UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0204

September Term, 2015

BRANDON COREY JACKSON

v.

STATE OF MARYLAND

Graeff,
Friedman,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: January 26, 2016

The appellant, Brandon Corey Jackson, was convicted in the Circuit Court for Wicomico County in a jury trial, presided over by Judge W. Newton Jackson, III., of, inter alia, three counts of attempted first-degree murder and one count of attempted first-degree arson. On this appeal, he contends:

> 1. that the evidence was not legally sufficient to support the convictions for attempted first-degree (or second-degree) murder;
>
> 2. that Judge Jackson abused his discretion by making the sentence for attempted arson consecutive with the sentences for attempted murder; and
>
> 3. that Judge Jackson erred in denying his motion to suppress physical evidence.

An Ambiguous Background Relationship

The background facts reveal a case of clearly intended murder and arson, awkwardly and clumsily executed. During the early morning hours of May 3, 2014, the appellant became enraged at Tameka Smullen, a woman with whom he had a long-term, but only vaguely described, relationship. Ms. Smullen lived with her two children in Apartment 7 of 1018 Fairground Drive in Salisbury. Ms. Smullen described the vague relationship as one wherein she and the appellant knew each other because they "used to talk to each other." They "talked" for nearly a year. She specified that they began talking in May of 2012 but "stopped having all ties" in February of 2013. A month later, however, they began talking again after the appellant got married in March of 2013. Ms. Smullen further testified that she again cut off all communications with the appellant in November of 2013 "after he told [her] he wanted to be with [her]."

An Apparent Provocation

However platonic the relationship may have been, it appears to have been a tinderbox. It was seven months after their latest break-up, during the early morning hours of May 3, 2014, that the appellant sought to renew their conversation. It was shortly after midnight when he showed up at the door of Apartment 7. When Ms. Smullen answered the appellant's knock, he told her that he needed her help in picking up a new car he had recently bought because he had been drinking. Why a new car was being picked up in the wee hours of the morning was not explained. Ever the Good Samaritan, Ms. Smullen agreed to drive the appellant to his destination, but explained that she needed to bring her children on the trip. At that development, the appellant without explanation "got mad," acting as if he did not want Ms. Smullen to bring the children along. He stormed off angrily toward his car without saying anything further. Ms. Smullen, however, followed the appellant to his car and began loading her children into the back seat. Ms. Smullen was ultimately found to have been one of the intended victims of the attempted murders.

The Target List Lengthens

It was at that point, according to Ms. Smullen's testimony, that the appellant "was searching through the car, and then he started acting crazy." It is here appropriate to introduce the other targets of the appellant's murderous wrath. The appellant suddenly walked back into the building, up three flights of stairs, and began arguing with two boys. Ms. Smullen got her own children out of the car and they walked back into the apartment

house. As Ms. Smullen and her children reentered the building, the appellant was on the third level where "two little boys were." According to Ms. Smullen, "he just kept saying they took his cell phone." Ms. Smullen told the appellant that there was no way the kids could have taken his cell phone.

The appellant then walked back downstairs to his car. The appellant paced back and forth in the parking lot and then sped off in his car, apparently in high dudgeon. Ms. Smullen described the abruptness of the appellant's departure. "[H]e skirted tires, leaving out." She defined this as meaning that he "squealed his tires." According to Ms. Smullen, the appellant yelled out of his window to the two boys, "I'm going to kill you. I'll be back." That is unusually high octane evidence of a homicidal mens rea. Ms. Smullen and the two boys "all just stood there and looked at him."

Ms. Smullen then walked to the guard shack adjoining the parking lot of the building and instructed the guard not to permit the appellant back in the facility. Ms. Smullen then accompanied the two boys to Apartment 12, where one of them lived, and informed the mother of one of them "what was going on." The mother described the boys as "shook up."

The second of the attempted murder targets was Danielle Thomas, a friend of Ms. Smullen and the occupant of a neighboring apartment, Apartment 12, at 1018 Fairground Drive. It was she who was the mother of one of the two boys. Ms. Thomas and the appellant both knew each other and Ms. Thomas identified him in court. The appellant was actually convicted on a fourth charge of attempted murder but was not, for whatever reason,

sentenced on that conviction. Listed as the intended victim on that charge was Cameron Smith, the son of Danielle Thomas and one of the two boys whom the appellant threatened to kill. The intended victim on the third charge of attempted murder for which the appellant was sentenced was Shawn Jones, a friend of Cameron Smith who was visiting him on May 3 and the second of the two boys threatened by the appellant.

The Appellant Equivocates

For an hour or more, the appellant's ensuing behavior was bizarrely irresolute. He returned to Ms. Smullen's apartment door 20 to 30 minutes after having left. He knocked on the door and asked Ms. Smullen to open it so they could talk. She refused to do so and he responded that she had "better get your kids and leave." Moments later, Ms. Thomas called Ms. Smullen to say that the appellant was "skirting tires leaving out at that time." Ms. Thomas advised Ms. Smullen to bring her children and herself up to Ms. Thomas's apartment. She did so, taking along a knife for her protection, lest the appellant return. At the Thomas apartment, the two women remained on the look-out. Shortly thereafter the appellant returned for yet a third time, this time on foot. He walked up to the apartment building and looked around. The women turned off the lights in the apartment so they could not be seen. The appellant left for the third time.

An Incendiary Trail

On his fourth and final trip back to the apartment complex, however, the appellant returned with a purpose. In anticipation of trouble, Ms. Smullen and Ms. Thomas had placed

the younger children in the bathtub, fearful that the appellant might fire shots into the apartment. From the front window of the Thomas apartment, Ms. Thomas, Ms. Smullen, Ms. Thomas's son Cameron Smith, and Cameron's friend Shawn Jones could all watch the parking lot. It was Shawn Jones who first spotted the appellant and called out, "He has gasoline."

Both Ms. Smullen and Ms. Thomas testified that they observed the appellant lay a trail of liquid from the apartment building to his car and then attempt to light it with a cigarette lighter. Ms. Smullen called the police. She testified that she could see the flickering of the lighter even as the police approached. Ms. Thomas stated that at one point, she could see, "through a gap," the appellant's feet outside her door. When Ms. Thomas subsequently opened the door of her apartment upon the arrival of the police, she detected the strong smell of lighter fluid, which was "strong and everywhere," including on her doormat and on her carpet.

When Detective Jay Miller of the Salisbury Police Department arrived at the scene, he found the appellant's car, with its motor running and lights on, parked at one end of a trail of lighter fluid running from the car into the apartment building. Detective Miller found in the car a Wal-Mart plastic bag and a receipt from Wal-Mart for lighter fluid. Both surveillance videos and store records established that the appellant had purchased lighter fluid from Wal-mart earlier that evening.

It was Officer Reed Plaskon who first came into contact with the appellant when he arrived at the scene at approximately 2:30 a.m. The appellant was walking toward the entrance of the apartment house when Officer Plaskon pulled up. The officer observed a "bulge" in the appellant's pants. When Officer Plaskon conducted a pat-down of the appellant, the appellant's shirt "raised up" so as to reveal a bottle of lighter fluid tucked into the waistband of his pants. The appellant's response to the officer was, "You planted that shit on me." The officer also noticed a lighter lying on the ground, essentially at the appellant's feet.

The bottle of lighter fluid was empty. The ground on which the two men stood was wet. A trail of moisture led to the front entrance of the apartment building and up a stairwell to the second and third floors. Lighter fluid was smeared on the doormats and door handles of all of the apartments in the building, with "an exceptional additional amount" on Apartment 7 (Ms. Smullen's) and Apartment 12 (Ms. Thomas's). The officer confirmed that the fluid was lighter fluid. Fluid was also found near the laundry room and on the floor of every hallway. The officer alerted the occupants of all twelve residential apartments in the building as to the possible danger. From this bounteous launching pad of inculpatory evidence, where do we go?

Defending By Trivializing

The defense now being mounted by the appellant is minimal. He does not challenge the sufficiency of the evidence to show his criminal agency. Nor does he challenge the proof

of an attempt generally or of attempted arson specifically. His only challenge to the sufficiency of the evidence to support the convictions for attempted murder is to focus on the single mens rea element of a specific intent to kill, a common denominator element of both first-degree and second-degree murder. The defense virtually admitted guilt in all of its aspects but sought to dismiss the gravity of the appellant's crimes as actions that were simply "stupid" or part of a "juvenile prank" that "went too far."

In opening statement, defense counsel did not deny the mountain of evidence against the appellant but blithely dismissed the appellant's actions as "stupid." The thrust of the argument was that although the appellant acted stupidly, he did not intend to kill anybody. The argument, of course, casually ignored the fact that but for a mal-functioning cigarette lighter, an entire apartment house consisting of twelve separate residential apartments could have become the scene of a massive and tragic conflagration.

At sentencing, the defense acknowledged that the entire apartment building had been prepared by the appellant to go up in flames, but trivialized such a near tragedy as a "juvenile prank" that "went too far." That is not an exculpatory argument.

On appeal, the appellant has continued to argue that "no one was injured" by his actions. He argues that absent such injury, the State cannot prove that he had the specific intent to kill the three attempted murder victims. The lack of actual injury to the victim, of course, is almost always the criterion that distinguishes an inchoate crime such as attempted murder from a consummated crime such as murder. The failure to consummate does not

negate the attempt. It is the very raison d'être for even charging the attempt. Even inchoate murder is nonetheless a very serious felony, as this case illustrates.

The Specific Intent to Kill

Of all the elements of all of the crimes of which the appellant has been convicted, the only element in dispute is the mens rea of attempted murder. We fully agree with the appellant that that mens rea is the specific intent to kill the intended victim. Whereas there are four mentes reae that can support a conviction for consummated murder – the specific intent to kill, the specific intent to inflict grievous bodily harm, the depraved heart commission of a life-endangering act, or the perpetration or attempted perpetration of a life-endangering felony – only one of those mentes reae, the specific intent to kill, can support a conviction for attempted murder. State v. Earp, 319 Md. 156, 571 A.2d 1227 (1990); Earp v. State, 76 Md. App. 433, 545 A.2d 698 (1988). That requirement is not in dispute.

What the appellant specifically challenges is the legal sufficiency of the evidence to support the convictions for the attempted murders of Shawn Jones, of Tameka Smullen, and of Danielle Thomas. In the case of Shawn Jones, the answer is easy. Not long before the ultimate lethal attempt, the appellant had shouted at Shawn Jones, "I'm going to kill you. I'll be back." In the case of the other two attempted victims, however, there was no such convenient announcement of the appellant's specific intent. The proof of such an intent, of necessity, must be more circuitous.

Even with the actus reus of a bullet to the heart or a knife to the abdomen, how do we deduce the mens rea that propelled the bullet or wielded the knife? Moylan, Criminal Homicide Law (MICPEL, 2002), §3.2, "Proving the Intent to Kill," p. 33, set out this basic introductory question and its most familiar answer:

> "Because the specific intent to kill lies hidden in the killer's brain, however, its proof is sometimes problematic. It may be proved directly, if the killer proclaims his purpose even as he kills or if he acknowledges his purpose afterward. It may be proved indirectly, by evidence of bad blood between the killer and the victim, by an earlier expression of an intent to kill, by a strong motive, by profiting from the victim's death, by an elaborate murderous scheme or plan, or by infinite varieties and combinations of circumstantial evidence. First and foremost in the ranks of proof, however, is the permitted inference of an intent to kill from the directing of a deadly weapon at a vital part of the victim's anatomy."

(Emphasis supplied).

The seminal Maryland case recognizing the inferential proof of the necessary mens rea is the opinion for this Court by Judge Orth in Lindsay v. State, 8 Md. App. 100, 105, 258 A.2d 960 (1969):

> "If a man voluntarily and willfully does an act, the natural and probable consequences of which is to cause another's death, an intent to kill may be inferred from the doing of the act. So, it has been consistently held, that in the absence of excuse, justification, or a mitigating circumstance, malice is inferred from the use of a deadly weapon directed at a vital part of the body."

(Emphasis supplied; footnotes omitted).

In Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), affirmed, 278 Md. 197, 362 A.2d 629 (1976), this Court undertook an intensive survey of homicide law. With respect to this permitted inference of murderous intent, we observed, 28 Md. App. at 704:

> "The only inference of any significance in our homicide law is the permitted inference of an intent to kill or of an intent to do grievous bodily harm from the directing of a deadly weapon at a vital part of the human anatomy or from some similar use of deadly force."

(Emphasis supplied).

In Smith v. State, 41 Md. App. 277, 281, 398 A.2d 426 (1979), we also referred to inferential proof of the intent to kill:

> "In this particular case, the variety of intent we are dealing with is the specific intent to kill. In this regard, we have evidence that the appellant fired a sawed-off shotgun at point blank range into the chest of victim. This represents, quite clearly, the directing of a dangerous and deadly weapon at a vital part of the human anatomy. It is well established that this gives rise to a permitted inference of the intent to kill."

(Emphasis supplied). See also, Baker v. State, 332 Md. 542, 548, 632 A.2d 783 (1993); State v. Rainer, 326 Md. 582, 591-93, 606 A.2d 265 (1993); State v. Earp, 319 Md. 156, 167, 571 A.2d 1227 (1990); Buck v. State, 181 Md. App. 585, 642-43, 956 A.2d 884 (2008).

The present case provides an interesting, but not at all difficult, variation on that inferential theme. A deadly weapon broader in its potential lethality than a knife thrust or a propelled bullet might engulf, and not merely hit, its intended target. The force of the inference it generates would not thereby be diminished. The intended ring of fire laid down

by the appellant covered the entire apartment house then occupied by the three attempted murder victims, and many other persons as well. The lighter fluid was especially concentrated at the door of Apartment 7, wherein Tameka Smullen was presumptively sleeping, and at the door of Apartment 12, wherein Danielle Thomas and Shawn Jones were presumptively at rest.

We do not hesitate to hold that the directing of a trail of flame at a residence in the middle of the night is the doctrinal equivalent of directing a deadly weapon at a vital part of the human anatomy. Indeed, the entire human anatomy thus endangered embraces the vital parts of the human anatomy. A flamethrower, we do not hesitate to hold, is as deadly a weapon as is a knife or a gun. The direction of that deadly weapon at the vital parts of a number of human anatomies was already a fait accompli and there but remained to light the fuse, which the appellant was frantically attempting to do when interrupted by the police. From the appellant's actions, we hold, there arose the permitted inference of a specific intent to kill. The evidence was thus legally sufficient. Q.E.D.

Fundamental Fairness in Sentencing

The appellant's second contention is that Judge Jackson abused his discretion by failing to merge the conviction for attempted arson into one of the convictions for attempted murder. At the very least he challenges his consecutive sentence of 15 years on the attempted arson conviction.

At the outset, the appellant acknowledges that he cannot rely on double jeopardy principles as implemented by Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Arson and murder each contains an element not found in the other. Self-evidently, murder need not involve the burning of a house and arson need not involve the killing of a person. Double jeopardy law is clearly not implicated by this contention.

Nor, as a backstop, may the appellant seek alternative solace in the so-called Rule of Lenity. The Rule of Lenity involves the reading of legislative intent about the relationship between two crimes created by the legislature. It is a rule of statutory construction. The rule does not apply if both of the crimes are common law crimes. This non-applicability of the rule is for the very good reason that there was no legislative intent with respect to the creation of two common law crimes. Both murder and arson, of course, are common law crimes. So is the inchoate crime of attempt. See, Monoker v. State, 321 Md. 214, 219, 582 A.2d 525 (1990) ("That rule [of lenity] is a rule of statutory construction, and since both solicitation and conspiracy are common law crimes, it is illogical and improper to couch our decision in terms of a rule designed as an aid to statutory interpretation."); McGrath v. State, 356 Md. 20, 25, 736 A.2d 1067 (1999) ("The rule of lenity, applicable to statutory offenses only..." (emphasis supplied).). The Rule of Lenity is of no avail to the appellant.

Above and beyond double jeopardy law and the Rule of Lenity, when merger may be required as a matter of law, there is the pre-existing and universally recognized requirement that the trial judge's sentencing shall be fundamentally fair. Unlike the other two

categories, where merger can be a matter of law, fundamental fairness is little more than a reference to the broad discretion entrusted to the sentencing judge. That is a decision toward which appellate courts are exceedingly deferential. A sentencing judge will only be deemed to have abused his discretion in the rare case where the sentence is clearly and unequivocally one that is fundamentally unfair.

Fundamental fairness in sentencing is committed to the broad discretion of the sentencing judge. In evaluating the evidence in a case and then determining a fundamentally fair sentence, the sentencing judge must use his or her discretion. An appellate court will not second-guess that exercise of discretion and will only reverse a trial judge in cases of a clear abuse of discretion.

In the case now before us, the implications of the attempted arson went far beyond the implications of three attempted murders. The appellant was in the middle of the night attempting to set fire to an entire apartment house containing 12 separate residential units. But for a mal-functioning cigarette lighter, there could well have been a massive tragedy imperiling as many as 30 or 40 lives. In treating the attempted arson as a separate crime deserving of a separate sentence, Judge Jackson did not abuse his discretion. The sentencing decision was, moreover, his decision to make and not ours.

An Empty and Superfluous Bottle

The appellant finally contends that Judge Jackson was in error in not suppressing the empty lighter fluid bottle that the police observed in the appellant's waistband when they

first confronted him at the crime scene. We find Judge Jackson's careful findings of fact most persuasive in this respect:

> "I don't think these are questions that need detain a rational mind with respect to whether or not there's a proper Terry stop or a proper pat down and seizure of the items. There may be a question of fact later for a jury to resolve. But I've already found that there was a reasonable articulable suspicion for the Terry stop of the Defendant. Clearly in view of the occupants of Fairground Drive there was some potential trouble afoot. He was called back a third time to the apartment complex, it's the middle of the night. The Court will take judicial notice of the fact, and you would probably agree, Mr. Sanderson, this is a high crime area, a lot of bad things happen in that location. He finds the Defendant in a parking lot, between two parked cars. And when approaching or when he asked the Defendant – well, first he asked for the Defendant's identity and the Defendant readily identifies himself as the Defendant, Brandon Jackson. The officer asks him to come over to him, he does with his hands up. The officer immediately notices a large bulge in his pants. He may have said, well, I don't think it was a gun, it could have been another kind of weapon, however. And for officer safety he had every right to conduct a pat down.
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> "The whys and wherefores of the pat down are somewhat anomalous but there's nothing in my opinion to indicate that it was an improper pat down or an improper frisk. So I consider it to be well within the scope of a Terry stop and a proper pat down, and I'm going to deny your motion to suppress the lighter fluid or the can of lighter fluid and lighter that was found on the ground. The lighter on the ground is probably abandoned property anyway."

(Emphasis supplied).

A Meaningless Contention In Any Event

Even if, purely arguendo, the police recovery of the empty bottle somehow offended the Fourth Amendment, we are persuaded beyond a reasonable doubt that the addition or subtraction of the empty bottle would not have altered in any way the jury verdict in this case.

Both Ms. Smullen and Ms. Thomas described in great detail how the appellant was sprinkling some sort of fluid all over the apartment house and laying a trail of it from his car to the front door of the building. The police found lighter-fluid smeared all over every floor of the apartment house. The observed the trail from the appellant's car to the front door of the building. Wal-Mart confirmed the appellant's purchase of the lighter fluid. The abandoned lighter was found at the appellant's feet. In terms of being meaninglessly superfluous, the addition of an empty bottle to the mix was a classic case of carrying coals to Newcastle. We do not reverse convictions for incidents that clearly do not make any difference.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.