Circuit Court for Baltimore County
Case No.: 3K-17-1-625

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2386

September Term, 2017

JUAN ALBERT SOTO, JR.

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: November 21, 2018

*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.

On January 18, 2018, appellant, Anthony Juan Albert Soto, Jr., was convicted by a jury sitting in the Circuit Court for Baltimore County of home invasion, first-degree burglary, robbery with a dangerous weapon, carrying a dangerous weapon openly with the intent to injure, first-degree assault, and theft under $100. The court sentenced him to twenty years of incarceration for armed robbery, a concurrent twenty-five years of incarceration for home invasion, and a concurrent three years of incarceration for carrying a dangerous weapon openly with the intent to injure. This timely appeal followed wherein he argues that the evidence was legally insufficient to sustain his convictions, and that the "trial court erred by failing to merge appellant's conviction for carrying a dangerous weapon openly with the intent to injure into appellant's conviction for robbery with a dangerous weapon." We disagree and affirm.

BACKGROUND

On December 9, 2016, William Elwood lived at 7856 Rockbourne Road in Dundalk, where he rented a room from the homeowner, Teresa Singh, who also lived in the home. Also present that morning was Christopher Alias, Singh's cousin, and a frequent visitor to the home. Alias left the home and sometime around 10:00 a.m. Singh asked Elwood if he would join her on the enclosed porch at the back of the house while she smoked a cigarette. Elwood agreed and the two sat on the porch together. Sometime soon thereafter the telephone rang inside the home and Singh excused herself to answer it.

As Elwood sat alone on the enclosed porch, a man with a dark hoody tied around his face burst in from outside and began striking him in the head with a bat and his fists. The attacker went through his pockets and took about $30 from his person. Just then Singh

came to the door separating the enclosed porch from the main house and yelled that she had called 911. The attacker then left the home. Elwood then called 911 himself and discovered that Singh had not yet called.

Elwood was transported to the hospital where he received eight stitches to his forehead. While the assailant was able to take $30 from his pants pocket, an additional $1,000 located in the pocket of a second pair of pants which Elwood wore underneath his outer pair of pants, was left undisturbed. During the robbery, the assailant felt around Elwood's pockets and the $1,000 wad of cash, but was unable to extract it due to the two layers of pants he wore.

Elwood advised responding officers that he had told Singh about the money and that he believed Singh had then told her cousin Christopher Alias about the money. Elwood did not, however, tell Singh that he wore two pairs of pants, and that he kept the money in the inner pair of pants. Police officers canvassing the area discovered that a neighbor had surveillance cameras affixed to his home which pointed toward the enclosed porch at the back of Singh's home, and towards a neighboring street. A review of the captured camera footage revealed that at 9:55 a.m. on December 9th, a blue Chrysler 200 and black Pontiac Grand Prix circled the block. The two cars then drove slowly down the alley directly behind Singh's home. The two cars then passed the back of Singh's house and parked on an adjacent street. A man wearing dark colored clothing and carrying a bat was then seen exiting the black Pontiac and walking down the alley behind Singh's home. At approximately 10:24 a.m. the man is seen on the video entering the enclosed porch at the back of Singh's home. At 10:26 a.m. the man is seen exiting the porch and running down

the alley towards the black Pontiac. The man then entered the black Pontiac and approximately a minute later drove away.

Police placed still pictures from the video on an informational flyer which was then distributed to police officers in an attempt to generate leads on the case. Christopher Alias's name was also included on the flyer. Two police officers who had stopped a black Pontiac Grand Prix on November 29, 2016 saw the flyer and alerted the investigating detective of the traffic stop. They advised that Christopher Alias was the last known owner of the car they had stopped, and that appellant was the driver of the car at the time of the stop.[1] Alias was arrested two days after the home invasion and his phone records were subpoenaed. A review of the phone records revealed numerous texts and calls between Alias and both Singh and appellant on the morning of the home invasion.[2]

Alias pled guilty to conspiracy to commit robbery with a dangerous and deadly weapon of Elwood and agreed to testify against appellant at trial. He testified that on the morning of December 9, 2016, Singh had told him that she wanted Elwood out of the house because he was not paying her rent. She told Alias that she was scared to tell Elwood that she wanted him to leave because he knew about her drug use, prostitution, and other elicit behavior. She asked Alias if he could "rough up" Elwood in an attempt to have him move out of the house. Alias refused to assault Elwood, but told Singh that he would ask

[1] Alias advised that he had sold appellant the car prior to the traffic stop.

[2] Appellant had given officers his phone number after the stop of his vehicle on November 29, 2016. Officers also subpoenaed his phone records. There were thirty-eight calls or texts between Alias and Singh between 8:42 a.m. and 10:41 a.m. There were seventeen calls or texts between Alias and appellant between 9:03 a.m. and 12:13 p.m.

someone else. It was then that he asked appellant, a friend of his, if he would assault Elwood. When appellant asked what he would get in return, Singh advised Alias to tell him that Elwood had "a few thousand dollars" in his pocket and that appellant could keep it as payment. Appellant then agreed and he and Alias drove to Singh's house. Alias advised that he was driving his blue Chrysler 200 and appellant was driving the black Pontiac that he had sold him. He further testified that he showed appellant Singh's home, including the rear of the home which faced the alley. Alias drove away from the location as appellant approached the house. Afterwards appellant called Alias and sounded "irate" on the phone because Elwood did not have the "few thousand dollars" on his person as Alias had so advised.

DISCUSSION

Sufficiency of Evidence

Appellant first argues that the evidence is insufficient to sustain his convictions. We disagree.

"In reviewing a challenge to the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the prosecution in order to determine whether, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Montgomery v. State*, 206 Md. App. 357, 385 (quoting *Morris v. State*, 192 Md. App1, 31 (2010), *cert. denied*, 429 Md. 83 (2012)).

Upon review, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery*, 206 Md. App. at 385

(quoting *Morris*, 192 Md. App. at 31). "In order to sustain a conviction of an adult based upon the testimony of an accomplice, that testimony must be corroborated by some independent evidence." *In re Anthony W.*, 388 Md. 251, 263-64 (2005).

> Not much in the way of evidence corroborative of the accomplice's testimony has been required by our cases. We have, however, consistently held the view that while the corroborative evidence need not be sufficient in itself to convict, it must relate to material facts tending to either (1) to identify the defendant with the perpetrators of the crime, or; (2) to show the participation of the accused in the crime itself.

Correll v. State, 215 Md. App. 483, 500 (2013).

Appellant argues that "where no physical evidence tied appellant to the scene and appellant had no prior history with the victim, such slim evidence simply would not allow a rational trier of fact to reasonably conclude, beyond a reasonable doubt, that appellant is the person who committed the crimes." While appellant is correct in that there was no physical evidence recovered which tied him to the case, his co-conspirator testified that appellant was the assailant. Alias's testimony was corroborated by the phone records which showed him in constant contact with both Singh and appellant at the time of the robbery. There were twelve calls or texts between appellant and Alias between 9:03 a.m. and 10:12 a.m. The robbery took place between 10:24 a.m. and 10:26 a.m., and the phone records showed no contacts between Alias's and appellant's phone during that time. At approximately 10:28 a.m. Alias called appellant, and appellant returned the call to Alias at 10:29 a.m.

Alias's testimony was also corroborated by the surveillance video which showed the two cars circling the block just prior to the robbery, and the cars then parking on an

adjacent street. We are satisfied that the phone records and video surveillance is adequate corroboration of Alias's testimony, and that based on Alias's testimony a rational trier of fact could have found appellant committed the home invasion.

Merger

Appellant next contends that the "trial court erred by failing to merge appellant's conviction for carrying a dangerous weapon openly with the intent to injure into appellant's conviction for robbery with a dangerous weapon." We disagree.

To determine whether one offense merges into another, we use the "required evidence test." *Marlin v. State*, 192 Md. App. 134, 158-59 (2010). In this test, we focus "upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Id.* at 159. "'When there is a merger under the required evidence test, separate sentences are normally precluded.'" *Moore v. State*, 198 Md. App. 655, 685 (2011) (quoting *State v. Lancaster*, 332 Md. 385 (1993)).

Here appellant was convicted of carrying a dangerous weapon openly with the intent to injure. Such offense requires the "intent to harm someone." *Sullivan v. State*, 132 Md. App. 682, 689 (2000). In contrast, robbery with a dangerous weapon does not require the intent to harm, but does require the intent to permanently deprive the property owner of his property. *State v. Gover*, 267 Md. 602, 606 (1973). Further, robbery with a deadly weapon requires the intent to rob "by means of intimidation produced by the use of the weapon, coupled with the apparent ability to execute the threat." *Eldridge v. State*, 329 Md. 307,

316 (1993). As both offenses contain elements that the other does not, merger is not required under the "required evidence test."

In addition, the two offenses do not require merger under the rule of lenity. Addressing this issue in *Selby v. State*, we reviewed a number of cases involving the application of the rule of lenity and determined:

> "A common thread connects all the cases we have just [reviewed]. It is the assumption (often not articulated) that under the circumstances of a given case, it is reasonable to believe that the legislature that enacted a particular statute or statutes would express some intent as to multiple punishment. That assumption is appropriate when a single act is charged as multiple offenses under a single statute ..., where the subject of two statutes is of necessity closely intertwined ..., where one offense is necessarily the overt act of a statutory offense ... and where one statute, by its very nature, affects other offenses because it is designed to effect multiple punishment.... Under those circumstances, it is not unreasonable to assume that the legislative body contemplated the possibility of multiple punishment and to conclude that unless the intention in favor of multiple punishment is clear ..., the Rule of Lenity or its equivalent should be applied against the imposition of multiple punishment. (Citations omitted)"

76 Md. App. 201, 219 (1988) (quoting *Johnson v. State*, 56 Md. App. 205, 215 (1983) (*cert. denied*, 299 Md. 136 (1984)). In *Selby* we declined to apply the rule of lenity and merge the offense of carrying a weapon openly with intent to injure into robbery with a dangerous or deadly weapon.

Just as in *Selby*, the rule of lenity does not apply to the particular facts of this case. Not only did appellant carry the bat openly with intent to injure, he actually used the bat and brutally beat the victim. Appellant committed these offenses after being directed by Alias to beat the victim so that the victim would move from the home. The robbery was

simply payment for completing the assault. This was an offense beyond and separate from the armed robbery, and as such, we decline to apply the rule of lenity.

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