Circuit Court for Worcester County
Case Nos. C-23-CR-18-000020 and C-23-CR-18-000033

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 2231 and 2243

September Term, 2018

GARLAND AVIAS MOSS

v.

STATE OF MARYLAND

Nazarian,
Wells,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 6, 2019

*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.

Following a jury trial in the Circuit Court for Worcester County, Garland Moss, appellant, was convicted of theft, eluding, negligent driving, reckless driving, speeding, and two counts of second-degree assault of the intent to frighten type. He raises four issues on appeal: (1) whether there was sufficient evidence to sustain his convictions for second-degree assault; (2) whether his second-degree assault convictions should have merged; (3) whether there was sufficient evidence to sustain his conviction for theft; and (4) whether the circuit court failed to comply with § 6-103(a) of the Criminal Procedure Article and Maryland Rule 4-271(a) when it permitted him to be tried on the assault and traffic charges in Circuit Court Case No. C-23-CR-18-000020 more than 180 days after his initial appearance.[1] For the reasons that follow, we affirm.

I.

Mr. Moss first contends that there was insufficient evidence to sustain his convictions for second-degree assault of the intent to frighten type. In reviewing the sufficiency of the evidence, we ask "whether, after reviewing 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." *Ross v. State*, 232 Md. App. 72, 81 (2017) (citation omitted). Furthermore, we "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the" State. *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Abbott v. State*, 190 Md. App. 595, 616

[1] Mr. Moss was charged with theft and eluding in Circuit Court Case No. C-23-CR-18-000033. He does not contend that his statutory right to a speedy trial was violated as to those charges.

(2010)). In this analysis, "[w]e give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Potts v. State*, 231 Md. App. 398, 415 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)). Whether a conviction is based on direct evidence, circumstantial evidence, or both does not affect our review. *Id.*

A defendant commits second-degree assault of the intent-to-frighten type where: (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. *Snyder v. State*, 210 Md. App. 370, 382 (2013) (citation omitted). The State may prove a defendant's intent through "direct [evidence] or circumstantial evidence[.]" *Thorton v. State*, 397 Md. 704, 714 (2007).

At trial, the State presented evidence that Mr. Moss took a television set from Wal-Mart without paying for it; fled the parking lot in his vehicle when he was approached by the police; pulled onto Route 113, a four-lane highway; and then drove over five miles in the wrong lane of travel at speeds of over 100 miles per hour. Based on this incident, the jury convicted Mr. Moss of two counts of second-degree assault of the intent to frighten type. The charged victims were Worcester County Sheriff's Deputy Shane Musgrave and "Jane/John Doe," which the State argued could be any one of the unidentified drivers that Mr. Moss almost struck with his vehicle as he fled.

In challenging the sufficiency of the evidence, Mr. Moss claims that the State failed to prove that he had the specific intent to frighten the victims. However, the jury could

reasonably find that he had the specific intent to frighten Detective Musgrave based on the evidence that: (1) Detective Musgrave was in a marked police vehicle with his emergency equipment activated driving in the left southbound lane of Route 113; (2) when Deputy Musgrave observed Mr. Moss driving toward him in the opposite direction, he moved his vehicle into the right lane to avoid a collision; (3) Mr. Moss then changed lanes so that he was again traveling in the same lane as Deputy Musgrave; and (4) Mr. Moss continued to drive his vehicle directly at Detective Musgrave's vehicle as if to strike him and only re-routed to avoid a head-on collision at the very last moment." Moreover, as to "John/Jane Doe," there was sufficient evidence that Mr. Moss intentionally created a zone of danger for the other vehicles on the road based on the testimony that he: (1) drove at a speed of greater than 100 miles per hour in the wrong lane of travel for over five miles; (2) continued to drive in the wrong lane of travel even after the police initially stopped pursuing him; (3) forced multiple vehicles off the roadway during that time; and (4) came within "inches" of striking several vehicles. And having created this zone of danger, the jury could reasonably conclude that Mr. Moss intended to place everyone in the zone of danger in fear of immediate harm, even if he did not know the identity of each individual driver. *See Jones v. State*, 440 Md. 450, 456 (2014) (holding that where "a defendant intentionally commits an act that creates a zone of danger, and where the defendant knows that multiple people are in the zone of danger, the defendant intends to place everyone in the zone of danger in fear of immediate physical harm – even if the defendant does not know of a particular victim's presence in the zone of danger").

Mr. Moss also claims that the State failed to prove that he had the "apparent present ability [to bring about physical harm] from the viewpoint of [John/Jane Doe]" because "[n]o 'John or Jane Doe' victim ever testified to such frightening." However, a victim's state of mind can be proven circumstantially even if the victim does not testify. *See Edmund v. State*, 398 Md. 562, 577 (2007). And the State introduced Detective Musgrave's dashcam video, which showed multiple people swerving to avoid a collision, and a recording of multiple 911 calls from people who had observed Mr. Moss driving towards them at a high rate of speed. Therefore, we are persuaded that the State presented sufficient evidence that the "John/Jane Doe" victim was aware that Mr. Moss had the apparent ability to cause him or her harm.

II.

Mr. Moss next asserts that his second-degree assault convictions should merge for sentencing purposes because they are "two offenses based on the same act or acts, and . . . are [ ] the same under the required evidence test." However, even if we assume that Mr. Moss's flight constituted a continuous course of conduct, and therefore was a single act for merger purposes, the required evidence test is inapplicable in this case as he was not sentenced for two different statutory offenses. Rather, he was sentenced for two counts of the same offense. And the issue of "[w]hether a particular course of conduct" permits "multiple sentences for the same offense . . . turn[s] on the unit of prosecution of the offense." *Brown v. State*, 311 Md. 426, 432 (1988).

Notably, Mr. Moss does not make any arguments in his brief regarding the appropriate unit of prosecution for the crime of second-degree assault of the intent to

frighten variety. Consequently, the issue of whether his assault convictions merge under a unit of prosecution theory is not properly before this Court. *See Diallo v. State*, 413 Md. 678, 692-93 (2010) (noting that arguments that are "not presented with particularity will not be considered on appeal" (citation omitted)). But, even if the issue had been raised with sufficient particularity we would find no error as the unit of prosecution in an assault case is the victim and the jury convicted Mr. Moss of assaulting two separate victims. *See Battle v. State*, 65 Md. App. 38, 50 (1985) ("Both an aggravated assault [ ] and a simple assault [ ] may be multiplied when there are multiple victims. The unit of prosecution is the victim."). Therefore, the court was not required to merge his second-degree assault convictions.

III.

Finally, Mr. Moss claims that there was insufficient evidence to sustain his theft conviction and that the circuit court violated his statutory speedy trial rights when it permitted him to be tried on the assault and traffic charges more than 180 days after his initial appearance. However, when making his motion for judgment of acquittal, defense counsel did not challenge the sufficiency of the evidence with respect to the theft charge. Moreover, defense counsel never requested the court to dismiss the charges in Case No. C-23-CR-18-000020 based on violation of Mr. Moss's speedy trial rights.[2] Consequently, neither of these claims are preserved for appeal. *See* Maryland Rule 8-131(a). And

[2] Mr. Moss has not provided us with a copy of the transcript from the July 12, 2018, hearing where his case was postponed past the 180-day mark. However, we note that the docket entries indicate the critical postponement was granted at the request of defense counsel, and the administrative judge found "good cause" to support that request.

although Mr. Moss does not specifically ask us to do so, we decline to exercise our discretion to engage in "plain error" review of these issues.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.