UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 756

September Term, 2016

MARCUS BUTLER

v.

STATE OF MARYLAND

Woodward,
Leahy,
Friedman,

JJ.

Opinion by Woodward, J.

Filed: January 24, 2017

A jury in the Circuit Court for Prince George's County convicted Marcus Butler, appellant, of robbery, second-degree assault, and theft of property valued under $1,000 following trial on March 14, 2016. At sentencing, despite the prosecutor noting that the convictions for theft and second-degree assault should merge into the robbery conviction, the court sentenced appellant to a term of imprisonment of fifteen years, with all but twelve years suspended, for robbery, a concurrent eight years for second-degree assault, and a concurrent eight months for theft,[1] to be followed by a five-year period of probation. Appellant presents two questions on appeal:

> 1. Did the court err in imposing separate sentences for robbery and second degree assault based on the same conduct?
>
> 2. Is the evidence [] insufficient to support appellant's robbery conviction?

For the reasons stated below, we conclude that the court erred in imposing separate sentences for robbery and second-degree assault. We, accordingly, vacate appellant's sentence for second-degree assault. There was, however, sufficient evidence to support the conviction for robbery, and we thus affirm that judgment.

BACKGROUND

On August 17, 2015, Patrick Gardiner and Michael Richardson Jr. were working at

[1] The transcript of the sentencing hearing reflects that the court sentenced appellant to eight months concurrent for theft. However, the commitment record indicates that appellant was sentenced to 18 months concurrent for theft. Because such conflict was not raised in appellant's brief, the issue is not properly before us for review. *See Jacober v. High Hill Realty, Inc.*, 22 Md. App. 115, 125 (stating that "[w]e decline to consider the argument as it was not presented in the brief"), *cert. denied*, 272 Md. 743 (1974). Appellant, of course, has the right to have the commitment record corrected in the circuit court. *See* Maryland Rule 4-351.

the CVS Pharmacy on Martin Luther King Highway in Glenarden. Sometime in the early afternoon, Gardiner and Richardson observed appellant enter the store. Gardiner witnessed appellant place several bars of soap into a bookbag and walk toward the entrance. Gardiner stopped appellant from exiting the store and asked him to return the items. Richardson came over to assist Gardiner.

Appellant "said some cuss words" and pulled out a knife. Gardiner described the knife as a "flip-knife." Richardson testified that appellant was waving the knife around as if he was going to stab either Gardiner or Richardson. Appellant then said, "Let me by." Gardiner and Richardson moved aside, and appellant exited the CVS without paying for the soap. While Richardson called police, Gardiner followed appellant and saw him get into a gold Ford Windstar minivan with a Virginia license plate**.** Gardiner took a picture of the license plate, and **t**he minivan then left the parking lot.

That evening, around 11:30 p.m., Officer Charles Lane of the Seat Pleasant Police Department was on patrol when he observed a gold Ford Windstar minivan with a Virginia license plate drive past without its headlights on. Officer Lane initiated a traffic stop and discovered that none of the three men in the van had a driver's license. Officer Lane identified appellant, who was sitting in the rear seat, as one of the passengers. Police seized the van and conducted an inventory search prior to impoundment, during which police recovered a red folding knife from the rear seat.

The State later charged appellant with robbery with a dangerous weapon, robbery, second-degree assault, theft of property valued under $1,000, and carrying a concealed dangerous weapon. The jury did not return a verdict as to the first and last charge, and the

State later entered a *nol prosse* as to those counts. The jury convicted appellant of the remaining charges, and the court sentenced him as indicated above.

DISCUSSION

I.

Merger of Sentences

At sentencing, the prosecutor noted that appellant's convictions for second-degree assault and theft should merge into the robbery conviction for sentencing purposes. Nevertheless, the circuit court imposed separate sentences – albeit concurrent ones – for all three convictions. On appeal, appellant contends that this was error as the required evidence test requires merger of second-degree assault and robbery in this case.[2] Moreover, appellant points out, neither the prosecutor in closing argument, nor the court in jury instructions, made clear to the jury that there were separate acts of assault and robbery.

The State concedes that the trial court should have merged the sentences for robbery and second-degree assault. Upon our own independent review, we agree.

The Court of Appeals has remarked: "The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). Elaborating on this protection, this Court noted: "'Merger

[2] We note that appellant does not argue on appeal for the merger of the theft conviction. Consequently, we do not address it. *See* Rule 8-504; *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 711-12 (noting that appellate court does not address arguments not raised in appellant's brief), *cert. denied*, 435 Md. 502 (2013).

protects a convicted defendant from multiple punishments for the same offense. Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test,'" the offenses are the same, or one is a lesser-included offense of the other. *Paige v. State*, 222 Md. App. 190, 206 (2015) (quoting *Brooks*, 439 Md. at 737).

Ordinarily, the test for merger of sentences is the required evidence test, which "'prohibits separate sentences for each offense if only one offense requires proof of a fact which the other does not.'" *Webster v. State*, 221 Md. App. 100, 128 (2015) (quoting *Christian v. State*, 405 Md. 306, 321 (2008)). Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), § 3-402(a) of the Criminal Law Article ("C.L.") provides that a "person may not commit or attempt to commit robbery." Robbery is defined as "'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.'" *Fetrow v. State*, 156 Md. App. 675, 687 (quoting *Metheny v. State*, 359 Md. 576, 605 (2000)), *cert. denied*, 382 Md. 347 (2004). This Court has also noted that robbery is "a compound larceny. It can be accomplished 'either [by] a combination of a larceny and a battery *or a combination of a larceny and an assault*, of the 'putting in fear variety.'" *Id.* (emphasis added) (quoting *Tilghman v. State*, 117 Md. App. 542, 568 (1997)), *cert. denied*, 349 Md. 104 (1998).

C.L. § 3-203(a) provides that a "person may not commit an assault." In Maryland, there are three "types" of assault: "'1) intent to frighten; 2) attempted battery; and 3) battery.'" *Thompson v. State*, 229 Md. App. 385, 413 (2016) (quoting *Jones v. State*, 440 Md. 450, 455 (2014)). In this case, the State alleged that appellant committed an "intent to

frighten" type of assault, which occurs when "'(1) the defendant commit[s] an act with the intent to place [a victim] in fear of immediate physical harm; (2) the defendant ha[s] the apparent ability at [the] time, to bring about the physical harm; and (3) [t]he victim [is] aware of the impending physical harm.'" *Id.* (quoting *Jones*, 440 Md. at 455).

Of course, if the assault conviction is based on separate conduct from that supporting the conviction for robbery, then separate sentences are warranted. *See Snowden v. State*, 321 Md. 612, 618-19 (1991). As the Court of Appeals explained in *Snowden*, if there is an ambiguity as to whether separate acts supported separate convictions, appellate courts should resolve that ambiguity in favor of the defendant. *See id.* (discussing ambiguity of separate sentences for child abuse and sex offense in one case and robbery and assault in another). In this case, neither the prosecutor in closing arguments, nor the court in jury instructions, differentiated separate assaultive conduct from that supporting appellant's conduct for robbery.

We agree with the prosecutor and appellant that appellant's conviction for assault merges with the conviction for robbery for sentencing purposes. The convictions are based on the same act of taking soap from the CVS and threatening Gardiner with the knife in order to accomplish the taking. The Court of Appeals has adopted the "continuous transaction" view of robbery, holding "that the better view is that the use of force during the course of a larceny in order to take the property away from the custodian supplies the element of force necessary to sustain a robbery conviction." *Ball v. State*, 347 Md. 156, 185, 188 (1997), *cert. denied*, 522 U.S. 1082 (1998). In this case, because appellant's assaultive conduct in the course of the larceny was the force that elevated his larceny to a

robbery, we conclude that the offenses should merge for sentencing purposes. Stated another way, the required evidence test is met in this case because robbery includes all of the elements of an "intent to frighten" type of second-degree assault, with the additional element of larceny.

II.

Sufficiency of the Evidence

Appellant also contends that there was insufficient evidence to support the conviction for robbery. Appellant maintains that he did not take property from Gardiner's person or presence, meaning that he merely committed a larceny.

The State responds that there is no requirement that the property be taken from the person of the individual who is assaulted in order to prove a robbery, and therefore, appellant's claim is without merit. The State further argues that "there is no requirement that the assault occur before or at the same time as the taking; if force is used to effectuate an escape with the property, a robbery has occurred."

In reviewing the sufficiency of the evidence, we "'ask[] 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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md.

726 (2016). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

In reviewing the definition of robbery stated above and the State's evidence in this case, we conclude that there was sufficient evidence to support appellant's conviction for robbery. In adopting the "continuous transaction" view of robbery, the Court of Appeals concluded that, "when one commits a larceny and then displays a weapon so as to overcome the resistance of the witness, the crime is then elevated to robbery." *Ball*, 347 Md. at 187 (internal quotation and citation omitted). The Court noted that "[t]he mere fact that some asportation has occurred before the use of force does not mean that the perpetrator is thereafter not guilty of the offense of robbery. Rather, the totality of the circumstances that surround the taking must be considered." *Id.* at 188. "If … the use of force enables the accused to retain possession of the property in the face of immediate resistance from the victim, then the taking is properly considered a robbery." *Id.*

Here, it is of no moment whether appellant took the merchandise immediately from Gardiner's person or presence. *See id.* There was sufficient evidence from which a rational fact-finder could conclude that, as he was trying to leave the store, appellant used force when confronted by Gardiner, which enabled him to retain possession of the stolen property. Accordingly, there was sufficient evidence supporting his conviction for robbery.

SENTENCE IMPOSED ON CONVICTION FOR SECOND-DEGREE ASSAULT VACATED. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY PRINCE GEORGE'S COUNTY.