UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 2561 & 2562

September Term, 2014

ANTHONY NYREKI EDWARDS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Friedman,

JJ.

CONSOLIDATED CASES

Opinion by Wright, J.
Concurring Opinion by Friedman, J.

Filed: February 3, 2016

Appellant, Anthony Edwards, appeals from two sets of convictions for theft of goods valued over $1,000.00 arising from two separate jury trials in the Circuit Court for Prince George's County. On February 6, 2015, Judge Maureen Lamasney, who presided over Case No. 13-1353X, and Judge Sean Wallace, who presided over Case No. 14-0225X, conducted a joint sentencing hearing. Judge Lamasney sentenced Edwards to six years' incarceration, and Judge Wallace imposed a sentence of ten years' incarceration with all but eight years suspended, to be served consecutive to Judge Lamasney's sentence, followed by five years of supervised probation upon release. Edwards noted a timely appeal in both cases, and we subsequently consolidated the two appeals.

Questions Presented

Edwards presents the following questions:

1. In Case No. 13-1353X, is the evidence sufficient to sustain [Edwards's] conviction for theft of goods valued over $1,000 under the theory of possession of stolen goods where [Edwards] possessed four items and the [S]tate produced no evidence of their value?

2. Did the court err in failing to merge [Edwards's] two theft convictions for sentencing purposes?

We answer "no" to the first question. As such, we vacate Edwards's conviction for theft of goods valued over $1,000.00 in Case No. 13-1353X, enter a conviction for the lesser included offense of theft under $1,000.00, and remand for resentencing on that count. In imposing a new sentence upon remand, the circuit court need not merge Edwards's two theft convictions, for reasons explained below.

Facts

I. Case No. 13-1353X

On September 17, 2013, Edwards was charged with burglary in the first, third, and fourth degree, theft of goods valued over $1,000.00, malicious destruction of property, and conspiracy to commit first-degree burglary. A jury trial was held on November 5-6, 2014.

Mary Gorham testified that she left her home in Fort Washington at approximately 7:00 a.m. on March 31, 2013, and returned the next day at approximately 8:00 p.m., when she discovered that her home had been broken into and the following items were missing: a television, a laptop, jewelry, jewelry boxes, and her mother's ashes. She estimated the total value of property that was taken to be approximately $5,000.00. Gorham testified that her television, her laptop, a necklace, and a class ring were later returned to her.

Detective David Gross of the Prince George's County Police Department testified that he arrested Edwards on April 1, 2013, after executing a search warrant. At the time of arrest, Edwards was wearing a class ring and a necklace. Det. Gross seized those two items, as well as other jewelry, a flat screen television, a laptop, and "some other items."

Following the close of all testimony, the circuit court granted Edwards's motion for judgment of acquittal as to the conspiracy and malicious destruction of property counts. Thereafter, the jury was instructed as follows regarding the theft count:

> THE COURT: The Defendant is charged with the crime of theft, and the type of theft is possession of stolen property. In order to convict the Defendant of theft, the State must prove first, that the Defendant possessed stolen property; two, that the Defendant knew that the property was stolen

> or believed that it probably was stolen; and three, that the Defendant had the purpose of depriving the owner of the property; four, that the value of the property was at least $1,000 and less than $10,000.
>
> Property means anything of value. Owner means a person, other than the Defendant, who has a lawful or unlawful possession of, or any other interest in the property, and without whose consent, the Defendant had no authority to exert control over the property.
>
> Deprive means to withhold property of another permanently, for such a period of time as to appropriate a portion of its value, with the purpose of restoring it only upon payment of a reward or other compensation or to dispose of the property or use and deal with the property so as to make it unlikely that the owner would recover it.
>
> And lastly, exclusive possession either alone or with others of recently stolen property, unless reasonably explained, may be evidence of theft. If you find that the Defendant was in possession of the property shortly after it was stolen, and the Defendant's possession is not otherwise explained by the evidence, you may, but are not required to, find the Defendant guilty of theft.
>
> Possession means knowingly having the property on one's person, or knowingly having the property within one's control or at one's disposal.
>
> In deciding whether the Defendant's possession was sufficiently close in time to the theft to be evidence of participation in the theft, you should consider all of the surrounding circumstances, including such factors as the type of property stolen, how the Defendant may have come into possession, and the amount of time between the theft and the Defendant's possession.

During closing argument, the State contended that "the Defendant was the one that went in," "[t]he person that had those things was the person that took them in the first place" and "[Edwards] is covered in stolen property because he took it." Following deliberations, the jury found Edwards guilty of theft of goods valued between $1,000.00

and $10,000.00 and not guilty of first-degree burglary, third-degree burglary, or fourth-degree burglary.

II. Case No. 14-0225X

On February 11, 2014, Edwards was charged with burglary in the first, third, and fourth degree, theft of goods valued over $1,000.00, theft of goods valued over $10,000.00, malicious destruction of property, and conspiracy to commit first-degree burglary. A jury trial was held on January 8, 2015.

Allen Anthony testified that when he returned to his home at 9802 Parr Court in Fort Washington from work on March 21, 2013, he discovered that his home had been burglarized. Anthony testified that there was a broken window in the family room and that the following items were taken from the home: a safe, laptops, cameras, Wii games, $4,000.00 in cash, numerous pieces of jewelry and watches, clothing, shoes, passports, Social Security cards, birth certificates, a limited edition Louis Perrelet watch appraised at $5,500.00, iPads, iTouch, purses, and televisions. Allen valued the missing jewelry at $70,000.00, the home goods and electronics at $9,000.00, and the cash at $4,000.00.

Diana Seaborn testified that she was serving a sentence in Virginia and that on March 21, 2013, she and Edwards broke into the house at 9802 Parr Court. According to Seaborn, Edwards first entered the house by breaking a window in the back of the house and then "went into the house and opened up a side door." Seaborn stated that once inside, Edwards kicked open a locked bedroom upstairs, and they removed a locked safe, purses, shoes, watches, jewelry, clothing, a game system, and laptops from the house.

They loaded all of the items into her uncle's truck and drove to a friend's house, where Edwards and the friend opened the safe. Edwards then announced that he was going to Virginia to sell the items in the safe. Later that evening, Seaborn and Edwards discarded the empty safe by throwing it off the 295 ramp.

Seaborn testified that the police came to her house on March 26, 2013, at which time she cooperated by providing them with information and returning all of the stolen items. At that time, she signed an agreement with the State, admitted to participating in numerous burglaries, pleaded guilty to burglary in two Maryland cases, and pleaded guilty to five burglaries in Virginia.[1] Seaborn testified that she led police to the safe that had been discarded off 295. Seaborn also stated that she was present in Edwards's house on April 1, 2013, during the execution of the search warrant (in Case No. 13-1353X).

Det. Gross testified that he was the lead investigator of the burglary at 9802 Parr Court. Det. Gross stated that he did not arrest Seaborn after she admitted to participating in this burglary because she was cooperating and providing information, but he did not promise her any benefit in exchange for her cooperation. He testified that Seaborn directed him to the safe that had been taken from the home and discarded from the highway, and that he obtained a search warrant for Edwards's home in Oxon Hill based

[1] Seaborn received a sentence of ten years, five years suspended, to be served concurrently, for the five burglaries in Virginia. Pursuant to her agreement with the State of Maryland, Seaborn pleaded guilty to two first-degree burglaries with a sentence cap of fifteen years (to run concurrent to the Virginia sentence), and the State of Maryland dropped the charges in twelve other first-degree burglary cases including counts of conspiracy to commit burglary, fourth-degree burglary, and theft.

on information he obtained from Seaborn. Det. Gross stated that, when he executed the warrant on April 1, 2014, Edwards was arrested, and he was wearing a necklace and a watch that were subsequently identified by the Anthonys.

Following the close of all testimony, the circuit court granted Edwards's motion for judgment of acquittal as to the charge of malicious destruction of property. Thereafter, the court instructed the jury as follows, with regard to the theft count:

> [THE COURT]: . . . Defendant is charged with the crimes of theft. In order to convict the Defendant of theft, the State must prove: first, that the Defendant possessed stolen property; second, that the Defendant knew that the property was stolen and believed that it was probably stol[]en - - or believed that it was probably stolen; and third, that the Defendant had the purpose of depriving the owner of the property; fourth, and this is the distinction that the State has to prove that the value of the property was either over $1,000, which would apply to question number four or over $10,000, which would apply to question number five. Okay.
>
> Property means anything of value. Owner means a person other than the Defendant who has possession or any other interest in the property and without whose consent the Defendant has no authority to exert control over the property.
>
> Deprive means to withhold property of another permanently or to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.
>
> Exert control means to take, carry away or appropriate to a person[']s own use or to sell, convey or transfer title to an interest in or possession of any property.
>
> And value means the market value of the property or service at the time and place of the crime.

During closing argument, the State again argued that Edwards was the burglar: "He is guilty . . . of breaking into the Anthonys' house on March 21st guilty of taking

their things[.] . . . They did it together on that day." Following deliberations, the jury found Edwards guilty of theft of goods valued over $1,000.00 and not guilty of first-degree burglary, third-degree burglary, fourth-degree burglary, theft of goods valued over $10,000.00, and conspiracy to commit first-degree burglary.

III. Joint Sentencing

On February 6, 2015, a joint sentencing hearing was held before Judge Lamasney and Judge Wallace, at which time counsel for Edwards argued that the two theft convictions should merge for sentencing purposes. Defense counsel relied on *Webb v. State*, 185 Md. App. 580 (2009), and argued that because Edwards was acquitted of all the burglary counts and convicted only of possessing stolen property, and because he possessed the property in the two cases at the same time, he should be sentenced for one criminal act with one sentence under the reasoning of the single larceny doctrine. Judge Lamasney denied the motion and ruled as follows:

> JUDGE LAMANSNEY: [Defense counsel], I loved your argument. It's actually brilliant, but I don't agree with it. I don't think they merge. I think the law is clear. These are breaking and enterings that occurred on separate days. The jury gave - - on each case they found the State did not prove beyond a reasonable doubt that Mr. Edwards was, in fact, the person who did the breaking and entering, but they found that he did, in fact, possess the fruits from those separate and distinct breaking and enterings. And I think what matters is that it was the property of different victims. Obviously, if it was the property of the same victim, that's one thing. But it's the property of different victims that was taken on different day. So I don't believe the . . . case[s] merge[.]

Judge Wallace also denied the motion and the following transpired:

> JUDGE WALLACE: I agree with Judge Lamasney not only because she's smarter than me but because independently reading *Webb*, I look at the

caution at the end where they say, "Lest there be any misapprehension of the reach of this opinion, the indispensable lynchpin of our decision that the single larceny doctrine should have been applied is that the credible evidence supported only that appellant, at a discrete point in time, was unlawfully in possession of the stolen property and not that he was the thief. In other words, only the point in time when the possession occurred was established. No evidence was adduced at trial that indicated that appellant came into possession of the stolen property at different times. Consequently, application of the single [larceny] doctrine constrains the conviction of one count of felony theft."

That's an entirely different case than what was presented in at least my case, CT140225X, where there was a plethora of evidence that showed that the defendant came into the property, participated in the theft of that property on the 21st from the household of Mr. & Mrs. Anthony, as opposed to what I understand to be the case in Judge Lamasney's case where he's alleged to have stolen the property ten days later on March 31st from a Mrs. Gorham. So I don't know what the evidence was in her case, but there was certainly evidence in my case that he had come into possession of that property on the 21st, a different date and different place than when he was ultimately proven to be in possession of it.

[DEFENSE COUNSEL]: I would just again reiterate that that was all the conduct that he was ultimately acquitted of. I think it's unfair to - - I think that violates the constitution and the rule of lenity to use it against him in this situation.

JUDGE LAMASNEY: I think it goes to as to when the evidence showed the property had been taken.

JUDGE WALLACE: And that he had knowledge of it and came into possession of it. I don't know that we can necessarily conclude from the jury's verdict that they disregarded everything. They simply found the State didn't prove beyond a reasonable doubt the other counts. Not that they disregarded all the other evidence. That, in any event, is a distinguishable circumstance from the *Webb* case that you cite.

Additional facts will be included, below, as they become pertinent to our discussion.

Discussion

I. Theft

Edwards first argues that in Case No. 13-1353X, the evidence was insufficient to sustain his conviction for theft of goods valued over $1,000.00 under the theory of possession of stolen goods. Specifically, Edwards notes that the State produced no evidence of the value of the four items he was convicted of possessing. Accordingly, he asks us to "vacate the conviction for theft over $1,000, enter a conviction for the lesser included offense of theft under $1,000, and remand for a new sentencing on that count."

In response, the State first contends that Edwards's claim of error is waived because the argument that he made at trial regarding this issue "was different from the argument he is now making on appeal." Alternatively, the State avers that the circuit court did not err in denying Edwards's motion for a judgment of acquittal because "the jury had heard testimony that the combined value of the stolen property was 'around $5,000, maybe more.'"

Maryland Rule 4-324(a) provides, in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

In that regard:

> It is a well established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal. Thus, a

> defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal.

Claybourne v. State, 209 Md. App. 706, 750 (2013) (internal citations omitted). In considering the merits of this claim of error, our primary function is to determine "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 (1979) (citation omitted; emphasis in original).

When Edwards moved for judgment of acquittal at the close of the State's case, his attorney argued, in pertinent part:

> As for Count 4 [theft of goods valued over $1,000], while I know Ms. Gorham said there was $5,000 worth of property found, there were only four items found with Mr. Edwards, and *the value for those four items wasn't given*. And it's certainly possible that the value of those items could be less than $1,000. And as to all counts, I would argue that there's insufficient evidence of agency, and that merely just being found with property after the burglary, I think is insufficient to say [Edwards] took it or knew that it was stolen.

(Emphasis added). Because Edwards argued, before the circuit court, that the value of the stolen property was not given, and because he repeats that same argument on appeal, we conclude that this issue has been preserved for our review.

Turning to the merits, we also reject the State's contention that there was sufficient evidence to sustain Edwards's conviction for theft over $1,000.00, when the only theory of theft on which the jury was instructed was theft by possession of stolen goods. As the circuit court correctly stated, in order to convict Edwards on that count, "the State must

prove first, that [he] possessed stolen property; two, that [he] knew that the property was stolen or believed that it probably was stolen; and three, that [he] had the purpose of depriving the owner of the property; *four, that the value of the property was at least $1,000 and less than $10,000*." (Emphasis added). In turn, "value" is defined as "(1) the market value of the property or service at the time and place of the crime; or (2) if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime." Md. Code (2002, 2012 Repl. Vol.), § 7-103(a) of the Criminal Law Article. "[P]roof of market value may be indirect as well as direct." *Wallace v. State*, 63 Md. App. 399, 410 (1985) (citation omitted).

At trial, Gorham stated that "the value of the property . . . that was missing" was "[m]aybe around $5,000, maybe more." Although the State entered pictures of those items into evidence, none of the items themselves were actually shown to the jury. Based on this record, we agree with Edwards that while Gorham was allowed to offer a lay opinion as to the value of her possessions, *Lamot v. State*, 2 Md. App. 378, 383 (1967), "Gorham's opinion that she valued the entirety of the stolen items at around $5,000 does not support a finding that the four items found in [Edwards's] possession were valued at over $1,000 when there was absolutely no evidence presented regarding the value of those four items." (Emphasis omitted). The State never asked Gorham to provide values for the individual items, nor did the State ask her to describe their appearance, age, or condition. Moreover, the State did not ask Gorham how much she paid for them

originally, how much they would have been worth at the time they were taken, or whether they were functional. Therefore, there was insufficient evidence to show that the value of the stolen property in Edwards's possession was at least $1,000.00 and less than $10,000.00. As such, we direct that the judgment in the circuit court be vacated, that a verdict of guilty of the lesser included offense of theft of property under $1,000.00 be entered, and that Edwards be sentenced on that conviction. *Cf. Champagne v. State*, 199 Md. App. 671, 678 (2011).

II. Sentencing

Next, Edwards argues that the circuit court erred in failing to merge his two theft convictions in Case Nos. 14-0225X and 13-1353X for sentencing purposes. Citing *Webb*, *supra*, Edwards contends that "because he possessed the property in the two cases at the same time, under the reasoning of the single larceny doctrine, he should be sentenced for one criminal act with one sentence." We disagree.

As the State correctly notes, "*Webb* stands for the narrow proposition that, where a person is convicted of multiple thefts, and the evidence of each theft is only that the defendant was in possession of the stolen items at a single time and place, [then] the separate theft convictions will merge at sentencing." *See Webb*, 185 Md. App. at 604. In that case, we emphasized:

> Lest there be any misapprehension of the reach of this opinion, the indispensable lynchpin of our decision that the single larceny doctrine should have been applied is that the credible evidence supported only that appellant, at a discrete point in time, was unlawfully in possession of the stolen property and not that he was the thief. In other words, only the point in time when the possession occurred was established. *No evidence was*

> *adduced at trial that indicated that appellant came into possession of the stolen property at different times.* Consequently, application of the single larceny doctrine constrains the conviction of one count of felony theft.

Id. (emphasis added).

Webb is distinguishable from Edwards's present appeal for two reasons. First, in *Webb*, the State presented several discrete thefts as a combined single case to the jury. *Id.* at 584. By contrast, here, Edwards was prosecuted for two separate thefts, neither to be aggregated nor proven together. Second, in *Webb*, there was no evidence that the appellant had acquired the stolen items at different times, nor was there any evidence that Webb was the actual burglar. *Id.* at 604. Here, however, Edwards was inculpated by Seaborn, who testified that she participated in one of the burglaries with him on March 21, 2013. Thus, Seaborn's testimony established that the stolen property found in Edwards's possession in CT14-0225X was not acquired at the same place and at the same time as that in CT13-1353X. In fact, Edwards possessed the stolen goods in CT14-0225X a full ten days before the second burglary.

In sum, Edwards was tried for two separate thefts in two separate trials. Although the two trial judges held a joint sentencing, they did not err in declining to merge Edwards's two theft convictions.

Conclusion

For the foregoing reasons, we vacate Edwards's conviction for theft of goods valued over $1,000.00 in Case No. 13-1353X and, instead, enter a conviction for the lesser included offense of theft under $1,000.00. We remand the case for resentencing on

that count. In imposing a new sentence for the lesser included offense upon remand, the circuit court need not merge Edwards's sentence for theft under $1,000.00 in Case No. 13-1353X with his sentence for theft over $1,000.00 in Case No. 14-0225X.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED IN PART. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND PRINCE GEORGE'S COUNTY.

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Wright,
Friedman,

JJ.

CONSOLIDATED CASES

Concurring Opinion by Friedman, J.

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I concur. I would also reverse Edwards' conviction for theft of goods valued over $1,000 but cannot agree with the manner by which the majority reaches that conclusion. The majority concludes that Mary Gorham's testimony that the items stolen were valued at $5,000 was insufficient to prove value. In my view, her testimony as to value was more than sufficient. Instead, I think that the defect is that we don't know to which items that value should be ascribed.

Gorham testified that the following items were stolen from her home: "a television, a laptop, jewelry, jewelry boxes, and her mother's ashes." Slip op. at 2. She testified that the combined value of all of these items was $5,000. *Id*. She further testified that some, but not all, of the items stolen were later found in Edwards' possession and returned to her, namely: "her television, her laptop, a necklace, and a class ring." *Id*. I'll call those items, "Subset A". We can deduce from Gorham's testimony that there was also other property that was stolen from her but that was not recovered from Edwards, namely the jewelry boxes, Gorham's mother's ashes, and perhaps some other jewelry. I'll call those items, "Subset B". The State did not attempt to elicit from Gorham, or from any other source, the value of the property recovered (Subset A) or the value of the property not recovered (Subset B). Rather, all we know, as I mentioned before, is that the total value of the stolen property is $5,000, which can be represented by the following formula: Subset A + Subset B = $5,000.

If Edwards had been convicted of burglary or theft by a means *other* than possession of stolen goods, I think that a jury could reasonably infer that because Edwards was the thief of Subset A, he was also the thief of Subset B. From that, the jury could aggregate the value of the two subsets as being worth, as Gorham testified, $5,000. Here, however, because Edwards was acquitted of burglary and because he was not charged with theft by any means other than by possession of stolen goods, I think it is improper for the jury to infer that Edwards stole the goods that were not recovered (Subset B). Because there was no testimony about the value of Subset A, and because that value cannot be derived from the testimony received, the State failed to prove the value of the goods that Edwards stole. Therefore, in my view, Edwards' conviction for theft over $1,000 cannot stand.