UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 292

September Term, 2015

ERNEST DANGELO CLEVELAND

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 10, 2017

A jury in the Circuit Court for Prince George's County convicted Ernest Dangelo Cleveland, appellant, of the following crimes: first and second-degree assault; first, third, and fourth-degree burglary; conspiracy to commit burglary; conspiracy to commit armed robbery; possession of a firearm by a disqualified person; and use of a firearm in a crime of violence. The court imposed a sentence of 25 years for the first-degree assault conviction, all but ten years suspended. For the other convictions, the court imposed concurrent sentences or merged the convictions for sentencing purposes.

On appeal, appellant presents the following questions for our review, which we have reordered and rephrased slightly, as follows:

1. Did the trial court err in preventing appellant from discharging his counsel near the close of the State's case?

2. Did the trial court err by imposing separate sentences for first-degree burglary and first-degree assault because both charges stemmed from the same conduct?

3. Did the trial court err by imposing a sentence for first-degree assault that exceeded the sentence the court could have imposed for robbery or robbery with a dangerous weapon, charges for which the jury acquitted appellant?

For the reasons set forth below, we answer questions 1 and 2 in the negative and question 3 in the affirmative. Accordingly, we vacate the court's sentence on first-degree assault and remand the case to the court for resentencing in accordance with this opinion. We otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDUREL BACKGROUND

This case arises from a robbery that occurred at the home of Ebony Boston on April 5, 2014. That evening, Ms. Boston answered a knock at her door. A man, later identified

as appellant, pointed a shotgun at her and told her to get on the ground. Appellant and five or six other individuals then entered the apartment and began searching it. The individuals left a short time later with $200 and Ms. Boston's flat-screen television.

On the second day of appellant's trial, near the close of the State's case, appellant asked to address the court:[1]

> THE COURT: All right. Go ahead, sir.
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> [APPELLANT]: My question was about Maryland Rule 4-125(e).[2]
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> THE COURT: What specifically?
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> [APPELLANT]: In this case, I don't feel like I've been represented fair.
>
> THE COURT: And why not?
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> [APPELLANT]: I feel like there was a lot of questions that I asked [defense counsel] to ask for me that she didn't ask that I felt was detrimental to this case on the credibility of the witnesses. So the jury could have knew what type of people they were dealing with.
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> THE COURT: What questions did you want her to ask?
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> * * *
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> [APPELLANT]: Did the witness know the difference between shotguns, because I feel as though that it could have been any shotgun; but her just saying shotgun, knowing that a shotgun was a shotgun, she could have just said she heard a shotgun.
>
> THE COURT: What else?

[1] At this point, the State had called Ms. Boston and several law enforcement officers as witnesses. The State had only one remaining witness, Officer Michael Jordan, who would testify that a shotgun recovered from appellant's girlfriend's home was operable.

[2] In context, appellant appeared to be referencing Md. Rule 4-215(e), which concerns a defendant's waiver of counsel.

[APPELLANT]: The State's Attorney, when he said that – in his opening statement that the defendants in the case took all the phones except for hers. And then she said herself that all the phones wasn't took. I feel like that should have been questioned.

Then she said the person with the gun put her face on the floor. So I asked [defense counsel] to ask her how did she see my face if her face was on the floor the whole time. That question wasn't asked.

I asked would that have made [sense] for – she said one of her neighbors opened the door. And the police, in the police statements, upon their investigation in the case, they said that they knocked on all doors in the apartment building.

And one of the . . . leaseholders in the apartment answered the door and said if both suspects would have came in there, would have came in the building, they would have knew.

And if somebody opened the door, then somebody had to know who. You feel me? I ain't . . . like that. I told her to ask that question for me, and she didn't.

THE COURT: Well, let me explain something to you about the strategy of going to trial. You know, I understand you're not an attorney. [Defense counsel] has been a public defender for literally decades.

One of the things a defense attorney never wants to do is give the witness the opportunity to explain a discrepancy. I heard the discrepancy that the victim testified that the outside door was open, and that's how the perpetrators got in. And the police having to get a neighbor to buzz them in.

I'm sure [defense counsel] noted that and plans to argue that in her final argument. The last thing, and I mean really, the very last thing a defense attorney wants to do is give someone the opportunity to explain a discrepancy. That's the State's Attorney's job, if he think[s] it can be explained. It is certainly not the defense attorney's job.

So she left that discrepancy concerning how the perpetrators of this got into the home, whether or not there was an opportunity to observe the persons committing this and how much there was any discrepancies about what phones were taken. All of that is in evidence. If she had asked the victim to explain it, it would be like she never went to law school. You don't do that.

As to whether or not the victim could recognize the difference between shotguns, I mean the evidence is that there was a shotgun, and one was located in the closet where you were staying. I don't think there's that much difference.

I think [defense counsel] is doing an outstanding job for you. A lot of the key to effective cross-examination is what not to ask as opposed what to ask because you don't want to open any doors.

So, I mean, are you making a motion to discharge her or what?

[APPELLANT]: Yes, ma'am.

THE COURT: You are?

[APPELLANT]: Yes, ma'am.

THE COURT: You understand that you'd have to represent yourself? You couldn't get another public defender because she hasn't done anything that merits a discharge. We're one witness away from finishing this case and doing instructions and argument.

You don't want her to argue this for you? I can assure you, she is going to do a fabulous job. She really is. I don't see any meritorious reason whatsoever to discharge her.

(Pause.)

Sir, I'm not going to let her go. So your motion to discharge her is denied. There is absolutely no meritorious reason. Like I said, do you really want to argue this case yourself?

[APPELLANT]: (Shaking head in the negative.) I guess not.

THE COURT: You're shaking your head no. No. You know, I understand that a lot of what people think should happen in the courtroom is motivated by things they see on TV. I can assure you this: She is doing a fabulous job for you.

There were several opportunities where a less experienced and less effective attorney would have stepped into something that you wouldn't want, but she is doing a very good job for you. And we haven't even gotten to the argument part. So your motion to discharge counsel is denied.

At this point, the trial resumed, the State finished presenting its case, the court ruled on defense counsel's motion for judgment of acquittal, instructed the jury, and the parties gave closing arguments. As indicated, appellant ultimately was found guilty of multiple offenses. This appeal followed.

DISCUSSION

I.

Appellant first argues that the trial court abused its discretion in denying his motion to discharge defense counsel. The State contends that the court did not abuse its discretion "in refusing to allow [appellant] to fire his attorney with the trial nearly completed, and any claim of error was waived when [appellant] agreed he did not wish to proceed pro se."

"A defendant's request to dismiss appointed counsel implicates two rights that are fundamental to our system of criminal justice: the defendant's right to counsel, and the defendant's right to self-representation." *State v. Brown*, 342 Md. 404, 412-13 (1996). "When a defendant indicates a desire to dismiss counsel, the defendant must request permission to obtain substitute counsel or to proceed *pro se.*" *Id.* at 413.

Generally, such requests are governed by Maryland Rule 4-215(e), which outlines the process the court must follow in the event that a defendant indicates a desire to dismiss counsel.[3] *Id.* at 412. When a defendant requests to discharge counsel after trial begins,

[3] Md. Rule 4-215 provides in pertinent part:

> (e) **Discharge of counsel – Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds

however, Md. Rule 4-215(e) no longer governs, and "the decision to permit the defendant to exercise either right must be committed to the sound discretion of the trial court." *Brown*, 342 Md. at 426.

The trial court's broad discretion once trial has begun, however, is not limitless. *Id.* at 428. The Court of Appeals has suggested that a court consider the following factors when deciding whether to permit a mid-trial discharge of counsel:

> (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity of the stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.

Id. "In evaluating trial court decisions on motions to dismiss counsel during trial, we shall apply an abuse of discretion standard." *Id.* at 429.

Here, the trial court did not abuse its discretion in denying appellant's mid-trial request to discharge counsel. As soon as appellant indicated a desire to discharge counsel, the trial court allowed appellant the opportunity to explain his reasons for requesting a discharge. The court then indicated that appellant's reason for discharge, that defense

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> that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

counsel was not asking certain questions during cross-examination, was not meritorious. The court further noted that defense counsel was "doing an outstanding job," and it explained that the proceedings were "one witness away from finishing [the] case and doing instructions and argument," and if appellant did discharge counsel, he would have to conduct the rest of the trial, including closing argument, himself. When appellant responded that he did not want to do that, the court denied appellant's motion, again noting that defense counsel was doing "a fabulous job."

To be sure, as appellant points out, the court did not make specific on the record findings with respect to each factor. Appellant cites no case, however, indicating that the court must do so. *See State v. Chaney*, 375 Md. 168, 181 (2003) (judges are presumed to know the law and apply it properly); *Jackson v. State*, 340 Md. 705, 717 (1995) ("trial judges are not obliged to detail every step of their logic").

Under the circumstances of this case, we perceive no abuse of discretion by the circuit court in denying appellant's request to discharge counsel near the close of the State's case. Appellant states no claim for relief in this regard.

II.

Appellant next argues that the trial court erred by imposing separate sentences for first-degree burglary and first-degree assault. He contends that, because both convictions "arose out of a single transaction and there is no indication by the General Assembly of an intent to punish a defendant separately for the offenses in such a situation," the convictions should have merged for sentencing purposes under the rule of lenity.

The State contends that "the court correctly imposed separate sentences for first-degree burglary and first-degree assault." It asserts that the rule of lenity does not apply here because the two crimes, burglary and assault, arose from two distinct acts. 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*), cert. denied*, 450 U.S. 990 (1981). 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 (citations and quotations omitted). 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*.

Here, appellant was convicted of first-degree assault pursuant to Md. Code (2012 Repl. Vol.) § 3-202(a)(2) of the Criminal Law Article ("CR"), which states that "[a] person may not commit an assault with a firearm." Appellant was convicted of first-degree burglary under CR § 6-202(a), which states that "[a] person may not break and enter the dwelling of another with the intent to commit theft." Clearly, as appellant concedes, the

two offenses in question do not meet the required evidence test, as each contains an element that the other does not. *See Williams v. State*, 187 Md. App. 470, 479, *cert. denied*, 411 Md. 602 (2009).

Thus, we turn to appellant's argument that the convictions should merge under the "rule of lenity." "The 'rule of lenity,' a rule of statutory construction, 'provides that doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction will be resolved against turning a single transaction into multiple offenses.'" *Pryor v. State*, 195 Md. App. 311, 338 (2010) (citations and quotations omitted). In short, "[i]f we are uncertain as to what the Legislature intended . . . we give the defendant the benefit of the doubt." *Id.* (citations and quotations omitted).

Here, we are not persuaded that merger under the rule of lenity is warranted. The two offenses at issue, burglary and assault, did not arise out of the same act. Appellant committed burglary when he entered Ms. Boston's apartment with the intent of committing a theft. Appellant committed assault when he pointed a shotgun at Ms. Boston and ordered her to get on the ground. That both of these acts occurred during the same criminal episode is immaterial: "[S]eparate acts resulting in distinct harms may be charged and punished separately." *Latray v. State*, 221 Md. App. 544, 562 (2015). *Accord State v. Boozer*, 304 Md. 98, 105 (1985) ("[S]eparate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and **even though they are part of a single criminal episode or transaction**.") (emphasis added). Accordingly, we hold that the trial court did not err in

imposing separate sentences on the above convictions of first-degree burglary and first-degree assault.

III.

Appellant's final contention is that the trial court erred in imposing a sentence of 25 years for first-degree assault. He asserts that the charge of first-degree assault was a lesser-included offense of the charge of robbery with a dangerous weapon, and therefore, if he had been convicted of robbery with a dangerous weapon, the conviction for first-degree assault would have merged for sentencing purposes, and the trial court would have been constrained by the 20-year maximum sentence for the robbery conviction. Although appellant was acquitted of the robbery charges, he asserts that this should not be "to his detriment," and therefore, the 20-year maximum sentence for robbery with a deadly weapon should have acted as a sentence cap. Accordingly, he asserts that his 25-year sentence should be vacated. The State agrees and so do we.

As noted, offenses that meet the required evidence test generally merge for sentencing purposes. In such instances, the offense with fewer elements (the "lesser offense") merges with the offense that has additional elements (the "greater offense"). *See Gerald v. State*, 299 Md. 138, 140-41 (1984).

Here, appellant was charged with armed robbery pursuant to CR § 3-403, which proscribes obtaining the property of another by force or threat of force using a dangerous weapon. Because the "force" used to sustain the armed robbery conviction was the assault on Ms. Boston, the charge of first-degree assault, "assault by firearm," was a lesser-included offense to the charge of armed robbery. *See Williams*, 187 Md. App. at 478.

Accordingly, had appellant been convicted of armed robbery, his conviction for first-degree assault would have merged for sentencing purposes into the greater offense, and the court would have been constrained by the 20-year statutory maximum for armed robbery. *See Gerald v. State*, 137 Md. App. 295, 312, *cert. denied*, 364 Md. 462 (2001).

As indicated, however, appellant was acquitted of the charge of robbery with a dangerous weapon. Where a defendant is acquitted of the greater offense, it is "unfair to permit the State to exact a more severe and unanticipated penalty . . . than that which could have been imposed if the State had been wholly successful." *Williams*, 187 Md. App. at 476. Accordingly, as requested by the parties, we vacate appellant's sentence for first-degree assault and remand for resentencing, with instructions that appellant's sentence not exceed 20-years' imprisonment.

SENTENCE FOR FIRST-DEGREE ASSAULT VACATED. JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 67% BY APPELLANT AND 33% BY PRINCE GEORGE'S COUNTY.