UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1495

September Term, 2015

SHAHID TURNER

v.

STATE OF MARYLAND

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: June 10, 2016

Appellant, Shahid Turner, was tried and convicted by a jury in the Circuit Court for Prince George's County of attempted armed robbery, attempted robbery, first degree assault, second degree assault and conspiracy to commit second degree assault. Appellant was sentenced to twenty years' imprisonment, with all but sixteen years suspended and three years' supervised probation, on the attempted armed robbery conviction, which merged with the attempted robbery conviction. In addition, a consecutive ten years' imprisonment was imposed, suspending all but four years, on the first degree assault conviction; the second degree assault was merged and a concurrent five years' imprisonment was imposed, with all five years suspended, on the conspiracy to commit second degree assault conviction. Appellant filed the instant appeal, in which he raises the following issues[1] for our review:

> 1. Did the trial court err in denying the motion for judgment of acquittal where the charge delineated in the indictment was for "armed robbery" and the evidence adduced at trial only ostensibly proved the elements of an *attempted* armed robbery; or, in the alternative, is the conviction and/or sentence for attempted armed robbery illegal?
>
> 2. Did the trial court err in admitting improper lay opinion testimony?

[1] The questions as framed by the State are:

> 1. Did the trial court properly deny the motion for judgment of acquittal where there was no material variance between the *allegata* and the *probata* and the charged count was judicially sound?
>
> 2. If preserved and not waived, did the trial court properly exercise its discretion when it permitted Detective Scall to offer lay opinion testimony that the mark on Turner's hand resembled a bite mark, and was any error harmless beyond a reasonable doubt?
>
> 3. Under the facts of this case, should Turner's sentence for first degree assault merge with his sentence for attempted armed robbery?

3. Should the trial court have merged first degree assault with attempted armed robbery for purposes of sentencing?

FACTS AND LEGAL PROCEEDINGS

Robert Anagho testified that he met the co-defendant, Kasharrah Gilmore, at a CVS several weeks before the occurrence of the events which form the subject matter of these proceedings and that they became friends. Gilmore accompanied Anagho to a friend's birthday party from July 29th through July 30th, 2014, after which they went to a casino located in the Arundel Mills Mall. According to Anagho, he had approximately $1,800 cash at the time. After Gilmore made a telephone call, they left the casino and, as Anagho was driving Gilmore home, she was texting someone. As Anagho proceeded to drive Gilmore to her home at Evans Trail in Beltsville, he "saw a gentleman coming behind" him. Anagho testified that he attempted to drive off but, at Gilmore's insistence that they stop to "help the gentleman," Anagho complied.

After Gilmore's attempt to place a phone call on the man's behalf failed, Anagho attempted to leave. Gilmore insisted that Anagho return and he complied. According to Anagho, the man jumped into Anagho's vehicle and demanded, "Give me the money." He then stabbed Anagho several times, causing the knife to break, whereupon Anagho bit the man's hand, resulting in a lost tooth. Anagho testified that the assailant appeared to have long hair and/or a wig at the time of the assault; however, he was able to identify appellant as his assailant from a photo array when he was later arrested. Anagho was treated at Prince

George's County Hospital for the injuries he sustained. In conjunction therewith, a certified copy of his medical records was admitted into evidence.

Detective Josh Scall of the Prince George's County Police Department testified that, in the course of his investigation, he met with Anagho at the hospital on July 30, 2014. Detective Scall later met with Gilmore, who responded to the police station and agreed to a "consent" search of her cell phone. However, after Detective Scall returned to the interrogation room with a copy of the consent form, the SIM card from Gilmore's phone had been broken, which led him to conclude that Gilmore sought to conceal or destroy evidence of her communications on the evening in question. Gilmore was subjected to a lengthy interrogation during which she implicated herself and appellant in a plan to rob Anagho. After interrogating Gilmore, the detectives also met with and interrogated appellant. Detective Scall and Detective Zedrick DeLeon testified that they observed what appeared to be a bite mark on appellant's hand.

During direct examination, the following colloquy occurred during Detective Scall's testimony.

> PROSECUTOR: Now, when you came into contact with Mr. Turner, what, if anything, did you observe about his appearance?
>
> DETECTIVE SCALL: I observed on his right hand a mark, a semi-circular mark. Looked like it was just starting to heal.
>
> PROSECUTOR: And what did it appear like to you?
>
> DETECTIVE SCALL: In my opinion, it looked like a bite mark.

[APPELLANT'S COUNSEL]: Objection. Ask that it be stricken.

THE COURT: Basis?

[APPELLANT'S COUNSEL]: No expertise.

THE COURT: He didn't say it was an expert opinion; so, therefore, it's overruled.

Detective Deleon testified that, in the course of the investigation of the attempted robbery, he showed Anagho the photograph array from which Anagho selected appellant's photograph as the a person who attempted to rob him.

Appellant's employer, Victor Kranwinkel, testified, on behalf of appellant, that during the course of his employment working on a trash truck, appellant sustained injuries on a regular basis and, in fact, he recalled appellant sustaining a hand injury close to the time of this incident in July 2014.

Testifying in his own behalf, appellant maintained that he sustained the injury to his hand during the course of his employment and he denied that he had attempted to rob the victim, Robert Anagho.

DISCUSSION

I. Attempted Armed Robbery Charge

Appellant first contends that the trial court erred in denying the Motion for Judgment of Acquittal where the charge delineated in the indictment was for "armed robbery" and the evidence adduced at trial only ostensibly proved the elements of "attempted armed robbery."

Alternatively, appellant contends that the conviction and/or sentence for attempted armed robbery is illegal.

The State responds that there was not a material variance between what was alleged in the indictment and what was proven at trial. Citing language from the charging document, the State maintains that appellant was on notice that "he was charged with attempting to steal property from the victim using violence."

In a criminal case, evidence presented must correspond to the allegations in the charging document. *Green v. State*, 23 Md. App. 680, 685 (1974) (quotation and citation omitted). It is outside of a court's jurisdiction to impose a conviction and/or sentence that is not present in the charging document. *Williams v. State*, 302 Md. 787, 791–92 (1985) (citation omitted). Furthermore, if there is a material variance between the *allegata* and the *probata*, reversal of the judgment is required. *Green*, 23 Md. App. at 685 (quoting and citation omitted).

> Although the customary method of identifying the particular crime charged has been to aver its *essential elements* in the charging document, that is not the exclusive method, and the *use of other words that sufficiently characterize the crime will satisfy the jurisdictional requirement*.

Williams, 302 Md. at 793 (Emphasis supplied) (citations omitted). Essentially, a charging document must provide sufficient notice to the accused to build a defense. *Id.*

In *Hopper v. State*, 64 Md. App. 97 (1985), we held that a charging document, which alleged, in pertinent part, "that Hopper unlawfully did attempt to commit a robbery,"

sufficiently set forth the crime to support a conviction for attempted armed robbery. *Id.* at 107. Although the accused argued that the charging document was insufficient because it "failed to state that Hopper attempted to take or carry away the property, that he did so by the use of violence, or that he intended to permanently deprive Mr. Mann of his property," in citing *Williams, supra,* we held that there was no fatal defect in the charging document. *Id.*

Regarding the crime of "robbery," the Maryland Code states that it retains its meaning under the common law, MD CODE ANN., CRIM. LAW ("CL") § 3–401(e), and this Court has held that robbery constitutes "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear." *Allen v. State*, 158 Md. App. 194, 240 (2004) (citation omitted). We have also noted that Md. Code Ann., CL § 3–403, which governs robbery with a dangerous weapon, "does not create a new offense but merely provides a more severe penalty where the robbery is committed by the use of a dangerous or deadly weapon." *McCord v. State*, 15 Md. App. 63, 70 (1972). Moreover, committing "violence to a person with an intent to steal," but where the act is not completed, "is not robbery but attempted robbery." *Cooper v. State*, 14 Md. App. 106, 117 (1972).

Despite an accused's right to a jury trial and the importance of the jury in the judicial process, "[i]f the trial judge finds that there is no relevant evidence which is legally sufficient to sustain a conviction, he must grant the motion for judgment of acquittal." *Brooks v. State*, 299 Md. 146, 151 (1984). "Maryland law is clear that, on appeal, an appellant's sufficiency

arguments are limited to the specific grounds stated in his motion for judgment at trial." *Reeves v. State*, 192 Md. App. 277, 306 (2010) (citation omitted). We review the sufficiency of the evidence as to "whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." *State v. Gutierrez*, 446 Md. 221, 231–32 (2016) (citing *Moye v. State*, 369 Md. 2, 12 (2002)).

In the case *sub judice*, Count One of the indictment against appellant, states in part:

> that Shahid Turner on or about the 30th day of July, 2014, in Prince George's County, Maryland, did unlawfully and feloniously, with a dangerous weapon, rob [the victim] and violently did *attempt to steal* from said person property, in violation of CR-03-403 of the Criminal Law Article against the peace, government and dignity of the State.

Furthermore, at trial, during the motion for judgment on Count 1, the following colloquy occurred between the judge and appellant's trial counsel:

> [APPELLANT'S COUNSEL]: I move for a judgment on Count 1. Count 1 charges my client with did unlawfully and feloniously . . . with a dangerous weapon to rob Robert Anagho, and did attempt to steal from him property. The sub caption is armed robbery. The testimony of Mr. Anagho is that nothing was taken from him; therefore, no robbery was committed.
>
> THE COURT: So you're saying because it doesn't have the word attempt in the first section—
>
> [APPELLANT'S COUNSEL]: Yes.
>
> THE COURT: Okay, No, I don't grant it.

Clearly, there is other language in the charging document, *i.e.*, "attempt to steal," that sufficiently postulates the crime, attempted armed robbery, of which appellant was convicted.

Furthermore, the evidence presented was sufficient for a rational trier of fact to have found the essential elements of attempted armed robbery beyond a reasonable doubt. *Gutierrez, supra.* Testimony from the victim and police officers, which the fact-finder found credible, supported the theory of the prosecution's case that appellant entered the victim's car, demanded money from the victim and stabbed the victim multiple times. Although the evidence presented did not support armed robbery, *i.e.,* no property was actually taken or carried away, the evidence was sufficient to support a conviction for attempted armed robbery. We, therefore, hold that the trial court properly denied appellant's motion for judgment of acquittal and the conviction and/or sentence for attempted armed robbery was legally within the court's jurisdiction.

II. Lay Opinion Testimony

Appellant next contends that the trial court abused its discretion in admitting, over objection, Detective Scall's testimony that appellant's hand injury constituted a "bite mark."

The State responds that appellant has failed to preserve this issue for our review because he did not object to the testimony of Detective DeLeon, who also indicated that the mark on appellant's hand appeared to be a "bite mark." If the issue has not been waived, the State maintains, then the issue has not been preserved because there was no proper basis for the objection and it was untimely. Finally, the State asserts, if the issue has not been waived and is preserved, Detective Scall's testimony was permissible lay opinion testimony and the court did not abuse its discretion in admitting it into evidence.

"Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008) (citation omitted).

In the instant case, during the direct examination of Detective DeLeon, the following colloquy occurred:

> [PROSECUTOR]: And when you spoke with Mr. Turner or when you saw Mr. Turner, what, if anything, did you observe about his appearance?
>
> [DET. DELEON]: Everything was, you know, usual. The only thing I did notice while speaking to him was on his right hand, being a father of two small children, what appeared to be a bite mark.
>
> [PROSECUTOR]: And did you see both of his hands?
>
> [DET. DELEON]: Correct
>
> [PROSECUTOR]: And which of the two hands had what appeared to you to be a bite mark?
>
> [DET. DELEON]: If I'm not mistaken, it was his right hand.

Detective DeLeon's testimony concerning the appearance of a bite mark on appellant's hand was admitted into evidence without objection. Accordingly, appellant's objection to Detective Scall's testimony, about the same point, is waived.

Assuming, *arguendo*, that the objection has not been waived, the basis for appellant's objection, *i.e.*, "no expertise," renders review of the permissibility of *lay opinion* testimony unpreserved. If, however, the issue were not waived and preserved for our review, we would, nevertheless, hold that Detective Scall's testimony admissible as lay opinion. We explain.

Maryland Rule 5–701 governs lay opinion testimony and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"The prototypical example of the type of evidence contemplated by the adoption of [Federal Evidence] Rule 701 relates to the *appearance* of persons or things . . . ." *Moreland v. State*, 207 Md. App. 563, 570 (2012) (citations omitted). Our conceptualization of lay opinion testimony, in *Goren v. U.S. Fire Ins. Co.,* 113 Md. App. 674, 686 (1997), is further instructive:

> The rule in Maryland is that a lay witness is not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or which are peculiarly within the specialized knowledge of experts. A lay witness may opine on matters as to which he or she has first-hand knowledge. Only lay opinions that are rationally based on the perceptions of the witness and helpful to the trier of fact are admissible, however. The admissibility of a lay opinion is vested in the sound discretion of the trial court.

Id. at 685 (internal quotation marks and citations omitted).

Furthermore, "Maryland recognizes that law enforcement officials often have specialized training and experience to justify permitting them to offer testimony in the form of a lay opinion. 'To restrict such testimony to underlying factual observations would often deprive the trier of fact of the necessary benefit of the percipient mind's prior experiences.'" *Washington v. State*, 179 Md. App. 32, 56–57, *rev'd on other grounds*, 406 Md. 642 (2008) (quoting *Robinson v. State*, 348 Md.104, 120 (1997)). *See Rosenberg v. State*, 129 Md. App.

221, 256–57 (1999) (holding police officer's testimony concerning the purpose of certain telephone equipment was permissible lay opinion testimony; it was based on detective's first-hand knowledge and was helpful to jury to understand defendant's actions); *but see also Ragland v. State*, 385 Md. 706, 726 (2005) (holding two officers' testimony not permissible lay opinion testimony because they had "devoted considerable time to the study" of the subject at issue and a connection between the officers' "extensive training" and opinion was made "explicit" by the prosecutor's questioning).

In the instant case, Detective Scall was offering his opinion as to what the mark on appellant's hand appeared to be. The Detective had first-hand knowledge of the mark, having viewed it in person and, as a law enforcement officer, his opinion testimony was helpful to the jury as Detective Scall may have encountered more bite marks and wounds than the average juror. Furthermore, the "semi-circular" nature of the mark on appellant's hand was helpful to the jury in determining the credibility of the testimony of appellant and Kranwinkel that appellant's injury was work-related.

Finally, Detective Scall's testimony was not admitted into evidence as expert testimony based on his specialized training or knowledge. He did not testify that the mark was made by the victim, or that there were bite patterns from which it could be concluded that they were inflicted by the victim, nor did the prosecution attempt to elicit from the detective any explicit connection between his "specialized training" and his opinion. *Ragland*, *supra.*

This Court reviews a trial court's rulings on the admissibility of evidence for abuse of discretion. *Donati v. State*, 215 Md. App. 686, 708 (2014) (citing *State v. Simms*, 420 Md. 705, 724–25 (2011)). A trial court abuses its discretion by admitting testimony that is "plainly inadmissible under a specific rule or principle of law." *Merzbacher v. State*, 346 Md. 391, 405 (1997). Accordingly, we hold that even if appellant had not waived his objection and the issue was preserved for our review, the trial court did not err in admitting Detective Scall's lay opinion testimony as evidence.

III. Merger for Purposes of Sentencing

Finally, appellant contends that the convictions for first degree assault and attempted armed robbery should have been merged for purposes of sentencing. Although appellant agrees that the attempted robbery and second degree assault convictions were correctly merged, appellant argues that the convictions for attempted armed robbery and first degree assault should have been merged as well. Appellant reasons that the convictions were based on the same act or transaction and, accordingly, merger was required to avoid violation of appellant's constitutional rights against double jeopardy.

In its brief to this Court, the State agrees that appellant's sentence for first degree assault should merge into his sentence for attempted armed robbery. Specifically, the State notes that the record does not reveal the basis for the jury's verdict regarding first degree assault and, accordingly, merger is appropriate.

> The doctrine of merger of offenses for sentencing purposes is premised in part on the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution, applicable to state court proceedings *via* the Fourteenth Amendment. The merger doctrine, which is derived from both federal and Maryland common law double jeopardy principles, provides the criminally accused with protection from, *inter alia*, multiple punishments stemming from the same offense.

Moore v. State, 198 Md. App. 655, 684 (2011) (Emphasis supplied) (internal quotation marks and citations omitted).

The Court of Appeals has held that there are "three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Carroll v. State*, 428 Md. 679, 693–94 (2012) (quotation omitted). However, "[u]nder federal double jeopardy principles and Maryland merger law, *the principal test for determining the identity of offenses is the required evidence test.*" *Moore*, 198 Md. App. at 685 (Emphasis supplied).

"The required evidence test focuses on the elements of each crime in an effort to determine whether all the elements of one crime are necessarily in evidence to support a finding of the other, such that the first is subsumed as a lesser included offense of the second." *Bishop v. State*, 218 Md. App. 472, 505-06 (2014), *cert. denied*, 441 Md. 218, 107 A.3d 1141 (2015) (quoting *Monoker v. State*, 321 Md. 214, 220 (1990)).

In *Morris v. State*, 192 Md. App. 1, 44 (2010), this Court held that a first degree assault charge merges with an attempted armed robbery conviction for purposes of sentencing when "neither the charging document nor the jury instructions made clear that the

charges of assault were based upon separate and distinct acts from those upon which the robbery charges were based.

> The 'same act or transaction' inquiry often turns on whether the defendant's conduct was 'one single and continuous course of conduct,' without a 'break in conduct' or 'time between the acts.' The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant.

Morris, 192 Md. App. at 39 (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)) (citing *Snowden v. State*, 321 Md. 612, 618, 583 A.2d 1056 (1991); *Williams v. State*, 187 Md. App. 470, 477 (2009)).

In the case *sub judice*, there is no ambiguity regarding whether the charge for first degree assault and attempted armed robbery resulted from the same act or transaction. Neither the charging document, jury instruction or evidence presented indicated that there was a break in conduct or time between the acts. As "[a] failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule," *Pair v. State*, 202 Md. App. 617, 624 (2011) (citing MD. RULE 4–345), we are constrained to reverse the circuit court's ruling with respect to its failure to merge appellant's sentence for first degree assault into the sentenced imposed for attempted armed robbery.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART; REMANDED FOR RE-SENTENCING;
COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY APPELLEE.