UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0326

September Term, 2016

MARCUS DALANO BUTLER

v.

STATE OF MARYLAND

Berger,
Friedman,
Thieme, Raymond A., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 29, 2016

Marcus Dalano Butler, appellant, and Kenneth Aron Vance, were jointly tried before a jury in the Circuit Court for Prince George's County, on charges stemming from an August 17, 2015 incident at a grocery store in Hyattsville. After the trial court granted defense motions for judgments of acquittal as to both defendants, the State persuaded the court to reconsider and reverse its ruling on one of the charges against Butler. The jury convicted Butler on that charge.

Butler challenges this conviction, arguing that the granting of his motion for judgment of acquittal, even if erroneous, triggered the prohibition against double jeopardy. The State concedes that Butler's conviction cannot stand. As explained below, we agree that reversal is required.

FACTS AND LEGAL PROCEEDINGS

At trial, the State's prosecution theory was that Butler and Vance stole groceries while a female accomplice attempted to distract the store security officer. In opening, counsel for Butler admitted that her client "committed a theft" but disputed that it amounted to a robbery.

The State presented testimony from only one witness affiliated with the grocery store. After observing Butler leave the store with unbagged items in his shopping cart, security officer Alimamy Kamaria confronted Butler and asked for a receipt. In response, Butler became "violent," "yelling" that Kamaria would regret it if he stood in his way. Butler then "removed some sharp object" from his pocket and threatened that he would do something that Kamaria would regret. As Butler "raise[d] up his hand" with the weapon, Mr. Kamaria, fearing that he would be stabbed, ran inside to call police.

Shortly thereafter, police stopped Vance's van, and Butler was arrested in the company of Vance and Santana Simpson. Inside the vehicle were "perishable food, crab legs," and a folding knife.

Butler and Vance were jointly tried on the following charges:

Count 1: robbery with a dangerous weapon
Count 2: conspiracy to commit robbery with a dangerous weapon
Count 3: robbery
Count 4: conspiracy to commit robbery
Count 5: second degree assault
Count 6: theft of property valued under $1,000.00[1]

At the close of the State's case and again at the close of all the evidence, both defense counsel for Butler and counsel for co-defendant Vance moved for judgments of acquittal on all counts. After initially denying the motions, the trial court was persuaded by Butler's arguments that (1) there was insufficient evidence to prove that he "took the property from" the person of a victim, so at worst "it's a theft" rather than a robbery, but (2) there was insufficient evidence as to the ownership of property to establish "a prima facie case for theft under a thousand." The trial court granted the motions, ruling:

> [T]he testimony was that the defendant Butler came into the store, was shopping, put things in his cart.
>
> He was – Mr. Kamaria was at that point was back at the door. Mr. Butler was trying to leave. And . . . Mr. Kamaria asked him whether he had a receipt. There was an exchange of words. I'm paraphrasing, and Mr. Butler pulled out a – something sharp, something pointy and threatened Mr. Kamaria. And with that Mr. Kamaria left.

[1] Vance was also charged with three additional counts, i.e., giving police a false name to avoid prosecution (Count 7), driving without a license (Count 8), and failure to display two lighted headlamps (Count 9). The trial court denied his motions for judgment of acquittal on these counts. He was convicted on Count 7.

Mr. Butler's argument – and there was no evidence that the . . . items number one are really the ownership of Mr. Kamaria. Giant Corporation – it's Giant of Maryland, L.L.C., is a corporation. And in the eyes of the law a corporation is a person. There really was not testimony even that Mr. Kamaria was a – well, a corporate designee of Giant of Maryland.

It wasn't as if Mr. Kamaria had taken some crab legs out of the cart a[nd] had them in his possession and the defendant threatened him and then Mr. Kamaria dropped the crabs and he picked them up and ran away. That wasn't the fact situation.

It was the possession and control in this case that the Court finds is lacking. Not only physical possession and control but did Mr. Kamaria as a security guard for Giant of Maryland, L.L.C. [sic] . . . . I can't recall if he was actually an employee of Giant or he was an employee of a security company.

It says in the indictment he was an employee of Giant, L.L.C., but I can't recall there was actual testimony that he was. . . .

But the bottom line is, Giant is a corporation. And in the eyes of the law, a corporation is a person. And therefore, this Court finds that a corporate designee, which Mr. Kamaria certainly is not, should have testified to the goods that were taken from Giant of Maryland, L.L.C.

No personal property was taken from Mr. Kamaria at all. He didn't have any of his own personal property taken. And for that reason, because I find that, number one, the property wasn't in his possession or his control physically, and because legally it wasn't in his possession and control, and there was no corporate designee to testify that this property which was in Giant food store belongs to Giant, Mr. Kamaria isn't a corporate designee to testify to that.

And he is a security guard. And if I recall correctly, he never said he was an employee of Giant. He said he worked at Giant or was working at the Giant that night.

I'm going to grant the defendant's motion for judgment as to counts one through six in Mr. Butler's case.

And if it's the same, there is a lack of evidence for Mr. Vance in Mr. Vance's case, counts one through six.

After a recess and further argument, the trial court affirmed its previous ruling and rationale, again noting the lack of evidence that the security officer had "a legal interest in the property" or was a corporate designee of Giant. The court stated: "I still grant the defendant's [sic] motion as to counts one through six in both indictments."

Despite these rulings, the prosecutor persuaded the court to reconsider its decision with respect to Count 5, the assault charge, as follows:

> [Prosecutor]: If I could be heard on one last argument, Your Honor?
>
> THE COURT: Oh, okay.
>
> [Prosecutor]: So, for count five, which charges assault against Mr. Kamaria.
>
> THE COURT: Oh, was it? I'm sorry.
>
> [Prosecutor]: So, even taken into –
>
> THE COURT: Oh, there is.
>
> [Prosecutor]: Their argument —
>
> THE COURT: Right. It shouldn't. You're – I'm sorry. You're right. There was the sufficient evidence [sic] that there was an assault upon Mr. Kamaria by Mr. Butler.

The court then changed its earlier ruling, explaining that the motion for judgment of acquittal on the assault charge would be granted as to co-defendant Vance but that "as to Mr. Butler, he still has remaining count five." After the jury found Butler guilty of assaulting Mr. Kamaria, the trial court sentenced him to eight years.

DISCUSSION

Butler argues that the trial court "erred by re-examining and reversing its prior ruling granting the motion for judgment of acquittal on Count 5 because the initial ruling

was based on insufficient evidence" and, therefore, "was the equivalent of a 'not guilty' verdict."

The Court of Appeals has summarized the jeopardy principles that govern this appeal, as follows:

> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects defendants in criminal prosecutions from multiple punishments and repeated prosecutions for the same offense, and was extended to the States through the Fourteenth Amendment . . . . An acquittal effectively bars retrial of a defendant because double jeopardy principles "forbid[] a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. The Supreme Court has defined an acquittal as the "resolution, correct or not, of some or all of the factual elements of the offense charged."

Giddins v. State, 393 Md. 1, 18–19 (2006) (citations omitted).

As the Court of Appeals previously recognized in *Pugh v. State*, 271 Md. 701, 705-06 (1974), under both Maryland common law and Fifth Amendment jurisprudence, "once a verdict of not guilty has been rendered at . . . a criminal trial, that verdict is final and cannot be set aside[,]" even when that "acquittal was based on a mistake of law or a mistake of fact." In Pugh's case, the Court rejected the State's argument that the trial court did not render a not guilty verdict, explaining that

> where a judge "obviously inadvertently" says one thing when he means something else, and immediately thereafter corrects himself, a "verdict" would not be rendered for purposes of [former] Rule 742 or the prohibition against double jeopardy. However, the trial judge's initial statement of "not guilty" in this case was not "inadvertent" or a "slip of the tongue." Instead it represented an intended decision based upon the judge's view that the prosecution had failed to prove possession of cocaine in sufficient quantity as to indicate an intent to distribute. When the prosecution then argued that its case was grounded upon an actual sale, rather than an inference of distribution based on possession of the drug in sufficient quantity, the trial

> judge changed his mind. He decided that, in light of this theory of the prosecution, the evidence was sufficient to show distribution or an intent to distribute the drug.
>
> Once a trial judge intentionally renders a verdict of "not guilty" on a criminal charge, the prohibition against double jeopardy does not permit him to change his mind.

Id. at 707.

Applying these principles in *Brooks v. State*, 299 Md. 146, 154-55 (1984), the Court of Appeals held that double jeopardy prohibited reconsideration and revision of a ruling granting a motion for judgment of acquittal based on insufficient evidence because

> [t]he acquittal here of necessity "represented an intended decision based upon the judge's view that the prosecution had failed to prove" that Brooks conspired to commit armed robbery. Here, as in *Pugh*, "[w]hen the prosecution then argued that its case" had presented evidence legally sufficient to sustain the charge, and that the issue should be submitted to the jury, "the trial judge changed his mind." He was belatedly persuaded in the light of the prosecution's tardy argument that the issue was for the jury. As in *Pugh*, both the State's argument and the judge's new ruling came too late. Once a trial judge intentionally acquits a defendant of a criminal offense over which the court had jurisdiction, the prohibition against double jeopardy does not permit him to change his mind. The grant of the motion for judgment of acquittal was a bar to further criminal proceedings on the same charge. . . . It follows that the trial judge erred in striking his grant of the motion for judgment of acquittal and thereafter denying the motion, and in his actions resulting therefrom, namely, permitting the offense to go to the jury and instructing the jury with respect to that offense.

Id. at 155.

The State agrees that Butler's conviction should be reversed. Maintaining that the trial court erred in granting the motion for judgment of acquittal on the Count 5 assault charge because there was uncontradicted evidence that Butler threatened the store manager, the Attorney General nonetheless acknowledges that the court also erred in

reconsidering and reversing that ruling. Accordingly, the State "reluctantly concedes that under *Pugh* and *Brooks* . . . , the defendant may enjoy the windfall of the trial court's errors."

The record set forth above confirms that the trial court twice announced that, for lack of evidence, it was granting Butler's motion for judgment of acquittal on all six counts, including the assault charge. Although the court later recognized its mistake in overlooking Count 5, we must follow *Pugh* and *Brooks* and reverse Butler's conviction on that charge.

JUDGMENT OF CONVICTION ON COUNT 5 (SECOND DEGREE ASSAULT) REVERSED AND SENTENCE VACATED. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.