Circuit Court for Wicomico County
Case No. C-22-CR-17-00759

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1280

September Term, 2019

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DELINTA WHITE

v.

STATE OF MARYLAND

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

JJ.

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Opinion by Berger, J.

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Filed: September 28, 2020

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Following a bench trial in the Circuit Court for Wicomico County, Delinta White, appellant, was convicted of second-degree assault, reckless endangerment, unauthorized removal of property, telephone misuse, and harassment. The court imposed a sentence of ten years for second-degree assault, four years for unauthorized removal of property, three years for telephone misuse, and 90 days for harassment.[1] The court ordered all sentences to be served consecutively, for a total sentence of 17 years and 90 days.

Appellant presents three questions for our review:

1. Was the evidence insufficient to convict Appellant of unauthorized removal of property?

2. Did the court err in imposing separate sentences for telephone misuse and harassment?

3. Did the court err in imposing a "6-month minimum mandatory" sentence for unauthorized removal of property?

For the following reasons we shall affirm the judgments of the circuit court.

## BACKGROUND

Donna Hardy dated appellant for approximately four months, up until August 11, 2017. On that date, Ms. Hardy and appellant got into an argument as she was giving him a ride home in her car. Before reaching appellant's house, she stopped the car and told him to get out, but he refused. Ms. Hardy saw some of appellant's friends standing outside a nearby house and she rolled down the car window and asked them to help her get appellant out of her car, but they took no action.

[1] For sentencing purposes, the conviction for reckless endangerment was merged with the conviction for second-degree assault.

Ms. Hardy testified that appellant then got out of the car and pulled her out. He "dragg[ed] her down the street," ripping some of her clothing off of her body in the process. At that point, one of appellant's friends intervened and "tried to get him off" of Ms. Hardy. Ms. Hardy was able to escape for a moment, but appellant "pulled [her] back" and hit her, knocking out the two front teeth in her lower jaw.

Ms. Hardy tried to get back into her car, but appellant took her keys from her. The mother of one of appellant's friends, who lived on the street where the assault occurred, told Ms. Hardy to come into her house. When Ms. Hardy went back outside, an unspecified amount of time later, her car was gone. Ms. Hardy stated that she did not give appellant permission to take her car. The police later advised Ms. Hardy that the car had been recovered, but she did not know where it had been found because her friend picked it up for her.

Ms. Hardy went to the hospital following the assault, where she received approximately 13 stitches in her lip. That same day, Ms. Hardy filed for a temporary protective order against appellant. The protective order was not served on appellant until September 20th.[2]

On August 26th, two weeks after the assault, Ms. Hardy returned to her house, for the first time since the assault, to pick up some clothes. When she went out onto her deck, she saw appellant entering the property through the back gate.[3] On four or five other

[2] Unless otherwise indicated, all dates are in 2017.

[3] Ms. Hardy did not explain what, if anything, happened after appellant came to her house on August 26th.

occasions, appellant showed up at Ms. Hardy's place of employment, prompting her to call the police each time. On yet another occasion, appellant suddenly appeared in front of Ms. Hardy, while she was at a gas station, and stood in front of her so that she could not get into her car. Appellant walked away after a gas station employee told him to leave Ms. Hardy alone. Ms. Hardy did not specify the dates on which the encounters at her place of work or at the gas station took place.

On September 7, 9 and 12, appellant called Ms. Hardy repeatedly, between eight and ten times on each date, from a phone other than his own. Ms. Hardy stated that she knew it was appellant because she answered the first call, "to see . . . who it was[,]" and she heard his voice. Ms. Hardy told appellant that she had nothing to say to him and to stop calling her. She explained, "after I answered the first time, I would just hang up, but it would be the same number over and over." She related that, "in an hour's time, it would be like [four] calls, and then it would stop for a couple of hours, and then start back up again." Appellant sent Ms. Hardy over one hundred text messages between September 1st and 12th, some of which said that he was watching her.

In November 2017, appellant, who was then in jail, sent Ms. Hardy two letters. In one letter, appellant stated that he did not intend to injure her and offered to pay for her to get her teeth fixed if the charges were dropped. In the other letter, appellant wrote: "I'm asking for forgiveness from you and that we can put this behind us without me going to prison." Appellant "begg[ed]" Ms. Hardy to "let it go" and to "let [him] pay for the damages that was done." He wrote that he was "willing to do whatever has to be done to make it right between [them] except go to prison[.]"

At the time of trial, in April 2018, Ms. Hardy was still missing her two bottom teeth. Her dentist had advised her not to have dental implant surgery until the swelling in the area subsided, which would take about a year. Her lip was permanently numb, and she experienced swelling of the lip on a daily basis.

Appellant took the witness stand in his defense. He explained that, at the time of the assault, he had another girlfriend, and that Ms. Hardy was "just somebody that [he] was seeing on the side[.]" On the date of the assault, Ms. Hardy was "really" upset because she discovered that he had a girlfriend. Appellant explained that, as Ms. Hardy drove him home, she "kept [ ] going on and on about it[,]" so he "cut the music up" because he "didn't want to talk to her really."

According to appellant, Ms. Hardy jumped out of the car when she saw his friends sitting on their porch and told them that appellant was cheating on her and that she was tired of him. He got of the car and "started cussing" at her. Appellant gave the following account of what happened next:

> Once I started cussing at her, she ran up behind me and she just started hitting on me. That's when I grabbed her, and I'm tell[ing] you the truth, I grabbed her around the shirt once she started swinging on me to keep her from hitting me.
>
> And once I grabbed her by the shirt, she yanked away. That's how her shirt got ripped. Once her shirt ripped, she just charged me and started hitting, started swinging on me. So I went to try like to push her away. And my forearm hit her head, and that how I guess her teeth . . . were knocked out[.]

After Ms. Hardy went into the house, the mother of appellant's friend asked appellant to move the car from in front of her house because the car doors were open, and

the music was still playing loudly. Appellant said that he "pulled the car to the side of the house[,]" gave the keys to his friend's mother to give to Ms. Hardy, and then walked home.

As noted, the court convicted appellant of second-degree assault, reckless endangerment, unauthorized removal of property, telephone misuse, and harassment. Additional facts will be included in the discussion as they become relevant.

## DISCUSSION

### I. Sufficiency of the Evidence

Appellant asserts that the evidence was insufficient to sustain his conviction for unauthorized removal of property. Based on our review of the record, we conclude that the evidence was sufficient.

"[A]ppellate review of the sufficiency of the evidence . . . is precisely the same in a jury trial and in a bench trial alike." *Chisum v. State*, 227 Md. App. 118, 129 (2016). We ask "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." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)).

"When evaluating the sufficiency of the evidence in a non-jury trial, we will not set aside the judgment of the trial court on the evidence unless it is clearly erroneous, giving due regard to the trial judge's opportunity to judge the credibility of the witnesses." *Livingston v. State*, 192 Md. App. 553, 572 (2010). *See also* Md. Rule 8-131(c). We "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the prevailing party." *Smith v. State*, 232 Md. App. 583, 594 (2017)

(quoting *Abbott v. State*, 190 Md. App. 595, 616 (2010)). "If there is any competent evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Goff v. State*, 387 Md. 327, 338 (2005) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (additional citation omitted)).

Appellant was charged with unauthorized removal of property, specifically, Ms. Hardy's vehicle, pursuant to Maryland Code (2012 Repl. Vol), Criminal Law Article ("CR"), § 7-203, which provides, in pertinent part, that, "[w]ithout the permission of the owner, a person may not take and carry away from the premises or out of the custody of another or use of the other . . . any property, including . . . a motor vehicle[.]" Appellant asserts that the State presented no affirmative evidence (1) that he took Ms. Hardy's vehicle away from the scene of the assault or (2) that he did so with knowledge that he lacked permission. We disagree.

Ms. Hardy testified that appellant took her car keys from her immediately after the assault, and that, when she emerged from the house, her car was "gone":

> [MS. HARDY]: . . . After [the assault], I got back to my car. I tried to get in my car. All I remember is blood being on my window. I tried to get back in my car, and he - - I think his friend's mom told me to come in her house. . . . When I did come out - - back, my car was gone, so I don't know where he went with my car. I don't know where they found my car because my friend picked it up from when the cop told me they found it.
>
> [PROSECUTOR]: Who had keys to your car on that day?
>
> [MS. HARDY]: [Appellant].

* * *

> [MS. HARDY]: . . . [Appellant] took the keys I had from me.
>
> [PROSECUTOR]: Okay. When did he take those from you?
>
> [MS. HARDY]: After he hit me, when I got back to the car and was trying to get in. I think I, I think I dropped them on the ground. I'm not positive though.
>
> * * *
>
> [PROSECUTOR]: So after you went into a friend's house and you came back out, your vehicle was not where you left it?
>
> [MS. HARDY]: No.
>
> [PROSECUTOR]: Okay. But you're sure it was [appellant] that took the keys from you?
>
> [MS HARDY]: Yes.[4]

Moreover, appellant admitted that he drove Ms. Hardy's vehicle after the assault. The court, as the finder of fact, was free to disbelieve the part of appellant's testimony in which he claimed that he only moved the car to the side of the house and gave the keys to his friend's mother to give to Ms. Hardy.[5] A rational inference to be drawn from the

[4] Appellant suggests that Ms. Hardy was not positive that appellant took her keys. We disagree with that interpretation. In the light most favorable to the State, Ms. Hardy's testimony established that appellant took her keys. The only thing she was "not positive" about was whether she had dropped them on the ground.

[5] Appellant suggests that the court had no choice but to accept his testimony because the State did not introduce evidence to negate it. This argument lacks merit. *See Nicholson v. State*, 239 Md. App. 228, 243 (2018) ("In its assessment of the credibility of witnesses, [a fact-finder is] entitled to accept – or reject – *all, part, or none* of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence.") (citation omitted, emphasis in original), *cert. denied*, 462 Md. 576 (2019). *See also Hennessy v. State*, 37 Md. App. 559, 561-62 (1977) (rejecting defendant's argument that he was entitled to judgment of acquittal because the State did not affirmatively negate

evidence was that, after assaulting Ms. Hardy, appellant took her keys and left the scene in her vehicle.

Moreover, Ms. Hardy's testimony was sufficient to establish that appellant did not have her permission, express or otherwise, to use her car:

> [PROSECUTOR]: . . . Did you ever tell him he could take your car?
>
> [MS. HARDY]: No.
>
> [PROSECUTOR]: Okay. Had you in any other way indicate[d] he had permission to take that vehicle?
>
> [MS. HARDY]: No.

Appellant contends that there was no evidence that he acted with the requisite mens rea, or knowledge that he lacked Ms. Hardy's permission to use her vehicle. We are not persuaded.

"[G]uilty knowledge is essential to a conviction of a person accused of larceny of use[.]"[6] *In re Landon G.*, 214 Md. App. 483, 506 (2013) (quoting *Anello v. State*, 201 Md. 164, 168 (1952)). *See also* Comment to Maryland Criminal Pattern Jury Instruction 4:34 ("The mens rea for unauthorized removal of property under CR § 7-203 is knowledge that the removal is unauthorized.") An accused's knowledge that the removal of property is

his self-defense testimony, reasoning that the "factfinder may simply choose not to believe the facts as described" by the defendant).

[6] The crime of larceny of use was codified at former Article 27, § 349 (the predecessor statute to CR § 7-203). *See Allen v. State*, 402 Md. 59, 62 n.1, 68-69 (2007) (discussing the history CR § 7-203).

unauthorized "may be inferred from facts and circumstances such as would cause a reasonable [person] of ordinary intelligence, observation and caution to believe that the property had been unlawfully taken." *Landon G.*, 214 Md. App. at 506 (quoting *Anello,* 201 Md. at 168).

The evidence at trial, viewed in the light most favorable to the State, demonstrated that Ms. Hardy was angry with appellant and asked him to get out of her car. Appellant responded by forcibly removing Ms. Hardy from her own car, ripping clothing off of her, and hitting her with enough force that he knocked out two of her teeth. Indeed, those facts and circumstances would cause a reasonable person to believe that appellant then knew that he did not have Ms. Hardy's permission to take her car. Accordingly, we conclude the evidence supported an inference that appellant had knowledge that he took Ms. Hardy's car was without her consent.[7]

In sum, viewed in the light most favorable to the State, the evidence at trial was sufficient to support a finding that appellant took Ms. Hardy's vehicle out of her custody and use, and that he did so without her consent. Accordingly, the court's finding that appellant was guilty of unauthorized removal of property was not clearly erroneous.

[7] Appellant claims that "it would have been reasonable for him to assume that he had [Ms. Hardy's] implicit permission to move her car." He points to Ms. Hardy's testimony that she had previously let him "go like wash the car or something," and to his testimony that "he only moved the car at the request of his friend's mother." We see no merit in this argument as permission to use a vehicle cannot be implied "in the face of an express statement [by the owner of the vehicle] to the contrary." *Payne v. Erie Ins. Exchange*, 216 Md. App. 39, 52 (2014), *aff'd* 442 Md. 384 (2015). Ms. Hardy expressly denied giving appellant permission to take her car, and there was no evidence that Ms. Hardy directed or acquiesced to any request made by the friend's mother for appellant to move the car.

## II. Sentences for Telephone Misuse and Harassment

Appellant asserts that the court erred in imposing separate sentences for telephone misuse and harassment "because the elements of and acts underlying those offenses overlap." The State contends that the court was not required to merge the convictions for sentencing purposes because "the record unambiguously shows that the two convictions were based on separate acts." We agree with the State.

The principle of merger is derived from the protections of the Double Jeopardy Clause. *State v. Frazier*, 469 Md. 627, 641 (2020). "It is the mechanism used to 'protect[] a convicted defendant from multiple punishment for the same offense.'" *Id.* (quoting *Brooks v. State*, 439 Md. 698, 737 (2014)).

"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." *Simms v. State*, 240 Md. App. 606, 625 (2019) (quoting *Carroll v. State*, 428 Md. 679, 693-94 (2012) (additional citation and internal quotation marks omitted). Appellant contends that his convictions merge under either the required evidence test or the rule of lenity.

Under the required evidence test, "one criminal offense merges into another 'when both offenses are based on the same act or acts' and 'one [offense] is a lesser included offense of the other." *Clark v. State*, 218 Md. App. 230, 254 (2014) (quoting *State v. Lancaster*, 332 Md. 385, 291 (1993) (additional citation and internal quotation marks omitted). "[I]f 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." *Frazier*, 469 Md. at 644 (quoting *Nicolas v. State*, 426 Md. 385, 401 (2012)). Accordingly, the defendant is sentenced for the latter offense only.

Under the rule of lenity, "[i]f the intent of the legislature to impose separate punishments for multiple convictions arising out the same conduct or transaction is unclear, then the rule of lenity generally precludes the imposition of separate sentences." *Simms*, 240 Md. App. at 626 (quoting *Paige v. State*, 222 Md. App. 190, 207 (2015)).

An appellate court utilizes the following approach in evaluating whether merger of convictions is required:

> To evaluate the legality of the imposition of separate sentences for the same act, we look first to whether the charges "arose out of the same act or transaction," then to whether "the crimes charged are the same offense," and then, if the offenses are separate, to whether "the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes[.]"

*Alexis v. State*, 437 Md. 457, 485-86 (2014) (quoting *Morris v. State*, 192 Md. App. 1, 39 (2010) (internal citation omitted). Here, we are persuaded that the charges for telephone misuse and harassment did not arise out of the same act or transaction. Accordingly, no merger is required.

The charging document does not specify the particular act or acts supporting the charges of telephone misuse or harassment, and the trial court did not state the factual bases for finding appellant guilty of each offense in announcing its judgment. It is clear from the record, however, that the two offenses were based on separate acts. *See Frazier*, 469 Md. at 642 (stating that, "where there is a factual ambiguity regarding whether the convictions arose out of the same transaction . . . the reviewing Court can look to the record for other

indications that might resolve the ambiguity in favor of non-merger.") (citations and internal quotation marks omitted)).

Arguably, the prosecutor's choice of phrasing in her closing argument created an ambiguity as to whether the conduct on which the harassment charge was based included the repetitive phone calls and texts:

> [w]ith respect to the harassment and telephone misuse, Your Honor, the testimony is uncontradicted that . . . that [Ms. Hardy] received not just phone calls but also multiple text messages from [appellant]. And with respect to the harassment, he is not just phoning her and texting her, he's also showing up at her place of work and very randomly showing up when she's trying to pump gas."

Defense counsel appeared to understand, however, that the two charges arose from different acts, specifically, repetitious phone calls as distinguished from acts of "pursuing" Ms. Hardy, and defense counsel conveyed that understanding to the trial court in arguing for acquittal, stating:

> The telephone use, repeated calls, here's what we have. 8 or 9 times on September the 12th, about 4 times in an hour, and then we wait. We have 9 times on September the 9th. So that's the evidence there.
>
> Anything else would be the State's fictional version of the case as opposed to what the actual evidence supported.
>
> Then we have the harassment. Harassment requires pursuing another where the person intends to place or knows or reasonably should know the conduct [ ] would place another in reasonable fear of serious bodily injury [or] assault of any degree, rape, imprisonment, death, et cetera . . . which don't apply.[8]

[8] Defense counsel apparently confused the elements of the crime of stalking, which appellant was not charged with, with the elements of harassment. One element of stalking

> So the State hasn't met its burden, Your Honor. It's a weak case. . . . [I]f anything, it's an assault second degree[.]

To the extent that there was any ambiguity in the factual predicate for the convictions, it was extinguished at sentencing, which took place immediately after the court announced its judgment. In arguing against merger, the prosecutor clarified that the charges were not based on the same acts, stating that:

> [t]elephone misuse is solely related to the phone calls and text messages. Then you have a harassing course of conduct, which is separate[.] . . . [Y]ou have the incident in the back yard and then the multiple incidents where he shows up at her place of work and then at the gas pump. . . . The harassment is repeatedly appearing where he knows her to be . . . at her home, at her place of work.

In then finding that the offenses did not merge, the trial court conveyed that it had found appellant guilty of telephone misuse and harassment based on different acts. Accordingly, the court did not err in imposing separate sentences for the two convictions.

## III. Sentence for Unauthorized Removal of Property

A person convicted of unauthorized removal of property is subject to imprisonment "for not less than 6 months and not exceeding 4 years[.]" CR § 7-203(b)(1). For that conviction, the court sentenced appellant to the maximum of four years, then stated, "I believe there's a 6-month minimum mandatory in that." The commitment record reflects that on that count, appellant was to serve four years. Under the heading "Additional

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is that the accused knew or should have known that their conduct placed another in reasonable fear of specific harm, including serious bodily injury, rape, or death. *See* CR § 3-802. By contrast, harassment is following another or engaging in a course of conduct that "alarms or seriously annoys the other[.]" CR § 3-803.

sentencing notes," the commitment record notes "6 months mandatory minimum pursuant to CR.7.203."

Appellant contends that, because CR § 7-203 does not set forth a mandatory minimum sentence of six months, his four-year sentence is illegal. We perceive no illegality in appellant's sentence.

"An illegal sentence is one that is 'not permitted by law.'" *Bratt v. State*, 468 Md. 481, 496 (2020) (quoting *State v. Wilkens*, 393 Md. 269, 273 (2006) (additional citation omitted)). Appellant does not contend that the court was without authority to sentence him to serve four years in prison for unauthorized removal of property. The court's mistaken belief that the offense carried a mandatory minimum sentence of six months, and the fact that the commitment record reflects the same, does not make appellant's sentence illegal, especially as the court did not impose a six-month "mandatory minimum" sentence but ordered appellant to serve the maximum sentence of four years. *See id.* at 497 (stating that a sentence that is "proper on its face" does not become "an illegal sentence because of some arguable procedural flaw in the sentencing procedure." (quoting *Corcoran v. State*, 67 Md. App. 252, 255 (1986)).[9]

**JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

[9] If appellant believes that there is an error in the commitment record that requires correction, the proper remedy is to file a motion pursuant to Maryland Rule 4-351(b). *See e.g. Bratt*, 468 Md. at 508.