Circuit Court for Prince George's County
Case No.: 14-1065X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0118

September Term, 2015

JAVON FOSTER

v.

STATE OF MARYLAND

Meredith,
Leahy,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: June 22, 2018

Following a jury trial in the Circuit Court for Prince George's County, Javon Foster, appellant, was found guilty of multiple offenses arising out of an armed robbery at Providence Motors, in Bladensburg, Maryland, on June 17, 2014. Foster noted a timely appeal, and presents us with the following four questions:

> I. Did the trial court abuse its discretion when it denied defense counsel's request for a postponement [of the trial]?
>
> II. Did the trial court err and/or abuse its discretion when it permitted the State to introduce irrelevant and prejudicial evidence?
>
> III. Did the prosecutor engage in improper and prejudicial closing argument when he made remarks which shifted the burden of proof?
>
> IV. Must Mr. Foster's sentences for false imprisonment be merged into his sentences for robbery with a dangerous weapon?

For the reasons that follow, we answer the fourth question in the affirmative and vacate Foster's sentences for false imprisonment. We answer the first three questions in the negative, and therefore otherwise affirm the judgments of the circuit court.

BACKGROUND

On June 17, 2014, at about 5:25 p.m., two individuals carrying firearms and wearing ski masks entered an automobile rental and repair business known as Providence Motors, and demanded money from the three employees on duty at the time. One of the two assailants was wearing a dark-colored jumpsuit. Two of the employees -- Olaniyi Oladeinde and Babajide Odulaje -- testified at trial. They both described the robbery and their assailants. They also provided narrative details when surveillance video of the crime was played for the jury. When the assailants began their exit from Providence

Motors, they were carrying an empty safe and approximately ten sets of keys, but they dropped the safe while exiting the building and left it behind. No money was stolen.

At the time the two assailants fled the scene of the robbery, Antoinette Phillips and her daughter (Monique Bland) happened to be across the street in their vehicle. They saw two masked men running away from Providence Motors, one of whom was wearing blue "overalls." Ms. Phillips and Ms. Bland saw the two masked men remove their masks, and then run down a side street and enter a white Toyota Camry. Ms. Phillips testified that she was close enough to the Camry that both she and her daughter were able to see the driver's unmasked face. (Ms. Phillips and Ms. Bland would both later identify Foster from a photographic array conducted by police and both identified him in court.)[1] Ms. Phillips followed the Camry in her car, and was able to read the license plate to be 8BB9886. Ms. Bland called 9-1-1 and reported what they had seen and the Camry's tag number.

A subsequent investigation revealed that the Camry was registered to Foster's mother, Jacqueline Johnson. Pursuant to search warrants, the police searched the Camry and Ms. Johnson's residence. From the Camry, the police recovered two pairs of gloves and a pair of blue "coveralls." From the residence, the police recovered two blue

[1] Phillips also purported to identify, from a photographic array, a person as the passenger in the Camry. That identification turned out to be incorrect as the person she identified was incarcerated on the day of the crime in this case.

"jumpsuits," one sized 48LN, and one sized XXL.[2] During the search of Foster's bedroom, the police recovered three pairs of gloves, and two ski masks.

Ms. Johnson testified for the defense, and stated that she worked for the United States Postal Service, and that she wore jumpsuits and gloves while working. She also said that she kept both items in her Toyota Camry. She testified that, on the day of the crime, she rode in the Camry with Foster to her friend Tina's house. She said that she and Foster left her apartment at 5:15 p.m. She was driving, but turned the car over to Foster after she arrived at Tina's house around 5:30 p.m. She said that, on the way to Tina's house, she stopped to buy some Natural Ice beer, and she also indicated that she saw Tina's brother Cordell, but did not pick him up.

On cross-examination, Ms. Johnson confirmed that her jumpsuits were part of her uniform and that they had labels indicating that they were the property of the United States Postal Service. But she also confirmed that her son (Foster) wore jumpsuits to work, and that he wore a ski mask on his head as a hat that she referred to as a "skully." And, with respect to Ms. Johnson's testimony about being with Foster around the time of the robbery, Ms. Johnson admitted that she had never told the investigating police

[2] The clothing appellant wore and the clothing recovered from the Camry and his mother's residence was variously referred to during trial as "overalls," a "jumpsuit," and "coveralls". We have reviewed both the surveillance video and the photographs of the clothing that was recovered, and it appears to us that the items of clothing are both what is commonly referred to as a "jumpsuit" or "coveralls," and not what is commonly referred to as "overalls."

officers that her son was with her that afternoon; she explained: "They never asked me that."

DISCUSSION

I.

On the morning of the first day of trial, February 2, 2015, counsel for Foster requested a continuance, and represented to the court that she had just spoken to an alibi witness for the first time that day. Foster presented the request for continuance to the administrative judge, who denied the request. Foster contends that the circuit court's denial of his request for a continuance was an abuse of the court's discretion.

Before the administrative judge, the following transpired:

> [DEFENSE COUNSEL:] . . . Your Honor, in this matter, the defense [is] requesting a continuance. Our Hicks date is February the 17.[3]
>
> The reason for the request for the continuance is that early on[,] Mr. Foster, he advised me that he did have alibi witnesses but did not give me contact information for those witnesses. That was back in September.
>
> The matter was scheduled, I believe, for motions in November. Mr. Foster came to court at that time. I was on leave. The matter was continued to December, Your Honor. Mr. Foster came to court then.
>
> Through the discovery he was scheduled to make an appointment to come in and discuss the case further and come in and provide further information. Mr. Foster was unable to make that appointment.
>
> Time clearly has gone by. This is over the holiday season. Mr. Foster has changed his number a couple of times due to his indigence.
>
> And I was able to track down one of the witnesses who is also a State witness who moved in this case. So, the address that the State had for

[3] *See State v. Hicks*, 285 Md. 310 (1979); Maryland Rule 4-271.

> the witness was no longer the -- and Mr. many [sic] Foster also moved as well. So, I am requesting a continuance.
>
> On my alibi witness, the State is objecting to the alibi witness testifying today[4]. I told the State about the alibi witness last week and what the alibi witness would say. The State indicated they needed additional time.
>
> There is a second alibi witness that I sent an investigator to locate, but I was unable to talk with the witness at that time. I spoke to that witness today. They confirmed what the first alibi witness said, so I am asking for a continuance.
>
> THE COURT: Okay, with all due respect, there has been plenty of time for your client to provide these names and for you to have access to them for you to secure them for the purpose of trial. Your motion is denied.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor. Judge, I just wanted to put one other thing on the record, that in this case these are serious charges. Mr. Foster has been coming to court. I just wanted –
>
> THE COURT: This case has been continued before. The motion has been continued a number of times. I'm going to deny the continuance.
>
> [DEFENSE COUNSEL]: Thank you.

We noted in *Fontaine v. State*, 134 Md. App. 275, 298 (2000): "It is a basic principle that rulings on requests for continuances are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." In *Wright v. Stat*e, 70 Md. App. 616 (1987), we held:

> To show such an abuse of discretion, the party who requests the continuance must show:
>
> > "(1) that he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some

[4] We infer that the alibi witness referred to here was appellant's mother, Jacqueline Johnson, who testified in the defense's case in chief.

> reasonable time; (2) that the evidence was competent and material, and he believed that the case could not be fairly tried without it; and (3) that he had made diligent and proper efforts to secure the evidence."

Id. at 623, quoting *Jackson v. State*, 288 Md. 191, 194 (1980). *Accord Whack v. State*, 94 Md. App. 107, 117 (1992).

An evaluation of the foregoing factors persuades us that the administrative judge committed no abuse of discretion in denying the last-minute postponement request. First, defense counsel failed to demonstrate that the defense had a reasonable expectation of securing the evidence of the absent witness within any specific time period. Other than the representation that counsel had finally located and spoken with the potential witness that day, the record is silent as to the length of time needed to secure the witness's attendance.

With respect to the second factor, defense counsel did not make a detailed proffer that established that the evidence was competent and material, such that Foster could not be fairly tried without it. The mere representation that the witness was an alibi witness who would corroborate statements of another alibi witness, without a more detailed proffer of the anticipated testimony of either witness, is insufficient to establish the materiality and necessity required by this factor.

And, with respect to the third factor, defense counsel's representations as to why more time was needed did not establish that the defense had made "diligent and proper efforts to secure the evidence."

A circuit court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Gray v. State*, 388 Md. 366, 383 (2005). Under the circumstances presented here, we are not persuaded that the circuit court abused its discretion when it declined to grant Foster's postponement request on the morning the trial was scheduled to begin.

II.

Foster contends that the trial court erred in admitting into evidence the jumpsuits, gloves, and ski masks that were recovered from his mother's home (where he also resided). Foster maintains that the evidence was irrelevant because no one "identified the jumpsuits, gloves and masks … that were recovered from the home as the jumpsuit, gloves and mask the driver of the Camry [wore]." In the alternative, citing to Maryland Rule 5-403, Foster contends that, even if the evidence was relevant, it should have been excluded because "its probative value [was] substantially outweighed by the danger of unfair prejudice."[5]

The State contends that Foster's arguments are not preserved for appellate review for two reasons. First, the State contends that, although Foster moved *in limine* to preclude the admission of the evidence, and objected when the items were admitted into

[5] Maryland Rule 5-403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

evidence, he did not object when the "items were testified to by the witnesses or shown to the jury before they were admitted into evidence."

Second, the State contends that Foster did not make the same argument for the inadmissibility of the items at trial that he now makes on appeal. The State claims that, at trial, Foster argued "only that the items were not relevant because they were cumulative," and not, as he now argues on appeal, that no one identified them as being items that Foster wore during the robbery.

The State further argues that, even if Foster's current argument was preserved, the items were relevant in any event, and therefore admissible, because they tended to make it more probable that Foster was involved in the robbery. We need not address the State's preservation arguments because we agree with the State that the evidence was neither irrelevant nor "unfairly" prejudicial, and therefore, it was not error for the trial court to admit the items.

As Foster points out, Maryland Rule 5-402 states, in part: "Evidence that is not relevant is not admissible." But Rule 5-402 also provides: "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible." In *State v. Simms*, 420 Md. 705, 727 (2011), the Court of Appeals observed: "[R]elevance is generally a low bar, but it is a legal requirement nonetheless."

Maryland Rule 5-401 defines "relevant evidence" as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the

instant case, the identity of the perpetrator who wore a blue jumpsuit and a ski mask was a fact of consequence to the determination of the action. In our view, the fact that Foster was in possession of more than one jumpsuit similar to the one worn by one robber, and more than one ski mask similar to the ones worn by the robbers, had a tendency to make the existence of a consequential fact more probable because it showed that Foster had access to distinctive clothing like the distinctive clothing of one of the perpetrators shown in the surveillance video. Because the evidence was legally relevant, the trial court did not err in admitting it into evidence.

Foster argues, in the alternative, that, "[even if] the clothing from the home was marginally relevant, it nevertheless should not have been introduced into evidence"; it should have been excluded pursuant to Rule 5-403 because "the introduction of the additional items from the home was cumulative and served only to suggest to the jury that Mr. Foster had a cache of robbery-related clothing that he could pick from, which in turn suggested a criminal propensity." Foster asserts that, given the low probative value of the evidence, the probative value was substantially outweighed by danger of unfair prejudice.

We do not agree with Foster's assertion that the probative value of this evidence was "quite low." The clothing in question matched closely what the surveillance video showed one of the perpetrators was wearing. Moreover, the evidence was found in Foster's room in his mother's residence. When coupled with the other evidence of Foster's criminal agency, Foster's possession of this clothing was probative of Foster's identity as one of the perpetrators.

We agree with the State that the trial judge did not err in failing to exclude this evidence as "unfairly" prejudicial. Evidence may be "unfairly prejudicial 'if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Odum v. State*, 412 Md. 593, 615 (2010), quoting LYNN MCLAIN, MARYLAND EVIDENCE §403:1(b) (2d ed. 2001). "The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." *Id*. The "probative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id*. In our view, the items of clothing recovered from Foster's home was not the kind of evidence likely to evoke an emotional response that would create a danger that the jury would disregard the other evidence in the case in arriving at its verdict.

Therefore, we are satisfied that there was no error or abuse of discretion in admitting the evidence.

III.

Foster contends that, during the State's rebuttal closing argument, the prosecutor made an improper argument when he "commented on [Foster]'s failure to call additional alibi witnesses in his defense, thereby impermissibly shifting the burden of proof."

The State, in response, argues as a preliminary matter, that Foster's claim is not preserved for appellate review because, when Foster objected to the State's closing argument, he gave specific grounds for the objection that are different from the grounds now raised on appeal. The State also argues that the State's rebuttal argument was

permissible rebuttal argument because the defense "opened the door" by placing emphasis on two persons who allegedly supported Foster's alibi but were not called at trial. Finally, the State argues that any error was harmless in any event.

During Foster's closing argument, counsel for Foster said:

> [DEFENSE COUNSEL:] … **[Foster] was with his mother on the day of the incident. You know that because [his mother, Ms. Johnson], got on the stand and told you where she was that day.** That she was driving her car. That her son, [Foster], was in the car. It was between the hours of 5:00 and 5:30.
>
> You recall what she said about the time. I believe she said a little bit after 5:00, she was at her house. Then she left, and **she went to go visit her friend Tina. She told you that her son was in the car. She let him take the car. She also said she talked with someone named Cordell, and she was going to see Tina.**
>
> **Now, she never said that any of those people saw [Foster],** but she told you where she was and where her car was. She told you that she gave him the car and let him go.
>
> She even said she told him that he better have her car back. She didn't want to be out late. She remembers that day because that was the day she took off. She told you that she works for the United States … Post Office.
>
> **So she told you what she did, where she was, and she told you where [Foster] was between 5:00 and 5:30 that day. It was not at [the crime scene].**

(Emphasis added.)

During the State's rebuttal closing argument, the prosecutor made the following comments regarding defense counsel's reference to "Tina" and "Cordell":

> [PROSECUTOR]: Okay. And then lastly, I want to deal with Ms. Johnson [Foster's mother]. . . . And I know at one point, when I asked Ms. Johnson about why she didn't tell police anything, her response I believe was, they didn't ask.

This is your first born. She described their relationship as close.

If that -- and you -- if you have all of this police activity at your house, and you have information that is going to exculpate, or -- you know, eliminate him as being a suspect, and you don't volunteer it, you say that they didn't ask, you use your own common sense on how you -- you know, how you would react to that, what you -- you know, like what a person that she concedes is a close family -- you know, she has a close relationship with, you know.

And then also, considering the fact she mentioned -- I don't know if it was before or after she stopped and, you know, got something to drink, but **she saw Cordell. Where is Cordell?** Where is –

[DEFENSE COUNSEL:] Objection, Your Honor.

THE COURT: Approach.

(Whereupon, counsel approached the bench and the following ensued:)

[DEFENSE COUNSEL:] **Your Honor, the witness never testified that Cordell ever saw the defendant. He [the prosecutor is] saying where is Cordell[?] Where is -- that's what I'm getting from what he's arguing, in terms of where is Cordell. This witness never testified that Cordell was involved.**

THE COURT: Objection overruled.

[DEFENSE COUNSEL:] Thank you.

(Whereupon, counsel returned to the trial tables and proceedings resumed in open court.)

[PROSECUTOR]: **So where is Cordell? Your son is on trial for an armed robbery.** You don't volunteer to the police, because the police didn't ask you? **You don't get Cordell?**

> **You don't even get** -- I forget her -- it may be a hyphenated name. **Tina** something**. You don't go, look, I need you to come to court.** This is what happened. **Where are these people?**
>
> [DEFENSE COUNSEL:] **Objection, Your Honor.**
>
> THE COURT: Overruled.

(Emphasis added.)

As noted above, the State first argu es that Foster's appellate argument -- *i.e*. that the State impermissibly shifted the burden of proof during closing argument -- is not preserved for appeal because Foster argued different specific grounds at trial, namely, that the State was arguing facts that were not in evidence. We agree with the State in part, but also disagree in part. The defendant twice objected to this part of the State's rebuttal argument. The first objection asserted only that the State was arguing facts not in evidence. The specific objection was: "Your Honor, the witness never testified that Cordell ever saw the defendant. He's saying where is Cordell. Where is -- that's what I'm getting from what he's arguing, in terms of where is Cordell. This witness never testified that Cordell was involved." As a result, that objection did not preserve for appellate review Foster's current appellate argument, *i.e.*, that the State impermissibly shifted the burden of proof to the defendant.

But Foster's second objection -- in which Foster said only "Objection, Your Honor" -- was a general objection which preserved all grounds for appellate review. *See* Maryland Rule 4-323(c) ("For purposes of review by the trial court or on appeal of any other ruling or order [*i.e.*, other than an objection to the admission of evidence], it is

sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. **The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs**." (Emphasis added.)). Foster's objection to the State's rebuttal argument at that point was not an objection to evidence, and, under Rule 4-323(c), the general objection was sufficient to preserve for appellate review his claim that the State's argument impermissibly shifted the burden (at least with respect to the State's remarks that came after his first objection and before his second).

As a general matter, the State, "in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148 (2000). In this case, the State said:

> **So where is Cordell?** Your son is on trial for an armed robbery. You don't volunteer to the police, because the police didn't ask you? You don't get Cordell? You don't ever get -- I forget her -- it may be a hyphenated name. Tina something. **You don't go, look, I need you to come to court**. This is what happened. **Where are these people?**

By asking the jury to consider "[w]here is Cordell?" and "[w]here are these people?" and why Tina was not asked to "come to court," the State was calling attention to the defendant's failure to call those witnesses, and the argument improperly suggested to the jury that the defense had an obligation to produce evidence. *See Lawson v. State*, 389 Md. 570, 596 (2005) ("the prosecution was not free to 'comment upon the defendant's failure to produce evidence to refute the State's evidence' because it could

amount to an impermissible shift of the burden of proof," quoting *Eley v. State*, 288 Md. 548, 555 n.2 (1980)).[6]

The State emphasizes that the prosecutor's argument was a targeted response to defense counsel's closing, and cites, *inter alia*, *Degren v. State*, 352 Md. 400, 433 (1999) ("prosecutors may address during rebuttal issues raised by the defense in its closing argument"), and *Blackwell v. State*, 278 Md. 466, 481 (1976) ("The prosecutor, in rebuttal, was merely responding to [defense counsel's] argument."). The State contends that the allegedly improper remarks were permissible because they were a narrowly tailored response to the defense closing argument which "opened the door" to the State's comments. The "opened door" doctrine is based on principles of fairness and permits a party to make comments in closing argument that otherwise might not be permissible in order to respond to argument put forth by opposing counsel. *See, e.g.*, *Mitchell v. State*, 408 Md. 368, 388 (2009). But we are not persuaded that Foster opened the door to the State's burden-shifting comments.

The State claims that, because defense counsel made an argument about Foster's mother visiting Tina and seeing Cordell during the time frame of the robbery, "it was fair to question where Cordell and Tina were to corroborate Foster's mother's testimony." But Foster's counsel merely asserted that Foster's mother had seen Cordell and Tina

[6] A different rule might apply in a case in which the defendant testifies in his own defense, but Foster did not do so in this case. *Cf. Mines v. State*, 208 Md. App. 280, 301-02 (2012) ("where appellant testified in his own defense and, in his own testimony identified potential exculpatory witnesses, but called none of them to the stand, questions as to their absence did not violate appellant's Fifth Amendment rights, and did not constitute improper burden shifting").

because those tidbits of detail in her testimony arguably made her testimony more believable. Foster's counsel did *not* say that either Cordell or Tina could testify to those facts, and expressly conceded in his argument Foster's mother did not say that either saw Foster that day. As a result, the closing argument by the defense did not "open the door" to the improper burden-shifting remarks by the State impugning the defense for failing to call those witnesses.

Nevertheless, even if a prosecutor's remark during closing is improper, the Court of Appeals has held: "Not every improper remark, however, necessarily mandates reversal." *Degren, supra*, 352 Md. at 430. "[R]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id*. at 430-31 (quotation marks and citations omitted). *Accord Spain v. State*, 386 Md. 145, 158 (2005); *Wilhelm v. State*, 272 Md. 404, 415-16 (1974). "'When assessing whether reversible error occurs when improper statements are made during closing arguments, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Shelton v. State*, 207 Md. App. 363, 387 (2012) (quoting *Spain, supra*, 386 Md. at 159).

Here, we are persuaded that the jury was not misled or influenced to the prejudice of Foster. The State's comments were isolated and did not overtly shift the burden to the defense. The State's reference to Tina and Cordell did not assert that these other persons had information that could have contributed anything to the case; and, as noted above, Foster's counsel had actually told the jury that Foster's mother *did not* say that either

Tina or Cordell saw Foster with his mother that day. Although the court overruled the objection (and therefore took no specific steps to address defense counsel's concern), the prosecutor had reminded the jury, at the beginning of his rebuttal, "I have the burden of proof in this matter throughout." And the evidence against Foster was quite strong. He was seen by two otherwise uninvolved eyewitnesses running from the scene of the robbery wearing a ski mask and dark blue coveralls. Both of those eyewitnesses picked Foster out of a photographic array and identified him in court. The robber fled the scene in a car that was registered to Foster's mother. When that car and Foster's residence were searched, dark blue coveralls and ski masks were found.

Under the circumstances, we are persuaded that remarks of the prosecutor did not actually mislead the jury and were not likely to have misled or influenced the jury to the prejudice of Foster.

III.

Foster contends that his sentences for false imprisonment should be merged into his sentences for robbery with a deadly or dangerous weapon. We agree.

For each of the three robbery victims, Foster was separately sentenced to one count of robbery with a deadly or dangerous weapon, and one count of false imprisonment. The court sentenced Foster to twenty years' imprisonment, with all but twelve years suspended, for each robbery with a deadly or dangerous weapon conviction, and separately sentenced Foster concurrently to two years' imprisonment, all suspended, for each false imprisonment conviction.

Foster relies on this Court's decision in *Hawkins v. State*, 34 Md. App. 82, 92 (1976), to support his merger argument. In *Garcia-Perlera v. State*, 197 Md. App. 534 (2011), we discussed *Hawkins* and its progeny as follows:

> In *Hawkins*, utilizing the required evidence test, this Court concluded that **it was necessary to merge a false imprisonment conviction into a rape conviction because the evidence established that "the victim was detained only a sufficient time to accomplish the rape,**" and therefore, "[a]ll of the facts necessary to prove the lesser offense were essential to proving the greater one." *Id*. at 92, 366 A.2d 421. This Court has subsequently distinguished its holding in *Hawkins*, however, clarifying that **merger is not required in cases where a victim is detained for longer than is necessary to accomplish the intended criminal act**. *Jones–Harris v. State*, 179 Md. App. 72, 100, 943 A.2d 1272 (2008) (considering merger of false imprisonment and rape).

Id. at 558-59 (emphasis added).

We declined to require merger of the false imprisonment and robbery convictions in *Garcia-Perlera* because the victims were tied up "much longer than was necessary to accomplish the intended robbery." *Id*. at 559. In the instant case, however, the surveillance video recorded from inside Providence Motors establishes that a mere 31 seconds elapsed from the time Foster and his accomplice entered the premises until they exited with the safe and keys. It does not appear that there was a detention of the individuals inside Providence Motors for any period of time beyond that which was necessary to complete the robbery.

In *Brooks v. State*, 439 Md. 698 (2014), the Court of Appeals analyzed whether a conviction for false imprisonment merged into a conviction for first degree rape. The Court noted: "The critical question as to merger in this case is thus whether the rape conviction and the false imprisonment conviction are based on the 'same act or acts.'" *Id.*

at 738-39. The *Brooks* Court quoted from *Hawkins*, without negative comment, and came to a conclusion similar to that reached by us in *Hawkins*. The *Brooks* Court explained that the false imprisonment conviction merged for sentencing purposes:

> While the false imprisonment conviction could have reasonably been based on Mr. Brooks' actions separate from the rape itself, it is not readily apparent whether the jury actually came to that conclusion. In such circumstances, we are constrained by precedent from assuming that the two convictions were not based on the same act or acts.

Under the facts of this case, the rationale of *Hawkins* remains applicable; the false imprisonment of the victims lasted no longer than was necessary to accomplish the robbery. As a result, Foster's sentences for false imprisonment should have merged into his sentences for robbery with a deadly or dangerous weapon.

SENTENCES FOR FALSE IMPRISONMENT VACATED; OTHERWISE, ALL JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED.
COSTS TO BE DIVIDED: 75% TO BE PAID BY APPELLANT, AND 25% TO BE PAID BY PRINCE GEORGE'S COUNTY.