Circuit Court for Montgomery County
Case No. 127302

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1883

September Term, 2016

ALEXANDER BROWN

v.

STATE OF MARYLAND

Graeff,
Berger,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 3, 2017

Appellant, Alexander Brown ("Brown"), was convicted by the Circuit Court for Montgomery County of first-degree assault, conspiracy to commit first-degree assault, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Appellant presents three questions on appeal, which we have revised slightly:

> I. Whether the suppression court erred in denying appellant's motion to suppress three items seized by the police.
>
> II. Whether the trial court erred by sentencing appellant separately for robbery with a dangerous weapon and first-degree assault.
>
> III. Whether the trial court erred by sentencing appellant separately for two counts of conspiracy.

For the reasons that follow, we shall vacate the conviction and sentence for conspiracy to commit robbery with a dangerous weapon, but otherwise affirm the judgments.

FACTS

Motions hearing

At approximately 8:24 p.m., on January 9, 2015, Officer Rick Latifov of the Montgomery County Police was on patrol in his marked cruiser in Gaithersburg, Maryland when he heard a dispatch over the radio for three black males suspected of involvement in an armed robbery at 722 Clopper Road. Officer Latifov testified that he was approximately thirty seconds away from the apartment complex from which the victim was calling when he heard the dispatch over the radio. He further testified that he went toward Clopper Road when he observed three black men who matched the description of the robbery suspects. The first man was walking by himself and carrying a

duffel bag, and the other two men were walking shoulder to shoulder approximately ten feet behind the man in front. According to Officer Latifov, the three men were the only people on the sidewalk at the time, and "[t]o me it looked like all three of them were together." He told the dispatcher to "hold me out with one," signaling that he had stopped someone.

The State introduced audio from the radio transmissions, and the following exchange was entered into evidence:

> [DISPATCHER:] (Unintelligible) respond priority. A robbery just occurred 722 Clopper Road, 722 Clopper Road. It's apartment 2. Abraham Donald calling for his father who was attacked by three males with a piece of metal and then took his wallet. Subjects were black males, armed with a knife and a piece of metal, possibly a pipe. Heading in the direction of Montgomery Village and 355, south of Montgomery Village Avenue, headed south on Quince Orchard Road, right on Clopper Road.
>
> ***
>
> [DISPATCHER:] Here's an update. Complainant called back and advised subjects were (unintelligible) Quince Orchard Plaza near the McDonald's and Shadow.
>
> [POLICE OFFICER 1:] Yeah, probably Shadowland, Quince Orchard and (unintelligible) circulating over there.[1]

Defense counsel questioned Officer Latifov regarding the "CAD report" that was generated at the time of the incident. According to Officer Latifov, there are typically two dispatchers who relay information over the radio and on a mobile computer in his

[1] Additional descriptive information as to the suspects' age, height, physical build, and the clothing they were last seen wearing continued to be transmitted over the radio and mobile computer in his cruiser after Officer Latifov stopped Brown.

vehicle, and the information transmitted over the radio "may not say word for word what's on that computer." He testified that the following information was transmitted over the computer by the dispatcher before he observed Brown walking with his two companions and stopped him, which stated in pertinent part:

> COMPLS FATHER WAS ATTACKED BY 3 MALES WITH A PIECE OF METAL AND THEN TOOK HIS WALLET // FRS CONFERENCED FOR FATHER
>
> SUBJS WERE BMS ARMED WITH KNIFE, AND PIECE OF METAL, POSS PIPE
>
> ***
>
> COMPL CALLED BACK // ADV LS ON FOOT TOWARD PLAZA NEARBY WITH MCDONALDS AND SHADOW
>
> ***
>
> SUBJ LSW ALL BLACK CLOTHING 1) MASK

Officer Latifov turned on the lights in his patrol vehicle and approached Brown, the man closest to him, stating "[y]ou match a description. If you're not my guy, you'll be on your way in a couple of minutes." He then asked Brown whether he was carrying any guns or knives, and Brown stated that he had a knife, which Officer Latifov retrieved. After securing the knife, he searched Brown to ensure that no other knives were present, and then removed his black knit hat from his head. Officer Latifov unrolled Brown's hat and "noticed there was a fold in [] the hat. And, then when I unrolled it, it was that face, the white mask that was described – by the dispatcher on the call."

The State argued that Officer Latifov had reasonable, articulable suspicion to approach Brown considering that he had heard a "lookout" dispatch for three black males

on foot, a height and age description, and a direction that they were traveling. The defense, on the other hand, contended that at the time Officer Latifov detained Brown, he only had a description of three black men walking in a general direction, and that the details the State relied upon to provide reasonable suspicion, such as their height, age, the color of their clothing, and that one suspect was wearing a mask, came after Officer Latifov initiated the stop. After the hearing the parties' arguments, the suppression court found as follows:

> [W]e have a description early on it's three black males. But, then, as this thing is unfolding, the information gets more clear between 18 and 20 years of age, thin, last seen wearing black hooded sweatshirt, white logo, and some of that's confirmed on the scene.
>
> The size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred. It's Gaithersburg. It's a particular corner. There's a shopping center there, but it's a huge intersection. But, according to Latifov, they're the only ones around, and it's very close in time and place to where the criminal event took place.
>
> …
>
> The known or probable direction of the offender's flight, again, we had that on foot towards the plaza nearby with the McDonald's and Shadowlands; we have that.
>
> …
>
> It started as initial investigatory stop, and ripened into reasonable, articulable suspicion.

Trial

The following evidence was adduced at trial. On the evening of January 9, 2015, Andres Espinoza-Seinos parked his car on the street behind his apartment complex and

noticed that three men began walking in his direction. Thirty feet before they crossed paths, the tallest man pulled a black and white mask over his face, and according to Mr. Espinoza-Seinos, "when I saw them coming, I mean, their ages, I sensed that there was going to be a problem." He tried to rush away, but the men stopped him and one held a knife to his neck and told him to "give me all your money because I swear I am going to kill you." Mr. Espinoza-Seinos was flanked by the two men without masks, and as he tried to avoid being cut by the knife, he was struck in the face by a blunt object later determined to be a metal pipe. He pushed the man wielding the knife and ran, but when he slipped and fell, the men followed him. He testified that the man in the mask stood behind the others "just looking at me" as they slashed at him with the knife and searched his pockets. He stated that "[w]hen they took my wallet, one of them said, I got it. And then the tall guy said, finish it." After taking his wallet and telephone, the three men ran. Mr. Espinoza-Seinos testified that he lost consciousness, but eventually reached his apartment where his fifteen-year-old son called 9-1-1.

Officer Latifov's testimony at trial was consistent with his testimony at the motions hearing. He stated that he received the radio transmission for a robbery involving three black males near Clopper Road. He was "very close" to the area where the robbery was reported, and as he reached the intersection of Quince Orchard Road and Clopper Road, he noticed three black men who matched the description of the robbery suspects, and that they were only people walking in the area. Officer Latifov stopped his vehicle and approached Brown, informing him that there had been a robbery in the area and "they kind of matched the description." He asked Brown whether he had any

weapons, and Brown responded that he was carrying a knife in his right front pocket. Officer Latifov searched Brown and retrieved a blade without a handle, which he placed on the hood of his patrol vehicle.

Thereafter, Latifov removed Brown's black knit hat from his head. Officer Latifov indicated that "[t]he white part I did not see initially when I pulled it off him" because he continued to receive updated radio dispatches throughout the encounter, and "that description of the white mask … from the victim through the dispatcher to us, that's when I made note that that's indeed that item." Officer Milano[2] of the Gaithersburg Police arrived on the scene some time afterward, at which point he arrested Brown and took custody of the blade and knit hat. He searched Brown again before placing him in the police cruiser, at which time he recovered a bank card and telephone from his right pants pocket. At trial, Mr. Espinoza-Seinos testified that the bank card and telephone belonged to him and were taken during the robbery.

The State introduced video surveillance footage from the Rite Aid pharmacy at 662 Quince Orchard Road which depicted Brown entering the store at 8:23 p.m. followed by two black men wearing black clothing. Brown can be seen wearing all black clothing as well, with a black knit hat with white markings visible on the back of his head. He is next seen at the register using a bank card to make his purchases. Certified bank records introduced at trial demonstrated that Mr. Espinoza-Seinos' bank card was used to make purchases at the Rite Aid, and he testified that he did not make or authorize the charges.

[2] The record is devoid of any reference to the first name of Officer Milano.

Although Mr. Espinoza-Seinos was unable to make an in-court identification of Brown, he identified the mask as the same one used during the robbery.

Brown was found guilty on all four counts. On October 17, 2016, he was sentenced to ten years' imprisonment for first-degree assault with all but eighteen months suspended; to a concurrent sentence of ten years for conspiracy to commit first-degree assault with all but eighteen months suspended; a consecutive three year suspended sentence for robbery with a dangerous weapon; and to a concurrent three year suspended sentence for conspiracy to comment robbery with a dangerous weapon. His total sentence was thirteen years' imprisonment, all but eighteen months suspended.

DISCUSSION

I.

Brown contends that the motions court erred when it denied his motion to suppress three items seized by the police during the stop at the shopping center: the victim's credit card and mobile phone, and the ski mask. Brown further asserts that Officer Latifov had only a general description of three black males "armed with a knife or possibly a piece of metal," and that this information was not sufficiently particularized to provide reasonable suspicion to justify the stop. The State responds that the suppression court did not err because it properly concluded that Brown's encounter with the police began as an accosting requiring no Fourth Amendment justification. The State further maintains that even if this Court finds that the encounter was a detention from its inception, the information available to Officer Latifov was sufficient to justify his reasonable suspicion that Brown had been recently involved in criminal activity.

We agree with the State that Brown was detained pursuant to an investigatory stop for which the police had reasonable, articulable suspicion from the start. As a result, we need not address the State's argument that he was subject to a mere accosting that ripened into a *Terry*-level stop a short time thereafter based on his responses and observations made by the detaining officer.

The Court of Appeals has described the standard of review to be applied in motions to suppress:

> When we review a trial court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality de novo and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497-98 (2012) (citations and internal quotations omitted).

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV. The Fourth Amendment, applicable to the States through the Due Process Clause of the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The police may, under the Fourth Amendment, stop and briefly detain a person for purposes of investigation, if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968); *accord Crosby v. State*, 408 Md. 490, 505 (2009). An officer, however, "must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch'" in order to justify making a stop. *Cartnail v. State*, 359 Md. 272, 287 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 1989). In evaluating whether "a reasonable and prudent police officer would have been warranted in believing that [the individual seized] had been involved in criminal activity," Maryland courts consider the following factors:

> "'(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.'"

Id. at 289 (quoting 4 Wayne R. LaFave, Search and Seizure § 9.4(g), at 195 (3d ed. 1996 & 2000 Supp.)). Courts must examine the totality of the circumstances when evaluating the constitutionality of a detention. *Stokes v. State*, 362 Md. 407, 416 (2001).

Brown draws comparisons to three cases[3] in support of his argument that the dispatch description was not sufficiently particularized to provide reasonable suspicion for the stop. Those cases, however, are distinguishable from the facts present here. In *Cartnail,* the Court of Appeals held that the police lacked reasonable suspicion to stop the appellant and his passenger, two black men, who were traveling in a gold Nissan in a different section of the city from where a robbery occurred, when the dispatch report described a gold or tan Mazda occupied by three black men that fled in "no known direction." 359 Md. at 277-78. The Court further explained that that the "range of possible flight" that the perpetrators could have taken in a vehicle more than an hour after the robbery was "relatively enormous," and emphasized the "significant difference [] between spotting a suspect within minutes of a crime, as opposed to an hour later" when considering whether, in totality, the information available provided reasonable suspicion. *Id.* at 295.

In *Stokes,* the appellant, a black man observed wearing "dark clothing, a black leather jacket, dark pants and a skull cap," was stopped approximately thirty minutes after a police dispatch described an armed robbery suspect as a "black man wearing a dark top." 362 Md. at 410-11. The Court of Appeals held that the police lacked reasonable suspicion to stop Stokes where "[t]he description of the robber broadcast in the lookout was sparse at best." *Id.* at 424-25. Further, the Court noted that "[t]hirty

[3] The cases relied upon by Brown are *Cartnail v. State*, 350 Md. App. 272 (2000); *Stokes v. State*, 362 Md. 407 (2001); and *Sheppard v. State*, 177 Md. App. 165 (2007). We address the appellants' reliance on these cases herein.

minutes is a considerable amount of time for a robber to only have proceeded around the corner." *Id.* at 425.

In *Madison-Sheppard,* the police broadcast an alert for "a black male, approximately six feet tall, 180 pounds, with cornrow-style hair" suspected of attempted murder earlier that week. 177 Md. App. at 168. An officer observed Madison-Sheppard, who generally fit the description, on the front porch of a house and searched him, finding cocaine. *Id.* at 169. In concluding that the police did not have reasonable suspicion to stop Madison-Sheppard under those circumstances, this Court stated that the physical description was not "'sufficiently unique to permit a reasonable degree of selectivity' because it could apply to a large segment of [the] African American male population." *Id.* at 179. We also noted that since the dispatch indicated that the crime occurred sometime "that week," the "area of possible flight after a week's time could be enormous." *Id.* at 180.

Here, the audio recording of the radio dispatch, as well as the CAD report indicate that Officer Latifov knew the race, gender, and number of suspects, the fact that they were on foot, and the direction that they were last seen traveling before he radioed dispatch to "hold me out" because he had seen and intended to approach Brown. Moreover, Officer Latifov observed Brown walking with two men mere minutes after the robbery was reported, compared to several days later in *Madison-Sheppard*, more than an hour later in *Cartnail*, and thirty minutes later in *Stokes.* The temporal and spatial proximity between the crime and Officer Latifov's observation of him, as well as the description of three black males traveling together toward the Shadowland Plaza,

provided sufficient reasonable, articulable suspicion to detain Brown and investigate whether he was involved in the armed robbery that had taken place minutes before and less than a mile away. Accordingly, the court properly denied the motion to suppress.

II.

Brown contends that the trial court erred in imposing separate convictions for robbery with a dangerous weapon and first-degree assault, and that this Court should reverse the conviction for first-degree assault, or in the alternative, merge the convictions. In support, he argues that the robbery with a dangerous weapon and first-degree assault offenses were predicated upon the same act, namely, the use of a knife and metal pipe to take Mr. Espinoza-Seinos' property. He also insists that the rule of lenity requires that his sentences be merged, as "[t]here is nothing in the indictment or arguments of counsel to suggest that that the State intended to prosecute conduct based on separate events."

The State responds that merger is not required in this case because Brown's conviction for first-degree assault and his conviction for robbery with a dangerous weapon are not based on the same conduct. The State asserts that Brown was convicted of robbery with a dangerous weapon based upon his act, in concert with two others, of using a knife to force Mr. Espinoza-Seinos to surrender his wallet and telephone, whereas the conviction for first degree assault was predicated on the three men subjecting Mr. Espinoza-Seinos to "a callous fifteen-minute beating."

Merger of convictions for sentencing purposes is derived from the protection against double jeopardy afforded by the Fifth Amendment to the United States Constitution and Maryland common law, and protects criminal defendants from multiple

punishments for the same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). As this Court explained in *Morris v. State*, 192 Md. App. 1, 39 (2010),

> To evaluate the legality of the imposition of separate sentences for the same act, we look first to whether the charges 'arose out of the same act or transaction,' then to whether 'the crimes charged are the same offense,' and then, if the offenses are separate, to whether 'the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes…' (citations omitted).

"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.'" *Id.* at 39 (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). The State bears the burden of proving distinct acts or transactions for purposes of separate units of prosecution. *Id.* In *Morris*, this Court held that "[f]irst-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)). Accordingly, the "dispositive inquiry" before the offenses are merged is whether the first-degree assault conviction was a distinct act or whether it arose out of the act of armed robbery. *Id.* at 40 (citations omitted).

In the instant case, Brown was convicted of first-degree assault with the intent to commit serious bodily harm and robbery with a dangerous weapon. Armed robbery "requires the taking of property of any value, by force, with a dangerous or deadly weapon." *Bates v. State*, 127 Md. App. 678, 688 (1999) (citations omitted), *overruled on other grounds by Tate v. State*, 176 Md. App. 365, 407 (2007). Here, the third count of

the charges under the indictment allege that Brown "did feloniously rob with a dangerous weapon, Andres Seinos-Espinoza of his personal property." A conviction for first-degree assault requires that the State prove: (1) that a person intentionally caused or attempted to cause serious physical injury to another, or (2) that a person committed an assault with a firearm. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-202. Thus, the first count of the indictment charged that Brown "did assault" Mr. Espinoza-Seinos.

In closing argument, the State urged the trial court to convict Brown of robbery with a dangerous weapon based on the act of using a knife to take Mr. Espinoza-Seinos' property, and then urged the court to convict Brown of first-degree assault based on the separate act of beating Mr. Espinoza-Seinos with the intent to cause serious bodily injury.

Although the indictment does not contain the particular act supporting the charge of first-degree assault, it is clear that the trial court considered Brown and his accomplices' intent to inflict serious bodily injury to Mr. Espinoza-Seinos as a separate act from the use of the knife to take his property. The court explained, "the State is required to prove all of the elements of a robbery and also to prove that the defendant committed the robbery by using a dangerous weapon. There was a knife used, and the victim talked about it, and it was put right at his neck." When considering whether the evidence satisfied the requirements for conviction of first-degree assault, the trial court found that "it's clear there was an intent, if necessary, to impose a serious physical injury by the holding of the knife to his neck," and that "[w]e also have the chilling instructions, finish it, which doesn't sound good. It sounds like it could have been far worse, but for

whatever reasons did not take place." Accordingly, we hold that the convictions do not merge for sentencing purposes under the required evidence rule.

The rule of lenity is a principle of statutory construction whereby any "'doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction' will be resolved against turning a single transaction into multiple offenses." *Marquardt v. State*, 164 Md. App. 95, 149 (2005) (citations and quotations omitted). The rule of lenity, however, "serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists." *Jones v. State,* 336, Md. 255, 261 (1994). The inquiry in determining the applicability of the rule of lenity is "whether the two offenses are of necessity closely intertwined or whether one offense is necessarily the overt act of the other." *Marquardt,* 164 Md. App. at 149-50 (citation omitted).

The rule of lenity is also inapplicable here because there is no legislative ambiguity as to the crime of first-degree assault and that of robbery with a dangerous weapon. The legislature created the specific offense of first-degree assault to punish perpetrators who caused or intended to cause serious bodily injury, whatever their ultimate goals in their use of force. Robbery with a dangerous weapon, on the other hand, is focused on the use of the weapon itself as the aid in the commission of a crime, and not on whether the victim has suffered an injury. Because of the differences in the legislature's goals when prohibiting these specific offenses, Brown's convictions do not merge under the rule of lenity. As such, the trial court did not err in imposing separate convictions for first-degree assault and robbery with a dangerous weapon.

III.

Finally, Brown contends that the trial court erred by imposing separate sentences for conspiracy to commit first-degree assault and conspiracy to commit robbery with a dangerous weapon because the evidence presented at trial supported only a single conspiracy. The State agrees, and so do we.

"It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *McClurklin v. State*, 222 Md. App. 461, 490 (2015) (quoting *Jordan v. State*, 323 Md. 151, 161 (1991). The Court of Appeals has held that "[t]he unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Id.* Accordingly, "'[a] single agreement … constitutes one conspiracy,' and 'multiple agreements … constitute multiple conspiracies.'" *Savage v. State*, 212 Md. App. 1, 13 (2013) (citations omitted).

Here, the record reflects that Brown and his accomplices reached a single agreement to commit armed robbery, during which the victim was assaulted. The trial court erred in imposing a sentence for conspiracy to commit first-degree assault and a separate sentence for conspiracy to commit robbery with a dangerous weapon. We,

therefore, vacate the conviction and sentence for conspiracy to commit robbery with a dangerous weapon pursuant to Maryland Rule 4-345(a).[4]

JUDGMENT AND SENTENCE FOR CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID AS FOLLOWS: THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY MONTGOMERY COUNTY.

[4] We vacate the conviction and sentence for conspiracy to commit robbery with a dangerous weapon because this conviction carries a lesser penalty than conspiracy to commit first-degree assault. *See Jordan v. State*, 322 Md. 151, 161 (1991).