Circuit Court for Prince George's County
Case No. CT030143A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 920

September Term, 2017

EVERETT WENDELL KEETON

v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 20, 2018

On November 5, 2003, a jury in the Circuit Court for Prince George's County convicted appellant, Everette Keeton, of numerous crimes in connection with the armed robbery of an International House of Pancakes in Marlow Heights, Maryland. He filed an initial appeal before this Court on February 2, 2004, raising issues with the jury selection process and the jury instructions. We affirmed his convictions. Appellant subsequently filed a petition for post-conviction relief and the circuit court granted his motion in part. Included in the court's order was the right to file a belated appeal of his robbery convictions upon two IHOP employees, Edward Smith and Kenneth Johnson. Appellant timely appealed and raises the following question for our review:

> I. Was the evidence insufficient to convict Mr. Keeton of robbery with a dangerous weapon and robbery of Edward Smith; and, was the evidence insufficient to convict Mr. Keeton of robbery with a deadly weapon and robbery of Kenneth Johnson?

For the reasons to follow, we affirm.

BACKGROUND

In the early morning hours on January 7, 2003, Melva Pittman, an employee at IHOP, observed three men walk into the restaurant: one wore a tan jacket, another a green jacket, and the third was wearing all black. Each concealed their face with a mask. Pittmann initially observed one man walk to the kitchen, another block the entrance, and believed the third had already gone into the kitchen. She then watched as the men brought the busboy, Kenneth Johnson, and the cook, Edward Smith, out of the kitchen. Pittmann immediately jumped up and attempted to tell customers to leave but was pushed down by the man in the green jacket. The other two men walked over and had the cashier open the

register. Pittmann testified that "they had the guns on Mr. Smith and Mr. Kenneth Johnson. And they -- one had the gun on me." She also testified that the men pointed their guns at Ebony Braxton, who was in charge of the cash register at that time.

Unsatisfied with the amount of money in the register, the men told Pittman to take them to the safe. Pittman testified that she, Johnson, and Smith were then taken to the office upstairs. Once in the office, Pittman heard the man in black saying "you're taking too long. You need to hurry up and open up the safe." She responded "[y]our scarring [sic] me," and that "[i]t took me like three turns to try to open it while the tan jacket guy had Kenny and Ed standing behind me with the gun on them." Once the safe was open, the three men used a large plastic bag and dumped the contents of the safe into the bag. All told, the men took $1,100 from the safe and approximately $7,900 from the cash register.

Officers Chris Murtha and Richard Smith responded to IHOP as the three men attempted to flee the scene. Officer Murtha observed three men wearing masks and that the first two had handguns. As he got out of his vehicle, Officer Murtha screamed "Prince George's County Police," "drop the weapon," and "freeze." The three men looked in the officers' direction, and the first two pointed weapons at them. Officer Murtha testified that the first individual had on a tan jacket and dark jeans; and the second was in dark clothing. The man in the tan jacket fired his weapon as the officers moved for cover, and a shootout ensued. Officer Smith reported shots fired.

During this time, two of the men ran behind a large wooden fence that leads into a residential area, and the man in the tan jacket ran towards a vehicle that was parked in the

rear of the restaurant. Officer Murtha yelled "[p]olice," and "[d]rop the weapon, drop the gun." Afterward, Officer Murtha testified that "the gun I saw raised up again right at me. And I saw the muzzle flash, heard the report. And I realized [the man in the tan jacket] fired again at me." Officer Murtha returned fire as the man got in the car, and an additional officer on the scene fired his weapon as the man exited the parking lot.

Officers Murtha and Smith returned to their patrol car and followed the man, never losing sight of him. During the chase, the man jumped out of his car, hopped a fence, and ran into a residential area. Officers Murtha and Smith set up a perimeter and called for a K-9 unit. Officer Murtha then searched the car and saw a large quantity of U.S. currency wrapped in a plastic bag. He also observed a handgun on the floorboard under the drivers seat—the same weapon the man pointed and fired at him when leaving the restaurant. Once the K-9 unit arrived, the dog tracked the man to a wooded area and alerted under a large utility trailer. The man was ultimately removed from the trailer and placed under arrest. Officer Murtha identified appellant, Everett Keeton, as the man that shot at him.

Following a three day jury trial in the Circuit Court for Prince George's County, appellant was convicted of four counts of robbery and armed robbery; six counts of use of a handgun in the commission of a crime of violence; two counts of attempted second-degree murder; six counts of first-degree assault; seven counts of second-degree assault; conspiracy to commit robbery; theft over $500; and carrying and transporting a handgun. On January 16, 2004, after merging the relevant offenses, the court sentenced appellant to a total of sixty years incarceration.

On February 2, 2004, appellant noted his first appeal to this Court. He raised two issues: 1) whether the trial court erred by denying his request for two preemptory challenges for each alternate juror selected; and 2) whether the trial court committed plain error by instructing the jury that he could be convicted of attempted second-degree murder on the basis of an intent to inflict grievous bodily harm. We affirmed his convictions in an unreported opinion. *See Keeton v. State*, No. 2721 (Md. Ct. Spec. App. May 6, 2005). The Court of Appeals denied his petition for writ of certiorari.

Appellant subsequently filed a number of motions, including a motion for reconsideration, a motion to correct an illegal sentence, and a motion for modification; the circuit court denied each motion. On January 16, 2014, he filed a petition for post-conviction relief and later filed a supplemental petition and a second supplemental petition. The circuit court held a hearing on January 26, 2017. Following the hearing, as pertinent here, the court granted the motion in part and ordered that appellant "shall have the right to file a belated appeal on count 6 (robbery with a dangerous weapon of Edward Smith), count 7 (robbery of Edward Smith), count 11 (robbery with a dangerous weapon of Kenneth Johnson), and count 12 (robbery of Kenneth Johnson), provided that such appeal is noted within 60 days of the entry of this order." This timely appeal followed.

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence to support a conviction, we 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." *State v. Smith*, 374 Md. 527, 533 (2003). "We give due regard

to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id.* at 534 (citations and quotations omitted). Our role is not to re-weigh the evidence, but rather to "determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* (citation and quotations omitted).

DISCUSSION

I. Sufficiency of the Evidence

Maryland common law defines robbery as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or putting in fear." *Metheny v. State*, 359 Md. 576, 605 (2000) (citation omitted). Robbery with a dangerous or deadly weapon is the offense of common law robbery, aggravated by the use of a dangerous or deadly weapon. *Cates v. State*, 21 Md. App. 363, 366 (1974). The General Assembly incorporated these judicial determinations in its definition of robbery in the Criminal Law Article:

> (e) "Robbery" retains its judicially determined meaning except that:
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> (1) robbery includes obtaining the service of another by force or threat of force; and
>
> (2) robbery requires proof of intent to withhold property of another:
> (i) permanently;
> (ii) for a period that results in the appropriation of a part of the property's value;
> (iii) with the purpose to restore it only on payment of a reward or other compensation; or
> (iv) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

Md. Code Ann., Criminal Law § 3-401(e) (West 2002). The statute does not expressly state, however, whether the crime can only be committed against the owner or one in immediate control of the stolen property, or if a conviction for robbery may also be upheld if the victim of the force is not the owner of the property taken and is not in the immediate presence of the property when it is taken. Two cases, *Borchardt v. State*, 367 Md. 91 (2001) and *Facon v. State*, 144 Md. App. 1 (2002), *rev'd on other grounds*, 375 Md. 435 (2003), are instructive.

In *Borchardt*, the defendant was convicted of two counts of murder and two counts of armed robbery after he robbed and killed a husband and wife in their home. 367 Md. at 98. Testimony at trial established that a wallet was taken from a desk in the hall of the home, not from the person of either the husband or wife. *Id.* at 100. The Court explained that although the wallet, money, and credit cards belonged to the husband, "a robbery conviction may be sustained even if the victim of the force is not the owner of the property taken and is not in the immediate presence of the property when it is taken." *Id.* at 144. It also observed that "[r]obbery convictions have been sustained where the victim was in one room of a house or place of business and property was taken from another room and that the defendant may be convicted even though [the person killed] was not the owner of the jewelry." *Id.* (citations and quotations omitted). In denying the defendant's sufficiency argument, the Court reasoned that even though the husband "may have been the owner of the wallet, there is a fair inference that [the wife] had equivalent possession of the desk or chest and thus of the wallet in the chest." *Id.* at 145.

In *Facon v. State*, we denied a similar sufficiency argument where the defendant claimed there was one robbery, not two, because "there was only a single act of taking from one entity, despite the fact that two employees were present in the store." 144 Md. App. at 34. Relying on *Borchardt*, we held that "Maryland follows the principle that the appropriate 'unit of prosecution' in a robbery case turns on the number of persons assaulted in the course of the taking." *Id.* at 43. While we cautioned that not every employee who is present at a place of business when a robbery occurs would necessarily be the victim of that offense, we also held that one who has a superior right to that of the robber, and who has actual or constructive possession, can be the victim of a robbery:

> A charge of robbery may be sustained by proof that the property was forcibly taken from the care, custody, control, management or possession of one having a right superior to that of the robber, which could include an employee of a business. Although an employee need not have legal title to property that is taken by force in order to be a victim of robbery, the employee must have a legal interest in the property, such as care, custody, control, or possession. Such custody or possession may be either actual or constructive, and individual or joint, so long as the property is taken by force or intimidation.

Id. at 43–44 (citations and quotations omitted). Because both employees were found to have joint possession, custody, or control of the pack of cigarettes taken by the defendant, we held that the defendant committed two armed robberies. *Id.* at 44.

In this case, appellant argues the State failed to prove that personal property was taken from Kenneth Johnson and Edward Smith. Maryland precedents, appellant argues, "have established the importance of the identity of the alleged victim, because *that person* must be in ownership or control of the property taken." Since Johnson and Smith—the cook and busboy, respectively—were not in lawful possession, ownership, or control over

the money that was taken, there was insufficient evidence to support the resulting robbery convictions. The State, citing *Borchardt* and *Facon*, responds that the evidence was sufficient to establish that appellant committed a robbery against Johnson and Smith because: 1) they were present during the robbery and 2) as employees, they had a legally superior possessory interest in the money than appellant.

We agree with the State. At trial, Melva Pittman testified that Johnson and Smith were removed from the kitchen by masked men; she told patrons to leave the restaurant and was pushed down by the man in the green jacket; and she also testified that during this time "they had the guns on Mr. Smith and Mr. Kenneth Johnson. And they -- one had the gun on me." Pittman, Johnson, and Smith were then taken to the office upstairs. Once in the office, Pittman heard the man in black saying "you're taking too long. You need to hurry up and open up the safe." She responded "[y]our scarring [sic] me," and that "[i]t took me like three turns to try to open it while the tan jacket guy had Kenny and Ed standing behind me with the gun on them."

Although Johnson and Smith did not have the combination to the safe or turn the money over to appellant, the jury could have found that they had constructive joint possession and control of the money during the commission of the armed robbery, they had a legitimate protective interest in their employer's property, and that Pittman's testimony was sufficient to infer they were placed in fear. As a result, Johnson and Smith's interest in the property was superior to appellant and sufficient to sustain appellant's respective convictions under the facts of this case.

The Maryland precedents cited by appellant do not compel a different result. Rather—consistent with *Borchardt* and *Facon*—they hold that a robbery may be committed where the victim of the crime has a legal interest in the property.

In *Kyle v. State*, the indictment alleged the defendant stole money from Barney Kruglak and his wife, Martha Kruglak, while the evidence at trial was that the stolen money belonged to a corporation under which the Kruglaks operated their store. 6 Md. App. 159, 162 (1969). We explained that it "is required that the victim be the owner *or have a legal interest* or special property in what was stolen as for example be in 'lawful possession as bailee,'" and we held that the husband was the "lawful possessor of the money whether it belonged to him, or to him and his wife, Martha Kruglak, or to a corporation under which they operated their store." *Id.* (emphasis added).

Similarly, in *Johnson v. State*, the indictment alleged a robbery against a bank supervisor, but the evidence at trial established that bank tellers were the ones to give the robbers the money. 9 Md. App. 143, 146 (1970). We explained that a "charge of robbery may be sustained by proof that the property was forcibly taken from the care, custody, control, management or possession of one having a right superior to that of the robber," and we held that the supervisor was a victim of robbery because "he was present at the bank on the day of the robbery, and that he was responsible for the operation of the tellers' windows." *Id.* at 146–47. Accordingly, neither *Kyle* nor *Johnson* stand for the proposition that a victim "must be in ownership or control of the property taken." We hold there was sufficient evidence for the jury to conclude that appellant committed robbery and robbery with a deadly weapon against Kenneth Johnson and Edward Smith.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.