Circuit Court for Cecil County
Case No. 7K15001159

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1301

September Term, 2016

LORENZO MISHAAD JONES

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 3, 2017

A jury in the Circuit Court for Cecil County convicted Lorenzo Mishaad Jones, appellant, of robbery with a dangerous weapon, robbery, first-degree assault, and second-degree assault. The court merged robbery into robbery with a dangerous weapon and second-degree assault into first-degree assault and subsequently sentenced appellant to fifteen years in prison for robbery with a dangerous weapon and a suspended, consecutive five years for first-degree assault. On appeal, appellant contends that the court erred in failing to merge first-degree assault into robbery with a dangerous weapon. Additionally, appellant argues that the court should have suppressed evidence relating to an out-of-court identification. For the reasons stated below, we agree that the court should have merged the convictions for sentencing purposes, and any error in the court's suppression decision was harmless. We, thus, shall vacate appellant's sentence for first-degree assault, but for the reasons stated herein, shall remand the case for a re-sentencing.

BACKGROUND

Motions Hearing

Prior to trial, appellant moved to suppress an out-of-court identification. Detective Francis Wallace was the only witness to testify at the suppression hearing.[1] He stated that on the evening of August 3, 2015, he was notified of a robbery in the Lakeside neighborhood of North East. The victim had been transported to Union Hospital in Elkton. Detective Wallace was advised that witnesses described the assailant as a black

[1] All law enforcement personnel in this case are members of the Cecil County Sheriff's Office, unless otherwise noted.

male with dreadlocks, wearing a baseball cap and driving a silver Jeep with Maryland plates. Witnesses were able to give a partial tag number.

After speaking with some of the residents of the neighborhood, Detective Wallace went to Union Hospital to interview the victim, William Crawford. Detective Wallace spoke with Crawford in his police vehicle following Crawford's discharge. Detective Wallace asked Crawford if he could identify his assailant in a photograph. Crawford responded, "[P]robably." Detective Wallace then testified that he received a picture from Corporal Johnathan Pruette that matched the suspect's description. Detective Wallace stated that Corporal Pruette had linked the partial tag number to a silver Jeep registered to Brittany Bellere. Corporal Pruette then searched Bellere's Facebook page and found a picture of a black male matching the suspect's description, and he sent this picture in an electronic message to Detective Wallace.

At the hearing, Detective Wallace identified State's Exhibit 1 as a paper version of the photograph that he received from Corporal Pruette and State's Exhibit 2 as an enlarged version of the same photograph.[2] Detective Wallace testified that within an hour or two of the robbery, he showed the picture that he received from Corporal Pruette to Crawford on his iPhone. Detective Wallace asked "if this was the person responsible for the robbery," and Crawford "identified him as such." Detective Wallace testified that there was not sufficient time to do a line-up or photographic array because Crawford was going home at that time. Additionally, police had arrived at Bellere's residence in an

[2] The court did not admit either exhibit, and neither one was introduced at trial.

attempt to make contact with appellant, and Detective Wallace had been advised that another robbery had occurred in Elkton approximately a half-hour after Crawford's, and witnesses gave similar descriptions of the robber and the vehicle.

The court denied appellant's motion, ruling that the showing of the single photograph on Detective Wallace's cell phone was not impermissibly suggestive because of the exigent circumstances presented.

Trial

Shortly after 9:00 P.M. on August 3, 2015, Crawford was walking home on Seneca Court in North East. A gray SUV pulled over in front of Crawford, and when he reached the vehicle, a man "jumped out" and held a gun against Crawford's jaw. The man demanded money and, when Crawford said he did not have any, the man hit Crawford over the head with the gun. Crawford fell to the ground. The man then took Crawford's wallet from his pocket, got into the vehicle, and left.

Crawford was later transported to Union Hospital and treated for his injuries. Upon his release, he spoke with Detective Wallace in the detective's vehicle. Crawford described his attacker as a black male with dreadlocks, wearing a baseball cap. Crawford said he had never met his assailant before, but responded that he could identify him if shown a photograph.

Meanwhile, witnesses provided a partial license plate number, "8455," of the SUV to police. Corporal Pruette matched that partial plate to a silver Jeep registered to Bellere. Corporal Pruette also determined that approximately a month prior, appellant

had been ticketed while driving the Jeep.[3] Corporal Pruette obtained a MVA photo of appellant and then examined Bellere's Facebook page. Corporal Pruette sent Detective Wallace a picture from Bellere's Facebook page of the person that he believed to be appellant. Detective Wallace showed Crawford the photo, and Crawford identified the person in the photo as his assailant. Additionally, Crawford identified appellant as his attacker at trial.

In a search of Bellere's home, police recovered a gun and a baseball cap. Furthermore, the State introduced recordings of telephone conversations between appellant and Bellere made from jail in which appellant asked Bellere to speak with Crawford and ask him to drop the charges. The jury convicted appellant of all charges, and the court sentenced him as indicated above.

DISCUSSION

Suppression Hearing

Appellant contends that the showing of a single photograph to Crawford was unduly suggestive. Appellant recognizes that showing a single photograph is sometimes acceptable, but he maintains that the way Detective Wallace showed the photograph in this case conveyed that appellant was the robber.

In reviewing an extrajudicial identification, we engage in a two-step analysis: "'The first question is whether the identification procedure was impermissibly suggestive.' If the procedure is not impermissibly suggestive, then the inquiry ends. If,

[3] We note that at trial, Bellere testified that she and appellant had been dating for fourteen years "on and off."

however, the procedure is determined to be impermissibly suggestive, then the second step is triggered," and the court considers whether the identification was, despite the suggestiveness, still reliable. *Smiley v. State*, 442 Md. 168, 180 (2015) (quoting *Jones v. State*, 310 Md. 569, 577 (1987)) (internal citation omitted).

Assuming *arguendo* that the showing of a single photograph was unduly suggestive, it amounts to harmless error because Crawford identified appellant as his attacker at trial without objection. *See In re D.M.*, 228 Md. App. 451, 475 n.10 (2016) (finding admission of out-of-court identification harmless error where victim made in-court identification without objection). Accordingly, we affirm the circuit court's denial of the motion to suppress.

Merger Issue

Appellant also contends that the court erred in failing to merge his conviction for first-degree assault into robbery with a dangerous weapon. He points out that at trial, the prosecutor and defense counsel were in agreement that these convictions should merge. On appeal, however, the State argues that the convictions do not merge because appellant committed separate acts.

Generally, we analyze whether offenses merge under the required evidence test. *See State v. Smith*, 223 Md. App. 16, 34 (2015). Merger may also be appropriate, however, when a defendant is convicted of multiple offenses based on the same conduct. *See Morris v. State*, 192 Md. App. 1, 39 (2010) (noting unconstitutionality of multiple punishments for same conduct unless intended by the legislature). In this analysis, we first determine whether the two offenses arose out of the same conduct, and, if so, then

we examine whether the legislature intended multiple punishments. *Wiredu v. State*, 222 Md. App. 212, 220 (2015). "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.'" *Morris*, 192 Md. App. at 39 (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). This Court has also noted that the State carries the burden of demonstrating distinct acts for multiple units of prosecution, and, "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." *Id.*

We stated squarely in *Morris* that "first-degree assault is 'a lesser included offense of robbery with a dangerous and deadly weapon.'" *Id.* at 39-40 (quoting *Williams v. State*, 187 Md. App. 470, 476 (2009)). The "dispositive inquiry," then, becomes whether appellant's conviction for first-degree assault was based on separate conduct from the conviction for robbery with a dangerous weapon. *Id.* at 40.

We are persuaded that appellant's convictions arose out of the same conduct. Neither the court in closing instructions nor the prosecutor in closing argument differentiated between the separate conduct supporting the assault and the armed robbery. Rather, the prosecutor's arguments indicated that appellant had embarked on a single course of conduct in which he had demanded money of Crawford and then hit him over the head in order to obtain Crawford's wallet. There was no discussion of two separate crimes until the court's refusal to merge the convictions at sentencing. Accordingly, we

agree with appellant that his sentence for first-degree assault should have merged with the sentence for robbery with a dangerous weapon.

The State also contends that the sentencing court may have designed appellant's sentence as a "package," and vacating a portion of the sentence disrupts that intent. The State, therefore, requests us to remand the case to the sentencing court pursuant to *Twigg v. State*, 447 Md. 1 (2016). Indeed, in *Twigg*, the Court of Appeals recognized that the majority of state and federal appellate courts view sentencing as a "package," and that the vacation of a sentence upon appeal for merger purposes may "frustrate" the intent of the trial judge in designing that package. *Id.* at 28. The Court agreed with the United States Court of Appeals for the First Circuit that "'[a]fter an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate).'" *Id.* (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989)).

In this case, the sentencing court imposed a suspended, consecutive five-year sentence on appellant for first-degree assault. Because the sentencing court may have designed this sentence as a package – given that the court imposed a fifteen year sentence for robbery with a dangerous weapon, and the maximum sentence for that offense is

twenty years – we remand the case to the sentencing court for a re-sentencing.[4] *See* Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 3-403(b).

SENTENCE FOR FIRST-DEGREE ASSAULT VACATED.

CONVICTIONS OTHERWISE AFFIRMED.

CASE IS REMANDED TO THE CIRCUIT COURT FOR CECIL COUNTY FOR RE-SENTENCING ON THE CONVICTION FOR ROBBERY WITH A DANGEROUS WEAPON. COSTS TO BE PAID HALF BY APPELLANT AND HALF BY CECIL COUNTY.

[4] We note that, pursuant to Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 12-702(b), upon a remand for a re-sentencing,

> the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:
>
> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and
>
> (3) The factual data upon which the increased sentence is based appears as part of the record.