Circuit Court for Baltimore County
Case No. C-03-CR-21-004656

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1301

September Term, 2022

DEVIN TAVON DAVIS

v.

STATE OF MARYLAND

Leahy,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: November 20, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Devin Davis, was convicted in the Circuit Court for Baltimore County of Armed Robbery, First-Degree Assault, Use of a Firearm During the Commission of a Crime of Violence, and Possession of a Firearm After Having Been Convicted of a Felony. Appellant presents the following questions for our review:

> 1. "Is the evidence insufficient to sustain the convictions?
> 2. Did the trial court err by failing to merge the conviction for first-degree assault into the conviction for robbery with a dangerous weapon?
> 3. Does the commitment record need to be corrected to reflect the sentence of the trial court?"

As to question 1, we shall find that the evidence was sufficient to sustain the conviction. As to question 2, we shall hold that the sentencing court erred in failing to merge the conviction for first-degree assault into the conviction for robbery with a dangerous weapon, and we shall vacate the sentence on count 3. As to question 3, we shall find that the commitment record reflects sentences not imposed by the trial court and must be corrected on remand.

I.

Appellant was indicted by the Grand Jury for Baltimore County of Robbery with a Dangerous Weapon (Count 1), Robbery (Count 2), First-Degree Assault (Count 3), Second-Degree Assault (Count 4), Theft of Less than $100 (Count 5), Use of a Firearm During the Commission of a Crime of Violence (Count 6), Possession of a Firearm After Having Been Convicted of a Felony (Count 7), and Transporting or Carrying a Handgun on his Person (Count 8). After a bench trial, the court found appellant guilty on all counts.

The court merged counts 2 and 5 with count 1, merged count 4 with count 3, and merged count 8 with count 7 for sentencing purposes. The court imposed a term of incarceration of twenty-five years, stating "The sentence is 25 years to the Division of Corrections. Start date will be November 2nd 2021. That has to be served without the possibility of parole."

On October 7, 2021, police responded to a report of a robbery at a Domino's Pizza located at 8626 Belair Road. Christopher Johnson, who had been working the Domino's front counter that morning, reported that an individual entered the store to order pizza. The individual then left for fifteen minutes, returned when the pizza was ready, and left again. Shortly thereafter, the individual entered the store for a third time and purchased a soda. This time, when Mr. Johnson opened the cash register to deposit the payment for the soda, the individual pulled out a gun, pointed it at Mr. Johnson, and robbed him of $88.00 from the cash register.

The police reviewed the store surveillance video and the surveillance video at the Jiffy Lube across the street. They observed the robber, but were unable to identify the robber's face based on the surveillance. They noticed that he was wearing distinctive cream-colored shoes with a bubbly sole, a mint green baseball cap, and cross-shoulder bag. The footage also showed the robber leaving the scene in an orange Mitsubishi Eclipse. The police ran the plates on the Eclipse and discovered that it was registered to India Williams. A search of Ms. Williams' social media revealed photos of appellant, Ms. Williams' boyfriend, wearing a mint green baseball cap matching that of the robber. Further social media investigation of appellant revealed that he had the same build as the robber and owned a pair of distinctive cream-colored, bubbly-soled shoes matching the robber's shoes.

Surveillance of appellant's mother's residence revealed that the orange Mitsubishi Eclipse was parked outside.

The police executed search warrants for appellant's mother's house and the orange Eclipse. They found ammunition in the house and a mint green baseball cap matching the robber's in the Eclipse. The police used historical cell phone location data for cell phone numbers associated with appellant in his parole records. They discovered that one of the associated cell phones with the number 443-242-5328 had been in the area of the robbery at the time of the robbery and had then traveled to appellant's mother's house where the Eclipse was found. Appellant was arrested and charged.

At trial, Officer Silke O'Hern testified to the investigation of the crime scene, the surveillance footage, the search of appellant's mother's home and the Eclipse, and the cell phone data as described above. Officer Michael Deremeik testified to the social media searches. Christopher Johnson testified and described the robber's behavior in the Domino's Pizza.

Appellant testified in his own defense. He claimed that he had been working on October 7, and, therefore, could not have been at the scene of the robbery. He stated that the cell phone number which the police tracked belonged to Ms. Williams, not to him, and that he had given it to his parole officer as a secondary means of contacting him because Ms. Williams was his girlfriend. He testified that Ms. Williams often left the cell phone in her car, the Eclipse, and often allowed other people to drive her car. He said that the car was at his mother's house because he had allowed Ms. Williams to have it towed there after it had stalled. Appellant called his work supervisor, Mr. Hurt, who testified that he

believed appellant had worked for him on October 7, because he had received payment that day for work he believed he would have sent appellant to do.

The court found appellant guilty on all counts. At sentencing, the trial court did not differentiate sentences between the various counts on which appellant had been found guilty, instead stating a total number of years. On September 12, 2022, the day of sentencing, the court issued a commitment record which, for the first time, stated that the sentence on count 1 was 25 years without parole; the sentence on count 3 was 25 years without parole to be served concurrent with count 1; the sentence on count 6 was 20 years, the first 5 without parole, to be served concurrent with count 3; the sentence on count 7 was 15 years, the first 5 without parole, to be served concurrent with count 6. All other counts were merged as described above. On September 13, 2022, the court issued a revised commitment record amending the notations on merged counts but leaving the sentences unchanged.

This timely appeal followed.

II.

Appellant argues first that the evidence was insufficient to sustain the convictions and that the State failed to establish, beyond a reasonable doubt, that appellant was the person who committed the robbery. He maintains that the State's circumstantial evidence amounted to nothing more than strong suspicion or probability and that, therefore, there was no solid evidentiary foundation for his conviction. He points out that he could not be identified on the store's surveillance footage and that there was no physical or forensic evidence tying him to the crime scene. He argues that, had he committed the crime, the

police should have found the gun used by the robber or the cross-shoulder bag the robber wore in the surveillance video. He points out that there was no eyewitness who saw him at the crime scene, in the orange Mitsubishi Eclipse which was used to flee the scene, or using the cell phone alleged to belong to him. Therefore, the evidence was insufficient to support the judgment of conviction beyond a reasonable doubt.

The State counters that it presented sufficient circumstantial evidence to sustain the convictions. The State argues that direct evidence is not required to establish criminal agency and that circumstantial evidence is sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a doubt of the guilt of the accused. The State points to the movements of the orange Mitsubishi Eclipse owned by appellant's girlfriend and the items seized from appellant's house, in conjunction with the evidence regarding the movements of the cell phone listed in appellant's parole records as demonstrating appellant's movements. The State further points to the matches between the robber in the surveillance video and appellant including his build, the mint green baseball cap, and the cream-colored, bubbly-soled shoes. The State argues that the court need not have credited the testimony of the defendant regarding the movements of the cell phone or the Mitsubishi. As a result, the State argues, the conviction is not based upon mere speculation or conjecture but is based on sufficient evidence for a rational fact finder to find that appellant was the robber.

Appellant next argues that, for the purpose of sentencing, count 3 should merge with count 1. Appellant argues that first-degree assault merges into armed robbery where the pleadings establish that the same conduct is at issue. He argues that the single armed

robbery of the Domino's Pizza is the only conduct at issue. The act constituting armed robbery and the act constituting first degree-assault are one and the same. As a result, count 3, the conviction for first-degree assault, should merge with count 1, the conviction for armed robbery.

The State disputes, as a matter of law, that first-degree assault merges into armed robbery even where the same conduct is at issue. The State argues that first-degree assault is not a lesser included offense of armed robbery. This is, the State claims, because first-degree assault under Md. Code. Ann., Crim. Law § 3-202, requires either that appellant intentionally cause or attempt to cause serious physical injury or that appellant committed the assault using a firearm. Armed robbery under Md. Code. Ann., Crim. Law § 3-403[1] does not require causing or attempting to cause serious physical injury, nor does it require the use of a firearm. Instead, it contains a general requirement for the use or possession of a dangerous weapon, which need not necessarily be a firearm. Therefore, one could commit an armed robbery under Crim. Law § 3-403 with a non-firearm deadly weapon, which would not constitute first-degree assault. Thus, the State claims, first-degree assault contains an element not required for armed robbery, and, under the required evidence test from *Blockburger v. United States*, 248 U.S. 299 (1932), the crimes do not merge.

Appellant argues, finally, that his commitment record should be corrected to reflect a single twenty-five year sentence on count 1 and no other sentences. Appellant argues that the sentences on counts 3, 6, and 7 were not imposed by the trial judge in open court.

[1] Unless otherwise noted, all subsequent statutory references shall be to Md. Code Ann., Crim. Law.

This produces a conflict between the trial transcript and the commitment record. Where there is such a conflict, the trial transcript takes precedence and the commitment record must be corrected to reflect the sentence announced by the court.

The State contends that there is no conflict. According to the State, the commitment record is entirely consistent with the trial transcript. The commitment record reflects an aggregate sentence of twenty-five years, the same time period announced by the trial court. The sentence announced in open court, according to the State, was the aggregate sentence, and not a specific sentence for any of the individual counts. The commitment record, according to the State, clarifies that sentence and establishes specific time periods for each count. It resolves ambiguity in the transcript rather than conflicting with said transcript. Docket entries are entitled to a presumption of regularity, argues the State, and, thus, the commitment record should stand.

III.

We address first the sufficiency of the evidence in this bench trial. Rule 8-131(c) provides that "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." We review the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Scriber v. State,* 236 Md. App. 332, 344 (2018). As a reviewing court, we do not judge the credibility of witnesses or resolve conflicts in the evidence. *Scriber*, 236 Md. App. at 344. The question before us is "not whether the evidence *should have or probably would have*

persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (emphasis in original).

Proof based on circumstantial evidence is held to no higher standard than proof based on direct eyewitness accounts. *Pinkney v. State*, 151 Md. App. 311, 327 (1998). Circumstantial evidence is sufficient to support a conviction, provided that the circumstances support rational inferences from which a rational trier of fact could be convinced of the accused guilt beyond a reasonable doubt. *Hall v. State*, 119 Md. App. 377, 393 (1998). Where there are competing rational inferences available to the fact finder based on the evidence presented, we do not second guess which inferences the fact finder chose to draw. *Smith v. State*, 415 Md. 174, 183 (2010).

Here the State presented evidence that appellant had listed the phone number 443-242-5328 in his parole records. A reasonable factfinder could conclude from that fact that this was a phone belonging to appellant. Cell phone location data presented by the State established that that phone was in the vicinity of the robbery at the time of the robbery and then traveled to appellant's mother's house. A reasonable fact finder could draw the rational inference that appellant was in the vicinity of the robbery at the time of the robbery and then traveled back to his mother's house.

Furthermore, the State presented evidence that the orange Mitsubishi Eclipse belonged to India Williams, appellant's girlfriend, and was found at appellant's mother's home. A reasonable factfinder could conclude that appellant had access to the orange Mitsubishi Eclipse. The orange Mitsubishi Eclipse was viewed on surveillance at the site of the robbery at the time of the robbery and at the time when the defendant was in the

vicinity. It then traveled back to appellant's mother's house, just like the cell phone associated with appellant. A reasonable factfinder could conclude that appellant had used his access to the Eclipse to drive it to the vicinity of the robbery and then back to his mother's house.

The surveillance video showed an individual matching appellant's build, and wearing a green cap and distinctive cream-colored, bubble-sole shoes identical to those worn by appellant in several photos, robbing the Domino's Pizza and then getting into the orange Mitsubishi Eclipse and driving away. Therefore, a reasonable factfinder could draw the rational inference that, when appellant used his access to the Eclipse to drive it to the vicinity of the robbery, appellant robbed the Domino's pizza.

Appellant presented, through his own testimony and the testimony of his supervisor, an alternative version of events, *i.e.*, an alibi. But the trial court is not required to credit appellant's version of events. *Allen v. State*, 402 Md. 59, 78 (2007). Where there are conflicting versions of events which a rational factfinder could credit based on the evidence, we defer to the judgment of the factfinder, here the trial court. *Smith*, 415 Md. at 183.

We hold that, viewing the evidence in the light most favorable to the State, the evidence is sufficient to establish that the appellant was the individual who robbed the Domino's Pizza. The evidence was sufficient to sustain his convictions.

IV.

We address next the merger of counts 1 and 3 and begin with the State's argument that first-degree assault does not merge with armed robbery. 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). Under the required evidence test, if each offense requires an element the other does not, the offenses are not the same and do not merge; if all of the elements of one are necessarily present in the other, then they do. *State v. Lancaster*, 332 Md. 385, 392-93 (1993). When a court fails to merge a sentence as required, the sentence is illegal as a matter of law. *White v. State*, 250 Md. App. 604, 643 (2021).

This court has held repeatedly that first-degree assault, when accomplished by use of a firearm (as opposed to the serious physical injury modality), is a lesser included offense of armed robbery and that, under the required evidence test, the two offenses merge. *See Thompson v. State*, 119 Md. App. 606, 621 (1998) ("For precisely the same reasons, the [first degree] assault charged in Count 9 was a lesser included offense within the attempted armed robbery charged by Count 3 and the conviction under Count 9 should, therefore, have merged into the conviction for Count 3."); *Gerald v. State*, 137 Md. App. 295, 321 (2001) ("[T]he first degree assault conviction must indeed merge into the robbery conviction"); *Williams v. State*, 187 Md. App. 470, 477 (2009) ("[W]e agree with Williams that we are required to merge his conviction for first-degree assault of Ambrose into the offense of robbery of Ambrose with a dangerous and deadly weapon"); *Morris v. State*, 192 Md. App. 1, 39 (2010) ("As this Court has previously held, first-degree assault is 'a lesser included offense of robbery with a dangerous and deadly weapon.'").

As the court explained in *Thompson*, the operative question is whether the conduct charged in the indictment as first-degree assault was the same conduct charged in the

indictment as armed robbery. *Thompson*, 119 Md. App. at 617 ("We hereby assert that the question of whether certain counts charge crimes that are lesser included offenses within other counts or, on the other hand, charge unrelated criminal conduct, can frequently be resolved within the four corners of the indictment."). We must look to whether the alleged conduct that gave rise to the assault charge in the indictment was a "necessary ingredient" in the armed robbery. *Id.* at 618. Critically, even where such conduct could theoretically be separated, we look to whether the charging scheme was intended to cover separate conduct. *Id.*

Here, the assault charge required the use of the firearm. The robbery charge required the use of a dangerous or deadly weapon. The indictment in this case cannot be read to have referred to any dangerous or deadly weapon besides the firearm used to rob the Domino's cashier. As a result the conduct charged as first-degree assault was a necessary ingredient of the conduct charged as armed robbery.

The State asks us to disregard this precedent and overrule *Thompson* and its progeny. The State argues that *Thompson* relies wrongfully upon decisions of the Supreme Court of Maryland which predate the 1996 addition of the firearm requirement in Maryland, found in Crim. Law § 3-202. *See, e.g.*, *Thompson*, 119 Md. App. at 617 (explaining that much of the court's holding was presaged by a dissenting opinion in *Snowden v. State*, 76 Md. App. 738 (1988), the reasoning later adopted by the Maryland Supreme Court in *Snowden v. State*, 321 Md. 612 (1991)). The State asks that we decline to follow *Thompson* and, instead, fashion new precedent on this issue using the required evidence test to distinguish between first-degree assault and armed robbery on grounds that

first-degree assault requires that the robber use a firearm whereas armed robbery can be accomplished using any dangerous or deadly weapon.

We decline to do so. While the Court in *Thompson* relied upon principles established prior to the firearm requirement in Crim. Law § 3-202, it considered correctly whether conduct charged under Crim. Law § 3-202 could be a necessary ingredient of armed robbery. The Court found that it could, and we agree. Here the indictment charges a single event: the robbery of Christopher Johnson at the Domino's Pizza. The State makes no argument that the first-degree assault charge referred to any alternative conduct. There can be no doubt that the same conduct was at issue for both count 1 and count 3. The charges merge for sentencing purposes. Accordingly, we shall vacate the sentence for count 3.

V.

Finally, we address appellant's argument that the commitment record must be corrected. In identifying a sentence imposed by the court, we look to three sources of information in the following order: (1) the transcript of the sentencing proceedings; (2) the docket entry; and (3) the order for commitment or probation. *Dutton v. State*, 160 Md. App. 180, 191 (2004). Where the transcript of the sentencing proceedings conflicts with either (or both) of the latter two sources of information, the sentence discernable in the transcript prevails. *Douglas v. State*, 130 Md. App. 666, 673 (2000).

The trial judge pronounced "the sentence is 25 years to the Division of Corrections. Start date will be November 2, 2021. That has to be served without parole." The State contends that the court intended the sentence as a summary of the aggregate term of

imprisonment and that the judge intended to clarify the specific terms of imprisonment in the commitment record. Yet, in such cases, we look, not to the intent of the sentencing judge, but to the effect of the words on the record. *Jackson v. State*, 68 Md. App. 679, 690 (1986) ("Thus, even where there is a transcript available, if the record is clear, although the trial judge's actual intentions be otherwise, we will give effect to that intention reflected in the record."). The trial transcript reflects a single twenty-five year sentence to be served without parole. It does not differentiate between counts. Nor did the sentencing judge indicate that this was meant to be an aggregate term of imprisonment comprised of several sentences on different counts. Rather, this unambiguously reads as a general sentence on all counts..

In *Vandegrift v. State*, 226 Md. 38 (1961), the Court of Appeals, now the Supreme Court of Maryland, held that a general sentence, *i.e.*, a sentence covering all counts of an indictment, is permissible and not improper under Maryland law.[2] *Id.* at 42. Since then, this Court has interpreted sentences that simply state a term of incarceration and do not differentiate between counts as general sentences. *See Collins v. State*, 69 Md. App. 173, 190 (1986) (interpreting the trial court's statement "It is the judgment and sentence of this Court that you, Daniel Dennis Collins, be committed to the custody of the Commissioner of Corrections, and to be confined under the jurisdiction of the Department of Correction, for a period of your life plus fifty years" as a general sentence). We hold that the sentence

[2]The Court noted that "the better practice is to sentence a defendant separately on each count of an information or indictment. This is so because if any part of a conviction is reversed on appeal, the sentences imposed under the valid counts would not have to be disturbed."

apparent from the trial transcript in this case was a general sentence on all counts of twenty-five years, to be served without parole.

The sentence in the commitment record departs significantly from that general sentence. The sentence in the commitment record imposes four separate sentences never described in the trial transcript. The commitment record conflicts with the transcript. On remand, the circuit court should correct the commitment record to reflect the sentence imposed as reflected in the trial transcript. *Douglas*, 130 Md. App. at 673.

A general sentence is appropriate if it does not exceed the aggregate of the sentences which might have been imposed cumulatively under the several counts. *Vandegrift*, 226 Md. at 42. Where, on appeal, a sentence or conviction on one count is vacated, a general sentence will still stand if the aggregate available sentences for the remaining convictions would have supported the imposed general sentence. *Gatewood v. State*, 244 Md. 609, 620 (1966). Here, appellant was subject to a mandatory twenty-five year sentence without parole for armed robbery because of his prior convictions. Crim. Law § 14-101. Because the sentence of twenty-five years without parole is supported by appellant's conviction for armed robbery alone, it is supported by the aggregate of the remaining convictions after the merger discussed above. Therefore, the general sentence stands notwithstanding our holding that count 3 merges with count 1 for sentencing purposes. We remand to the circuit court to correct the commitment record to reflect the merger of counts 3 with count 1 and the general sentence as reflected in the trial transcript.

SENTENCE ON COUNT 3, FIRST-DEGREE ASSAULT, IN THE CIRCUIT COURT FOR

BALTIMORE COUNTY, VACATED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO MERGE THE CONVICTION INTO ROBBERY WITH A DANGEROUS AND DEADLY WEAPON, AND TO CORRECT THE COMMITMENT RECORD CONSISTENT WITH THIS OPINION. ALL OTHER JUDGMENTS AFFIRMED. COSTS TO BE PAID 1/3 BY APPELLANT AND 2/3 BY BALTIMORE COUNTY.