains its judicially determined meaning. In *Dixon v. State*, 364 Md. 209 (2001), the Court of Appeals stated that "first degree assault is a statutory offense." *Dixon*, 364 Md. at 238-39. Other Maryland appellate cases have contained similar statements indicating that assault is a statutory offense. *See e.g., Robinson v. State*, 353 Md. 683, 694 (1999)(repeal of existing provisions and enactment of new assault statute in 1996 represent the entire subject matter of the law of assault and battery in Maryland, abrogated the common law, and "subsumed all previous statutory assault provisions as

well as the common law into a single scheme and established a two-tiered regimen."); *Quansah v. State*, 207 Md. App. 636, 646 (2012)("Second-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery."), *cert. denied*, 430 Md. 13 (2013); *Marlin v. State*, 192 Md. App. 134, 157-58)(2010)(The statutory scheme enacted in 1996 created a new statutory scheme for assault and abrogated the common law crimes of assault and battery). In *Pair v. State*, 202 Md. App. 617, 642 (2011), however, Judge Moylan, writing for this Court, held that assault was a common law crime, stating:

> Assault, whatever its degree or statutorily prescribed punishment, remains a common law crime. It is not an offense created by the Maryland General Assembly. *White v. State*, 318 Md. at 746, 569 A.2d 1271, made it very clear that neither the legislative establishment of punishment for a crime nor the dividing of a crime into degrees (such as with murder, rape, or assault) amounts to the legislative creation of the crime:
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> > *The rule of lenity is simply a rule of statutory construction.* It originated in Supreme Court federal criminal cases. In the field of federal criminal law, offenses are created by acts of Congress. *Under Maryland law*, however, *there are a multitude of criminal offenses which were not created by Maryland statutes. They include both common law offenses and offenses based on pre-1776 English statutes. As to some of these, there simply is no Maryland legislation. As to others, the role of the General Assembly has largely been confined to prescribing the range of penalties and, in a few instances, dividing the offenses into degrees. Obviously a rule of statutory construction has little relevance to an offense not created by Maryland statute.*
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> (Emphasis supplied).

Pair, 202 Md. App. at 642. For this reason, in *Pair*, Judge Moylan concluded that the rule of lenity did not apply in a case involving convictions of first-degree assault and the common law crimes of robbery and false imprisonment. *Id.* at 641-43.

In the case at hand, we need not resolve this apparent conflict in the case law because, under the facts of this particular case, if first-degree assault is a statutory offense, merger is required by the rule of lenity and, if it is a common law offense, merger is required by the principle of fundamental fairness. We explain.

The assault statute, which encompasses the common law crimes of assault, battery, and assault and battery, is silent on the issue of whether the Legislature intended to impose multiple punishments in cases where a single battery constitutes both involuntary manslaughter and first-degree assault. The CL§3-202 does not include an "anti-merger" provision indicating that a separate sentence may be imposed for another crime based on the same act. Further, in this case, the assault on Ms. Collins was so closely intertwined with the act of involuntary manslaughter that caused her death that it is not unreasonable to assume that the Legislature would not intend multiple punishments for these offenses. For these reasons, if first-degree assault is viewed as a statutory offense, merger is required under the rule of lenity.

If first-degree assault is viewed as a common law offense for purposes of merger, the rule of lenity would not apply. Nevertheless, merger would be required under the principle of fundamental fairness. The principle of fundamental fairness is one of the most basic considerations in meting out punishment for a crime. *Monoker*, 321 Md. at 223. In considering a claim for merger based on fundamental fairness, our inquiry is fact-driven because it depends on the circumstances surrounding a defendant's convictions, and not solely the mere elements of the crimes. *Carroll v. State*, 428 Md. 679, 695 (2012). Merger is appropriate under the principle of fundamental fairness when one offense is "part and parcel" of another or when one crime is "clearly incidental" to

another. *Monoker*, 321 Md. at 223-24; *Marquardt v. State*, 164 Md. App. 95, 152-53 (2005).

Here, appellant's singular act of touching his mother after lighting himself on fire properly resulted in the convictions for first-degree assault charge and involuntary manslaughter. The crimes were, in that way, incidental to each other. Nevertheless, under either the principle of fundamental fairness or the rule of lenity, only one sentence was warranted.

As we have already noted, ordinarily, when sentences merge under the rule of lenity, the offense carrying the lesser maximum penalty merges into the offense carrying the greater maximum penalty. *Abeokuto*, 391 Md. at 356; *Miles*, 349 Md. at 229; *Williams*, 323 Md. at 322. Without directing our attention to any applicable case law, appellant contends that because Ms. Collins's death would not have occurred absent the assault, and because involuntary manslaughter is "more blameworthy" than first-degree assault because it requires the victim's death, as opposed to a substantial risk of death or serious injury, the offense carrying the greater maximum penalty, first-degree assault, should merge into the offense carrying the lesser maximum penalty, involuntary manslaughter. We reject that argument.

This is not a case, like *Nicolas v. State*, which involved merger under the required evidence test of a greater sentence into a lesser sentence because the jury's verdict was ambiguous as to whether it found one or two assaults. *Nicolas*, 426 Md. at 408. Here, in what appears to have been a compromise verdict, the jury found that appellant intended to cause serious physical injury to his mother, but did not intend to cause her death.[2] We

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[2] In acquitting appellant of second-degree murder and finding him guilty of (continued...)

[2](...continued)
involuntary manslaughter, first and second-degree assault, and reckless endangerment, the jury clearly disregarded the trial judge's instructions with regard to the order of deliberations. On the charges of first-degree assault and involuntary manslaughter, the court instructed the jury as follows:

> [First degree assault] still the same elements of assault, which means the State has to prove that the Defendant caused the physical contact or harm, that the contact was the result of an intentional or reckless act by the Defendant and was not accidental, and that the contact was not consented to by the Defendant's mother. And the State must also prove that the Defendant intended to cause serious physical injury in the commission of the assault.
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> Serious physical injury is one that creates substantial risk of death or causes a serious or permanent - or serious and protracted disfigurement or loss or impairment of the function of any bodily member or organ. That's assault in the second degree building upon that to assault in the first degree.
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> * * *
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> Now, the Defendant, in count number two, is charged with the crime of involuntary manslaughter as a result of an unlawful act. The Defendant is charged with the crime of involuntary manslaughter. In order to convict the Defendant of this count of involuntary manslaughter, the State must prove that the Defendant committed an assault in the second degree, the battery, and the impermissible touching, and that the Defendant killed the victim and that the act resulting in the death of Mrs. Collins occurred during the commission of the assault in the second degree.
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> Let me try to make a little sense out of this. Begin in your deliberations with considering assault in the second degree. If you find the Defendant guilty of that, then you don't consider any of these other charges. But if you can find him guilty of assault in the second degree, consider assault in the first degree then to see whether or not the State has proved the additional element then, that the Defendant intended to cause serious physical injury in the commission of the assault.
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> If you find the extra element, then you would find the Defendant guilty of assault in the first degree. If you don't find that additional element, then you don't consider any of the other charges except for reckless endangerment.
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> Now, if you find the Defendant did commit assault in the first degree, then you consider whether or not that is second degree felony murder. And the extra element has to be that the victim died from that assault and that the

(continued...)

see no reason, in this case, to veer from the ordinary practice of merging the offense carrying the lesser maximum penalty into the offense carrying the greater maximum penalty. Here, the sentence for involuntary manslaughter should merge into the sentence for first-degree assault.

SENTENCE FOR INVOLUNTARY MANSLAUGHTER VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

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[2](...continued)
act of the Defendant creates a substantial and foreseeable risk of death.

Now, if you don't find the Defendant guilty of first degree assault, you don't consider felony murder. If you find the Defendant guilty of second degree assault, but not first degree assault, then you still do consider involuntary manslaughter to decide whether the Defendant committed the assault in the second degree and then whether that's what killed the victim and whether the act resulting in the death of Mrs. Collins occurred during a commission of that assault.

(Tr. 1/16/13 at 81-83)