Circuit Court for Howard County
Case No. 13-K-15-056017

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1884

September Term, 2016

ANTONIO R. EDWARDS

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 14, 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 in the Circuit Court for Howard County convicted Antonio Edwards, appellant, of two counts of first-degree assault, second-degree assault, false imprisonment, use of a handgun in a crime of violence, illegal possession of a gun, and illegal possession of ammunition. The court sentenced appellant to a total sentence of twenty-five years' imprisonment, suspending all but fifteen years, and to a consecutive ten years for use of a handgun in a crime of violence, to be followed by a three-year period of supervised probation.[1]

Appellant noted this appeal, arguing that the court erred in failing to merge second-degree assault into first-degree assault and also false imprisonment into first-degree assault. We perceive no error as to merger. Appellant also contends that the court abused its discretion in ordering a consecutive sentence for the use of a handgun conviction. For the reasons stated below, we agree. Accordingly, we vacate the sentence for use of a handgun in a crime of violence and remand for re-sentencing, and otherwise affirm.

BACKGROUND

In October 2015, Shanay Danforth lived in an apartment in Columbia, Maryland, with her infant child. Appellant, the father of the child, had been staying with Danforth

[1] Specifically, the court imposed the following sentence: first-degree assault of Shanay Danforth – 25 years, suspend all but 15 years; first-degree assault of Diona Dunson – 25 years, suspend all but 15 years; second-degree assault – ten years; false imprisonment – 25 years, suspend all but 15 years; use of a handgun in a crime of violence – ten years; illegal possession of a handgun – ten years; illegal possession of ammunition – one year. All of the sentences were to run concurrently, save for the use of a handgun in a crime of violence sentence, which was to run consecutively.

since August 2015 in an effort to build a relationship with the child and also to rekindle the relationship between Danforth and him, which had ended the previous February.

On the morning of October 11, 2015, appellant woke Danforth up around 7:00 A.M. to question her about some social media posts he found on her cell phone.[2] Appellant accused Danforth of spending time with other men. She responded that she was not seeing anyone. Appellant became "very angry" and looked "upset." The pair argued and then appellant straddled Danforth, pinning her to the bed, and ripped her clothes off. Appellant then choked Danforth to the point where she had difficulty breathing. Appellant let go and continued questioning Danforth about the social media posts. Then appellant "did bring out his gun" and pointed it at Danforth's side and threatened to kill her and leave the child motherless.

Meanwhile, in the child's room, Danforth's friend Diona Dunson had been awakened by the argument.[3] She testified that she heard appellant loudly ask Danforth about pictures on her phone. At one point appellant came to the doorway of the child's room and asked Dunson to leave. Appellant then returned to Danforth's room and continued arguing. At one point, Dunson grabbed her clothes and went to the front door.

As she was about to leave, Dunson heard Danforth screaming and called 911. While she was speaking with the dispatcher, appellant approached Dunson and put the gun against her neck, demanding to know if Dunson had called the police. Dunson said she was talking

[2] The child was not at the apartment. Danforth had taken the child to her mother's house the previous day.

[3] Dunson had spent the night in Danforth's apartment.

to her employer. Appellant held the gun on Dunson's neck, snatched the phone away from her and threw it on the ground.

Appellant then ordered Dunson to go into the bedroom with Danforth, and said that they were "going to die today." Appellant pointed the gun at Dunson's back as she walked into the room. Appellant closed the bedroom door and ordered Dunson to "get on her knees," but Dunson refused. Appellant then alternated aiming the gun at Danforth and Dunson, accusing Dunson of trying to sabotage his relationship with Danforth and questioning them about their activities the previous night. Appellant threatened to kill Dunson, and then he turned the gun on himself and threatened to commit suicide.

At that point, police tapped on the bedroom window and asked to be let inside. Officers questioned Danforth, Dunson, and appellant. Eventually, police arrested appellant and recovered ammunition and a black handgun, which Danforth and Dunson separately identified as the gun appellant had pointed at them. Appellant was tried and convicted as indicated above.

DISCUSSION

I. Merger Issues

Appellant first contends that the court erred in failing to merge: 1) second-degree assault (of Danforth) into first-degree assault (of Danforth); and 2) false imprisonment (of Dunson) into first-degree assault (of Dunson). Appellant contends that second-degree assault is a lesser-included offense of first-degree assault, and, therefore, they should merge. As to false imprisonment and first-degree assault, appellant maintains that the

offenses should merge pursuant to the rule of lenity and/or the principles of fundamental fairness because the offenses were part of the same course of conduct.

Second-degree assault is, indeed, a lesser-included offense of first-degree assault pursuant to the required evidence test.[4] *See State v. Fennell*, 431 Md. 500, 505 (2013). That does not end our inquiry, however. The Court of Appeals has observed that "[m]erger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and 'when [the] offenses are based on the same act or acts*[.]'" *Nicolas v. State*, 426 Md. 385, 408 (2012) (emphasis added) (quoting *Holbrook v. State*, 364 Md. 354, 370 (2001)). Appellant asserts that the convictions for first and second-degree assault of Danforth were based on the same act. We disagree.

In *Snowden v. State*, 321 Md. 612, 615-619 (1991), the Court of Appeals considered whether to merge Snowden's convictions for robbery and assault. In the course of a robbery, Snowden shot a man in the arm and demanded money. *Id.* at 615. Because robbery requires an element of force, and it was unclear whether his assault conviction was based on a different act of force than that used to commit the robbery, the Court merged the offenses. *Id.* at 619. The Court observed that the circuit court could have resolved the

[4] Sometimes referred to as the "same evidence test" or the "*Blockburger* test" (from *Blockburger v. United States*, 284 U.S. 299 (1932)), "'[t]he required evidence test focuses upon the elements of each offense; if 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.'" *Moore v. State*, 198 Md. App. 655, 685 (2011) (emphasis omitted) (quoting *State v. Lancaster*, 332 Md. 385, 391 (1993)). Stated another way, "'if each offense contains an element which the other does not, there is no merger under the required evidence test[.]'" *Id.* (emphasis omitted) (quoting *Lancaster*, 332 Md. at 391).

ambiguity in its jury instructions, had the case been tried by a jury, or in its remarks. *Id.* This Court has also concluded that the charging document, verdict sheet, evidence introduced at trial, and counsel's arguments may also elucidate the issue when there is an ambiguity as to whether two convictions are based on the same or different acts. *See Johnson v. State*, 228 Md. App. 27, 47-49, *cert. denied*, 450 Md. 120 (2016).

We are persuaded that appellant's conviction for second-degree assault was based on different conduct than that supporting the conviction for first-degree assault. In simpler terms, appellant committed two different assaults against Danforth. In instructing the jury, the court stated as follows concerning the multiple assault charges:

> The Defendant is charged with the crime of assault. Assault is intentionally frightening another person with the threat of immediate physical harm. In order to convict the Defendant of assault, the State must prove that the Defendant committed an act with the intent to place Shanay Danforth in fear of immediate physical harm. That the Defendant had the apparent ability at that time to bring about the harm and that Shanay Danforth reasonably feared immediate physical harm.
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> * * *
>
> Assault is also causing an offensive physical contact to another person. In order to convict the Defendant of assault the State must prove that the Defendant caused physical harm to Shanay Danforth. That the contact was the result of an intentional or reckless act of the Defendant and was not accidental. And that the contact was not consented to by Shanay Danforth.
>
> Defendant is also charged with the crime of first degree assault. In order to convict the Defendant of first degree assault the State must prove all of the elements of second degree assault which I just instructed you on and must also prove that the Defendant used a firearm to commit the assault.

In closing argument, the prosecutor made it clear that the State's theory of the case was that appellant committed two different assaults against Danforth. The prosecutor

contended that appellant committed first-degree assault when he pointed the gun at Danforth when he was questioning both Danforth and Dunson in Danforth's room. By pointing the gun at Danforth, the prosecutor argued, appellant was placing Danforth in fear of immediate physical harm. Then the prosecutor differentiated the second-degree assault as to Danforth:

> Now, you have a separate count. A second degree assault count. And in order to prove that the State must prove the Defendant caused physical harm to Shanay Danforth. And if you look at State's Exhibit 2 and 3 [pictures of Danforth following the incident] – and you'll have these exhibits. You can look closely. You can see Ms. Danforth had physical injuries.

The prosecutor then went on to discuss the choking incident that Danforth described. In short, the prosecutor argued that appellant committed second-degree assault in choking Danforth and first-degree assault in later pointing a gun at her.

We are persuaded, therefore, that the circuit court properly sentenced appellant separately for first-degree assault and second-degree assault of Danforth because appellant's convictions for those offenses were based on separate criminal acts.

Likewise, appellant's convictions for false imprisonment and first-degree assault of Dunson do not merge, as those convictions were also based on separate criminal acts. The assault was not, as appellant claims, merely "incidental to the false imprisonment." As the prosecutor explained to the jury, the charge of first-degree assault of Dunson was based on the act of putting a gun to Dunson's neck as she was calling the police:

> [Appellant] commited an act with the intent to . . . place Ms. Dunson in fear of immediate physical harm while he held the gun up to her and she was real specific with you. That he held it up to her. She felt it. [Appellant] had the apparent ability [to bring about physical harm] at that time. . . . [Ms.

> Dunson] told you she believed it was a real gun and that [appellant] could pull that trigger and kill her.

The charge of false imprisonment, however, was based on conduct that occurred next:

> [Appellant] couldn't let [Dunson] leave. She had heard too much. She had now seen too much because he had a gun and he brought her back into the room, which leads us to the next two counts, which are false imprisonment counts. . . . [B]ringing [her] into the bedroom and closing that door and not letting [her] leave. That's confining or detaining . . . Ms. Dunson.

That the offenses were, as appellant states, "essentially coincidental" is immaterial. *See Latray v. State*, 221 Md. App. 544, 562 (2015) ("separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction" (quoting *State v. Boozer*, 304 Md. 98, 105 (1985)).[5]

II. Use of a Handgun Sentence

In sentencing appellant for the use of a handgun in a crime of violence, the court sentenced appellant to ten years in prison. The court then said that the sentence would be "consecutive to the other. By law it has to be." Appellant maintains that the court abused its discretion in imposing a consecutive sentence because the court had the discretion to impose a concurrent sentence. The circuit court's belief that it had to impose a consecutive sentence was, therefore, a lack of discretion. The State contends that this issue is not

[5] Because we conclude that the convictions for first-degree assault and false imprisonment of Dunson were based on separate acts, and therefore, that merger of the convictions for sentencing purposes is not required, we need not address appellant's contention that first-degree assault is a statutory crime in the context of a merger analysis.

preserved because appellant failed to object at sentencing. We conclude that the issue is preserved pursuant to Rule 8-131(a) because the court decided it.[6]

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 4-204(c)(1)(i) provides that a person who uses a firearm in the commission of a crime of violence or felony "shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years." Subsection (c)(2) of the statute provides that "[f]or each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony."

Appellant was not convicted of more than one count of the use of a handgun in a crime of violence, nor does it appear from the record before us that he had a prior conviction for violation of that statute. The Court of Appeals has held that a "court has a power to impose whatever sentence it deems fit as long as it does not offend the constitution and is within statutory limits as to maximum and minimum penalties. This judicial power includes the determination of whether a sentence will be consecutive or concurrent, with the same limitations." *Kaylor v. State*, 285 Md. 66, 70 (1979) (internal citations omitted). The circuit court, therefore, had the discretion to impose a consecutive or a concurrent sentence in this case. The court was not required by law to impose a consecutive sentence, as it apparently believed. The Court of Appeals has held that a circuit court abuses its

[6] This rule provides, in part: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

discretion in a situation where it believes it does not have discretion. *See Pollard v. State*, 394 Md. 40, 46-47 (2006).

Accordingly, because the circuit court had the discretion to impose a consecutive or concurrent sentence for appellant's conviction for the use of a handgun in a crime of violence, and it did not recognize that discretion, we will vacate appellant's sentence for that offense and remand for resentencing.

SENTENCE FOR USE OF A HANDGUN IN A CRIME OF VIOLENCE VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY OTHERWISE AFFIRMED. CASE IS REMANDED FOR RESENTENCING.
COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY HOWARD COUNTY.