Circuit Court for Prince George County
Case No.: CT-17-0246B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 192

September Term, 2018

ROBERT BERRIS HILTON

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 5, 2019

A jury sitting in the Circuit Court for Prince George's County convicted Robert Berris Hilton, appellant, of illegal possession of a firearm and two counts each of armed robbery, first degree assault, use of a firearm in a crime of violence, and conspiracy to commit armed robbery. The court sentenced him to a total term of twenty years of incarceration, the first five years to be served without the possibility of parole. He appeals and argues that the evidence was insufficient to sustain his convictions, that the court erred in sentencing him for both counts of conspiracy to commit armed robbery, and that the court erred in failing to merge the convictions for first-degree assault and robbery with a dangerous weapon for sentencing purposes. We agree that one of his two sentences for conspiracy to commit armed robbery must be vacated and that his sentences for first-degree assault and armed robbery must merge. Otherwise we affirm.

BACKGROUND

About 11:00 p.m. on January 17, 2017, Clifton Koonce and Davon McDuffie were parked on the street in front of a friend's home near Woodstock Drive and Rheims Court in Upper Marlboro. The vehicle's engine was off, and both the driver's side window and the front passenger side window were down. As the two men sat, preparing to leave, they observed a silver Toyota Prius drive by with its high beams on. The Prius passed their location, drove a short distance, turned around, and then drove slowly past their car again. Both men lost sight of the Prius after it passed a second time. But shortly thereafter two men, wearing ski masks, walked up to their car. One of the masked men approached the driver's side of the vehicle where Mr. Koonce was seated, and the other approached the passenger side of the vehicle where Mr. McDuffie was seated. The man who approached

Mr. Koonce wore a camouflage print ski mask which covered the bottom half of his face. The man who approached Mr. McDuffie wore a black ski mask which covered his entire face. Both men pulled out guns as they approached the vehicle. The man with the camouflage print ski mask placed his gun through the driver's side open window and placed it on Mr. Koonce's chest. With his other hand he rummaged through Mr. Koonce's pants' pockets. When finished, the man opened the car door and told Mr. Koonce to "stand up." After Mr. Koonce complied, the assailant placed his gun to Mr. Koonce's back as he went through his pockets again.

On the other side of the car, the second assailant held a gun to Mr. McDuffie and told him that he wanted "everything." When Mr. McDuffie replied that they didn't have anything, the second assailant took Mr. McDuffie's headphones and jacket. The second assailant then told Mr. McDuffie to get out of the car.

The assailants then instructed both victims to lay on the grass next to the car. While on the ground, the man in the camouflage print ski mask went through Mr. Koonce's car while the man in the black ski mask held a gun over the victims. In addition to Mr. McDuffie's jacket and headphones, the assailants took both men's phones, Mr. Koonce's watch, and the key to Mr. Koonce's car. When Mr. Koonce asked the assailant wearing the black ski mask if he could have his phone back, the assailant said, "I should shoot y'all because y'all are broke." As they laid on the ground, Mr. Koonce and Mr. McDuffie observed a car drive down the street, pass their location, and then make a u-turn. When this car then turned off its bright lights and paused for a moment, the two assailants ran, entered a silver Prius, and fled the scene.

Off-duty Prince George's County police officer Mario Harkness was driving a friend home to the area of Woodstock Drive in Upper Marlboro about the time of this incident. As he traveled on Woodstock Drive, he noticed four individuals near the roadway – two standing up and two lying on the ground. The two who were standing wore dark clothing and ski masks, and one pointed a handgun at the individuals on the ground. Believing he was witnessing a robbery, he turned off his headlights and asked his companion to call 911. The two people wearing ski masks then ran from the scene and entered a silver Toyota Prius. As the Prius drove away from the scene, Officer Harkness followed the vehicle while his friend stayed on the phone with 911. About ten minutes later, the Prius reached Marlboro Pike and took off at a high rate of speed and turned off its headlights. Officer Harkness lost sight of the Prius and turned down a side street, mistakenly believing the Prius had also turned down the side street. Dispatch then advised Officer Harkness that the silver Prius had crashed at the intersection of Marlboro Pike and Larchmont Avenue. Officer Harkness drove to that location and saw that the silver Prius he had been following had hit a pole and that pieces of the car were strewn about the roadway.

Corporal Chris Hall of the Prince George's County Police Department was dispatched to Capitol Heights for a report of an off-duty police officer following behind a vehicle involved in an armed robbery. As he approached Marlboro Pike from Silver Hill Road, he observed a silver Toyota Prius travelling at a high rate of speed with Officer Harkness following behind in a non-police vehicle. He followed the Prius for

approximately a minute, during which time the Prius reached speeds of over 100 miles per hour.

At the intersection of Marlboro Pike and Larchmont Avenue, the Prius hit a pole or a gate. Corporal Hall stopped and exited his vehicle. The Prius sustained heavy damage and two men were lying injured on the ground nearby. Mr. Hilton, one of the injured men, was screaming in pain and was transported to a hospital. The other injured man was identified as Everett Parrish. A loaded handgun and the key to Mr. Koonce's vehicle were found in Mr. Parrish's pants pocket and a camouflage print ski mask was found in a pocket of his coat.

After the police learned that a third man had run from the Prius after the accident, a K-9 search was conducted of the surrounding area. Keyron Jenkins was discovered hiding in an abandoned building a block away from the accident scene.[1]

A number of items were found on the ground around the wrecked Prius, including articles of clothing, gloves, and a ski mask. In a subsequent search of the Prius, the police recovered a loaded semi-automatic handgun, a silver jacket, and a pair of headphones. Both the gun found in Mr. Parrish's pocket and the gun found in the Prius were test fired and discovered to be fully functioning.

The police transported the robbery victims to the scene of the accident and conducted a show-up identification with Mr. Parrish, but neither victim could identify him. Both explained that the assailants were wearing masks and as a result they were unable to

[1] Prior to Mr. Hilton's trial, Mr. Parrish pled guilty to armed robbery and handgun offenses and Mr. Jenkins pled guilty to armed robbery.

make an identification. At trial, Mr. Koonce identified the camouflage mask which was recovered from Parrish's pocket and the black mask which was recovered from the crash scene as the masks worn by the assailants during the robbery. He also identified one of the handguns in evidence as one of the handguns held by the assailants during the robbery. The jacket and the headphones recovered from the Prius were also identified by Mr. Koonce as items taken during the robbery.

DISCUSSION

Sufficiency of the Evidence

Mr. Hilton asserts that the "evidence was legally insufficient to sustain convictions on all counts" because there "was no direct evidence of [his] involvement, and there was legally insufficient circumstantial evidence of his participation at all in any of the charged offenses." Specifically, he maintains that the State failed "to prove that [he] played the role (if any) of the actual perpetrator (i.e., as a first-degree principle) in the alleged crimes because the victims admittedly could not identify the perpetrators." The State responds that the "jury could infer from the facts adduced at trial that [appellant] was one of the robbers or, alternatively, that he was present during the robbery and acting as an accomplice, and either scenario sufficed for a guilty verdict." We agree with the State.

"In reviewing a challenge to the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the prosecution in order to determine whether, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Montgomery v. State*, 206 Md. App. 357, 385 (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)). We do not "'distinguish between circumstantial and

direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery*, 206 Md. App. at 385 (quoting *Morris*, 192 Md. App. at 31). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

A person may be guilty of a crime as a principal in the first degree or as a principal in the second degree. "Whereas principals in the first degree commit the deed as perpetrating actors, either by their own hand or by the hand of an innocent agent, principals in the second degree are present, actually or constructively, aiding and abetting the commission of the crime, but not themselves committing it[.]" *Moody v. State*, 209 Md. App. 366, 388 (2013) (quotations omitted). "An aider is one who assists, supports or supplements the efforts of another in the commission of a crime" and an "abettor is one who instigates, advises or encourages the commission of a crime." *Id.* "A criminal conspiracy is "the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013).

The jury heard that two masked men brandished guns and robbed Mr. Koonce and Mr. McDuffie. When Officer Harkness came upon the scene, the two assailants ran to a nearby Toyota Prius and fled at a high rate of speed. The Prius stopped only after hitting a pole. Mr. Hilton and Mr. Parrish were located injured and lying beside the totalled Prius.

The evidence indicated that the Prius sustained significant damage to its passenger side, while the driver's side was largely undamaged. A third male, Mr. Jenkins, was found relatively unharmed and hiding in a nearby abandoned building. Based on this evidence, as the State argued in closing statements at trial, the jury could have reasonably inferred that Mr. Hilton and Mr. Parrish suffered significant injuries because they had entered the passenger side of the Prius after the robbery and were in the Prius at the time of the accident. It was also reasonable for the jury to infer that Mr. Jenkins walked away relatively unscathed because he was seated in the driver's seat of the Prius – evidence from which a rational trier of fact could conclude that Mr. Jenkins was the get-away driver while Mr. Hilton and Mr. Parrish were the gunmen. Alternatively, the jury could have reasonably inferred from the evidence that Mr. Hilton was in the Prius at the time of the robbery and aided or abetted the crimes even if he was not one of the masked men who robbed the victims. Finally, a rational jury could have inferred that Mr. Hilton was a part of the conspiracy to rob the victims based on the evidence that, prior to the robbery, the Prius twice drove slowly past Mr. Koonce's vehicle with its high beams on, the Prius remained in close proximity to the scene during the execution of the crime, and the assailants fled in the Prius upon the arrival of Officer Harkness at the scene of the crime. In short, we are persuaded that the evidence was sufficient to sustain Mr. Hilton's convictions.

Sentencing

With respect to sentencing, Mr. Hilton first contends that the trial court erred in sentencing him on both conspiracy convictions. The State concedes, and we agree, that the conspiracy convictions must merge for sentencing purposes. *See Tracy v. State*, 319

Md. 452, 459 (1990) ("It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit.").

Mr. Hilton also asserts that the sentencing court erred in failing to merge his convictions for first-degree assault and robbery with a dangerous weapon under the required evidence test. The State maintains that the court correctly imposed separate sentences for these offenses because they were based on distinct acts.

Where convictions for first-degree assault based on the use of a firearm and armed robbery arise out of the same act, the assault must merge into the armed robbery for sentencing purposes. *See Morris v. State*, 192 Md. App. 1, 39-40 (2010). Where the two acts are distinct, however, the offenses do not merge. *Id.* at 40. "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 the acts.'" *Id.* at 39 (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). The State bears the burden of proving distinct acts for purposes of separate units of prosecution. *Id.* at 39 (citation omitted). If a jury could have based multiple convictions on the same conduct but it is not clear whether it actually did so, "we must resolve the ambiguity in favor of appellant and assume that the jury based all of the convictions on the same conduct." *Jones v. State*, 175 Md. App. 58, 88 (2007) (citation omitted). Thus, where "neither the charging document nor the jury instructions [make] clear that the charge[] of [first-degree] assault [is] based upon [a] separate and distinct act[] from [that] upon which the robbery charge[] [is] based," the charges must merge. *Morris*, 192 Md. App. at 44.

As the State points out, there was evidence of a first-degree assault that was separate and distinct from the armed robbery, specifically, when one of the assailants pointed a gun at both victims after their property had been taken and then threatened to shoot them because they were broke. However, as in *Morris*, neither the indictment, the jury instructions, nor the verdict sheet advised the jury that to find Mr. Hilton guilty of first-degree assault it must find an assault that was separate and distinct from the robbery. And we do not agree with the State that the prosecutor's comments during closing made that distinction clear. Rather, the prosecutor simply argued that a first-degree assault was either "[p]ointing a handgun at somebody" or "brandishing a loaded firearm against somebody," both of which also occurred during the armed robbery. Because it is not clear from the record whether the jury convicted Mr. Hilton of first-degree assault based on his conduct during the robbery, as opposed to his conduct after the robbery was completed, we must resolve that ambiguity in his favor. Consequently, Mr. Hilton's sentence for first-degree assault must be vacated.[2]

CASE REMANDED WITH INSTRUCTIONS TO VACATE ONE OF THE CONSPIRACY SENTENCES AND THE SENTENCE FOR FIRST-DEGREE ASSAULT. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY PRINCE GEORGE'S COUNTY.

[2] Because Mr. Hilton's sentences for first-degree assault and conspiracy were ordered to run concurrent with his sentences for other offenses, vacating those sentences does not alter the sentencing "package" devised by the trial court. *See Twigg v. State*, 447 Md. 1, 26-28 (2016). Consequently, it is not necessary to vacate his remaining sentences and remand for resentencing.