UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1115

September Term, 2015

TIMOTHY LOWERY

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: July 12, 2016

After his jury trial on a charge of theft over $500 resulted in a hung jury, appellant, Timothy Lowery, entered a guilty plea, in the Circuit Court for Prince George's County, to a lesser charge of theft under $1,000. Thereafter, Lowery filed an application for leave to appeal, which this Court granted, presenting the following question:

> Do Maryland courts lack jurisdiction over a theft when the appellant obtained control over the property at issue outside Maryland?

For the reasons that follow, we shall affirm.

I.

Background

Appellant was charged in the District Court of Maryland for Prince George's County, Maryland, with theft over $500, pursuant to Section 7-104 of the Criminal Law Article. Md. Code (2002, 2012 Repl. Vol.), § 7-104 of the Criminal Law ("Crim. Law") Article. Then, upon his request, his case was transferred to the Circuit Court for Prince George's County for a jury trial. When, at the trial that ensued, the jury was unable to reach a unanimous verdict, a mistrial was declared.

Thereafter, the State offered to amend the charging document to theft under $1,000 and to recommend a sentence of eighteen months, with all but thirty days suspended, to be followed by three years of supervised probation. The court indicated that, once restitution was paid, appellant's probation would no longer have to be supervised. Then, after ascertaining that appellant understood the terms of the State's plea offer, the nature of a

guilty plea and the charge to which he was pleading guilty, the State made a proffer of the facts underlying that charge:

> STATE'S ATTORNEY: . . . If this matter would have proceeded to trial, the State would have proven beyond a reasonable doubt that on August 18th of 2006 at the location of Auth Road and Branch Avenue, the Defendant, who is standing to the left of defense counsel, entered a contract with the victim in this case, James Hicks.
>
> The contract was for an investment for a property located at the location of 5701 and 5th Street, Lanham, Maryland, Prince George's County. The evidence the State would have presented was that that address did not, in fact, exist, and that the Defendant took a money order from – a cashier's check from the victim in this case in the amount of $26,000 for the alleged property that did not exist, at which time the Defendant refused and failed to provide the victim with his funds of $26,000 in this case.
>
> All events did occur in Prince George's County, Maryland, and for the purposes of the plea agreement that would have been the State's case.
>
> THE COURT: Any additions or correction?
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> [DEFENSE COUNSEL]: Your Honor, I would just submit the, if I could approach the, just the transcript from the last trial.
>
> THE COURT: For what reason?
>
> [DEFENSE COUNSEL]: For the purpose – instead of reading all the additions, I would just submit on this.
>
> THE COURT: Okay. All right. . . .

The testimony from appellant's prior trial, which the court agreed to incorporate into the proffer of facts, showed that, on August 18, 2006, James Hicks entered into a contract

with appellant to invest $26,000 in a residential property purportedly located at 5701 Fifth Street, Lanham, Maryland ("the Lanham property").[1] Hicks explained that the appellant arrived at his residence, located in Prince George's County, and there told him that he could "help me make some money." Hicks testified that once appellant "did what [appellant] had to do to get it sellable, then [Hicks would] get 26,000 back plus how much [appellant] made on the property." According to Hicks, "[appellant] had to get a contractor to get it up to whatever condition that he could sell it."

After Hicks had obtained a cashier's check for $26,000, he and appellant met at Hicks' place of employment, the Washington Metro station at L'Enfant Plaza which was located in the District of Columbia. It was there that Hicks gave appellant the $26,000 cashier's check to invest in the Lanham property.[2]

[1] Although admitted as an exhibit at trial, the contract is not included in the record on appeal. Without the actual contract, it is unclear whether Hicks thought he was purchasing a house, or whether he thought he was simply making an investment in real property for purposes of later resale. This is complicated by the fact that, during trial, the prosecution referred to the agreement at times as both an "investment" and a "purchase." Based on our review of the record, it appears that the agreement was an investment in real property for resale rather than a purchase of real estate.

[2] Contrary to appellant's representations in the application for leave to appeal, at trial, the cashier's check was marked for purposes of identification, and Hicks identified the check as the one he provided to the appellant. However, after the court sustained appellant's objection to admission of the check on the grounds of hearsay, the check was not admitted into evidence.

Over the course of the next few months, whenever Hicks called appellant from his work, the appellant told Hicks that "the house was in various stages of repair, or whatever was going on." But, approximately four or five months after Hicks and appellant entered into their contract, appellant stopped answering Hicks's phone calls. Whereupon, Hicks learned, after conducting his own investigation, that the Lanham property in question did not exist. And, Allen Hirsch, Chief of the Development Review Division of the Maryland National Capitol Park and Planning Commission, a division responsible for premise addresses in Prince George's County, confirmed that no such address existed in Lanham, Maryland.

Hicks and appellant did not have any further personal contact until after appellant was charged in connection with this case. Then, when Hicks and appellant appeared together at hearings in the Prince George's circuit court, appellant started giving Hicks money orders in varying amounts. This included two money orders for $500 and one for $1,000, which appellant gave Hicks shortly before trial. Appellant ultimately repaid Hicks a total of approximately $13,500 before trial.

Guilty Plea

After the court concluded that there was a factual basis for appellant's guilty plea, it accepted the State's recommendation as to disposition and sentenced appellant to a term of eighteen months imprisonment, suspending all but thirty days of that sentence, to be served

on weekends at the County Detention Center. He would then be placed on three years supervised probation, which would become unsupervised upon appellant's payment of $12,500 in restitution to Hicks.

Appellant then filed an application for leave to appeal in the Circuit Court for Prince George's County, Maryland. Relying on *State v. Cain*, 360 Md. 205 (2000), appellant claimed that the circuit court had no jurisdiction over the crimes for which he was charged, given that the "essential element" of the crime of theft by deception was the actual location where appellant obtained control over the $26,000 cashier's check. Because that occurred in the District of Columbia, not Maryland, he claimed that "the plea should be dismissed for lack of jurisdiction by the State." On October 13, 2015, this Court granted appellant's application for leave to appeal and transferred the case to the regular appeal docket of this Court.

II.

DISCUSSION

Appellant contends, as noted, that the circuit court lacked "territorial jurisdiction" because the evidence established that the victim, Hicks, handed him the cashier's check in the District of Columbia. And, since the "essential element" of the offense of theft by deception occurs, maintains appellant, where the person obtains control over the property,

according to *State v. Cain*, 360 Md. 205, 215 (2000), the lack of territorial jurisdiction requires reversal of his guilty plea.

The State responds that appellant's premise is flawed because he did not plead guilty to the specific crime of theft by deception. Instead, appellant generally pleaded guilty to theft under $1,000, and that, because theft is a continuing offense and part of the crime occurred in Maryland, Maryland courts had jurisdiction. In the alternative, the State suggests that appellant had a duty to account to the victim in this case, Hicks, for the funds paid under the contract that was written in Maryland.

Appellant replies that there was no evidence that he brought the cashier's check back into Maryland and that the continuing larceny doctrine does not apply. Moreover, the duty to account doctrine relied upon by the State does not apply, appellant insists, to crimes like the one at issue here.[3]

We first must determine the proper standard of review. Appellant contends that this is just a jurisdictional question and that our review should therefore be *de novo*. But, the case that appellant cites in support of that claim, *Talbot County v. Miles Point Prop., LLC*,

[3] Appellant acknowledges that territorial jurisdiction was not raised at his plea hearing but asserts that we should decide the issue as territorial jurisdiction is "a necessary and fundamental element of the broader concept of jurisdiction." *State v. Butler*, 353 Md. 67, 83 (1999). The State does not take issue with this assertion nor do we. *See generally, Whittington v. State*, 147 Md. App. 496, 513 n.3 (2002) (where there is no challenge on preservation grounds, appellate court may assume the issue is squarely presented).

415 Md. 372, 384-91 (2010), involved a claim of subject matter jurisdiction, not territorial jurisdiction. And, those two types of jurisdiction are quite different. *See Eastham v. Young*, 250 Md. 516, 518 (1968) (distinguishing between territorial and subject matter jurisdiction, stating that "[t]erritorial jurisdiction or venue was involved and not fundamental or basic jurisdiction of the subject matter"); *see also* Restatement (Second) of Judgments § 11 (1982) ("[T]he question of subject matter jurisdiction is very different from the question of territorial jurisdiction or one of regularity of notice").

"Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state." *State v. Butler*, 353 Md. 67, 72-73 (1999). Although there is a presumption that a court has jurisdiction until the contrary is proven,[4] establishing such a claim is, in fact, a challenge to the sufficiency of the evidence adduced at trial to prove that the crimes occurred in Maryland. *See West v. State*, 369 Md. 150, 158 (2002) (observing that "when the 'evidence raises a genuine dispute' over Maryland's territorial jurisdiction, 'territorial jurisdiction becomes an issue the State must prove,' and it must prove it 'beyond a reasonable doubt'")

[4] *See* 7 Maryland Law Encyclopedia, *Courts §* 10, pp. 20-21 (2013) ("Nothing is presumed to be out of the jurisdiction of the courts of general jurisdiction that is not shown to be so, and every presumption consistent with the record is to be indulged in favor of such jurisdiction, at least when the allegations of the petition show jurisdiction")(footnotes omitted).

(quoting *State v. Butler*, 353 Md. at 79, 81). *Accord Khalifa v. State*, 382 Md. 400, 418 (2004) (stating that "[t]erritorial jurisdiction is a factual issue for the trier of fact"); *see also Jones v. State*, 172 Md. App. 444, 454 (2007) (observing that territorial jurisdiction may be proven by circumstantial evidence) (citation omitted).

Moreover, the standard of review is affected by the specific posture of this case: It is before us following appellant's guilty plea to the underlying charge.

Under Maryland Rule 4-242 (c):

> The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. . . .

Because a challenge to territorial jurisdiction is ultimately a challenge to the sufficiency of the evidence, our focus is on part (2) of the Rule, that is, whether there was a "factual basis" for appellant's guilty plea. The "primary purpose of the factual basis requirement of Maryland Rule 4-242 (c) is to ensure that the accused is not convicted of a crime that he or she did not commit." *Rivera v. State*, 409 Md. 176, 194 (2009). As a means to that end, "[a] trial court has broad discretion as to the sources from which it may obtain the factual basis for the plea, including a statement of facts agreed to by a defendant and the government, testimony from a defendant, inquiry of the prosecutor or defendant's counsel,

and any other appropriate source." *Metheny*, 359 Md. at 603. Furthermore, "[b]y parity of reasoning, therefore, under Maryland Rule 4-242(c), when facts are admitted by the defendant and *are not in dispute*, the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists." *Id.* (emphasis added).

And, we review the application of the facts to the "legal elements of the crime charged" for abuse of discretion. *Metheny*, 359 Md. at 604. An abuse of discretion occurs:

> "[W]here no reasonable person would take the view adopted by the [trial] court '. . . ." [Thus,] a trial court has not abused its discretion in determining that there was a factual basis for the guilty plea if the court had facts from which it reasonably could determine that the defendant was guilty of the crime charged.

Metheny, 359 Md. at 604 (internal citations and footnotes omitted).

The crime charged in this case, as amended, was theft under $1,000. Maryland's consolidated theft statute encompasses "the seven pre-existing larceny offenses." *Weems v. State*, 203 Md. App. 47, 54 (footnote and citation omitted), *aff'd*, 429 Md. 329 (2012). These offenses are "larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting, and receiving stolen property." *Weems*, 203 Md. App. at 54 n.2 (citing Crim. Law § 7-102 (a)); *see also* Crim. Law § 7-104 (a)-(e).

Although there are several different types of theft, the General Assembly made clear that "theft . . . constitutes a single crime . . . ." Crim. Law § 7-102 (a); *see also Counts v. State*, 444 Md. 52, 55 (2015) ("Maryland's consolidated theft statute creates the single

statutory crime of theft, demarcating the seriousness of the offense based on the value of the goods stolen"). And, "[t]he primary virtue of the consolidated law (indeed, the *raison d'etre* for the law) is that it is no longer necessary to prove which specific preexisting criminal elements or which specific preexisting criminal modality is satisfied by the evidence so long as the more generic elements of theft are satisfied." Moylan, *Maryland's Consolidated Theft Law and Unauthorized Use*, ch. 13 at 91 (MICPEL, 2002) (emphasis omitted); *see also Jones v. State*, 303 Md. 323, 333 (1985) (noting that another result of the consolidated theft law is "to eliminate the confusing and fine-line common law distinctions between particular forms of larceny"); *Craddock v. State*, 64 Md. App. 269, 278 (1985) ("Clearly, the gravamen of the offense of theft is the depriving of the owner of his rightful possession of his property. The particular method employed by the wrongdoer is not material; "an accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading. . . .").

The statement of facts read into the record at the plea hearing established that the victim, Hicks, and appellant entered into a written investment contract that provided that Hicks would invest $26,000 in the Lanham property. That property, it turns out, was simply a fiction. Then, after Hicks gave appellant a cashier's check for the agreed upon amount, appellant "refused and failed to provide the victim with his funds of $26,000 in this case." And, according to that statement of facts, all of these "events" occurred in Maryland.

> Generally, the law of theft prohibits the following conduct:
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> A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Crim. Law § 7-104 (a).

Based on the agreed facts as read into the record by the prosecutor, it was entirely reasonable for the court to determine that appellant was guilty of theft. By accepting Hicks's cashier's check for real estate that appellant knew did not actually exist, it is clear that the appellant willfully and knowingly intended to deprive Hicks of his property. If this was all there was to this case, we would have no difficulty affirming, and our analysis could end here. The issue that is presented, however, is that, after the prosecutor read the statement of facts in support of the guilty plea, the court then agreed to incorporate by reference the facts from the prior trial that resulted in a hung jury. Neither appellant nor the State dispute that those facts established that Hicks's cashier's check for $26,000 was handed over at the metro stop at L'Enfant Plaza in the District of Columbia. These facts, appellant claims, denied Maryland territorial jurisdiction over the charge in this case. For support of that claim, appellant relies on *State v. Cain, supra*.

In *State v. Cain*, the victim, Debbie Ann Amyot, of Cumberland, Maryland, ordered a collection of 95 Barbie dolls in "mint" condition over the internet from Mary Jean Cain, a resident of Riverdale, Georgia. *State v. Cain*, 360 Md. at 209. After completing negotiations by email and over the phone, Amyot mailed a bank check in the amount of $6,140.00 to Cain's home in Georgia for the entire collection. When only a third of the Barbie dolls arrived and Amyot found those dolls to be in "poor condition." *Id.* at 210. Amyot then contacted Cain in a failed effort to return the dolls and, although not mentioned by the Court of Appeals, presumably (as it was not expressly mentioned by the Court of Appeals), to obtain a refund. *Id.* at 210. After Georgia declined to prosecute Cain for the alleged theft of Amyot's funds, Cain was charged with theft by deception in the District Court of Maryland for Allegany County. *Id.* at 209.

The issue in that case was whether Maryland had territorial jurisdiction over the theft charge, *State v. Cain*, 360 Md. at 211-12, as under Maryland common law, "a state may punish only those crimes committed within its territorial limits." *Id.* at 212 (citation omitted). But, in addition to actual presence, the Court recognized that a person may also be constructively present in the state at the time of the crime. *State v. Cain*, 360 Md. at 213. Therefore, the pivotal question was "when" the crime was committed:

> "If the various elements of a given offense do not all occur within the borders of a single state, it becomes necessary to decide in which state the offense has been 'committed.'" It is sometimes stated that each offense has, for

> jurisdictional purposes, one key act or omission and that this element must have taken place in the state where the prosecution is instituted.

State v. Cain, 360 Md. at 213-14 (internal citation omitted).

After concluding that "[t]he essential element of the crime of theft by deception, at least for jurisdictional purposes, is the accused's obtaining control of the subject property." *State v. Cain*, 360 Md. at 215. The *Cain* Court went on to explain:

> [T]he element of obtaining control of the property is accomplished when the victim surrenders his or her property to the control of the accused. That is accomplished when the property is under the control of the defrauding party, whether personally or through the defrauding party's agent, and beyond the control of the other.

State v. Cain, 360 Md. at 219.

It then held that, because Cain obtained control over the check when the victim, Amyot, gave it to Cain's "agent," *i.e.*, the United States Postal Service, by placing it in the mail in Maryland, that Maryland had territorial jurisdiction over the charges. *State v. Cain*, 360 Md. at 215, 221. This reasoning suggests that, because Hicks, the victim in the case before us, actually surrendered the cashier's check to appellant in the District of Columbia, under *State v. Cain*, that was the operative fact for purposes of establishing theft by deception.

But, the State points out that appellant was not charged with nor convicted of "theft by deception" but just "theft." Hence, *State v. Cain*, according to the State, does not control and appellant's conviction should be affirmed. *See generally, In re Melvin M.*, 195 Md.

App. 477, 481 n.2 (2010) ("Theft is a continuing crime and may be prosecuted in any county in which it occurs.").

In support of this argument, the State relies on the theory of a "continuing larceny." This theory was addressed in *Hamilton v. State*, 265 Md. 256 (1972). Hamilton and his codefendants robbed a bank in the District of Columbia, *Hamilton*, 265 Md. at 257-58, but were subsequently arrested in Maryland while in possession of the money they had stolen from the bank. *Id.* at 258. The Court of Appeals declared that the defendants could be tried in Maryland because their larceny was an ongoing offense. *Id.* at 258-59. It explained: "one of the common-law incidents of simple larceny is that it is ambulatory in nature, * * * and is a continuing offense while the thief retains possession of the stolen goods, or that there is a continuing trespass and asportation every moment he does so pursuant to the felonious intent.'" *Id.* at 258 (citation omitted); *see also Pennington v. State*, 308 Md. 727, 730 n.3 (1987) ("A widely recognized exception permits prosecution and punishment of larceny in any state into which the thief transports the stolen goods.").

Sometime later, issues of territorial jurisdiction were discussed by this Court in *Allen v. State*, 171 Md. App. 544 (2006), *aff'd on other grounds*, 402 Md. 59 (2007). Allen was arrested in Maryland, while he was driving a stolen GMC Hummer, with stolen license tags. *Allen*, 171 Md. App. at 549. The Hummer had been stolen from a dealership in Fairfax

County, Virginia, approximately one month earlier. *Id.* A Maryland jury subsequently convicted him of unauthorized use of an automobile. *Id.* at 551.

On appeal, Allen challenged whether Maryland had jurisdiction over the offense. *Allen*, 171 Md. App. at 557. While acknowledging the common law rule that "[a] person cannot be convicted here for crimes committed in another state[,]" *id.* at 558, and that resolution may depend on the single "essential element" of an offense, this Court declared that there will be times when there will be more than one, single "essential element" to an offense. *Id.* at 559. And, "if the requisite elements of the crime are committed in different jurisdictions, any state in which an essential part of the crime is committed, may take jurisdiction." *Allen*, 171 Md. App. at 559 (citing *State v. Cain*, 360 Md. at 214-15).

Regarding the theft, the parties expressly agreed at the plea hearing that, other than the transfer of the cashier's check, "[a]ll events did occur in Prince George's County, Maryland[.]" The contract was negotiated and signed by appellant and Hicks at Hicks's home in Upper Marlboro, Maryland. And, the property, which was the subject of that contract, was purportedly located in Maryland. Consequently, we are persuaded that there was a factual basis for the guilty plea and that Maryland had territorial jurisdiction over the

offense at issue. Accordingly, the trial court reasonably could determine that appellant was guilty of theft under $1,000.[5]

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

[5] This conclusion makes it unnecessary to consider the State's alternative argument that appellant had a duty to account to Hicks. Under that theory, there is territorial jurisdiction in the courts of a particular state "of a crime involving misappropriation of property if the accused had a preexisting obligation to account for the property in that state." *State v. Cain*, 360 Md. at 211 n.2. As the appellant observes:

> The duty to account will sustain jurisdiction *only* where such a duty is an essential component of the crime. Thus, a person who lacks authority to take possession of certain property can consummate a theft merely by acquiring possession; in such a case, there is no duty to account, and jurisdiction cannot be founded on that basis.

Wright v. State, 339 Md. 399, 406 (1995) (emphasis added).