Circuit Court for Baltimore City
Case No. 819007014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 220

September Term, 2019

EDWARD BYRD

v.

STATE OF MARYLAND

Berger,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 27, 2020

Following a jury trial in the Circuit Court for Baltimore City, Edward Byrd, appellant, was convicted of fourth-degree burglary and theft of property valued between $100 and $1,500. He raises two issues on appeal: (1) whether he knowingly and intelligently waived his right to testify, and (2) whether his conviction and sentence for fourth-degree burglary must be vacated. For the reasons that follow, we shall reverse his conviction for fourth-degree burglary and otherwise affirm.

Mr. Byrd contends that he did not knowingly and intelligently waive his right to testify because, during his advisement of rights, his defense counsel stated that he could be impeached for "something like burglary and the like going past or back to 15 years." Specifically, Mr. Byrd claims that this advisement was clearly erroneous because (1) he could not be impeached for offenses "going past" 15 years, and (2) he could not be impeached with all his prior burglary convictions because "statutory fourth-degree burglary," for which he had been previously convicted, is not an impeachable offense. This claim lacks merit.

Assuming for the sake of argument that Mr. Byrd's trial counsel's advice was incorrect, Mr. Byrd must also "establish that the incorrect advice influenced his election not to testify" before he would be entitled to relief on appeal. *Savoy v. State*, 218 Md. App. 130, 255 (2014) ("Absent detrimental reliance, appellant is not entitled to reversal."). But there is no evidence in the record indicating that Mr. Byrd changed his mind about testifying based on his attorney's statement regarding impeachable convictions. Here, Mr. Byrd told the court that he had already spoken to his attorney prior to the advisement of rights and decided not to testify. Moreover, the record reveals that Mr. Byrd had three

convictions for first-degree burglary and two convictions of theft during the previous fifteen years, all of which would have been admissible to impeach him if he had testified. Thus, even if Mr. Byrd had mistakenly believed that he could have been impeached with his fourth-degree burglary conviction or with other convictions that occurred outside of the 15-year period, it is unlikely that this would have altered his decision to testify under the circumstances. Because the existing record does not clearly indicate that Mr. Byrd detrimentally relied on his defense counsel's allegedly incorrect advice, reversal is not required.[1]

Mr. Byrd also contends, and the State concedes, that his conviction for fourth-degree burglary must be reversed because he was convicted of an uncharged form of fourth-degree burglary. We agree.

Mr. Byrd was charged in a Statement of Charges with fourth-degree burglary pursuant to § 6-205(c) of the Criminal Law Article, which provides that a person, with the intent to commit theft, may not be in or on "the dwelling or storehouse of another" or "a yard, garden, or other area belonging to the dwelling or storehouse of another." That charge was never amended, and no new charging documents were issued. However, the trial court only instructed the jury on the elements of fourth-degree burglary pursuant § 6-205(a) of the Criminal Law Article, which provides that a "person may not break and enter the

[1] We note that our decision in this case is without prejudice to Mr. Byrd raising this issue in post-conviction proceedings. *See Savoy*, 218 Md. App. at 157 (noting that "the question of whether appellant detrimentally relied on his attorney's advice is best left for post-conviction proceedings").

dwelling of another." Mr. Byrd was not charged with that modality of fourth-degree burglary in the Statement of Charges. Moreover, fourth-degree burglary pursuant to § 6-205(a) is not a lesser included offense of fourth-degree burglary pursuant to § 6-205(c) because each offense contains an element that the other does not.[2] Mr. Byrd was therefore convicted of an uncharged offense. Consequently, his conviction and sentence for fourth-degree burglary are illegal and his conviction must be reversed. *See Johnson v. State*, 427 Md. 356, 378 (2012) (holding that when a defendant is convicted of an offense that is not charged in the indictment, the judgment of conviction and its attendant sentence are illegal and must be vacated).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY ON COUNT 1 REVERSED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.

[2] Specifically, § 6-205(a) requires proof of a breaking, which § 6-205(c) does not, and § 6-205(c) requires proof of an intent to commit a theft, which § 6-205(a) does not.