Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000873

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 2019

September Term, 2021

SELVIN FEDERICO REYES

v.

STATE OF MARYLAND

Zic,
Tang,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: January 11, 2023

*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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This belated appeal stems from an October 2017 bench trial in the Circuit Court for Anne Arundel County. Appellant, Selvin Federico Reyes, was found guilty of first-degree assault, second-degree assault, reckless endangerment, and theft of property valued less than $1,000. As to the first-degree assault conviction, the court imposed a sentence of ten years' incarceration, with all but six years suspended. As to the reckless endangerment and theft convictions, the court imposed six-month sentences concurrent with the sentence for first-degree assault. For sentencing purposes, the court merged the second-degree assault conviction into the first-degree assault conviction and placed appellant on three years of supervised probation.

In February 2022, the court granted appellant post-conviction relief, allowing him to file this belated appeal. Appellant presents three questions for our review, which we quote:

1. Did the trial court err in conducting a bench trial in the absence of a proper waiver of jury trial?

2. Is the evidence insufficient to sustain the convictions?

3. Did the trial court err in imposing separate sentences for first-degree assault and reckless endangerment?

For the reasons to follow, we shall affirm the judgments of the circuit court.

BACKGROUND

The State's evidence at trial centered on a domestic dispute between appellant and his wife, Leslie Journet, at their home on September 1, 2016. Early that morning, Ms. Journet confronted appellant about his infidelity, which developed into an argument lasting about 30 minutes. Ms. Journet was screaming while appellant was calm. When appellant

tried to leave the home, Ms. Journet grabbed him by the hand to keep him from leaving so she could "get the answers from him."

Appellant became angry, placed both of his hands tightly around Ms. Journet's neck, and told Ms. Journet that he "just wanted to leave [and] to let him leave." Ms. Journet screamed, "Somebody help me" two or three times and "stop, don't kill me" as appellant had his hands around her neck.

Ms. Journet testified that she could not see, as her vision began to blur, initially describing that she saw "like stars, like blurry stars." She testified that her breathing "was a little tight." She felt dizzy and lightheaded. Although she did not lose consciousness or black out completely, Ms. Journet thought that she was going to pass out and die. Ms. Journet testified that appellant's hands were not around her neck for long because, when she screamed for help, her teenage son appeared and told appellant to let her go.

Appellant complied, took his belongings, and left the house from the rear. Ms. Journet proceeded outside from the front and tried to call 911, but appellant ran from the back of the house, "grabbed [her] phone," and "threw it across the street." Panicked and scared, Ms. Journet climbed into the bed of appellant's pick-up truck, which was parked on the street in front of the house, where she believed would be safer than inside the house. Appellant got into the truck and drove away before Ms. Journet had a chance to get off the truck. After making a turn, appellant stopped the truck, "ask[ed Ms. Journet] to get off the pickup[,]" and then he "started grabbing [her] by the arm and eventually by the hair and

threw [her] to the ground." Ms. Journet ran towards the house screaming for someone to call 911.

By that time, Ms. Journet's teenage daughter was on the phone with 911. As the daughter was calling 911, a neighbor found Ms. Journet's cell phone. The court admitted the 911 recording in which Ms. Journet conveyed that appellant "choked" her and she "blacked out," meaning she "was seeing the blurry and the stars and [she] felt lightheaded."

Although Ms. Journet had no scratches on her face or neck and did not seek medical treatment after the incident, she relayed to the investigating detective, who testified, that Ms. Journet experienced neck pain and, for about two days following the incident, pain in her "throat."

A domestic violence report, which was admitted into evidence, contained a section for "Strangulation Symptoms and/or Injury" that was completed by an officer. That section indicated "bruising" on or about Ms. Journet's face and "redness" "under chin/chest/shoulder." The questionnaire on the report inquired "How long?" the strangulation lasted, and the indicated response was a "decent amount," "started to black out." The questionnaire also asked, "Was the victim shaken simultaneously while being strangled?" and the indicated response was "Yes."

We shall supply additional facts, as may be relevant, in our analysis.

DISCUSSION

I.

Appellant first contends that the circuit court erred in conducting a bench trial without a proper jury trial waiver. Specifically, he argues that the colloquy conducted by his trial counsel lacked information about the reasonable doubt standard. Before the trial began, the court asked defense counsel to "qualify [appellant] with regard to . . . his desire to have a bench trial." The following colloquy occurred:

> THE COURT: All right. And, sir, with regard to your plea of not guilty, I also understand that you have decided to proceed without benefit of a jury trial, is that correct?
>
> [DEFENSE COUNSEL]: So, jury -- just to explain, I think he gets a little --
>
> THE COURT: I was going to say, counsel, qualify your client with regard to his -- his desire to have a bench trial.
>
> [DEFENSE COUNSEL]: Certainly. Mr. Reyes, we discussed that you have two options here this morning. You can either have a judge -- excuse me, a trial -- it's called a bench trial, which is a -- a trial just in front of Your Honor[.] Okay, or we can have a jury trial which means that 12 persons who are residents of Anne Arundel County would be seated here in this jury box and arrive at a unanimous decision regarding your guilt or innocence. Okay, and we spoke about this, correct, whether to have --
>
> [APPELLANT]: Correct.
>
> [DEFENSE COUNSEL]: -- a trial with just a judge or a jury. And you -- you agree that you'd like to have a trial just in front of a judge, correct?
>
> [APPELLANT]: Correct. Correct.
>
> THE COURT: All right. The Court, having heard the response of the defendant in this matter, believes that he is knowingly, intentionally and

> voluntarily waiving his right to a jury trial. He is asking to proceed by way of a bench trial and the Court is prepared to hear that case.

Based on this colloquy, appellant contends that his jury trial waiver was not made knowingly.

Rule 4-246(b) governs the waiver of the right to a jury trial in circuit court and provides in relevant part:

> Procedure for Acceptance of Waiver. A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the *waiver is made knowingly* and voluntarily.

(Emphasis added). Although there is no "fixed incantation" which the court must recite, the record must show that the defendant has "some knowledge of the jury trial right before being allowed to waive it." *Abeokuto v. State*, 391 Md. 289, 317-18 (2006) (citations omitted). "In determining whether a constitutional right has been violated, we make an independent, de novo, constitutional appraisal by applying the law to the facts presented in a particular case." *Williams v. State*, 372 Md. 386, 401 (2002).

Appellant contends that the waiver was deficient because the colloquy conducted by his counsel contained no information regarding the State's burden to prove his guilt beyond a reasonable doubt.[1] *Kang v. State*, 393 Md. 97 (2006), is instructive. In *Kang*,

[1] As the State aptly observes, that information would not distinguish a jury trial from a bench trial.

the Supreme Court of Maryland[2] upheld a jury trial waiver based on a colloquy, which likewise did not advise the defendant of the reasonable doubt standard. *Id*. at 109-10. In that case, the trial court provided a brief *voir dire,* informing Kang that a jury would consist of "12 men and women chosen from the community" that "would decide [his] guilt or innocence of the charges[,]" and "would have to unanimously agree upon [his] guilt[.]" *Id*. The Court stated that while the colloquy conducted by the trial judge was "not clothed in the finest cashmere," it informed Kang about "the fundamentals of a jury trial, including that the defendant possessed the right to a trial by a judge or jury; a jury consists of 12 individuals who are chosen from the defendant's peers; and a jury's decision must be unanimous[.]" *Id*. at 111-12.

In the instant matter, defense counsel informed appellant about his right to have either a bench or jury trial, confirming on the record that they had discussed this right. Defense counsel also informed him about the fundamentals of what a jury trial would entail, including the number of jurors who would deliberate, the jurors' county of residence, and the requirement that the jurors' verdict be unanimous. The record thus "more than adequately demonstrates that [appellant] possessed 'some knowledge' of his

[2] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

right to a jury trial." *Id*. at 111 (quoting *State v. Bell*, 351 Md. 709, 727 (1998)). Accordingly, the circuit court did not err in accepting appellant's jury trial waiver.

II.

Appellant next challenges the sufficiency of the evidence supporting his convictions for first-degree assault, reckless endangerment, and theft of Ms. Journet's cell phone. Maryland Rule 8-131(c) provides the standard for appellate review of bench trials:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the [circuit] court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the [circuit] court to judge the credibility of the witnesses.

The Supreme Court of Maryland has explained that, pursuant to this rule, the appellate court must "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.'" *Koushall v. State*, 479 Md. 124, 148 (2022) (emphasis and citation omitted); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We do not retry the case or draw "other inferences from the evidence." *Koushall*, 479 Md. at 148 (citations omitted). "[O]ur concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* at 148-49 (quoting *Taylor v. State*, 346 Md. 452, 457 (1997)). Moreover, "because the circuit court is entrusted with making credibility determinations, resolving conflicting evidence, and drawing inferences from the evidence, the reviewing court gives deference

to a trial judge's or a jury's ability to choose among differing inferences that might possibly be made from a factual situation." *Id*. at 149 (citations omitted) (cleaned up).

A. First-Degree Assault

Appellant challenges the first-degree assault conviction because there was insufficient evidence that he acted with the specific intent to cause Ms. Journet serious physical injury.

First-degree assault is prohibited under Md. Code, Criminal Law Article ("CR") § 3-202. At the time of the criminal conduct in this case (September 1, 2016), CR § 3-202(a)(1) provided that "[a] person may not intentionally cause or attempt to cause serious physical injury to another."[3] "Serious physical injury" means physical injury that "creates a substantial risk of death." CR § 3-201(d)(1).

The evidence was sufficient to support a finding of first-degree assault. Ms. Journet testified that appellant had "two hands" around her neck and his grip was "tight." Although Ms. Journet said that appellant's hands were not around her neck for long, her vision became blurry and breathing "a little tight," which the trial court could have reasonably inferred was impeding Ms. Journet's ability to breath. Ms. Journet also stated she thought

[3] Effective as of October 1, 2020, CR § 3-202 expressly prohibits strangulation as a modality of first-degree assault. Indeed, CR § 3-202(b)(3) now states that "[a] person may not commit an assault by intentionally strangling another[,]" and CR § 3-202(a) provides: "In this section, 'strangling' means impeding the normal breathing or blood circulation of another person by applying pressure to the other person's throat or neck." These new provisions of CR § 3-202 were not in effect at the time of appellant's conduct. Thus, these new provisions have no effect on our legal analysis in this opinion. For clarity and uniformity, the remainder of this opinion refers to the pre-October 2020 version of CR § 3-202.

she "was going to, like, pass out" and that she felt "like a dizziness, lightheaded." When appellant had his hands around her neck, she screamed, "stop, don't kill me" because she thought she "was going to die." Although the incident may not have left scratches to her face or neck, there was evidence that Ms. Journet experienced bruising on or about her face, redness around her chin/chest/shoulder, and neck pain.

Although he acknowledges that a factfinder may infer intent to injure from surrounding circumstances regardless of whether a victim suffers physical injury, appellant attempts to compare the sufficiency of the evidence here against that in other cases where intent to injure was inferred based on apparent physical injuries. He argues that the evidence in the instant case does not measure up to facts in other cases: Ms. Journet did not have scratches or marks on her face and neck, and, in any event, appellant had attempted to diffuse the domestic dispute by leaving the home. According to appellant, it was only when Ms. Journet prevented appellant from leaving that he "momentarily" placed his hands around Ms. Journet's neck. On that premise, appellant contends that the evidence was insufficient to support a first-degree assault conviction.

If we adopted appellant's facts-comparison approach, we would run afoul of the established principles for reviewing sufficiency challenges. As this Court has explained,

> In the most basic of terms, the critical issue, regardless of the trial modality, is whether the State has satisfied its burden of production. The issue of legal sufficiency of the evidence is not concerned with the findings of fact based on the evidence or the adequacy of the factfindings to support a verdict. It is concerned only, at an earlier pre-deliberative stage, with the objective sufficiency of the evidence itself to permit the factfinding even to take place. The burden of production is not concerned with what a factfinder, judge or jury, does with the evidence. It is concerned, in the abstract, with

> what any judge, or any jury, anywhere, could have done with the evidence. It is an objective measurement, quantitatively and qualitatively, of the evidence itself. It is a question of supply and not of execution.
>
> In a criminal case, no issue is more important than whether the State has satisfied its burden of production. The concern is with production, as a matter of law, and not with persuasion, as a matter of fact. The appellate assessment of the burden of production is made by measuring the evidence that has been admitted into the trial objectively and then determining whether that body of evidence is legally sufficient to permit a verdict of guilty.

Chisum v. State, 227 Md. App. 118, 129-30 (2016) (footnote omitted). In other words, "the question is not what the particular trial judge in that particular case did with the evidence but whether the evidence itself was sufficient to permit 'any rational trier of fact' to return a verdict of guilty based on that evidence[.]" *Id*. at 130 n.1 (citation omitted). The evidence was sufficient for the trial court to conclude that appellant attempted to cause serious physical injury to Ms. Journet, and thus the evidence was sufficient to find that he committed first-degree assault.

B. Reckless Endangerment

Appellant argues that the evidence was insufficient to find him guilty of reckless endangerment because "[h]olding someone by the neck momentarily, where the person does not lose consciousness or require medical attention, as was the evidence here, does not amount to reckless conduct necessary to sustain a conviction for reckless endangerment." In support of his sufficiency claim, appellant relies on a trial court decision by the Connecticut Superior Court[4] in *State v. Atkinson*, 741 A.2d 991 (1999).

[4] The Connecticut Superior Court is not an appellate court; it is a trial court that "hears all legal controversies except those over which the Probate Court has exclusive

That case involved a domestic altercation where the defendant "placed his hands around [the victim's] throat and choked her for a few moments as he pushed the victim down sideways onto the couch." *Id*. at 996. The event was interrupted when the victim's daughter heard screaming and came downstairs during the assault. *Id*. "Within moments, as [the daughter] cried out for him to stop, the defendant responded by ceasing his assault and removing his hands from the victim's throat. The victim, who had 'blacked out' temporarily, revived when she heard her daughter crying." *Id*. at 996.

The trial court in *Atkinson* applied an "extreme indifference to human life" standard for first-degree reckless endangerment under Connecticut statutory law. *Id*. at 998. It concluded that the "momentary use of the defendant's hands in a choking motion about the victim's neck, without a weapon or instrument other than his hands and arms, without causing permanent disfigurement or lasting physical injury to the victim, notwithstanding her brief loss of consciousness" was insufficient to meet that standard. *Id*. at 1001.

To prove reckless endangerment under Maryland law, however, the State is not required to establish that the defendant acted with "extreme indifference to human life."[5] *See* CR § 3-204(a)(1) (stating that "[a] person may not recklessly: (1) engage in conduct

jurisdiction." About Connecticut Courts, STATE OF CONNECTICUT, JUDICIAL BRANCH, https://www.jud.ct.gov/ystday/orgcourt.html (last visited Jan. 6, 2023).

[5] That element, by contrast, must be proved in depraved-heart murder. *See Beckwitt v. State*, 477 Md. 398, 468 (2022) (charge of depraved-heart murder requires showing "that the act in question be committed under circumstances manifesting extreme indifference to the value of human life").

that creates a substantial risk of death or serious physical injury to another"). Therefore, appellant's reliance on the Connecticut Superior Court's decision in *Atkinson* is misplaced.

Appellant also attempts to minimize his actions from a temporal perspective, characterizing his conduct as a "momentary" seizure of Ms. Journet's neck. As explained in Section II.A, *supra*, although Ms. Journet testified that the time the appellant's hands were around her neck was "not long because [she] was screaming[,]" the evidence established that the appellant strangled her to the point where her breathing, vision, and consciousness were diminished. For all these reasons, the evidence was sufficient to find that appellant's conduct created a substantial risk of death or serious physical injury to another.

C. Theft

Appellant argues that the evidence was insufficient to support a theft conviction because the State failed to prove that he acted with the requisite intent to deprive Ms. Journet of her cell phone. At trial, defense counsel argued that the evidence was insufficient to prove theft because appellant merely threw the phone to the other side of the street. The trial court rejected that argument:

> The testimony that the Court has received is that [appellant] took the phone. He didn't have her permission and he threw it across the street. And it was described to the Court as the property, the sidewalk, the street, and that it was thrown away from the home, away from where the victim had possession and control over it.

On appeal, appellant argues, "[w]here the phone was left at the scene, [appellant] made no attempt to take it with him as he left, and it was quickly recovered by Journet, the

State failed to establish that [appellant] intended to 'deprive' Journet of the phone, as contemplated under the theft statute."

CR § 7-104(a), in relevant part, provides that "[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[.]" "Exert control" means, *inter alia*, "to take" or "carry away." CR § 7-101(d)(1). "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.

CR § 7-101(c).

There is sufficient evidence for the court to have found that appellant committed theft beyond a reasonable doubt. First, appellant undisputedly exerted unauthorized control over the cell phone by "grabbing" Ms. Journet's phone.

Second, the evidence was sufficient to support the court's finding that appellant intended to deprive Ms. Journet of the cell phone. Ms. Journet testified that appellant "threw [the phone] across the street" into a neighbor's yard. The intent to deprive Ms. Journet of the cell phone can be inferred from his handling of the property. *See Lee v. State*, 59 Md. App. 28, 43 (1984) ("The requisite mental state of having an intent to deprive is most frequently proved by the defendant's handling of the property.") (citation omitted).

That Ms. Journet eventually recovered the phone later is immaterial. *See*, *e.g.*, *id.* (upholding a theft conviction even though defendant returned concealed merchandise upon approach by store employee; that defendant did not leave store with merchandise did not negate his intent to deprive the store of its property). Here, by throwing the phone across the street, the trial court could have found that appellant had the requisite mental state of having an intent to deprive Ms. Journet of the phone. The evidence was sufficient to find appellant guilty of theft of property.

III.

Finally, appellant claims that his reckless endangerment sentence is illegal and should be vacated. As stated, the court imposed a sentence of ten years, with four years suspended, for first-degree assault and a concurrent sentence of six months for reckless endangerment. Because both convictions were based on the same act of strangulation, appellant argues that those convictions should have been merged under the required evidence test, resulting in a single sentence for the greater offense of first-degree assault.

Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "The sentence may be attacked on direct appeal[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). However, "the only temporal limitation on 'at any time' is that the correction must occur before the sentence is fully served." *State v. Bustillo*, 480 Md. 650, 664 (2022) (citing *Barnes v. State*, 423 Md. 75, 86 (2011)). Claiming that his reckless endangerment sentence is illegal, appellant asks us to vacate that sentence. That six-month sentence, however, was imposed in January 2018, more than four years before appellant filed his

notice of appeal in February 2022. In other words, appellant's sentence for reckless endangerment has been fully served. Consequently, his merger claim is moot. *See Barnes*, 423 Md. at 88 (holding that, after a defendant serves his or her full sentence, the issue of sentence illegality is moot because the court can "no longer fashion an effective remedy"; case dismissed as moot).

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.