Circuit Court for Baltimore County
Case No. 03-K-16004418

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1291

September Term, 2017

WILLIE B. STEWART

v.

STATE OF MARYLAND

Wright,
Kehoe,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.
Concurring Opinion by Kehoe, J.

Filed: August 8, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury, sitting in the Circuit Court for Baltimore County on May 23, 2017, found the appellant, Willie B. Stewart, guilty of robbery but acquitted him of second-degree assault. On rendition of the verdict, defense counsel pointed out to the court that the verdict was legally inconsistent and requested that the jury be directed to resume deliberations. The court found the verdict to be consistent. We reverse and remand.

The victim was Brian Rampmeyer, the owner of an ice cream store in a shopping center on Reisterstown Road. Shortly before the store opened for business on August 12, 2016, a man, later identified as Stewart, entered the store. Stewart apparently satisfied himself that Rampmeyer was alone. Rampmeyer testified that Stewart "told me if I follow[ed] his instructions I would not be shot and killed." The victim further testified that Stewart "then told me to empty all of the money out of my register and move slowly and I would not be harmed." Rampmeyer complied and Stewart left the store with between $150 and $200.

Rampmeyer was afraid that Stewart was armed, but he never saw Stewart with a weapon. On cross-examination, Rampmeyer acknowledged that Stewart had not made any threatening gestures. The State played for the jury three clips of the occurrence from the surveillance video at the store. There was no audio on the footage.

Some days later Rampmeyer saw Stewart walking on Reisterstown Road, watched as the latter entered an apartment complex, and reported to the police.

Set forth below are the court's instructions to the jury on robbery and second-degree assault:

> "The Defendant is charged with the crime of robbery. Robbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property. To convict the Defendant of robbery, the State must prove that the Defendant took the property from Brian Rampmeyer, that the Defendant took the property by force or threat of force, and that the Defendant intended to deprive Brian Rampmeyer of the property. Property means anything of value.
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> "The Defendant is charged with the crime of assault. Assault is intentionally frightening another person with the threat of immediate physical harm. To convict the Defendant of assault, the State must prove the Defendant committed an act with the intent to place Brian Rampmeyer in fear of immediate physical harm, that the Defendant had the apparent ability at that time to bring about physical harm, and that Brian Rampmeyer reasonably feared immediate physical harm and that the Defendant's actions were not legally justified."

The court also instructed on theft of under $1,000.

The jury foreperson announced that Stewart was found guilty of robbery, not guilty of assault, and guilty of theft. At that point defense counsel asserted that the verdict was inconsistent and that further deliberations were required. The State opposed with the following argument:

> "Your Honor, robbery requires only a threat of force. It doesn't require an overt act. As assault does. I know it is typical that we talk about robbery as an assault and a theft together but that is not what the jury instructions require. A threat of force alone is enough along with removal of property. Perhaps they didn't believe there was an overt act which had the intent to frighten but they are different elements. I don't think it is an inconsistent verdict."

The court agreed with the State.

Polling of the jurors, however, revealed that one juror disagreed with the announced verdict. Deliberations were resumed, to seek unanimity and not to resolve inconsistency.

A unanimous jury then returned the same verdict as previously announced by the foreperson.

The court merged the assault conviction into the robbery conviction and sentenced Stewart to fifteen years' confinement. From that judgment this appeal was taken.

Question Presented

Stewart presents but one question for our review: "Did the trial court err by accepting an inconsistent verdict?"

Discussion

This Court summarized the current state of Maryland law on the subject of inconsistent verdicts in *Wallace v. State*, 219 Md. App. 234 (2014), where we said:

> "Legally inconsistent jury verdicts in criminal cases are no longer acceptable in Maryland. *See McNeal v. State*, 426 Md. 455, 458, 44 A.3d 982 (2012); *Price v. State*, 405 Md. 10, 35, 949 A.2d 619 (2008) (Harrell, J., concurring); *Teixeira* [*v. State*], 213 Md. App. [664,] 678-79, 75 A.3d 371 [(2013)]. 'A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law.' *McNeal*, 426 Md. at 458, 44 A.3d 982 (citing *Price*, 405 Md. at 35, 949 A.2d 619). More specifically, '[v]erdicts where a defendant is convicted of one charge, but acquitted of another charge *that is an essential element of the first charge*, are inconsistent as a matter of law.' *Id*. (emphasis added).
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> > "'The underlying purpose of this rule is to ensure that an individual is not convicted of a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all. A person cannot be convicted of a crime if a jury has necessarily decided that one of the essential elements was not proven beyond a reasonable doubt.'
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> "*Teixeira*, 213 Md. App. at 680, 75 A.3d 371 (internal quotation marks omitted) (quoting *People v. Muhammad*, 17 N.Y.3d 532, 539, 935 N.Y.S.2d 526, 959 N.E.2d 463 (2011))."

Id. at 251-52 (footnotes omitted).

Simple assault is a lesser included offense of robbery. *Gerald v. State*, 299 Md. 138, 140-41 (1984); *Wallace*, 219 Md. App. at 252 n.15. Thus, Stewart submits, and we agree, the verdict here is legally inconsistent because, under the undisputed facts, the same conduct underlies the convictions for robbery and assault.

In this Court, the State adopts the argument raised by the prosecutor and accepted by the court at trial. The argument attempts to distinguish, in the language of the pattern jury instructions, between the "threat of force" as an element of robbery and "an act with the intent to place [the victim] in fear of immediate physical harm" as an element of assault. Because there was evidence from Rampmeyer that Stewart "made no threatening gestures," the State submits that "the jury logically could have found that there *was not* an intent-to-frighten assault, but that there *was* a robbery by threat of force."[1]

Maryland appellate cases do not support the distinction advanced by the State. Today, one form of the crime of assault is "'[a] placing of a victim in reasonable apprehension of an imminent battery.'" *Cruz v. State*, 407 Md. 202, 209 n.3 (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992), *cert. denied*, 329 Md. 110 (1993)).

In *Dixon v. State*, 302 Md. 447 (1985), the accused was convicted of assault with intent to rob. One element of that offense is "[a]n assault on the victim." *Id*. at 451. The victim was the cashier in a self-service gasoline filling station who was working alone at night. Dixon approached the cashier's booth with a newspaper "folded underneath his arm,

[1]The prosecutor had argued that assault requires an "overt act."

with his hand underneath of it." *Id*. at 452. The cashier opened the transaction drawer and Dixon placed a note in it reading, "'I want all your money and hurry.'" *Id*. The victim thought Dixon had a weapon under the newspaper.

The Court of Appeals reviewed numerous authorities including R. Perkins, *Perkins on Criminal Law* 114 (2d ed. 1969), where the author stated that assault is either "(1) an attempt to commit a battery or (2) an intentional placing of another in apprehension of receiving an immediate battery." The facts in *Dixon* were sufficient to constitute an "intent to frighten" assault. In the case before us, Stewart expressly threatened to shoot and kill Rampmeyer if the former's instructions were not followed.

The *Perkins* definition of assault was quoted and applied by the Court in *Snowden v. State*, 321 Md. 612, 617 (1991). That case involved a robbery gone bad. The owner of the site of the robbery, a restaurant, was shot in the arm as he entered the kitchen. Then, he was held at gunpoint while the armed robbery was consummated. Snowden was convicted, and separately sentenced, for robbery and for "assault and battery." The Court of Appeals could not discern "whether the robbery charged was based on battery [(the shooting)] as a lesser included offense or on assault [(the threat)] as a lesser included offense with the battery considered separate." *Id*. at 619. Consequently, the Court of Appeals merged the "assault and battery" sentence into the armed robbery sentence.

Snowden conflicts with the State's argument in the case at bar. Intimidation can be an "act with the intent to place [the victim] in fear of immediate … physical harm," referred to in the pattern assault instruction, and intimidation may be the "threat of force" referred

to in the pattern robbery instruction for purposes of the assault element of a robbery conviction.

In the following cases, the evidence was sufficient to sustain a conviction for robbery based on the "intent to frighten" form of assault: *Rose v. State*, 37 Md. App. 388 ("'I have a gun and you know what I want.'"), *cert. denied*, 281 Md. 743 (1977), *overruled on other grounds by Campbell v. State*, 65 Md. App. 498 (1985); *Montgomery v. State*, 206 Md. App. 357 (hostilely demanding that store clerk charge to credit card number without producing card sufficient evidence of intimidation), *cert. denied*, 429 Md. 83 (2012).

Here, although Rampmeyer did not see a gun, Stewart threatened to shoot and kill him. Under the uncontradicted evidence that was the threat of force that effected the theft. The result was a consummated robbery. The jury verdict is legally inconsistent.

This conclusion raises the issue of the proper disposition of this appeal. *Wallace v. State*, 219 Md. App. 234, presented the same question. Wallace's jury found him guilty of robbery, not guilty of assault, and guilty of certain theft charges. The trial court overruled the defense objection of legal inconsistency, sentenced on robbery, and merged the remaining charges. We reversed the robbery conviction for inconsistency (there was but a single incident) and remanded for sentencing on the merged charges. Accordingly, here we reverse on the First Count (robbery) and remand for sentencing on the Third Count (theft).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED ON THE FIRST COUNT (ROBBERY).

CASE REMANDED FOR SENTENCING ON THE THIRD COUNT (THEFT).

COSTS TO BE PAID BY BALTIMORE COUNTY, MARYLAND.

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I agree with the Majority's analysis, which is, and must be, directed to the contentions raised by the parties on appeal. The contentions of appellate counsel, in turn, are limited to what was argued to the trial court. I think that there may be other aspects of appellant's inconsistent verdict contention but this case is not the vehicle to consider them. *See Master Financial, Inc. v. Crowder*, 409 Md. 51, 57 n.1 (2009) ("For good reason, it is rare that the Court will add an issue not raised by the parties in either the lower courts or this Court.").