UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0122

September Term, 2014

BARRINGTON SWEENEY

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: June 16, 2015

Barrington Sweeney, appellant, was charged in the Circuit Court for Baltimore County with first, third, and fourth-degree burglary and two counts of theft of property having a value of at least $1,000 but less than $10,000. After a jury trial on February 11-12, 2014, he was convicted of first-degree burglary. Appellant was sentenced to incarceration for a term of twenty years with all but fifteen years suspended and upon release a period of five years supervised probation. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> [I]. Must this Court vacate appellant's convictions for third-degree burglary, fourth-degree burglary, and two counts of theft of goods valued between $1,000 and $10,000, and correct the docket entries and commitment record accordingly, where no verdicts were entered on the verdict sheet or announced in court on any of these counts?
>
> [II]. Did the circuit court err in instructing the jury on accomplice liability?

For the reasons outlined below, we shall vacate the convictions for third and fourth-degree burglary and two counts of theft. We shall remand this case to the circuit court for correction of the docket entries and commitment record consistent with this opinion. In all other aspects, we shall affirm judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2013, at about 6:20 in the morning, Linda Ross left her home at 1002 Leeds Avenue in Baltimore County and went to work. Her daughter, Jennifer, who also lived at the home, woke up shortly before 9 a.m. A short time later, Jennifer left the home.

She locked the doors as she left, accompanied her sister and niece to school, and then went to a gym. According to Jennifer, when she left the home it was "clean" and "[p]ut together."

Upon returning home, Jennifer opened the front door and heard the telephone ringing. She answered the call, which was from her father. While talking to him, she walked into the kitchen and saw a large suitcase on the floor that had not been there before. She also saw that the back door had been broken in and was wide open. Jennifer hung up the phone and called 911.

Subsequently, Linda Ross returned home. She saw the suitcase, which previously had been stored in the basement, lying on the kitchen floor. Both Linda and Jennifer walked through the house and observed that it had been ransacked. The dresser drawers in Linda's bedroom were pulled out of the dresser and its contents had been removed. Envelopes and mail were "everywhere[.]" Linda's armoire jewelry box and the jewelry that was kept in it, were gone. That jewelry included more than fifty Pandora beads worth $35 to $80 each, a ring that had belonged to Linda's mother worth around $3,500, two diamond rings worth $1,500 to $2,000 each, a strand of pearls worth $500, and some birthstone jewelry. In addition, $500 cash, some pillow cases, checkbooks, prescription medicines belonging to both Linda and Jennifer, and three cameras, worth $200 to $300, were missing. A television that had a built in DVD player was missing from a spare bedroom. Also missing were Jennifer's iPad mini, worth about $400, her laptop computer with a Nightmare Before

Christmas decal on it, worth about $400, her jewelry, including a Fossil watch valued at $200, a Kindle, and some phone chargers.

Baltimore County Police Officer J.P. Gainor was the first to respond to the burglary call. After observing that the back door had been broken in and that "somebody had rummaged through the location," he radioed for a crime scene technician. A crime scene technician later processed the scene for fingerprints.

In the course of their investigation of the burglary, police located a witness who was in possession of several goods taken during the robbery including an iPad. That witness led police to Franklin Ludwig, ("Mr. Ludwig") who resided at 1811 Ramsay Avenue in Baltimore City. Police obtained and executed a search and seizure warrant for Mr. Ludwig's address. Baltimore County Police Detective Todd Wiedel, who assisted in the execution of the search warrant, testified that both appellant and Mr. Ludwig were present in the Ramsay Avenue home at the time the search was conducted. Police recovered a pair of brown gloves from appellant's left rear pants pocket and two checkbooks belonging to Linda Ross from his right rear pants pocket. Police also recovered Linda's pillowcases, Jennifer's laptop computer, two cameras, some Pandora beads, and the television that had been in Linda's spare bedroom. They also seized $130 in cash and some Pandora beads from Mr. Ludwig.

David Reyes, ("Mr. Reyes"), a licensed precious metals dealer who owns a pawn shop in Ellicott City, purchased a number of pieces of jewelry from appellant. Mr. Reyes

photocopied appellant's driver's license and paid appellant $440 for some gold jewelry including rings, earrings, pendants, necklaces, and bracelets.

Police showed Linda photographs of items that had been sold to the pawn shop and she identified them as her property. About two months after the burglary, Linda went to the pawn shop and saw several Pandora beads in the same unique bags that she had used to store her Pandora beads. Linda testified that the bags were somewhat unique because customers don't usually get them when they purchase Pandora beads at a store. Linda had acquired the bags when she purchased beads at a discount from her cousin who worked for the Pandora company.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues on appeal.

DISCUSSION

I.

Appellant first contends that the docket entries erroneously indicate that he was convicted of third-degree burglary, fourth-degree burglary, and two counts of theft, and that those crimes merged into his conviction for first-degree burglary. Appellant further contends that at the sentencing hearing, State, appellant's counsel, and the trial judge erroneously proceeded with the understanding that he had been convicted of third-degree burglary, fourth-degree burglary, and two counts of theft, all of which merged into the first-degree burglary conviction, when, in fact, the jury had not found him guilty of those charges.

Appellant asserts that because the only verdict entered on the verdict sheet and orally announced was a guilty finding for first-degree burglary, the convictions for the remaining charges must be vacated. The State agrees and so do we.

Both the verdict sheet and the transcripts reveal that after the jury entered a guilty verdict for first-degree burglary, it did not proceed to the remaining charges listed on the verdict sheet. The first crime listed on the verdict sheet was first-degree burglary, and the following instruction was written below the space for indicating guilty or not guilty as to first-degree burglary:

> If your answer is "Not Guilty," go on to Question 2. If your Answer is "Guilty," stop here as your deliberations are complete. The foreperson should sign the Verdict Sheet and notify the clerk that you have reached a verdict.

The foreperson wrote "Yes" next to the space indicating "Guilty" as to first-degree burglary and then signed and dated the verdict sheet without indicating any verdict as to the three remaining offenses. Only the jury's guilty verdict as to first-degree burglary was announced in open court, polled, and hearkened. After the jury was dismissed, the court inquired as to whether the remaining counts merged. State responded, "[m]erge, yeah," but appellant's counsel did not respond.

At appellant's sentencing hearing, State, appellant's counsel, and the court agreed that the charges of third and fourth-degree burglary and the two theft counts merged into the

first-degree burglary conviction. The docket entries and an amended commitment record both show that appellant was found guilty of third and fourth-degree burglary and the two theft counts and that each of those counts merged into the first-degree burglary conviction.

At the time of the underlying trial, Maryland Rule 4-327(a) provided, as it does now, that "[t]he verdict of a jury shall be unanimous and shall be returned in open court." The Court of Appeals has held that the requirement to return the verdict in open court demands an oral announcement of the verdict, an opportunity for the defendant to exercise his or her right to poll the jury, and hearkening. *Jones v. State*, 384 Md. 669, 685 (2005). In *Jones*, four counts were submitted to the jury, but it orally announced verdicts on only three of them. *Id.* at 675-76. No mention of the fourth count was made when the jury was polled and hearkened. *Id.* at 676. Nevertheless, Jones was sentenced on the count for which no verdict had been orally announced. *Id.* at 677. The Court of Appeals held that the sentence on the count that had not been announced orally was illegal. *Id.* at 685-86.

The same reasoning applies in the instant case. Because no verdict was announced in open court or entered on the verdict sheet for any count except first-degree burglary, the convictions for third and fourth-degree burglary and the two counts of theft are illegal and must be vacated. The docket entries and commitment record must be amended. The docket entries and the commitment record must show, as the transcript shows, that the jury returned a verdict only as to the first-degree burglary charge and that no verdict was returned as to the remaining charges. *Gatewood v. State*, 158 Md. App. 458, 481-82 (2004) (where there

is conflict between the docket entries and the transcript, the transcript controls), *aff'd on other grounds*, 388 Md. 526 (2005); *Douglas v. State*, 130 Md. App. 666, 673 (2000) (where there is conflict between the commitment record and the transcript, unless it is shown that the transcript is in error, the transcript controls).

II.

Appellant next contends that the trial court abused its discretion in instructing the jury on accomplice liability, because there was no evidence from which the jury could have concluded that appellant aided and abetted some other individual in committing the burglary. We review a trial court's decision to give a jury instruction under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (2011); *Thompson v. State*, 393 Md. 291, 311 (2006). When deciding whether a trial court abused its discretion, we consider whether the requested instruction was a correct statement of the law, whether it was applicable under the facts of the case, and whether it was fairly covered in the instructions actually given. *Stabb*, 423 Md. at 465. An abuse of discretion will be found where the court's exercise of discretion was "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Bazzle v. State*, 426 Md. 541, 549 (2012) (quoting *In re Don Mc.*, 344 Md. 194, 201 (1996)). Pursuant to Maryland Rule 4-325(c), a trial court must give a requested instruction when "'(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Cost v. State*, 417 Md. 360,

368-69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)); *see also* Md. Rule 4-325(c). With this standard in mind, we turn to the case at hand.

Over objection, the trial court instructed the jury on accomplice liability as follows:

> The Defendant may be guilty of burglary in the first degree as an accomplice, even though the Defendant did not personally commit the acts that constitute the crime. In order to convict the Defendant of burglary in the first degree as an accomplice the State must prove that the burglary in the first degree occurred and that the Defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime, or communicated to a primary actor in the crime that he was ready, willing and able to lend support if needed.
>
> A person need not be physically present at the time and place of the commission of the crime in order to act as an accomplice.

A review of the record reveals ample evidence to generate the instruction on accomplice liability. Although there were no witnesses to the burglary, and no fingerprints or DNA evidence connecting appellant to Linda Ross's home, evidence was presented to show that on the same day as the burglary, appellant went to Mr. Reyes's pawn shop in Ellicott City and pawned a number of pieces of jewelry that were taken in the burglary. That night, when police executed a search warrant at 1811 Ramsey Avenue, appellant and Mr. Ludwig were the only people in the house. Police found a number of items in the Ramsay Avenue house that had been taken from the Rosses during the burglary. Police also recovered gloves and two checkbooks belonging to Linda Ross from appellant's pants pockets. There was no evidence that appellant lived at the Ramsey Avenue location, but the evidence showed that Mr. Ludwig was the primary resident. Police recovered from Mr.

Ludwig some of the jewelry taken in the burglary as well as $130 in cash. From the evidence that mere hours after the burglary, both appellant and Mr. Ludwig were found together in Mr. Ludwig's residence, each in possession of stolen items. Mr. Ludwig was in possession of jewelry and cash, which were numerous stolen items were in Mr. Ludwig's home. Appellant pawned a number of items taken during the burglary. A jury could reasonably infer that appellant and Mr. Ludwig committed the burglary together. As a result, the trial court did not abuse its discretion in instructing the jury on accomplice liability.

Even if there was no evidence to support the jury instruction, any error in giving it would have been harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). In *Brogden v. State*, 384 Md. 631 (2005), the Court of Appeals commented that an unnecessary or superfluous jury instruction can sometimes be erroneous, such as when it "purports to place a burden of proof on a defendant to prove a defense that the defendant never raised." *Brogden,* 384 Md. at 645 n.6. In the case at hand, the accomplice liability instruction did not shift the burden of proof to appellant. The State argued consistently that appellant was the burglar and thief. When appellant attempted to lay the blame exclusively on Mr. Ludwig, the State argued in closing that there was evidence from which the jury could find that both appellant and Mr. Ludwig were the burglars and thieves. Moreover, the jury was reminded a number of times throughout trial, including in the final jury instructions, that the burden of proof rested with the State alone. Thus, even if the trial court

abused its discretion in giving the accomplice liability instruction, any such error would have been harmless beyond a reasonable doubt.

CONVICTIONS AND SENTENCES FOR THIRD-DEGREE BURGLARY, FOURTH-DEGREE BURGLARY, AND TWO COUNTS OF THEFT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR CORRECTION OF THE DOCKET ENTRIES AND COMMITMENT RECORD. JUDGMENTS AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID BY BALTIMORE COUNTY.