Circuit Court for Wicomico County
Case Nos.: 22-K-16-000787
22-K-16-000785

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1252 and 1406

September Term, 2017

MICHAEL W. CAREY

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Harrell, Glenn D.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: August 22, 2019

In 2016, Michael W. Carey was accused of robbing two separate banks in Wicomico County. He was tried before a jury on various charges arising out of each incident including, in each case, robbery, theft, and assault in the second degree. Each jury convicted him of robbery and theft, but acquitted him of second-degree assault.

On appeal, Mr. Carey argues that his convictions for robbery should be reversed because the juries' verdicts of guilty on those charges were legally inconsistent with their verdicts of not guilty on the second-degree assault charges. The State contends otherwise. We will affirm the convictions for the reasons set out in this opinion.

Background

The cases were tried within a month of one another. At each trial, Carey was represented by the same defense counsel, the State was represented by the same prosecutor, and presiding was the same judge. Carey does not challenge the sufficiency of the evidence against him. Therefore, we will summarize the evidence relevant to the parties' appellate contentions in the light most favorable to the State. *See Washington v. State*, 180 Md. App. 458, 461 n. 2 (2008).

A. The First Shore Federal Bank Robbery
(No. 1252, September Term, 2017)

On September 26, 2016, Carey robbed the First Shore Federal Bank in Salisbury, Maryland. Wearing a baseball cap and a hooded sweatshirt with the sleeves pulled over his hands, he entered the bank and passed a note to the teller, Linda Lloyd. The note read: "give me all your money in your top drawer and your bottom drawer. I know you have

kids, I know where you live. Give me back my note when you're done reading this." Avoiding eye contact, Ms. Lloyd returned the note to Carey and handed him $1,600 in cash. Carey took the money and left the bank.

When asked at trial how she felt after reading the note, Ms. Lloyd said she was "in disbelief at first. It was like a dream." Later, Ms. Lloyd was unable to recall what the man looked like or what color his clothing was. She was unable to identify Carey from a photo array, and, in fact, identified another man as the culprit from the photo array. She only glanced at Carey's face, and could recall only that he had a "stubble beard" and "pointed nose." She also noticed that Carey had symbols or numbers tattooed on his fingers. On cross-examination, Ms. Lloyd testified that, although she has children, they are adults and live on their own.[1]

B. The Bank of Delmarva Robbery
(No. 1406, September Term, 2017)

On September 30, 2016, Carey robbed the Bank of Delmarva branch office in Delmar, Maryland. Lindsay Parsons was working as a teller at the bank the day of the robbery. At 3:00 p.m., Carey entered the bank and approached Ms. Parsons's window. Ms. Parsons, who was busy counting the money in her drawer, asked another teller, Kristen Clark, to attend to Carey. Carey presented Ms. Clark with a note that said: "I want all the loose

[1] The State presented a substantial amount of additional evidence tying Carey to the robbery, but we need not discuss it because he does not challenge the legal sufficiency of the evidence.

money out of the drawer, no strap, no bait, no dye pack, no GPS. I have a gun." Ms. Clark testified that reading the note "scared" her because she "had to worry about everyone else when he implied he had a gun." Ms. Clark reached into the drawer and handed Carey about $1,080. When she did so, she drew the attention of Ms. Parsons, who turned around and saw the note. Ms. Parsons described the incident as "traumatic" and said she was afraid because "[i]n the note he stated that he had a weapon and was reaching to his right side implying that there was a weapon there. I didn't see it but he implied that there was one."[2]

C. The Jury Instructions and the Verdicts

After the close of evidence in each trial, the juries were given instructions for robbery and second-degree assault, taken with minor changes from Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") (2nd Ed., 2013 Suppl.). The Bank of Delmarva robbery was the first case to be tried. In that case, the court's robbery instruction was based upon MPJI-Cr-4:28. The court instructed the jury that:

> Defendant is charged with the crime of robbery of Linda Lloyd. Robbery . . . is the taking and carrying away of property from someone else or someone's presence or control, by force or threat of force, with the intent to deprive the victim of the property. In order to convict the defendant of robbery, the State must prove:
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> First, that the defendant took the property from Linda Lloyd's presence – – from her or from her presence and control;
>
> Second, *the Defendant took the property by force or threat of force*; and

[2] As in the previous trial, the State presented other evidence connecting Carey to the robbery.

> Third, that the Defendant intended to deprive Linda Lloyd of the property.
>
> Property means anything of value. Deprive means . . . to withhold property of another permanently or to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(Formatting altered and emphasis added.)

For second-degree assault, the jury was instructed as to the "intent to frighten" variety. The instruction was based on MPJI-Cr 4:01:

> The final charge is that of second degree assault with respect to Linda Lloyd. Second degree assault in this context means intentionally frightening another person with the threat of immediate physical harm.
>
> In order to convict the Defendant of assault the State must prove:
>
> First, the Defendant created an act with the intent to place Linda Lloyd in fear of immediate physical harm;
>
> Second, *the Defendant had the apparent ability at that time to bring about physical harm*; and
>
> Third, that *Linda Lloyd reasonably feared immediate physical harm*.

(Formatting altered and emphasis added.)

Carey did not object to these instructions. The juries returned verdicts of guilty for the robbery and theft charges, but not guilty for the second-degree assault charge.

Immediately after the verdict was returned, Carey's counsel requested a bench conference. Defense counsel argued that the verdicts for robbery and second-degree assault were legally inconsistent and requested that the court instruct the jury to continue deliberating. Essentially, counsel argued that assault equates to the "force or threat of

force" element of robbery, and so reasoned that the jury could not find Carey guilty of robbery when it did not find him guilty of assault. Because the arguments at trial are the same as they are on appeal, we will discuss them in more detail in our analysis.

The court denied Carey's request. It reasoned that the "force or threat of force" element of robbery was not akin to the "fear of immediate physical harm" element of assault, and that "fear" of bodily harm was not a prerequisite at all to robbery. The court reasoned that the "force or threat of force" element of robbery was sufficiently met by the note passed by Carey to the bank teller.

The same scenario played out in the First Shore Federal robbery trial. The instructions to the jury as to robbery and second-degree assault were identical, except for the name of the victim and minor variations in wording. The jury again returned guilty verdicts on the robbery and theft counts but not guilty on the second-degree assault charge. Once again, defense counsel argued that the verdicts were legally inconsistent and requested that the court order the jury to continue deliberating. Consistent with its ruling in the prior trial, the court denied the motion on the basis that the verdicts were not inconsistent as a matter of law.

D. Proceedings on Appeal

Carey timely appealed his convictions. The appeal from the First Shore Bank robbery convictions was docketed as No. 1252, September Term, 2017. The appeal from the Bank of Delmarva robbery was docketed at No. 1406, September Term, 2017. On May 9, 2018,

this panel heard oral argument in the appeal arising out of the First Shore Bank trial. The appeal from the Bank of Delmarva robbery was placed on the submitted on brief docket of the same panel.

On November 7, 2018, the Court of Appeals granted the State's petition for a writ of certiorari in *State of Maryland v. Willie B. Stewart*, 461 Md. 613 (2018). On December 19, 2018, this panel entered orders staying proceedings in each appeal "pending a decision by the Court of Appeals in *State of Maryland v. Willie B. Stewart*, No. 53, September Term 2018[.]" The Court of Appeals issued its opinion in *Stewart* on June 25, 2019. *State v.* Stewart, ___ Md. ___, 2019 WL 2590600 (June 25, 2019). At that juncture, the pending appeals were consolidated for purposes of disposition.

Analysis

This Court "reviews without deference a trial court's ruling on a motion to strike a guilty verdict that is allegedly inconsistent with a not-guilty verdict." *Givens v. State*, 449 Md. 433, 447-48 (2016) (citing *McNeal v. State*, 426 Md. 455, 461–62 (2012)).

1.

Carey's contentions are the same in each appeal. He argues that the trial court erred in denying his request to have the jury re-deliberate after it found him not guilty of second-degree assault, but guilty of robbery. Underlying this argument is Carey's assertion that those verdicts are legally inconsistent. Observing that Maryland does not permit legally inconsistent verdicts, Carey contends that second-degree assault, including the intent to

frighten variety, is a lesser included offense of robbery because it forms one of the essential elements of robbery, namely, "the threat of force." Thus, according to Carey, assault and robbery merge as long as they arise out of the same transaction. In support of his argument, Carey looks to the common law definitions of robbery and assault, the commentary to the Maryland Criminal Pattern Jury Instructions, and a number of reported Maryland cases. *See Spencer v. State*, 422 Md. 422, 425 (2011); *Dixon v. State*, 302 Md. 447, 464 (1985); *Coles v. State*, 374 Md. 114, 125 (2003); *Montgomery v. State*, 206 Md. App. 357, 392 (2012).

The State contends that when an issue of illegally inconsistent verdicts arises, our focus is not whether second-degree assault merges with robbery or whether those crimes share common elements. Rather, the focus of our inquiry should be on whether "the jury acted contrary to the trial judge's proper instructions regarding the law." *Price v. State*, 405 Md. 10, 36 (2008). According to the State, "it is undisputed that the trial judge gave proper instructions regarding the law." (Interior quotation marks omitted.) Although we do not entirely agree with the State's reasoning, we conclude that the verdicts should nonetheless be affirmed.

2.

For most of Maryland's legal history, inconsistent verdicts were not generally treated as a basis to overturn convictions in criminal cases tried by juries. *State v. Williams*, 397 Md. 172, 189 (2007) (citing, among other cases, *Galloway v. State*, 371 Md. 379, 408

(2002); and *Hoffert v. State*, 319 Md. 377, 384 (1990)).[3] This rule was based upon the premise that inconsistent verdicts in criminal cases "may be the product of lenity, mistake, or a compromise to reach unanimity, and that continual correction of such matters would undermine the historic role of the jury as the arbiter of questions put to it." *Williams*, 397 Md. at 189 (quoting *Galloway*, 371 Md. at 408).

In *Price v. State*, the Court of Appeals held that "inconsistent verdicts [in criminal cases] shall no longer be allowed." 405 Md. 10, 29 (2008). In a concurring opinion, Judge Harrell, joined by Judge Battaglia, drew a distinction between *legally* inconsistent verdicts and *factually* inconsistent verdicts:

> I think it important to note explicitly that the Majority's holding applies only to "legally inconsistent" verdicts, not "factually inconsistent" verdicts. The Court should continue to recognize factually or "logically" inconsistent verdicts rendered by juries in criminal cases.
>
> A factually inconsistent verdict is one where a jury renders different verdicts on crimes with distinct elements when there was only one set of proof at a given trial, which makes the verdict illogical. The feature distinguishing a factually inconsistent verdict from a legally inconsistent verdict is that a factually inconsistent verdict is merely illogical. By contrast, a legally inconsistent verdict occurs where a jury acts contrary to a trial judge's proper instructions regarding the law. . . .
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> • • •
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> A legal inconsistency, by contrast, occurs when an acquittal on one charge is conclusive as to an element which is necessary to and inherent in a charge on which a conviction has occurred.

[3] The rule was subject to exceptions. *See Price v. State*, 405 Md. 10, 20 (2008).

405 Md. at 34–37 (cleaned up).

Further, Judge Harrell suggested that a court should not disturb factually inconsistent verdicts; but, upon a proper and timely objection to legally inconsistent verdicts, a trial court should:

> instruct or re-instruct the jury on the need for consistency and the range of permissible verdicts. The jurors then should be permitted to resume deliberation. The jury is free to resolve the inconsistency either by returning verdict in the defendant's favor, convicting on the implicated counts, or deadlocking on a charge so that no inconsistent finding results.

Id. at 41–42.

Judge Harrell's analysis as to the distinction between legally and factually inconsistent jury verdicts was adopted by the Court in *McNeal v. State*, 426 Md. 455 (2012); *see also Givens v. State*, 449 Md. 433, 458 (2016).

In order to preserve the issue of alleged legally inconsistent verdicts for appellate review, "a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury." *Givens*, 449 Md. at 473. If the trial court concludes that the verdicts are legally inconsistent, it may "correct the error in the proceedings by sending the jury back to deliberate to resolve the inconsistency." *Id*. It is not disputed that Carey has preserved his objections to the verdicts for appeal.

3.

Robbery is:

> the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear. . . . The hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force, the latter of which also is referred to as intimidation.

Coles v. State, 374 Md. 114, 123–24 (2003) (cleaned up); *see also Spitzinger v. State*, 340 Md. 114, 121 (1995) ("Robbery requires a taking of property of any value whatsoever which is accomplished by violence or putting in fear.").

The crime of second-degree assault can be committed in three distinct ways:

> Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) § 3–203 criminalizes second-degree assault, of which there are three types: (1) intent to frighten, (2) attempted battery, and (3) battery. A defendant commits second-degree assault of the intent-to-frighten type where: (1) the defendant commits an act with the intent to place a victim in fear of immediate physical harm; (2) the defendant has the apparent ability, at the time, to bring about the physical harm; and (3) the victim is aware of the impending physical harm.

Jones v. State, 440 Md. 450, 455 (2014) (cleaned up).

The question before us is whether a guilty verdict for robbery and a not guilty verdict for second-degree assault of the attempt to frighten variety are legally inconsistent. The Court of Appeals addressed this issue in *State v. Stewart*, ___ Md. ___, No. 53, September Term 2018, 2019 WL 2590600 (filed June 25, 2019).

Stewart was charged with robbery, theft, and second-degree assault of the attempt to frighten variety arising out of an incident in which he allegedly robbed an ice cream store. *Id*. at *7. The victim, a cashier at the store, testified that Stewart said if he did not "make

any sudden moves" and "followed his instructions[,]" that he "would not be shot and killed." *Id*. at *7. Despite not seeing a firearm, the victim believed that Stewart had a firearm on him because he kept his hand on his waistband during the robbery. *Id*. at *7. As a result, the victim testified that he "felt threatened" and "felt like his life could be in danger." *Id*. at *7.

The jury instructions given by the trial court for robbery, theft, and second-degree assault given to the jury were those found in the Maryland Pattern Criminal Jury Instructions. *Id*. at *8; *see* MPJI-Cr 4:01; 4:28 (2nd Ed., 2013 Suppl.). The jury convicted Stewart of robbery and theft, which merged for purposes of sentencing, but acquitted him of second-degree assault. Immediately after the verdicts were announced, Stewart's counsel argued that the verdicts for robbery and assault were legally inconsistent, and asked the court to instruct the jury to keep deliberating until it reached consistent verdicts. *Id*. at *8. The court disagreed and denied the request. *Id*. at *8.

Stewart appealed. A panel of this Court reversed Stewart's conviction for robbery, and remanded for new sentencing on his theft conviction. *Id*. at *8. The panel concluded that the verdicts for robbery and assault were legally inconsistent because Stewart's conduct satisfied the elements of both robbery and second-degree assault of the attempt to frighten variety. *Id*.

The State petitioned for a writ of certiorari, which the Court of Appeals granted. A majority of the Court agreed that the Court of Special Appeals should be reversed and that

Stewart's conviction for robbery should be affirmed. *Id*. at *2. However, no four judges agreed as to the correct analysis to reach this result. Judge McDonald (joined by Chief Judge Barbera and Judge Adkins), Judge Watts (joined by Judge Getty), Judge Greene, and Judge Hotten each authored separate opinions. The judges on the Court parted company on three issues: first, whether Maryland should continue to recognize the distinction between legally and factually inconsistent verdicts established by *McNeal* and Judge Harrell's concurring opinion in *Price*; second, whether the crime of assault of the attempt-to-frighten variety is a lesser included offense of the crime of robbery; and third, whether a verdict of guilty as to robbery is legally consistent with a verdict of not guilty for second-degree assault of the attempt to frighten variety. For our purposes, the views of the judges can be summarized as follows.[4]

As to the first issue, Judge McDonald (joined by the Chief Judge and Judge Adkins) suggested that the distinction between factually and legally inconsistent verdicts has not proven to be "a useful rubric." 2019 WL 2590600, at *4. Instead,

> the key question is whether the jury verdict on its face indicates that the jury failed to follow the trial court's proper instructions on the law governing the charged offenses. If the answer to that question is "yes," then the guilty verdict warrants reversal. However, if the trial court's instructions accurately describe the elements of the offenses and if the jury verdict does not indicate on its face that the jury failed to follow those instructions, then the guilty verdict should be upheld.

[4] Our summaries do not remotely do justice to the meticulous and scholarly analysis in each opinion.

Id. (footnotes omitted).

As to this issue, Judge Watts (joined by Judge Getty) concluded that the "doctrine of stare decisis mandates that this Court adhere" to the distinction between legally and factually inconsistent verdicts enunciated in *McNeal*. *Id*. at *14 n. 8. Both Judge Greene and Judge Hotten agreed with Judge Watts's conclusion on this issue. *Id.* at *20 (Judge Greene); at *24 (Judge Hotten).

As to the second and third issues, Judge Watts (again joined by Judge Getty) concluded that second-degree assault of the intent-to-frighten modality is not a lesser included offense of robbery:

> To secure a conviction for second-degree assault of the intent-to-frighten type, the State must prove that: (1) the defendant committed an act with the *intent to place a victim in fear of immediate physical harm*; (2) the defendant *had the apparent ability, at the time, to bring about the physical harm*; and (3) *the victim was in reasonable apprehension of the physical harm*. By contrast, to secure a conviction for robbery, the State must prove that the defendant took and carried away the property of someone else by force or *threat of force* with the intent to deprive the victim of the property. *The State need not prove that the victim reasonably feared immediate physical harm, that the defendant intended to create such fear*, or that the defendant was apparently able to physically harm the victim.
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> • • •
>
> For the above reasons, *I would conclude that second-degree assault of the intent-to-frighten type is not a lesser-included offense of robbery*. Because the circuit court correctly instructed the jury regarding the two offenses' elements, and because second-degree assault of the intent-to-frighten type is not a lesser-included offense of robbery, *the guilty verdict as to robbery and the not-guilty verdict as to second-degree assault of the intent-to-frighten type are not legally inconsistent*.

2019 WL 2590600, at *7, *20 (emphasis added).

Judge McDonald (again joined by the Chief Judge and Judge Adkins) stated:

> The trial court instructed the jury that a conviction for the assault count required that they find beyond a reasonable doubt that, among other things, the defendant intended to place the victim "in fear of immediate physical harm" and "had the apparent ability at that time to bring about the physical harm." It also instructed the jury that a conviction on the robbery count required that they find beyond a reasonable doubt that the defendant took property from the victim "by force or threat of force." *In my view, a "threat of force" does not always or necessarily equate to an intent to place another in fear of immediate physical harm or necessarily involve the apparent ability to do so*. The fact that a jury may acquit a defendant on an assault charge after receiving such instructions does not mean that it has ignored the court's instruction on the robbery charge in finding the same defendant guilty of that charge.
>
> Thus, we cannot say, simply from looking at the verdicts in this case, that the jury failed to follow the court's instructions on the law. Accordingly, *I would hold that Mr. Stewart's conviction of robbery should not be overturned on the basis of an "inconsistent" acquittal of second-degree assault.*

Id. at *6 (emphasis added).

In contrast, both Judge Hotten and Judge Greene concluded that second-degree assault of the intent to frighten variety is a lesser included offense of the crime of robbery, and that, accordingly, the verdicts of guilty on the robbery charge and not guilty on the assault charge were inconsistent as a matter of law. *Id.* at *23–24 (Judge Greene); and *24–28 (Judge Hotten).

4.

Sometimes, it is difficult to identify the holdings of plurality opinions. When there is "no single rationale explaining the result" that a majority of the appellate court can agree

upon, "the holding of the Court may be viewed as that position taken by those [judges] who concurred in the judgments on the narrowest grounds." *Derr v. State*, 434 Md. 88, 114 (2013) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). The Court's opinion in *Stewart,* however, does not present such a challenge. Four judges concluded that the analytical approach to inconsistent jury verdicts in criminal cases limned in *McNeal* and Judge Harrell's concurring opinion in *Price* remains the law of Maryland. Five judges agreed that second-degree assault of the intent to frighten variety is not a lesser included offense of the crime of robbery. Those same judges concluded that a jury's verdict of guilty to a charge of robbery is not legally inconsistent with the same jury's verdict of not guilty to the charge of second-degree assault of the intent to frighten variety. These are the holdings of *Stewart.*

Applying these holdings to the cases before us is straightforward. The instructions given by the court to the juries in each Carey's trials accurately identified the elements of each of the crimes of robbery and second-degree assault of the intent to frighten variety. There was no evidence in either case that would have supported an instruction for either of the other modalities of second-degree assault. (In any event, Carey did not request such an instruction during either trial and does not assert in either appeal that such an instruction would have been appropriate.)

This brings us to the dispositive issue in these appeals—were the juries' verdicts of guilty as to robbery and not guilty as to second-degree assault of the intent to frighten

modality legally inconsistent? To the extent that there was uncertainty as to this issue prior to the filing of *Stewart*, that uncertainty is now resolved—*Stewart* clearly stands for the proposition that there is no legal inconsistency between a verdict of guilty of robbery and a verdict of not guilty of second-degree assault of the intent to frighten variety. Accordingly, we will affirm the convictions.

CASE NO. 1252, SEPTEMBER TERM, 2017:

THE JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.

CASE NO. 1406, SEPTEMBER TERM, 2017:

THE JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.