UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1506

September Term, 2014

DELONTAE HERBERT

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 19, 2016

*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.

Delontae Herbert ("Herbert") was convicted by a jury in the Circuit Court for Prince George's County of theft of property with a value of less than $1,000. The jury acquitted Herbert of second degree assault. The trial judge sentenced Herbert to a one-year term of imprisonment, all suspended in favor of one year of unsupervised probation. Herbert filed a timely appeal to this Court in which the sole issue presented is whether the evidence, taken in the light most favorable to the State, was sufficient to sustain the theft conviction. We shall hold that it was.

I.

EVIDENCE PRESENTED BY THE STATE

A. Testimony of Ashlyn Purifoy

In June 2013, Ashlyn Purifoy was an acquaintance of appellant's mother. At that time, Ms. Purifoy was dating appellant's uncle and lived in the same building as appellant's grandmother.

On June 21, 2013, Ms. Purifoy got into an argument with appellant's mother. The next day, appellant was still upset about the fact that there had been an argument and, according to Ms. Purifoy's testimony, appellant approached her and struck her three times in the head with his fist. Immediately after Ms. Purifoy was struck, appellant took her wallet and cell phone. After appellant did this, Ms. Purifoy asked him: "Why would you take my phone and wallet?" Appellant replied: "This is my phone now." Very shortly after the

incident, charges were brought against appellant for second degree assault and theft of property worth less than $1,000.

B. Stipulation Between the Parties

The parties stipulated that after appellant was charged in the instant case, his aunt returned to Ms. Purifoy her wallet and cell phone. The return was made on June 24, 2013, which was two days after those items were taken by appellant.

C. Testimony of Appellant

Delontae Herbert testified that on June 22, 2013, he and his mother encountered Ms. Purifoy. Shortly thereafter, Ms. Purifoy and his mother began fighting and he intervened to stop the fight. According to appellant's testimony, however, he never punched or struck Ms. Purifoy during his effort to break up the scuffle. Nevertheless, appellant admitted that he took Ms. Purifoy's phone and wallet after the fight. He told the jury that he took the property, "[o]ut of anger, I was just mad. I'm not sure. It was no reason like I was intending to take anything from her, it was just anger."

II.

In reviewing the sufficiency of the evidence presented at a criminal trial, an appellate Court is required to "view the evidence in the light most favorable to the prosecution," *Moye v. State*, 369 Md. 2, 12 (2002), and determine whether "any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In this case, the trial judge, based on the evidence introduced, correctly instructed the jury as to only one type of theft that was applicable to the facts proven, *i.e.*, the unauthorized control variety of theft. In this regard, the court's instruction was as follows:

> Defendant is charged with the crime of theft. In order to convict the Defendant of theft, the State must prove that the Defendant willfully and knowingly obtained or exerted unauthorized control over property of the owner, and that the defendant had the purpose of depriving the owner of the property.

The instruction just quoted was in full accord with subsection (a)(1) of Maryland Code (2002, 2013 Supp.) Criminal Law Article, Section 7-104, which provides insofar as here pertinent: (a) 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.

Section 7-101(c) of the Criminal Law Article provides:

> "Deprive" means to withhold property of another:
>
> (1) permanently;
>
> (2) for a period that results in the appropriation of a part of the property's value;
>
> (3) with the purpose to restore it only on payment of a reward or other compensation; or

(4) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

In his brief, appellant explains why he contends that the evidence was insufficient:

> Even when the evidence is viewed in the light most favorable to the [S]tate, no rational trier of fact could find beyond a reasonable doubt that Mr. Herbert intended to deprive Ms. Purifoy of her property permanently. First, Ms. Purifoy is known to Mr. Herbert. She dates Mr. Herbert's uncle and lives in the same building as Mr. Herbert's grandmother. The pre-existing relationship between Mr. Herbert and Ms. Purifoy tends to show that Mr. Herbert did not intend to deprive Ms. Purifoy of her property. Even more, Mr. Herbert did not in fact deprive Ms. Purifoy of her property. Mr. Herbert did not permanently keep the property for himself, or dispose of the property. Instead, Mr. Herbert returned the property to Ms. Purifoy a mere two days later, without payment of any compensation or reward. Finally, Mr. Herbert testified to his own state of mind at the time he took Ms. Purifoy's wallet and phone. He disclaimed any intent to take anything from Ms. Purifoy. Mr. Herbert was angry at Ms. Purifoy because she was fighting Mr. Herbert's mother. In light of these facts and circumstances, no rational trier of fact could determine beyond a reasonable doubt that Mr. Herbert intended to deprive Ms. Purifoy of her wallet and phone permanently.

(References to record extract omitted.)

We find no merit in the above argument. The fact that appellant knew the victim and the victim knew him does not negate an intent to permanently deprive the victim of her property. Thieves, if they are bold enough, frequently forcibly take property from people they know. They do so usually with the belief (or hope) that the crime will not be reported to the police. Moreover, contrary to appellant's argument, he never returned the stolen goods to the victim. His aunt did so, but only after charges were brought against appellant. Return

of stolen property, under such circumstances, does not necessarily prove that appellant did not have the intent, at the time of the theft, to deprive the victim of the items permanently. In fact, as the State stresses, the jury could infer appellant's intent, at least as to the theft of the phone, by what appellant himself said just after he took it, *i.e.,* "[t]his is my phone now." After proclaiming that he owned the phone, appellant then left with the phone and the wallet. Lastly, it is true, as appellant stresses in his brief, that he testified that before the fight he did not intend "to take anything from" the victim but only did so out of anger. The jury, of course, was free to disbelieve that testimony – and it had good reason for doing so. A rational jury might ask, why would a person, even if angry, take someone's wallet and phone, if that person did not have the intent to commit theft.

From the evidence, the jury could have reasonably found that appellant took the victim's wallet and phone with the intent to deprive her of those items permanently, but, two days later, when he realized he faced criminal charges, decided to attempt to escape the charges, or at least reduce his culpability, by allowing his aunt to return the items to the victim.

Because we hold that the evidence was clearly sufficient to support appellant's conviction of the theft charge, we shall not consider the State's alternative argument that the sufficiency of the evidence issue was not properly preserved for appellate review.[1]

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[1] In the trial court, appellant's counsel, although he moved for a judgment of acquittal, never contended that the evidence was insufficient to show appellant's intent to permanently deprive the victim of her wallet or phone. The State contends that pursuant to Md. Rule 4-324(a), that failure on the part of appellant's trial counsel waived this point for appellate purposes. In his brief, appellant admits that trial counsel did not preserve the issue but asked us to nevertheless consider it in order to avoid a post-conviction proceeding against trial counsel.

Appellant's trial counsel plainly did not prejudice his client by failing to move for a judgment of acquittal based on the "lack of intent" issue because, as shown in the body of this opinion, the State did meet its burden of proving that appellant intended to permanently deprive the victim of her property. A motion on that grounds was doomed to fail and it is therefore completely understandable why the argument was not made.