Circuit Court for Montgomery County
Case No.: C-15-CR-21-000204

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1322

September Term, 2022

RICARDO APARICIO

v.

STATE OF MARYLAND

Graeff,
Zic,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: December 7, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

After purchasing allegedly stolen goods from an undercover police officer on October 16, 2020, and again on December 22, 2020, appellant, Ricardo Aparicio, was charged in the District Court for Montgomery County with eight misdemeanor counts of theft in violation of Md. Code, § 7-104 of the Criminal Law Article ("Crim.").[1] By superseding information filed in the Circuit Court for Montgomery County, the State later added a felony count for a theft scheme, under Crim. § 7-103(f),[2] which is an offense over which district and circuit courts have concurrent jurisdiction.[3]

Before trial, Aparicio moved to dismiss all charges on the ground that the State's information charging him with the felony was invalid because there had not been a preliminary hearing to determine probable cause for the felony prosecution and without

[1] Under Crim. § 7-104(c)(1)(i), "[a] person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person . . . intends to deprive the owner of the property[.]" "A person convicted of theft of property . . . with a value of . . . at least $1,500 but less than $25,000 is guilty of a felony and . . . is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both[.]" Crim. § 7-104(g)(1)(i).

[2] Under Crim. § 7-103(f)(1)-(2), "[w]hen theft is committed in violation of this part under one scheme or continuing course of conduct, whether from the same or several sources[,]" that "conduct may be considered as one crime; and . . . the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor."

[3] Md. Code, § 4-301(b)(2) of the Courts & Judicial Proceedings Article ("CJP") provides that, "[*e*]*xcept as provided in § 4-302* of this subtitle, the District Court . . . has exclusive original jurisdiction in a criminal case in which a person at least 18 years old . . . is charged with . . . [v]iolation of § 7-104 . . . of the Criminal Law Article, whether a felony or a misdemeanor[.]" (Emphasis added.) One of the exceptions under CJP § 4-302(d)(1) establishes concurrent jurisdiction in the district and circuit courts for criminal cases that charge either "a felony, as provided in § 4-301(b)(2)" or in which the penalty exceeds three years or a $2,500 fine.

that charge, the circuit court did not have jurisdiction over the remaining misdemeanors. After a hearing, the court denied Aparicio's motion.

At trial, the court granted a judgment of acquittal on four misdemeanor counts and amended other counts to aggregate charges, resulting in four counts remaining, with the jury considering separate theft and theft scheme counts for each of the corresponding dates of purchase. The jury acquitted Aparicio of felony theft related to the December purchases and convicted him on the remaining misdemeanor counts related to both the October and December purchases. After he was sentenced to consecutive terms of one year, with all but six months suspended, plus three years of probation, he noted this timely appeal.

Aparicio presents the following questions for our review:

1. Did the circuit court err by denying [his] motion to dismiss the charges because the felony was invalidly charged, and the court lacked jurisdiction over the misdemeanors without the felony?

2. Must this Court vacate the conviction on count 1 or count 3 of the information because both counts were charged for a single theft?

On the charging issue, we agree with the State that even if Aparicio was entitled to a preliminary hearing under Md. Code, § 4-102(2) of the Criminal Procedure Article ("CP"), the circuit court still had jurisdiction to try all the charges and did not err or abuse its discretion in exercising that jurisdiction. On the multiple convictions issue, however, we agree with Aparicio that the single larceny doctrine precludes one of the two convictions predicated on his October 2020 purchase of allegedly stolen property. Consequently, we will vacate Aparicio's conviction on Count 2, which is the renumbered

count for theft scheme based on the October purchase, and affirm his remaining convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Because Aparicio does not contest the sufficiency of the evidence to support his convictions, we will focus first on the timeline of pretrial proceedings pertinent to the preliminary hearing and single larceny issues he presents in this appeal. We will then summarize the evidence at trial.

Legal Proceedings

January 12, 2021: Alleging Aparicio purchased stolen goods on October 16, 2020, and on December 22, 2020, the State filed a statement of charges in the District Court for Montgomery County, charging Aparicio with eight counts of misdemeanor theft in violation of Crim. § 7-104(g)(2)-(3). *See* District Court Case No. 2D00414577.

August 12, 2021: The district court postponed the first trial date.

October 1, 2021: The district court postponed the second trial date at Aparicio's request.

December 14, 2021: The State filed an information in the Circuit Court for Montgomery County, charging Aparicio with the same eight counts of misdemeanor theft, plus one count of felony theft scheme and continuing course of conduct in violation of Crim. § 7-104(f), based on his December 2020 purchases.

May 9, 2022: Aparicio made his initial appearance in circuit court.

May 13, 2022: At a pre-trial conference, trial was postponed to September 12, 2022.

August 30, 2022: Aparicio moved to dismiss the Count 9 felony theft charge on the ground that "the State has violated Maryland Criminal Procedure Code § 4-102(2) with respect to the felony count and the Court lacks jurisdiction over the remaining misdemeanor counts." According to Aparicio, the State improperly charged the felony count by filing an information in the circuit court without conducting a preliminary hearing to determine that probable cause existed to prosecute that charge. He argued, without a valid felony count, the circuit court lacked jurisdiction over "the remaining misdemeanor theft counts" because they were "within the exclusive jurisdiction of the

District Court" based on the penalty being less than three years or a fine of $2,500. Therefore, they "must be dismissed."

September 8, 2022: The State opposed dismissal, arguing that the felony was properly charged by information without a preliminary hearing, because Aparicio did not have an absolute right to a preliminary hearing for felonies that are within the jurisdiction of the district court. *See Brown v. State*, 454 Md. 546, 560 (2017); CP § 4-102; CP § 4-103(c).

September 9, 2022: At a hearing on Aparicio's motion to dismiss, the circuit court, noting "these somewhat unclear statutes and this . . . situation . . . does not have [any] appellate decision straight on[,]" the court declined to dismiss the charges.

September 12-13, 2022: The circuit court granted Aparicio's motion for a judgment of acquittal on counts 2, 5, 6, 7, and 8. The circuit court, at trial, "renumbered count 3 to reflect count 2; count 4 to reflect count 3; count 9 to reflect count 4 for the purpose of trial." These amendments reflected the court's stated intention to aggregate theft charges for the items Aparicio purchased from the undercover officer into separate theft and theft scheme counts arising from the October and December transactions.

The jury convicted Aparicio on "Count #1 (Theft: $100 to under $1,500)" related to the transaction on October 16, 2020; "count #2 (Theft scheme: [$]100 to under $1,500)" related to the transaction on October 16, 2020; and "Count #3 (Theft: $100 to under $1,500)" related to the transaction on December 22, 2020; and found him not guilty on "Count #4" for felony theft "scheme and continuing course of conduct" related to the transaction on December 22, 2020, property valued between $1,500 to $25,000.

October 3, 2022: The court sentenced Aparicio as follows: Count 1 – one year with all but six months suspended; Count 3 – "[m]erged with count 1, no sentence imposed"; Count 4 – one year, "suspended consecutive to count 1"; plus three "years supervised probation with conditions." Not having been incarcerated, he received "0 days" credit. The same day, Aparicio noted this timely appeal.

October 24, 2022: Aparicio was released pending appeal, after posting a $1,000 bond.

Trial

The State presented evidence that, while investigating Aparicio's role in "a fence operation[,]" Montgomery County Police Detective Matthew Vendemio and his undercover partner Detective Artemis Goode, after collecting items from "[l]oss prevention officers" at "big box retailers" Home Depot, Target, Victoria's Secret, and

CVS, solicited Aparicio to buy them as "hot" goods from "stores in the area[.]" At trial, the State presented evidence that on two occasions, Aparicio purchased such merchandise from an undercover detective who indicated that he was selling stolen property.

On October 16, 2020, Detective Goode went to Aparicio's house, while wearing a wire so that Detective Vendemio and other officers could listen. Showing goods in his vehicle, the detective told Aparicio that he had "to get rid of" "a bunch of items" that were "hot," meaning "stolen," so "whatever you want to give me, I'll get rid of these for that." The items included a chainsaw from Home Depot, valued at $199, and Victoria's Secret fragrances, valued at either $59.95 or $78 each. Aparicio paid $70 for the saw and five fragrances.

When Goode asked Aparicio whether he wanted anything else in particular, Aparicio answered "that he needed power tools[.]" Goode responded that those were hard to get from Home Depot and that his "friends keep getting arrested" there. Aparicio advised him to "[p]lace the power tools in the bottom of the cart" and "miscellaneous items on top of the power tools and walk out."

Aparicio was charged by information with the following counts relating to this October transaction:

> **Count 1:** misdemeanor theft of the Home Depot chainsaw, valued at $100-1,500
>
> **Count 2:** misdemeanor theft of five Victoria's Secret fragrances, valued at $100-1,500
>
> **Count 3:** misdemeanor theft scheme of property listed in Counts 1 and 2, valued at $100-1,500

On December 22, 2020, Goode returned to Aparicio's house. He showed Aparicio more items, telling him again that the items were "hot" and that his friends had been arrested at Home Depot. Pointing out that Goode "didn't pay anything for these items[,]" Aparicio negotiated the price. He paid Goode $220 for two chainsaws, two leaf blowers, a pressure washer, a drill, a sander, a television, a shaver, fragrances, bodywashes, and detergent pods.

The charges relating to this transaction were as follows:

> **Count 4:** misdemeanor theft of pressure washer, leaf blower, chainsaw, sander, and drill, from Home Depot, valued at $100-1,500
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> **Count 5:** misdemeanor theft of television and electric razor, from Target, valued at $100-1,500
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> **Count 6:** misdemeanor theft of five fragrances, from Victoria's Secret, valued at $100-1,500
>
> **Count 7:** misdemeanor theft of nine bodywashes, from CVS, valued under $100
>
> **Count 8:** misdemeanor theft of detergent, from Safeway, valued under $100
>
> **Count 9:** felony theft scheme of items in Counts 4-8, valued at $1,500-2,500

At the close of evidence, the court amended and renumbered certain counts that aggregated the allegedly stolen items according to the two dates Aparicio purchased them. As a result, the jury was presented with two separate counts of theft by possession of stolen property and theft scheme for each of the two dates. Count 1 covered possession of all items from the October 16 transaction, in violation of Crim. § 7-104(c)(1)(i), while Count 2 covered the theft scheme related to those items, in violation

of Crim. § 7-103(f). Count 3 covered possession of all items purchased on December 22, while Count 4 covered the felony theft scheme related to those items. The court granted a judgment of acquittal on Counts 2, 5, 6, 7, and 8 on the original information.

The jury acquitted Aparicio on the felony theft scheme related to the December 22 transaction but convicted him on the three remaining misdemeanor charges. For sentencing purposes, the court merged the October theft scheme count into the October theft count.

DISCUSSION

I. Preliminary Hearing

Aparicio first contends that all of his charges should have been dismissed because "[t]he felony was charged in violation of" CP § 4-102(2) because that statute "requires a finding of probable cause in a preliminary hearing if the State charges a person in an information with a felony within the district court's jurisdiction." Therefore, the circuit court should not have exercised jurisdiction over the remaining misdemeanor theft counts. For the following reasons, we disagree.

Standards Governing Charging and Preliminary Hearings

The issue here is whether, under CP § 4-102(2) and related rules, Aparicio had the right to a preliminary hearing when he was charged by information with a felony, in the circuit court. The statute provides:

§ 4-102. Charge by criminal information.

A State's Attorney may charge by information:

> (1) *in a case involving a felony that does not involve a felony within the jurisdiction of the District Court*, if the defendant is entitled to a preliminary hearing but does not request a hearing within 10 days after a court or court commissioner informs the defendant about the availability of a preliminary hearing; or
>
> (2) *in any other case, if a court in a preliminary hearing finds that there is probable cause to hold the defendant*.

(Emphasis added.)

Interpreting relevant statutes and rules governing rights of the accused "is a question of law that this Court reviews *de novo*." *Brown*, 454 Md. at 550. In doing so, we "view the plain language of a statute in the context of the statutory scheme to which it belongs, with a focus on ascertaining the intent or underlying policy of the General Assembly in the statute's enactment." *Id.* at 551. In addition, we read the statute and rules under consideration "'as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Id*. (quoting *Phillips v. State*, 451 Md. 180, 196 (2017)). If the statutory language is unambiguous, our analysis ordinarily ends, but we may "'examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language[,]'" including "'the context of a statute, the overall statutory scheme, and archival legislative history of relevant enactments.'" *Id*. (quoting *Phillips*, 451 Md. at 197).

The Maryland Declaration of Rights gives criminal defendants the right to be informed of accusations against them in sufficient time to prepare a defense. *See* Md. Const. Decl. of Rts. art. 21. The Maryland Rules implement that right by requiring the State to file a charging document, which may take alternative forms. *See* Md. Rule 4-

201; *Landaker v. State*, 327 Md. 138, 140 (1992). Md. Rule 4-201 governs the use of charging documents. Pertinent to the use of an information to charge, it provides:

> (a) **Requirement.** – An offense shall be tried only on a charging document.
>
> (b) **In the District Court.** – In the District Court, an offense may be tried (1) on an information[.]
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> * * *
>
> (c) **In the circuit court.** – *In the circuit court, an offense may be tried*
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> * * *
>
> > (2) *on an information if the offense is* (A) a misdemeanor, or (B) *a felony within the jurisdiction of the District Court*, or (C) any other felony and lesser included offense if the defendant requests or consents in writing to be charged by information, or *if the defendant has been charged with the felony and a preliminary hearing pursuant to Rule 4-221 has resulted in a finding of probable cause*, or if the defendant has been charged with the felony as to which a preliminary hearing has been waived[.]

(Emphasis added.)

In *Brown*, the circuit court dismissed misdemeanor charges that had been filed by information, on the ground that the accused was entitled to a preliminary hearing that he did not receive. *See Brown*, 454 Md. at 550. This Court reversed, "holding that the circuit court improperly construed CP § 4-102(2) to require preliminary hearings in cases involving misdemeanors charged by information in circuit court." *Id.*

Affirming this Court's decision, the Supreme Court addressed

> whether the phrase "any other case" of CP § 4-102(2) includes cases involving misdemeanors brought in the circuit court, or *whether that subsection of the statute is limited to cases where a defendant is charged by information with felonies within the jurisdiction of the district court.*

Id. at 552 (emphasis added). The Court concluded that "[t]he plain meaning of the phrase '*any other case*' . . . does not include cases where a defendant is charged by information with misdemeanors in circuit court." *Id*. at 562. Instead,

> [t]he legislative history of CP § 4-102, along with other relevant statutes and Maryland Rules controlling the use of information and preliminary hearings, make clear that *this phrase refers to cases in which a defendant is charged with a felony within the jurisdiction of the district court, and that a defendant is entitled to a preliminary hearing in those cases*.

Id. at 562-63 (emphasis added).

The Supreme Court held that this Court "correctly concluded with regard to the circuit court's dismissal of Mr. Brown's charges, 'the language requiring a preliminary hearing was aimed at felonies for which a grand jury indictment otherwise would be required.'" *Id*. at 556 (citation omitted). In turn, because "Mr. Brown was charged with misdemeanors and was never incarcerated awaiting grand jury indictment, for which a preliminary hearing establishing probable cause would have been necessary[,]" the Supreme Court concluded that his "case falls outside the judicially announced purpose of preliminary hearings." *Id*.

The Supreme Court emphasized that "[t]he legislative history of CP § 4-102 and CP § 4-103 also supports" its interpretation that the statutory scheme allows "a State's Attorney to charge a felony by information under specified conditions rather than by indictment, which the common law right required." *Id*. After reviewing how the language "in any other case" in CP § 4-102(2) evolved, the Court explained that it is "limited to situations that do not fall under CP § 4-102(1)—*situations where a defendant*

is charged with a felony within the jurisdiction of the district court." *Id*. at 558 (emphasis added).

Parties' Contentions

Citing *Brown*, Aparicio contends that CP § 4-102(2) "requires a finding of probable cause in a preliminary hearing if the State charges a person in an information with a felony within the district court's jurisdiction." He argues that if, as held in *Brown*, CP § 4-102(2) does not apply to misdemeanors, and is construed not to apply to "felonies within the district court's jurisdiction, the entire subsection would be 'rendered surplusage, superfluous, meaningless or nugatory.'" As he sees it, "the State invalidly charged him with felony theft without a preliminary hearing and a finding of probable cause," and "without the felony charge" the circuit "court lacked jurisdiction over the misdemeanor theft charges" and erred in denying his motion to dismiss those charges.

The State counters that Aparicio's "analysis is incorrect" because, "even though he was charged by information" in the circuit court, he "was not entitled to a preliminary hearing" because the felony theft charge "was within the jurisdiction of the district court[.]" The State maintains that "the statutory scheme provides the right to a preliminary hearing only when a felony *not* within the jurisdiction of the district court is charged by information."

The State nevertheless acknowledges the *Brown* Court's statement that the phrase "in any other case" in CP § 4-102(2), when viewed "along with other relevant statutes and Maryland Rules controlling the use of information and preliminary hearings, . . . refers to cases in which a defendant is charged with a felony within the jurisdiction of the

district court, and that a defendant is entitled to a preliminary hearing in those cases[.]" *Brown*, 454 Md. at 562-63. According to the State, however, *Brown* only involved misdemeanors and those statements by the Court, "implicitly acknowledge[d]" by Aparicio, "were *dicta*[.]" "Aparicio implicitly acknowledges that the Court's statements" about felonies in the district court's jurisdiction "were *dicta*, as the issue in that case involved only misdemeanors."

The State "respectfully submits" that we should not consider this *dicta* to be "persuasive, as its reasoning does not withstand more focused scrutiny on that precise issue." More specifically, it posits that "CP § 4-102(2) is *not* rendered superfluous" but is "much better read" and more "consistent with the statutory scheme" when understood as referring "to felony cases that are *not* within the jurisdiction of the district court, but in which the right to a preliminary hearing has *not* been waived as set forth in CP § 4-102(1)." It argues that "[i]t makes sense that, in those cases, a preliminary hearing would be required" and would bring "the statutory scheme into greater harmony."

But "even assuming *arguendo* that the charges entitled Aparicio to a preliminary hearing," the State alternatively contends that "dismissal [would be] unwarranted" because "the absence of [a preliminary] hearing would not divest the circuit court of its fundamental jurisdiction over either the felony charge or the related misdemeanors." Quoting *Powell v. State*, 324 Md. 441, 447 (1991), the State argues that the Supreme Court has characterized the predecessor to CP § 4-102 and Md. Rules 4-201(c) and 4-213(a)(4), which serve to regulate the '"movement of cases from the District Court, in which the preliminary hearing process is lodged, to the circuit court[,]"' as "'a procedural

matter'" but that "'*do*[*es*] *not control the fundamental jurisdiction of the circuit courts*.' *Id*. at 447 (emphasis added). *Cf. Beckwitt v. State*, 477 Md. 398, 421 (2022), *reconsideration denied* (March 25, 2022) ('We have expressly recognized the difference between a court lacking fundamental jurisdiction and improperly exercising jurisdiction.')." In other words, "even if . . . Aparicio was entitled to a preliminary hearing, he is nonetheless wrong in claiming that this is a jurisdictional issue." In addition, the State notes that Aparicio "cites no authority for dismissing the misdemeanors, over which the circuit court gained jurisdiction when the felony theft charge was filed in circuit court, based on the lack of preliminary hearing." It argues that "the absence of a probable cause determination that would have occurred at a preliminary hearing, *see* Md. Rule 4-221(e), is simply not prejudicial at this point."

In reply, and stating he is not arguing "that the circuit court lacked fundamental jurisdiction over the felony charge[,]" Aparicio contends that "*Powell* does not apply to this case." He insists, however, that

> the court should have granted his motion to dismiss that charge, because it was invalidly charged by information without a preliminary hearing in violation of CP § 4-102(2). The jurisdictional issue in this case relates to the misdemeanors. But for the felony, the court lacked fundamental jurisdiction over the misdemeanors, because those offenses are within the exclusive jurisdiction of the district court unless charged with a felony. . . . Even if dismissal of the misdemeanors was not strictly required, *see generally Harris v. State*, 94 Md. App. 266 (1992), under the circumstances it would have been an abuse of discretion for the judge to keep those charges in the circuit court after dismissing the invalidly charged felony, because the only reason the misdemeanors were in the circuit court rather than the district court was the State's charging error.

In regard to being prejudiced by the erroneous failure to hold a preliminary hearing, he contends that his felony charge might have "been dismissed for lack of probable cause[,]" which in turn "could have affected the State's plea offer" and his "decision to go to trial." As he sees it, he was deprived of "options" that he would have had if the felony charge had been dismissed. For example, a dismissal of the felony charge could have resulted in the case being refiled in district court, where he "would have had the choice to seek a resolution or a trial in that court, or he could have exercised his right to a jury trial and taken the case back to circuit court."

Charging Analysis

As a threshold matter, the State's argument that this Court should not treat *Brown* as persuasive on the charging question because its "reasoning does not withstand more focused scrutiny" is more properly directed to the Supreme Court. *See, e.g., Foster v. State*, 247 Md. App. 642, 651 (2020) (emphasizing that "[i]t is not up to this Court . . . to overrule a decision of the [Supreme Court] that is directly on point"); *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 237 Md. App. 102, 145 (2018) (stating that this Court "may not entertain" an "invitation to adopt and apply a new standard of law in contravention of existing [Supreme Court] precedent"); *Scarborough v. Altstatt*, 228 Md. App. 560, 577 (2016) (explaining that regardless of any "'criticisms which logic, semantics, policy and history permit to be directed against' a ruling adopted by the [Supreme Court], the ruling of [that Court] remains the law of this State until and '[u]nless those decisions are either explained away or overruled by the [Supreme Court]

itself'" (quoting *Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft*, *Inc*., 17 Md. App. 646, 659 (1973))).

On the other hand, however, we do not need to resolve the parties' contentions over how *Brown* affects the validity of the information that was filed in this case, because even if we assume that Aparicio was entitled to a preliminary hearing on the felony count, we are not persuaded that that would entitle him to a reversal of his convictions on jurisdictional grounds. Rather, we agree with the State that such a jurisdictional argument for dismissal was rejected in *Powell*, 324 Md. at 446-47 and supporting cases.

Like Aparicio, Powell argued that the circuit court lacked jurisdiction over felony charges filed in that court, on the ground that he did not receive a preliminary hearing and was not advised of his right to one. *See Powell*, 324 Md. at 444-45. The Supreme Court disagreed, explaining in some detail:

> Petitioner interprets Rules 4-201(c) [authorizing trial of offenses in circuit court "on an information if the offense is (A) a misdemeanor, or (B) a felony within the jurisdiction of the District Court"] and 4-213(a)(4) [providing that judicial officer "shall advise the defendant of the right to have a preliminary hearing" on a felony charge "that is not within the jurisdiction of the District Court"] as affecting the circuit court's fundamental jurisdiction, that is, its "power to act with regard to a subject matter which 'is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.'"
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> * * *
>
> Circuit courts of this state . . . derive their jurisdiction from Maryland Constitution, Art. IV, § 20. They are courts of original general jurisdiction, authorized to hear all actions and causes, other than those particularly prescribed by statute or constitutional provision for other fora. More particularly, pursuant to Maryland Cts. & Jud. Proc. Code Ann. § 1-501 (1973), [(]1989 Repl. Vol.), they are

> the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

The felonies as to which petitioner complains he did not receive a preliminary hearing . . . are within the fundamental jurisdiction of the circuit courts. Section 592 [the predecessor to CP § 4-102(2)] *and Maryland Rules 4-201(c) and 4-213(a)(4) address a procedural matter*: the regulation of the movement of cases from the District Court, in which the preliminary hearing process is lodged, to the circuit court; they *do not control the fundamental jurisdiction of the circuit courts. Thus, we have frequently refused to overturn convictions for failure to hold preliminary hearings*. *See Ferrell v. Warden*, 241 Md. 432, 435-436 (1965); *Petrey v. State*, 239 Md. 601, 603 (1964); *Hardesty v. State*, 223 Md. 559, 563 (1960); *Pritchard v. Warden*, 209 Md. 662, 664 (1955).

Petitioner's argument based on the failure to advise him of the right to a preliminary hearing on the added felony charges is likewise meritless. In *Smith v. State*, 73 Md. App. 156, *cert. denied*, 311 Md. 719 (1988), the defendant was tried and convicted in the District Court of driving under the influence of alcohol. His appeal to the circuit court alleged that the District Court did not have jurisdiction to try him because he was not advised of the right and, so, did not waive a jury trial. Judge Karwacki, then a judge of the Court of Special Appeals, speaking for the court, rejected that argument, observing:

> The fundamental jurisdiction of the District Court to hear the criminal charges pending against the appellant would not have been affected by the court's failure to comply with Md. District Rule 751. Such error, if in fact it did occur, was one of procedure in the court's exercise of its jurisdiction which could have been corrected on direct appeal. . . .

73 Md. App. at 161.

Powell, 324 Md. at 445-47 (emphasis added, some internal citations omitted).

Here, the circuit and district court had concurrent jurisdiction over the felony theft charge. *See* CJP § 4-301(b)(2); CJP § 4-302(d)(1). As in *Powell* and *Smith*, the fundamental jurisdiction of the circuit court to adjudicate the felony and misdemeanor charges pending against Aparicio was not affected by the lack of a preliminary hearing. Therefore, any error in failing to conduct a preliminary hearing does not require reversal of Aparicio's misdemeanor convictions.

Nor are we persuaded that the claimed prejudice to Aparicio would otherwise warrant dismissal. We are mindful that "the requirement of a preliminary hearing is aimed at preventing defendants from being incarcerated without a determination of probable cause while" a charging decision, including "grand jury action[,] is pending." *Brown*, 454 Md. at 555. As in *Brown*, this case "falls outside the judicially announced purpose [for holding] preliminary hearings." *See id.* at 556. It does not implicate a need to protect Aparicio against incarceration without a determination of probable cause while his felony charge was pending, because Aparicio was not incarcerated on these charges at any time before trial. In addition, concerns about indigent defendants being subjected to increased periods of pretrial incarceration "are insufficient to refute the interpretation of CP § 4-102(2) . . . discerned from the legislative history, surrounding statutory framework, and related Maryland Rules governing preliminary hearings." *Id*. at 562.

Here, Aparicio was first charged in district court with misdemeanors. When the felony charge was added, the district court had concurrent jurisdiction, but the case moved to the circuit court, where Aparicio was charged by information, received the jury trial he requested, and eventually was acquitted on the felony. Consequently, on the

felony charge that Aparicio contends triggered his right to a preliminary hearing, he was neither incarcerated, nor convicted.

On this record, we do not agree with Aparicio that "[t]he jurisdictional issue in this case relates to the misdemeanors." Once he was acquitted on the felony charge, he argues, the circuit court, even if it was not strictly required to dismiss the "remaining misdemeanor[]" charges, should not have exercised jurisdiction on those counts because they were "within the exclusive jurisdiction of the district court unless charged with a felony."

We do not find this argument persuasive. Not only does it disregard the holding in *Powell* and *Smith* that the fundamental jurisdiction of the circuit court to hear criminal charges is not affected by the lack of a preliminary hearing, it ignores Aparicio's affirmative election, by requesting a jury trial, not to be tried in district court. That resulted in his acquittal on the lone felony charge.

In short, we hold that the circuit court did not err or abuse its discretion in denying Aparicio's motion to dismiss or in exercising its jurisdiction to try all charges to the jury.

II. Single Larceny Doctrine

Aparicio contends that under the single larceny doctrine, he is entitled to have this Court vacate either his Count 1 theft conviction for possession of the allegedly stolen property he purchased on October 16, 2020, or his Count 2 theft scheme conviction

involving that same property, "because there was at most one theft on that date."[4] He argues that the court's merger of those convictions for sentencing purposes is not a sufficient remedy because two overlapping convictions for his single purchase of allegedly stolen goods on October 16, 2020 violates the constitutional guarantee against double jeopardy.

The State contends that Aparicio failed to preserve his double jeopardy contention, that "no case law . . . firmly establishes the unit of prosecution in this situation[,]" and that Aparicio "arguably" is not entitled to vacatur of either conviction because "theft is an element of the complex crime of theft by continuing course of conduct." *See Dyson v. State*, 163 Md. App. 363 (2005).

We will address the preservation and single larceny doctrine issues in turn.

Preservation

We are satisfied that Aparicio preserved his single larceny doctrine challenge. "A formal exception to a ruling or order of the court is not necessary." Md. Rule 4-323(d). "For purposes of review . . . on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-323(c). In *Webb v. State*, 185 Md. App. 580 (2009), for example, this Court held that "the requirement 'that counsel bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct

[4] We shall use the count numbers from the verdict sheet, which reflect the trial court's aggregation and renumbering of the counts.

any errors in the proceedings,' . . . was achieved in this case" because another party raised the issue of whether the single larceny doctrine precluded multiple sentences for possessing stolen property in a pre-sentencing memorandum, and the court resolved that matter against the defendant. *Id.* at 596 (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)).

Here, we agree with Aparicio that his "attorneys made it known to the trial court what action they wanted the court to take[.]" Defense counsel repeatedly challenged whether Aparicio could be convicted on multiple counts for each of the two purchases. The transcript shows that after Aparicio moved for a judgment of acquittal, court and counsel discussed which counts would be aggregated, which would be dismissed, and which would appear on the verdict sheet. Defense counsel invoked "the single larceny doctrine" in arguing that "there should only be two counts that go to the jury[,]" for "one crime in December, one crime in October and that's it." "[O]therwise the charging document is . . . duplicitous."

When the trial court indicated that it planned to revise and renumber counts, so that the jury would be asked for verdicts on separate counts for possession of stolen property and for theft scheme, corresponding to each of the two purchase dates, defense counsel again argued that "they've got to pick one" because "this isn't two different kinds of crimes." After the court reviewed the two amended counts related to the October 16 purchase, defense counsel objected stating "we don't agree that" the amended Count 1 charge for theft "should be there" along with a separate count charging a theft scheme for

the same transaction. After the trial court instructed the jury on all four counts, defense counsel renewed the prior objections.

As this record establishes, defense counsel consistently and clearly asserted Aparicio's objection to asking the jury to consider separate counts for both theft and theft scheme, related to the same purchase. Defense counsel expressly invoked the single larceny doctrine and raised concern that multiple theft counts for each transaction would be "duplicitous." Although the trial court later renumbered the two counts for each purchase – with the October transaction renumbered as Counts 1 and 2 on the verdict sheet and then merged those convictions for sentencing purposes – that did not occur until sentencing and otherwise remedy the multiple challenged *convictions*. *See generally Lovelace v. State*, 214 Md. App. 512, 543 (2013) (recognizing that sentencing "merger does not affect the underlying conviction"). Consequently, we will address Aparicio's claim that he was wrongfully convicted twice for theft of the same property on the same date.

Application of the Single Larceny Doctrine

Aparicio contends that his theft scheme conviction on Count 2 is a conviction for the same offense as his theft conviction on Count 1, because it "is not independent of the crime of theft[,]" but instead a duplicate conviction based on "aggregating the value of stolen property when multiple items . . . are taken or possessed in a single transaction." In support, Aparicio points to the "single larceny doctrine," as a common law concept

now codified in Crim. § 7-103(f).[5] Under this principle, "the gist of the offense" of theft is the "taking of the property[.]" Therefore, Aparicio's conviction for possessing stolen property that he purchased on October 16, 2020 rests on that single simultaneous purchase, even though he acquired multiple items that were allegedly stolen from two different owners (Home Depot and Victoria's Secret).

Although the State contends there is no precedent on the "unit of prosecution" for the theft crimes in question, we find this issue to have been plainly addressed and resolved in *Webb*, 185 Md. App. 580. Under the single larceny doctrine, "if a defendant comes into possession of multiple items of stolen property in rapid and unbroken succession, he has committed but one criminal act, regardless of whether the items in his possession belonged to multiple owners or were the subject of multiple thefts." *Id.* at 599. This Court adopted the majority view of

> sister jurisdictions [that] have specifically held that, where a defendant is convicted of possession of stolen goods at the same time and place, he has committed but one criminal act under the single larceny doctrine. *See Beaty v. State*, 856 N.E.2d 1264, 127[1] (Ind. [Ct.] App. 2006) ("By simple extension, . . . if a defendant *receives* several items of stolen property, knowing the property to be stolen, at the same time and the same place, he has committed but one criminal act, regardless of whether the items he received belonged to several owners or were the subject of more than one theft."); *People v. Loret*, 136 A.D.2d 316, 317 ([N.Y. App. Div.] 1988) (holding that "possession at one time and place of several items taken in separate thefts from various owners is but one crime of criminal possession of stolen property"); *State v. Bair*, 671 P.2d 203, 206 (Utah 1983)

[5] Under this statute, "[w]hen theft is committed in violation of this part under one scheme or continuing course of conduct, whether from the same or several sources[,]" that conduct "may be considered as one crime" and "the value of the property . . . may be aggregated in determining whether the theft is a felony or a misdemeanor." Crim. § 7-103(f). *See infra* note 1.

> (determining that, where the evidence shows that stolen articles were all received on one occasion, the receipt is considered a single offense and must be prosecuted as one crime); *State v. Reisig*, 623 P.2d 849, 851 ([Ariz. Ct. App.] 1980) (holding that a defendant who possessed nine articles of property can only be convicted of one count of possession).
>
> The single larceny doctrine, we conclude, is applicable to the crime of "Possessing personal property." [Crim.] § 7-104(c).

Id. at 598-99.

On a record comparable to this one, we held that the single larceny doctrine precluded multiple convictions and sentences based on the defendant's one-time purchase of multiple items of stolen property that had been taken from multiple owners. *See id.* at 604. In language directly applicable to this case, we explained why multiple convictions and sentences under Crim. § 7-104(c) could not rest on the defendant's single, simultaneous receipt of multiple items of property that allegedly had been stolen at different times from different owners:

> Appellant is charged with "possession" of stolen property rather than "knowing" that the property was stolen at different times. *Even if appellant knew that the items were stolen at different places from different owners, so long as appellant came into possession of those stolen items at the same time, he has committed a single act.*
>
> We have concluded from our review of the record and the transcript of the trial proceedings that the State failed to establish that appellant was guilty of multiple felonies. To the contrary, the evidence indicated that the police witnessed appellant in possession of three stolen items at the "same place and time." Although evidence indicates that the vehicles were stolen at different times, the State provided no evidence that appellant's possession of the property was preceded by his theft or knowledge of the theft of the property; the jury properly acquitted appellant of these charges. The police observed appellant enter a stolen van that contained stolen motorcycles, which was sufficient to establish only that appellant was in simultaneous possession of the stolen property. Lest there be any misapprehension of the reach of this opinion, the indispensable lynchpin of

> our decision that the single larceny doctrine should have been applied is that the credible evidence supported only that appellant, at a discrete point in time, was unlawfully in *possession* of the stolen property and not that he was the thief. In other words, *only the point in time when the possession occurred was established. No evidence was adduced at trial that indicated that appellant came into possession of the stolen property at different times. Consequently, application of the single larceny doctrine constrains the conviction of one count of felony theft.*
>
> Accordingly, appellant was improperly convicted and sentenced for three separate felonies.

Id. at 603-04 (some emphasis added, footnote omitted).

Guided by *Webb*, we agree with Aparicio that the single larceny doctrine precludes convictions for separate counts of theft under Crim. § 7-103(f) and Crim. § 7-104(c), based on his single, simultaneous purchase of multiple items of allegedly stolen property on October 16, 2020. *See id.* Because Count 2 has already been merged for sentencing purposes, we need only vacate that conviction while affirming the conviction on Count 1.[6]

JUDGMENTS OF CONVICTION ON COUNTS 1 AND 4 AFFIRMED. JUDGMENT OF CONVICTION ON COUNT 2 VACATED. COSTS TO BE PAID 1/2 BY APPELLANT, 1/2 BY MONTGOMERY COUNTY.

[6] We note that because appellant was acquitted of the theft scheme charged in Count 3, there is no single larceny issue concerning Aparicio's conviction on Count 4, which is predicated on his single, simultaneous purchase of allegedly stolen property on December 22, 2020.