UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2214

September Term, 2014

MARK WILLIAM ANDREWS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 16, 2016

Following a trial in the Circuit Court for Prince George's County, a jury convicted appellant Mark William Andrews of attempted robbery, second-degree assault, and conspiracy to commit robbery. The jury acquitted Andrews of one count of robbery, a second count of second-degree assault, two counts of theft of property having a value under $1000, and attempted theft of property having a value under $1000. [1]

The trial court sentenced Andrews to a total prison term of 15 years, suspending all but eight years, and imposed a restitution order in the amount of $1000 to one of the two victims. The court merged the assault charge into the attempted robbery charge for sentencing purposes.

Andrews filed a timely notice of appeal. He presents the following question for our consideration: Is the evidence sufficient to show that Mr. Andrews committed the charged offenses?

Andrews argues that the eyewitness testimony and video evidence introduced by the State was insufficient to allow the jury to conclude beyond a reasonable doubt that he

[1] Arguably, the attempted robbery conviction is legally inconsistent with the acquittal on the theft charges. Under the controlling authority in this Court, however, Andrews did not preserve that issue for appeal, as he did not object before the jury was discharged. *Hicks v. State*, 189 Md. App. 112, 129 (2009) ("the issue of possible inconsistencies among the verdicts was not preserved for appeal as the defense did not object to the allegedly inconsistent verdicts at trial"); *Tate v. State*, 182 Md. App. 114, 136-37 (2008) (defendant failed to preserve objection to inconsistent verdicts when he "did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency"); *see Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring) ("a defendant must note his or her objection to allegedly inconsistent verdicts prior to the verdicts['] becoming final and the discharge of the jury").

was a perpetrator. For the reasons that follow, we reject that argument and affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of March 9, 2014, University of Maryland, College Park, students Jacob Bremerman and Leonardo Balieiro attended a party on campus. After consuming several alcoholic beverages,[2] the pair left the party at approximately 1:00 a.m. to walk back to their dormitory. Moments later, two men approached the students and demanded money.

One of the men pushed Bremerman down, causing his wallet and cell phone to fall out of the pocket of his pants. The man grabbed the cell phone and the wallet, which contained approximately $50 in cash, approximately $400 in gift cards, and credit cards, and ran off. Someone later found the wallet, with all its contents missing except for Bremerman's ID, and returned it to him.

Bremerman, who is five feet and four inches tall, sustained minor bruises on his neck as a result of the assault. He estimated that the person who attacked him was taller than he and weighed approximately 170 pounds. He believed the man to be black, but was unable to provide a description to police because he said he did not focus on the man's face; at trial, he conceded that he had told the investigating detective that he was unsure of the robber's race.

[2] Bremerman admitted to drinking eight beers. Balieiro claimed to have drunk only two mixed drinks.

The second man tackled Balieiro to the ground and reached for his wallet, which was in the pocket of his jeans. Although his head was injured, Balieiro struggled and retained hold of his wallet, but later found that $5 or $10 was missing from it. Baliero, who is also five feet and four inches tall, described his attacker as taller than he. He believed that one of the attackers was African-American and one was white, but he did not see their faces, because he was "pretty sure" that at least one of the men was wearing a mask.

Bremerman described the area of the robbery as having "a few lights" but "mainly" being "pretty dark." He and Balieiro recalled there being a few other students in the area when they were attacked. The bystanders attempted to find the robbers, who had left the scene headed in different directions.

University of Maryland Police Sergeant Richard Peña-Ariet investigated the robbery. He interviewed Bremerman and Balieiro, obtaining a loose description of the assailants, and then reviewed campus surveillance video-recordings. Determining that the robbery occurred close to a 7-Eleven, he obtained surveillance video from that store.

With no objection from the defense, Sgt. Peña-Ariet narrated what he saw on the video. According to the Sergeant, the 7-Eleven video showed that at 12:22 a.m. on the night in question two persons matching the general descriptions given by the victims were in the store. A white man in the video put a black ski mask over his face, looked at his masked reflection in the window of the store, and then pulled the mask back over his head, "wearing it almost like a hat," before placing what appeared to be a Redskins cap over it.

Sgt. Peña-Ariet created a bulletin containing an image of the white man in the video and distributed it to local law enforcement agencies. His investigation led him to a Facebook page for Mark "White Boy" Andrews. At trial, Andrews, through counsel, conceded that he was the white man seen in the 7-Eleven surveillance video.

Andrews's Facebook page listed Aaron Starks as a friend. Sgt. Peña-Ariet identified Starks as the second person in the video.[3]

According to Sgt. Peña-Ariet, the video showed Andrews and Starks leaving the 7-Eleven at approximately 1:00 a.m. Campus security videos showed Andrews wearing a gray and black jacket, dark pants, a dark cap facing backwards, and light colored shoes. Andrews also had a grey sweater or jacket tied around his waist. Starks was wearing a blue track jacket with white stripes on the sleeves and multi-colored pants.

A campus security video picked up what Sgt. Peña-Ariet said were the same two men as they proceeded up Knox Road toward the College Park campus at approximately 1:06 a.m. The two men stood near the location of the robbery and donned jackets over what they had been wearing; the man whom Sgt. Peña-Ariet had identified as Andrews gave Starks a gray sweater or jacket that Andrews had around his waist in the 7-Eleven video.[4]

[3] The prosecutor informed the jurors that Starks's case had "been disposed of" before Andrews's trial.

[4] In closing, the State argued that the men put on the extra clothing to make it more difficult for the victims to identify them. Without the extra clothing, Starks, in particular, would not have been difficult to identify, because of his track jacket with its prominent white stripes.

Another campus security video pans around the area where the robbery occurred. When the camera panned back to the site of the robbery at 1:15 a.m., Sgt. Peña-Ariet pointed out that two persons could be seen standing over people on the ground at the place where the victims said the robbery occurred. Although Bremerman and Balieiro recalled that there were bystanders at the robbery, the video did not capture the images of any in its visual field.

On cross-examination, Andrews's counsel attempted to establish that the person accompanying Starks was shorter than Andrews (apparently implying that Starks and Andrews had parted company after leaving the 7-Eleven and that Starks had committed the robbery with an unknown but shorter accomplice). Sgt. Peña-Ariet agreed that it was "hard to judge depth" in the videos. He insisted, however, that based on the profile and clothing worn by the men in the 7-Eleven, and the way in which Andrews was wearing his hat (backwards), the campus security video depicted the same person who was seen leaving the 7-Eleven. The Sergeant also testified, on cross-examination, that based on the location depicted in the video, the time of the events that it recorded, and the absence of any other reported robberies in that area, "a reasonable person would believe that" the campus security video depicted the robbery of Bremerman and Balieiro.

A search warrant executed at Andrews's house recovered red, white, and black Nike Air Jordan shoes, a maroon and gray Redskins cap, a gray North Face jacket, a gray zip-up sweater, black pants, and a black ski mask. No items belonging to Bremerman or Balieiro were recovered.

At the close of the State's case-in-chief, Andrews moved for judgment of acquittal, arguing that the victims had given no real description of the robbers and that the campus security video was not clear enough to support the conclusion that he was one of the persons depicted on it. The court denied the motion. Andrews put on no evidence, and the court denied his renewed motion for judgment of acquittal at the close of all the evidence.

DISCUSSION

Andrews's sole contention on appeal is that the evidence presented at trial was insufficient to prove that he was one of the assailants. Although admitting that he was in the area of the University on the night of the robbery, Andrews asserts that the State's circumstantial case rested upon Sgt. Peña-Ariet's assumptions that Andrews was one of the men on the campus surveillance video that showed two men on the ground and, that in convicting him, the jury engaged in "impermissible conjecture, assumption, and speculation."

We recently set forth the applicable standard for reviewing challenges to the sufficiency of the evidence:

> In reviewing the sufficiency of the evidence, an appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Derr v. State,* 434 Md. 88, 129, 73 A.3d 254 (2013); *Painter v. State,* 157 Md. App. 1, 11, 848 A.2d 692 (2004) ("[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder'") (citations omitted) (emphasis in original).

> The appellate court thus must defer to the factfinder's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State,* 151 Md. App. 311, 329, 827 A.2d 124 (2003); *see also State v. Mayers,* 417 Md. 449, 466, 10 A.3d 782 (2010) ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (citations omitted). Circumstantial evidence, moreover, is entirely sufficient to support a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *See, e.g., State v. Manion,* 442 Md. 419, 431-32, 112 A.3d 506 (2015); *Painter,* 157 Md. App. at 11, 848 A.2d 692.

Benton v. State, 224 Md. App. 612, 629-30 (2015).

Andrews does not contend that the State failed to prove the required elements of each of the crimes of which he was convicted. Instead, he argues that the jury could not reasonably have determined that he was one of the perpetrators of those crimes because the video-recordings on which the State relied were too unclear for anyone to identify him as one of the assailants. In our view, however, his argument amounts to nothing more than a renewed jury argument.

The State presented surveillance video from a 7-Eleven near the College Park campus, which undisputedly depicted Andrews and Starks in the store approximately 50 minutes before the robbery. Andrews is visible in the video, modeling a ski mask and wearing a gray and black jacket, dark pants, a dark cap facing sideways or backward, and light colored shoes, with an extra jacket or sweater tied around his waist. He and Starks are seen leaving the store at approximately 1:00 a.m. and proceeding in the direction of the College Park campus. Several minutes later, a campus video showed two men, attired

as Andrews and Stark had been just moments before, standing near the location of the robbery and putting jackets over their clothes. Shortly thereafter – at approximately the same time and place the victims testified they were robbed – the video revealed what arguably were the same men standing over people on the ground. According to one of the victims, one of the men was wearing a mask; and not only had Andrews been trying on a mask at the 7-Eleven, but after his arrest one was found was at his residence, along with other clothes similar to those worn by the person in the video.[5]

Andrews's claim of insufficiency rests on his belief that the jury was incapable of identifying him as one of the robbers or of finding that the final video actually showed the robbery of Bremerman and Balieiro. To the contrary, given the video record of Andrews's physical profile and clothing and the undisputed evidence that he was the man who was shown trying on the ski mask (with Starks) at the 7-Eleven, the jury could find that he was also the man in the backwards cap who was shown walking (with Starks) away from the 7-Eleven and toward the scene of the robbery, the man who was changing his clothes (with Starks) just before the robbery, and one of the men who appeared to be robbing Bremerman and Balieiro on the University video. The jury could also have accepted Sgt. Peña-Ariet's testimony, introduced without objection, that the campus video showed what appeared to be a robbery occurring at the same time and place as the robbery reported by the victims, when no other such event had been reported that

[5] The State did not introduce any evidence specifically about the temperature or weather conditions on the night of the robbery. Apparently on the basis of the conditions depicted in the videos, however, the State argued that there was no snowstorm or other weather-related reason to wear a ski mask that night.

evening. Finally, the jury could have found it significant that, according to Balieiro, one of the assailants was wearing a mask.

It is true that, in the absence of any objection from Andrews's counsel, the court allowed Sgt. Peña-Ariet to narrate the video and to offer his observations and what counsel characterized as "assumptions" about what it depicted.[6] The jury did not, however, have to rely on Peña-Ariet's assumptions that Andrews was the man seen on the campus video. It could rely upon its own observations of the videos and its determination that the combination of all the videos depicted Andrews and Starks preparing to attack, and later attacking, Bremerman and Balieiro.

Andrews complains that on cross-examination Sgt. Peña-Ariet responded affirmatively to the question, "[A]s to the video where the actual event [occurred] . . . , there's no way of telling who those people are?" That single concession does not eviscerate the State's case. The jury itself viewed the recordings during the presentation of the State's evidence. Moreover, during its deliberations, the jury requested and received permission to review the recording of the persons resembling Starks and Andrews changing their clothes just before the robbery and the video that, the State said,

[6] Sgt. Peña-Ariet did not overtly characterize his observations as "assumptions." On cross-examination, he responded affirmatively to the questions, "So you're going to assume that those people are the same two people that left [the 7-Eleven]?," and "[S]ince we don't know those people [the people depicted in the video allegedly showing the robbery], we're assuming that this is the robbery that was talked about?" On the facts of this case, those "assumptions" could also be fairly described as reasonable and permissible inferences.

depicted the robbery itself. The jury was entitled to make its own decisions about what the videos did or did not show.

It is not up to a reviewing court to second-guess the jury's decision about the credibility of the witnesses and the resolution of evidentiary conflicts. *See, e.g.*, *State v. Smith*, 374 Md. 527, 533-34 (2003), and cases cited therein. While the jury certainly was entitled to find that the State had failed to prove its case beyond a reasonable doubt, it was not compelled to reach that conclusion on the facts of this case. Based on the evidence presented, the jury could reasonably have determined that the masked white man who attacked Bremerman and Balieiro was Andrews – the white man who was indisputably seen gauging his appearance in a ski mask on the 7-Eleven video not long before the robbery, and who had the same profile and attire as the white man who was seen walking from the 7-Eleven toward the robbery scene and changing his clothes just before the occurrence of the only robbery that was reported to have happened in that area that night. Viewing that evidence in a light most favorable to the State, we have no basis to conclude that the circuit court erred in denying Andrews's motion for judgment of acquittal and submitting the case to the jury.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.