Circuit Court for Prince George's County
Case No.: CT 15-0316X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0362

September Term, 2016

SEIFULLAH A. ALI

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 9, 2018

Seifullah A. Ali, appellant, was convicted, by a jury in the Circuit Court for Prince George's County, of 90 counts of criminal conduct related to telephone and electronic mail harassment, stalking, and violating a protective order on multiple dates between August 2014 and December 2014. The court sentenced Ali to a total of 27 years' imprisonment.

Ali presents the following questions for our consideration:

1. Did the circuit court err in denying defense counsel's motion for judgment of acquittal?

2. Did the circuit court err in refusing to instruct the jury on territorial jurisdiction?

3. Must the docket entries and the commitment record be corrected to reflect the accurate sentence imposed on Count 113?

4. Must the one-year consecutive sentence for harassment (Count 124) merge into the one-year sentence for electronic mail harassment (misuse of electronic mail) (Count 122) where both offenses [were] alleged to have occurred on November 29, 2014?

For the reasons that follow, we shall vacate the sentence that was imposed for Count 124 (harassment), and order correction of his commitment record and docket entries, but otherwise affirm the judgments.

FACTUAL BACKGROUND

Evidence adduced at trial revealed that Ali had, at one point in the past, dated Jeavetta Lucas (the complaining witness) for about three and a half years. Lucas testified that, approximately one year to one-and-a-half years into the relationship, Ali's behavior changed, and he became "aggressive and mean and short" with her. Lucas testified that, on July 12, 2014, Ali tried to kill her, and that he "put a gun in [her] face." She tried to

end the relationship in July 2014, but Ali was "very persistent" and "would constantly call" her and send her text messages after she had told him their relationship was over and refused to date him.

Lucas was employed as a hairstylist at a salon on Marlboro Pike in Prince George's County, Maryland. From August to December of 2014, she had two cell phones: a personal cell phone, and a business cell phone that she used to communicate with her clients. The salon where she worked also had a phone. Lucas indicated that, as of August 2014, Ali was calling her a minimum of ten times per day on all three phone numbers while she was at work. The calls were so excessive that the salon had to take its phone off the hook, and she had to silence her cell phones. Although Lucas had asked Ali not to contact her any more, and she had tried to block his phone number, he continued to call her repeatedly.

Lucas was terrified of Ali. She testified that Ali told her that she "would never get away from him, that he would never be out of [her] life," that "[t]his is not over," and that "he should have killed [her] during that time in July." She stated that Ali sent her text messages threatening to "beat [her] face and slit [her] throat." Photographs or "screenshots" of text messages that Lucas said she received from Ali, as well as recordings of voice mail messages from Ali, were admitted into evidence. Lucas's cell phone records and the cell phone records for a phone number that she identified as belonging to Ali were admitted into evidence.

Lucas testified that, in September 2014, she resorted to "hiding" from Ali. She moved out of her home and moved in with family members. She moved her son, who was nineteen years old, to a location where she thought he would be "safe." As part of her

efforts to avoid Ali, she rearranged her work schedule, cut her work hours, asked clients for rides to and from work, and switched cars with friends and family members. But Ali continued calling and texting Lucas, and driving past her place of work.

On September 24, 2014, Lucas obtained a final protective order against Ali in the District Court of Maryland for Prince George's County. But, despite the protective order, Ali continued to call Lucas and send her threatening text messages. As of November 11, 2014, Lucas was reporting the "constant calling and threatening" from Ali to the court weekly, "sometimes twice a week," and filing charges against Ali.

Lucas testified that, on November 21, 2014, she was at work when she received several text messages from Ali that made her "a little unnerved, a little scared." Shortly thereafter, Ali drove his Tahoe vehicle up to the front windows of the salon so that the grille of the vehicle was bearing on the window. Lucas thought that Ali was "going to come through the window, through the wall," and "[e]verybody [in the salon] just started scattering and shouting." Ali jumped out of the car wearing plastic gloves, goggles, and a hood over his head. He peered in through the windows of the salon and attempted to open the front door of the salon, which was locked as a safety precaution "due to the issue [that Lucas] was having with Ali." Lucas called 911. The 911 recording was played for the jury and admitted into evidence. Lucas described it as "the most terrifying experience ever," and said that she felt "scared to death."

Lucas testified that, prior to August of 2014, she lived in Greenbelt, Maryland. She stated that "between August and September" 2014, she did not leave the State because she "was afraid," explaining:

> I didn't leave the State. I've been in Maryland since this happened. I don't know if it was when I was at work or home, but I was either at one of those two places, either work or home.

On October 18, 2014, she was "at home" at her aunt and uncle's home in Bowie, Maryland, when she received a text from Ali. She was also at "home" in "Prince George's County" when she received texts from Ali on November 2 and November 3, 2014. She recalled that she was staying with her uncle in Bowie on November 13, 2014. As of November 14, 2014, she was still hiding from Ali, but she remained in Maryland. Although she could not recall her exact location when she received a text message from Ali on November 14, 2014, she explained:

> I know I was in Maryland. It could have either been at work or at home. There were many days that I couldn't work because I was scared, so I spent a lot of days at home. At that time in November, home for me was Bowie. I was just very frightened and sheltered. I didn't do much of anything other than work at home.

At one point during the direct examination of Lucas, after the prosecutor had repeatedly asked questions to specify Lucas's location during the fall of 2014, the court instructed the prosecutor to refrain from asking Lucas where Lucas was when she received the harassing communications from Ali:

> Ma'am, you don't have to do that over and over again. She's only said she's only been in Prince George's County, Maryland, during the period of time that is relevant.

The jury found Ali guilty of 25 counts of harassment; 20 counts of electronic mail harassment; five counts of telephone harassment; 17 counts of telephone misuse by obscene content; 22 counts of violating a peace order; and one count of stalking.

We shall include additional facts as relevant to our discussion of the issues.

DISCUSSION

I. & II. (Territorial Jurisdiction)

With respect to the first question raised on appeal, Ali contends that the trial court erred in denying his motion for judgment of acquittal as to the counts for harassment, telephone harassment, and electronic mail harassment; he contends the evidence was insufficient to show that Lucas was in Maryland when she received the harassing communications, and consequently, the prosecution failed to establish territorial jurisdiction for the electronic and telephonic offenses allegedly committed in Maryland. (Ali does not challenge his convictions for stalking or failing to comply with a peace order.)

With respect to the second question raised on appeal, Ali argues, in the alternative, that the question of territorial jurisdiction for these offenses should have been submitted to the jury by an instruction on territorial jurisdiction. Ali asked the trial court to use Maryland Criminal Pattern Jury Instruction on Territorial Jurisdiction, MPJI-Cr 5:09 (2d ed. 2012), which provides:

> You have heard evidence that the crime of (offense) was not committed in the State of Maryland. While not all of the elements of the crime of (offense) must occur in Maryland, in order to convict the defendant, the State must prove, beyond a reasonable doubt, that at least one of the following elements of the crime occurred in Maryland: (essential element(s) for territorial jurisdiction).[1]

The State contends that, for territorial jurisdiction purposes, the pertinent location of the essential elements of each of the crimes for which Ali was convicted was the location

[1] The usage note to MPJI-Cr 5:09 states, in part: "Use this instruction only if the evidence generates an issue of territorial jurisdiction."

where Ali engaged in the harassing conduct, rather than the location where Lucas received the harassing communications. The State argues that the trial court properly denied the motion for judgment of acquittal and the request for a jury instruction based on MPJI-Cr 5:09 because there was no genuine dispute over territorial jurisdiction, and Ali simply raised a bald allegation at trial with respect to both of his territorial jurisdiction arguments. We agree with the State on both points.

Maryland follows the common law rule concerning territorial jurisdiction which "generally focuses on one element, which is deemed 'essential' or 'key' or 'vital' or the 'gravamen' of the offense, and the offense may be prosecuted only in a jurisdiction where that essential or key element takes place." *West v. State*, 369 Md. 150, 158-59 (2002) (footnote omitted). Ali's jurisdictional challenge is limited to the contention that the evidence was insufficient to establish violations of Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), Criminal Law Article ("CL"), §§ 3-803, 3-804 and 3-805. The "essential elements" of each of these statutory offenses focus on the prohibited conduct of the defendant. Therefore, for purposes of CL §§ 3-803, 3-804 and 3-805, territorial jurisdiction is determined by the location of the defendant's prohibited conduct. Ali has pointed to no evidence that created a genuine dispute as to his presence in Maryland at all times pertinent.

He nevertheless contends that there was a genuine dispute as to whether Lucas was in the State of Maryland at the time each act of harassment was committed. Even if that were the appropriate focus of the analysis – which it is not – we would still conclude that there was no genuine dispute regarding Lucas's presence in the State.

"'Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state.'" *Jones v. State*, 172 Md. App. 444, 453 (2007) (quoting *State v. Butler*, 353 Md. 67, 72 (1999)). The general rule in Maryland is that "the crime, or essential elements of it, must have occurred within the geographic territory of Maryland." *Butler*, 353 Md. at 78. Nevertheless, in Maryland, territorial jurisdiction is *not* an element of the offense that must be proved in every case. *Id.* at 79 n.5.

In order to properly raise an issue challenging territorial jurisdiction, **"[i]t is incumbent upon the appellant to do more than make a bare allegation that the crime *might have* occurred outside of Maryland[.]"** *McDonald v. State*, 61 Md. App. 461, 469 (1985) (emphasis added). As we explained in *Jones*, *supra*, 172 Md. App. at 454:

> "A bald conclusory assertion that the offense was not committed within Maryland's territorial jurisdiction . . . is not, by itself, sufficient to create a dispute as to territorial jurisdiction--there must be some supportive evidence." *Butler, supra*, 353 Md. at 79. It is not enough for the defendant to "make a bare allegation that the crime might have occurred outside of Maryland in order to sufficiently generate the issue of lack of jurisdiction." *McDonald, supra*, 61 Md. App. at 469. When the evidence generates a genuine issue of territorial jurisdiction, the prosecution must prove, beyond a reasonable doubt, that the crime was committed within the geographic limits of the State of Maryland. *Butler, supra*, 353 Md. at 83, 724 A.2d 657.

(Ellipsis in *Jones*.)

In *Jones*, the victim was a woman who had been abducted at night by strangers who forced her into their car at a location in Baltimore County. She was driven around for nearly five hours, during which time she was beaten and sodomized, and then dumped out of the

car, half-naked, in Leakin Park in Baltimore City. At trial, she admitted that she did not know for certain where she was at any point in time other than where she was when placed in the car and where she was when put out of the car. On cross-examination, her testimony included the following:

> Q. The driver could have taken you on the Beltway?
>
> A. I don't know. I don't remember.
>
> Q. He could have taken you on the BW Parkway headed toward D.C., correct?
>
> A. I don't know. I don't know what you're saying. I mean, I ended up where I ended up at.
>
> Q. But you don't know, so the rape could have taken place in D.C. in a car, correct?
>
> A. It could have, but I know it didn't.
>
> Q. How do you know?
>
> A. Because I know.
>
> Q. How do you know?
>
> A. Because I know it didn't. Why wouldn't they leave me in D.C. then?
>
> Q. Well, we can't speak for people.
>
> A. Well, you know what? I don't know.
>
> **Q. So you don't know whether it happened in D.C., Virginia or Maryland?**
>
> **A. It happened.**
>
> **Q.** We are not disputing it happened**, but you don't know where it happened, correct?**

A. I don't know where it happened, but it happened in the car.

Id. at 450-51 (emphasis added).

Based upon the victim's concession that she could not rule out the possibility that the criminal acts occurred in D.C. or Virginia, Jones's counsel moved for judgment at the close of evidence, arguing that the prosecution had failed to prove territorial jurisdiction. The trial judge denied the motion. And the jury convicted the defendant.

Even though Jones did not request a jury instruction on territorial jurisdiction, he argued on appeal that the issue should have been decided by the jury rather than the trial judge. We rejected his argument that a territorial jurisdiction issue had been generated by the evidence. We explained:

> The appellant's argument at trial, and here, is that because it is physically possible to drive a car from Nick's Place, in Randallstown, into the District of Columbia (or Pennsylvania), and back to Leakin Park within a 4 hour and 20 minute period of time, and because the victim did not see where she was being driven but knew that she was on high speed roads for some period of time, a genuine dispute was generated over whether the sexual assault took place in Maryland. We disagree.
>
> Evidence of a mere possibility that a crime did not take place in Maryland is not sufficient to create a genuine factual dispute about territorial jurisdiction. . . .
>
> * * *
>
> In this case, . . . there is no evidence whatsoever that the car in which the victim was sexually assaulted traveled into the District of Columbia or Pennsylvania (as defense counsel argued at trial) during the early morning hours of December 4, 1998. To be sure, in the several hour time frame involved, the person at the wheel of the car could have driven it into the District or Pennsylvania, and back to Leakin Park; or for that matter he could have driven into Virginia, West Virginia, Delaware, or southern New Jersey, and back to Leakin Park in that time frame. Maryland is a small state that borders or is near many other states, some also small, and the District of

Columbia; hence, it is possible in a four to five hour span of time to drive from the Baltimore area into one of the surrounding states or the District and back, with time to spare. The mere fact that it was physically possible for the appellant and his accomplice to have driven the victim out of state and then back to Maryland in that time period, standing alone, is speculation, not evidence.

The case that most closely resembles the one at bar is *McDonald v. State, supra*. There, the defendant was convicted of attempted second-degree murder and other offenses in connection with the severe beating of his live-in girlfriend. The couple resided in a house in Germantown with the victim's two children. The defendant and the victim had gone to dinner at a restaurant in Gaithersburg. At 9:30 p.m., the victim called her daughters at home and told them she and the defendant would be there shortly. The two did not arrive home until 2:30 a.m., however, and it was obvious from the victim's condition at that time that she had sustained serious injuries. Although she lived, she never recovered fully enough to be able to communicate what had happened that night.

Charges were brought against the defendant in the Circuit Court for Montgomery County. On appeal following conviction, the defendant argued that the circuit court had been without jurisdiction to hear the case because the State had not proven that the crime had been committed in Maryland. This Court rejected the argument, explaining:

> In the instant case, the evidence supports an inference that [the victim's] beating by the [defendant] took place in Montgomery County, Maryland. There was evidence adduced at trial to show that the [defendant] and [the victim] were seen leaving the [restaurant] in Gaithersburg, Maryland at approximately 9:30 p.m. Further [the victim's daughter] testified that she observed the [defendant] carry [the victim] into their Germantown, Maryland home at 2:00 a.m. the following morning. *The [defendant], on the other hand cannot point to even a scintilla of evidence which would indicate that the crime was committed outside of Maryland. Rather he speculates that the location of the [restaurant] is such that in the period of time during which the whereabouts of the [defendant] and [the victim] could not be shown, they could have traveled into several other states as well as the District of Columbia*.

> It is incumbent upon the [defendant] to do more than make a bare allegation that the crime might have occurred outside Maryland in order to sufficiently generate the issue of lack of jurisdiction.

McDonald, supra, 61 Md. App. at 468–69, 487 A.2d 306 (emphasis added [in *Jones*]).

> Likewise, in this case the evidence adduced by the appellant was legally insufficient to generate the issue of territorial jurisdiction. Evidence that the driver of the car involved in this crime ***could have*** traveled from Randallstown outside of Maryland before the crime was committed and ***could have*** traveled back to Leakin Park after the crime was committed is not evidence that he did so. Moreover, the victim's testimony that at times the car was being driven at high speed did not elevate the issue of territorial jurisdiction from mere conjecture to a genuine dispute of fact. The Baltimore Beltway, a high-speed road that divides the Randallstown area of Baltimore County, where Nick's Place is located, from inner Baltimore County and the City, including the Leakin Park area, does not cross any state line. It would be nothing short of guess work to surmise from evidence that the car at times was traveling at high speed that it had been driven out of state. Without evidence amounting to more than conjecture that the crime was committed outside of Maryland, the issue of territorial jurisdiction was not generated for decision by the jury and, if the court had been asked to grant an instruction on that issue, and had refused, it would not have erred.

Id. at 457-60.

In this case, Ali's argument about territorial jurisdiction is as speculative as the argument made by the defendant in *Jones.* Lucas's testimony established that she was located in Maryland when she received the harassing communications from Ali between August and December of 2014, and there was ample circumstantial and direct evidence that Ali was also in Maryland when he committed the acts of harassment. The only bits of evidence (either testimonial or documentary) that Ali points to in his brief to support his contention that there was a genuine dispute as to territorial jurisdiction included the fact that, when asked where she was from, Lucas replied: "Born and raised in Washington,

D.C." She also acknowledged that her parents still lived in D.C., and at least one of her phone bills listed an address in D.C. As in *Jones*, those bits of information do not raise a genuine dispute about the location where Ali committed the acts of harassment, and it would require guess work to surmise that Ali's acts of harassment were committed when Lucas – let alone Ali himself – was outside the State of Maryland. *See Jones*, 172 Md. App. at 460. The court did not err either in denying the motion for judgment or refusing to give an instruction on territorial jurisdiction.

III. (Commitment Record)

Ali contends that the docket entries and the commitment record should be corrected to reflect the sentence imposed by the court as to Count 113 matches what is stated in the transcript of the sentencing hearing. The docket entry reflects that Ali was sentenced on "Count 113 for a period of 1 year; consecutive to Count 110." The commitment record also states that the sentence on Count 113 is "Consecutive to Count 110." But the corresponding portion of the transcript of the sentencing hearing states:

> Count 113, the sentence of this Court is that you serve one year in the Department of Corrections. That sentence runs **concurrent to 107**.

(Emphasis added.)

Ali asks that we order that the docket entry and commitment record be amended to conform to the transcript. He asserts that, "'[w]hen there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails.'" *Lawson v. State*, 187 Md. App. 101, 108 (2009) (quoting *Douglas v. State*, 130 Md. App. 666, 673 (2000)). The rule is the same with respect to a discrepancy between

the transcript and the docket entries. *Id*. (citing *Dedo v. State*, 105 Md. App. 438, 462 (1995)).

The State does not dispute that Ali has correctly set forth the case law regarding discrepancies between the sentencing transcript and either the docket entries or the commitment record. Nevertheless, the State theorizes, based upon the volume of counts involved, and the court's pattern of sentencing Ali to one-year terms of imprisonment to be served consecutively for each violation of CL § 3-805, the transcript may be incorrect. The State points out that, for each violation of CL § 3-805, the court sentenced Ali to one year of imprisonment, to run consecutive to each other. The sentences announced for only two counts deviate from that sentencing pattern: Count 113 and Count 124.[2] The State requests that we remand the case to the circuit court with instructions to review the recording of the sentencing hearing to determine whether the transcript is correct in stating "concurrent to 107" rather than consecutive to the sentence in Count "110."

Ali replies that the remand requested by the State is not the appropriate remedy in this instance. He points out that the State is resorting to speculation and conjecture on this issue, and the State has (apparently) made no effort to have the transcript reviewed for possible error even though the discrepancy was pointed out in appellant's opening brief. We agree with Ali's argument that the State's claim of transcript error is speculative. Accordingly, we will direct that the docket entry and commitment record be revised to

[2] Because we conclude in section IV below that Count 124 should merge for sentencing purposes with Count 122, whether there is an error in the transcript regarding that sentence is moot.

conform to the sentencing transcript with respect to Count 113 as being concurrent to the sentence for Count 107.

IV. (Merger – Count 124)

Ali's final contention is that his sentence for Count 124 (the harassment offense on November 29, 2014) must merge into his sentence for Count 122 (misuse of electronic mail on November 29, 2014) under the "required evidence test," also known as the *Blockburger* test.[3] The State concedes that the circuit court erred by imposing separate sentences as to both Counts 124 and 122, and agrees that those convictions must merge for sentencing purposes. We also agree.

"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." *Brooks v. State*, 439 Md. 698, 737 (2014) (citing *Nicolas v. State*, 426 Md. 385, 400-02 (2012); *State v. Lancaster*, 332 Md. 385, 391 (1993)). We review the elements of each offense and determine "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. The required evidence '"focuses upon the elements of each offense; if 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."' *Marlin v. State*, 192 Md. App. 134, 159 (2010) (quoting *Lancaster*, *supra*, 332 Md. at 391).

[3] *Blockburger v. United States*, 284 U.S. 299 (1932).

Count 124 of the indictment alleged that Ali had violated the second modality of CL § 3-803 by "maliciously engag[ing] in a course of conduct that alarms or seriously annoys the other." The second modality of harassment pursuant to CL § 3-803 provides:

> A person may not . . . maliciously engage in a course of conduct that alarms or seriously annoys another:
>
> (1) with the intent to harass, alarm, or annoy the other;
>
> (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and
>
> (3) without a legal purpose.

CL § 3-805 contains one more element in addition to those listed above, namely, that the harassment must occur "through the use of electronic communication." We conclude, therefore, that the circuit court should have merged the offense of harassment in Count 124 into the offense of misuse of electronic mail in Count 122 for the purposes of sentencing. Accordingly, we shall vacate the sentence for Count 124. *See Carroll v. State*, 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged[.]"), *aff'd*, 428 Md. 679 (2012).

CASE REMANDED WITH INSTRUCTIONS TO REVISE THE DOCKET ENTRY AND COMMITMENT RECORD TO CONFORM TO THE SENTENCING TRANSCRIPT WITH RESPECT TO COUNT 113; AND THE SENTENCE THAT WAS IMPOSED AS TO COUNT 124 IS HEREBY VACATED; OTHERWISE, ALL JUDGMENTS ARE AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY PRINCE GEORGE'S COUNTY.