UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0481

September Term, 2014

DAVID NKEMTITAH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Berger,

JJ.

Opinion by Berger, J.

Filed: October 2, 2015

*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.

Following a bench trial in the Circuit Court for Prince George's County, David Nkemtitah ("Nkemtitah"), appellant, was convicted of second-degree assault, misconduct in office - misfeasance, and misconduct in office - malfeasance. On appeal, Nkemtitah presents five questions for our review, which we have rephrased and consolidated as follows:[1]

1. Whether the evidence was sufficient to sustain Nkemtitah's conviction for second-degree assault on an aiding and abetting theory.

2. Whether the circuit court erred by convicting Nkemtitah of two counts of misconduct in office.

3. If preserved, whether the trial court's conduct deprived Nkemtitah of a fair trial.

[1] The questions, as posed by Nkemtitah, are:

1. Did the trial court err in convicting Mr. Nkemtitah of second degree assault on an aiding and abetting theory?

2. Did the trial court err in convicting Mr. Nkemtitah of misconduct in office?

3. Did the trial court render inconsistent verdicts of guilty on the misconduct in office charges?

4. Did the trial court erroneously shift the burden of proof to Mr. Nkemtitah?

5. Was Mr. Nkemtitah deprived of a fair trial because the trial court failed to preserve an attitude of impartiality?

In the discussion section of Nkemtitah's brief, Nkemtitah presented a consolidated argument with respect to the fourth and fifth questions, with the argument relating to allegedly impermissible burden shifting appearing as a sub-argument within the discussion of whether Nkemtitah was deprived of a fair trial. Our opinion will similarly address the two issues in a consolidated manner.

For the reasons stated herein, we shall affirm in part and vacate in part the judgment of the Circuit Court for Prince George's County.

FACTS AND PROCEEDINGS

The following evidence was adduced at trial through the testimony of several witnesses as well as a video recording of the incident. Nkemtitah, a Department of Corrections corporal, was working in the intake area of the Prince George's County Detention Center on February 4, 2013. The intake area, also referred to as the "regional processing unit" or "RPU," is the location where detainees are brought by law enforcement agencies after arrest. Surveillance video cameras recorded activity in the RPU. Nkemtitah's supervisor, Sergeant Andre Porter, was also present in the RPU at the time, as was Corporal Ryan Trueblood.

On February 4, 2013, Prince George's County Deputy Sheriff George Rogers[2] brought Luther Lee Springs, a 17-year-old juvenile, into the RPU for processing. Spriggs was handcuffed and seated in the RPU. Two other detainees were present in the processing area at the time. Nkemtitah and other officers were working behind a desk completing paperwork when Rogers and Spriggs engaged in what Sergeant Porter described as "normal inmate/officer gibberish." At one point, Spriggs told Deputy Rogers that "messing with people like [Spriggs] will be the reason you lose your job." Deputy Rogers responded that

[2] The parties agree that the correct spelling of the deputy's name is "Rodgers." Throughout the transcripts, the name appears as "Rogers." Both parties used the spelling "Rogers" in their briefs in order to maintain consistency with the transcripts. We shall also refer to the deputy as "Rogers" herein.

"[t]hanks to people like [Spriggs] it will be the reason [Deputy Rogers will] always have a job." Spriggs and Deputy Rogers continued to banter, and Rogers walked towards Spriggs, commenting, "[Y]ou're lucky these cameras are here."

Earlier, Spriggs had called Deputy Rogers "Shorty." At one point, Deputy Rogers approached Spriggs. Deputy Rogers "looked mad," got "in [Spriggs's] face," and said, "Call me Shorty one more time." After Spriggs called Deputy Rogers "Shorty" again, Deputy Rogers "started swinging" at Spriggs. Deputy Rogers put Spriggs in a headlock and threw him on the ground. Deputy Rogers proceeded to kick Spriggs and drag him across the floor of the RPU into an adjacent search room. There were no surveillance cameras in the adjacent search room. Sergeant Porter and Corporal Trueblood both testified that they gave no orders to move Spriggs into a different room.

After Deputy Rogers dragged Spriggs into the search room, the door was left open. With the door open, staff and detainees in the RPU could see that the altercation continued in the search room. Sergeant Porter ordered Corporal Trueblood to move the other two detainees out of the RPU. The detainees left with Corporal Trueblood.

Conflicting testimony was presented with respect to whether Sergeant Porter ordered Nkemtitah to close the door to the search room.[3] On the video recording, Sergeant Porter is

[3] At trial, Sergeant Porter testified that he "motioned for Corporal Nkemtitah to go over to isolate the incident with the deputy and the inmate, the juvenile." He was impeached with prior statements in which he had said that he ordered Nkemtitah to go to the search room to stop the incident rather than to isolate the incident. Sergeant Porter testified that he did not give any verbal orders to Nkemtitah but that he "motioned for him to go to the area, (continued...)

seen gesturing with his left hand, in the opposite direction from the search room. As Corporal Trueblood was removing the other two detainees from the search room, Nkemtitah moved from his location behind the desk, approached the search room, and kicked the door closed with his foot. Keenan Jones, one of the other detainees, testified that after Nkemtitah closed the door to the search room, he heard the sounds of two "open smacks." A few seconds later, Deputy Rogers walked out of the search room and picked up a pair of slippers that had fallen off Spriggs's feet during the altercation. Deputy Rogers threw the slippers into the search room and walked back out again.

Nkemtitah was subsequently indicted for one count of second-degree assault, one count of misconduct in office-misfeasance, and one count of misconduct in office-malfeasance.[4] The case came before the circuit court on February 12, 2014 for a bench trial, which was continued to February 19, 2014. The State called as its witnesses Prince George's County Sheriff's Deputy Jamal Dedier, Spriggs, fellow-detainee Keenan Jones, and Sergeant Porter. At the conclusion of the State's case, defense counsel moved for judgment of acquittal. The motion for judgment of acquittal was denied. Based upon the

[3] (...continued)
so in my mind I was saying something but I didn't actually give words."

[4] Nkemtitah was originally indicted for one count of misconduct in office-misfeasance in case number CT131482B on October 10, 2013. On February 4, 2014, the State returned a superseding indictment in case number CT140196X for one count of second-degree assault, one count of misconduct in office-misfeasance, and one count of misconduct in office-malfeasance. On the first day of trial, the State moved to consolidate the two cases and proceeded to trial on the superseding indictment.

comments the trial court made when denying the motion for judgment of acquittal, defense counsel moved for a mistrial. The motion for mistrial was denied.

The defense called as witnesses Corporal Trueblood and expert witness Lieutenant Colonel Carl Crumbacker, Sr. In addition, Nkemtitah also testified in his own defense. Nkemtitah testified that the altercation between Deputy Rogers and Spriggs occurred suddenly. Nkemtitah explained that he did not see what precipitated the incident and that he "just saw the commotion." Nkemtitah testified that Sergeant Porter specifically told Deputy Rogers to put Spriggs in the search room. Nkemtitah explained that he believed that the altercation had ended before Deputy Rogers placed Spriggs in the search room and that it was "the normal process when an inmate or detainee becomes disorderly or disturbing, just put him in the room and lock him down." Nkemtitah testified that he closed the door to the search room after Sergeant Porter "called [Nkemtitah's] attention to the open door." Nkemtitah "assumed [that they were] shutting down the place [and] securing the scene," so he "walk[ed] over there and push[ed] the door closed." Nkemtitah further explained that he "didn't think anything foul or anything wrong should be going on in the [search room]" and that he believed that Deputy Rogers was "securing [Spriggs] in the room." Nkemtitah testified that he believed that Spriggs was being isolated and contained in the search room in a manner consistent with appropriate policy and procedures.

At the conclusion of the defense case, the defense attorney renewed his motion for judgment of acquittal. The motion for judgment of acquittal was again denied. The trial

court found Nkemtitah guilty on all three counts. On April 20, 2014, the case came before the circuit court for sentencing. The circuit court merged the second-degree assault conviction with the conviction for misconduct in office-malfeasance. The circuit court imposed a suspended sentence and three years of supervised probation for the two misconduct in office convictions. As a condition of probation, Nkemtitah was ordered to performed sixty hours of community service. The court ordered that the probation become unsupervised after the community service requirement was satisfied. The court further commented that it would entertain a request for probation before judgment at the end of the three-year period.

This timely appeal followed.

DISCUSSION

I.

Nkemtitah contends that the evidence was insufficient to support his conviction for second-degree assault on a theory of aiding and abetting. Although the evidence supporting Nkemtitah's assault conviction is admittedly thin and obscure, we conclude that a reasonable fact-finder could have found that the elements of aiding and abetting a second-degree assault were satisfied.

A. Standard of Review

"'[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Smith v. State*, 415 Md. 174, 184 (2010) (emphasis omitted) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court of Appeals has explained:

> It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to the jury's inferences and determine whether they are supported by the evidence.

Id. at 185 (internal citations omitted).

"A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony." *Pryor v. State*, 195 Md. App. 311, 329 (2010). Moreover, we recognize that "the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation." *Smith*, *supra*, 415 Md. at 183 (internal quotations omitted). As such, we "defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) (citing *State v. Smith*, 374 Md. 527, 557 (2003)). We "need not decide whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Id.*

To the extent the trial court's factual findings are "ambiguous," "incomplete," or "non-existent," we turn to the "supplemental rule of interpretation" to fill any fact-finding

gaps. *Turkes v. State*, 199 Md. App. 96, 113 (2011). We have explained the "supplemental rule of interpretation" as follows:

> In determining whether the evidence was sufficient, as a matter of law, to support the ruling, the appellate court will accept that version of the evidence most favorable to the prevailing party. It will fully credit the prevailing party's witnesses and discredit the losing party's witnesses. It will give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence. It will resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party.

Morris v. State, 153 Md.App. 480, 489-90 (2003).

B. Aiding and Abetting Second-Degree Assault

A person who did not commit a crime can nonetheless be guilty to the same degree as the person who committed the crime if he "aids" or "abets" the person who committed the substantive offense. *Kohler v. State*, 203 Md. App. 110, 119 (2012). The person who committed the substantive offense is known as a "principal in the first degree," while a person who aids and abets the principal in the first degree is known as an accomplice. An accomplice is also known as a "principal in the second degree." *Id.* We have explained:

> Under Maryland law, one may commit an offense as either a principal in the first degree, or a principal in the second degree. A first degree principal is the actual perpetrator of the crime. A second degree principal must be either actually or constructively present at the commission of a criminal offense and aid, counsel, command, or encourage the principal in the first degree in the commission of that offense. The activity of a principal in the second degree is generally referred to as aiding and abetting, and the aider or abettor is usually called an accomplice.

Owens v. State, 161 Md. App. 91, 99-100 (2005) (quotations and citations omitted). "A person may be guilty of a felony, as a principal in the second degree, by aiding, counseling, commanding, or encouraging, either actually or constructively, the commission of the felony in the person's presence." *Odum v. State*, 156 Md. App. 184, 192 (2004). "'An accomplice . . . who knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime . . . is a guilty participant, and in the eye of the law is equally culpable with the one who does the act.'" *Owens*, *supra*, 161 Md. at 99-100 (quoting *Woods v. State*, 315 Md. 591, 615 n.10 (1989)). The guilt of an accomplice "is not determined by the quantum of his advice or encouragement." *Pope v. State*, 284 Md. 309, 332 (1979). Rather, if the accomplice's advice or encouragement "is rendered to induce another to commit the crime and actually has this effect, no more is required." *Id.*

On appeal, Nkemtitah asserts that there is "absolutely no evidence" to support the trial judge's conclusion that Nkemtitah knowingly aided, counseled, commanded, or encouraged the assault on Spriggs with the requisite intent. Nkemtitah contends that the trial court ignored the testimony of witnesses who testified that the incident occurred spontaneously and suddenly.

Our task when reviewing a sufficiency claim on appeal is not to re-weigh the evidence and substitute our judgment for that of the fact-finder. Viewing the evidence in the light most favorable to the State, and resolving any ambiguities and inferences in favor of the

State, we are persuaded that sufficient evidence exists to support Nkemtitah's second-degree assault conviction.

With respect to Deputy Rogers's assault on Spriggs, the trial court's factual findings were supported by the video recording of the incident. The trial court found, primarily based upon the video, that Deputy Rogers "put[] [Spriggs] in a headlock, dragg[ed Spriggs] to the ground, kick[ed Spriggs] and push[ed] [Spriggs] into [a] search room." The trial court further found that Deputy Rogers "continu[ed to] kick[] and swing[] at Spriggs" while in the search room. The trial court expressly found that Nkemtitah "carefully walk[ed] to th[e] door [to the search room and] kick[ed] th[e] door shut." All of these facts were supported by the video recording.

Based upon the facts the trial court gleaned from the video recording as well as testimony, the trial court inferred that, by closing the door to the search room, Nkemtitah intended to conceal the assault and permitted the assault to continue. Intent "is a question of fact." *Thornton v. State*, 397 Md. 704, 714 (2007). To be sure, direct proof of intent is difficult. *Jones v. State*, 213 Md. App. 208, 218 (2013), *aff'd*, 440 Md. 450 (2014). A fact-finder cannot peer into the mind of the accused to discern whether he had the requisite intent. Rather, the fact-finder is required to draw reasonable inferences based upon the accused's acts, conduct, and words. *Id.*

In the present case, the trial court inferred that Nkemtitah knew the assault was occurring in the main processing room based upon Nkemtitah's position in the room during

the initial altercation. The trial court further inferred that Nkemtitah "appear[ed] to intentionally mak[e] sure he did not know [what was going on in the search room] by walking around the right side of the door to kick it shut." Based upon these inferences, the trial court concluded that "there was no reason whatsoever [for Nkemtitah] to shut that door other than to conceal the assault and let the assault continue."

We cannot conclude that the trial court's inferences with respect to intent were unsupported by the evidence. Critically, we defer to any possible reasonable inferences the fact-finder could have drawn from the admitted evidence, and we need not determine whether the fact-finder could have drawn other inferences. *Mayers*, *supra*, 417 Md. at 466. Further, we do not consider whether we would have drawn different inferences from the evidence presented. *Id.* All that is required to aid or abet is "aiding, counseling, commending, or encouraging, either actually or constructively, the commission of the felony in [Nkemtitah's] presence." *Odum*, *supra*, 156 Md. App. at 192. Accordingly, the trial court's inference that Nkemtitah closed the search room door to aid or encourage the assault was not unreasonable. The inference was based upon the factual finding that the assault continued to occur in the search room at the time Nkemtitah closed the door. Moreover, the inference was supported by the court's finding that there was no risk that other detainees would join the confrontation because, at the time Nkemtitah closed the door, the other detainees had left the processing room or were in the process of leaving.

None of these inferences are contradicted by the evidence Nkemtitah points to in his brief. Nkemtitah points to testimony from various witnesses which established that the assault occurred quickly and "out of nowhere." This is not inconsistent with the trial court's finding because, even if the incident arose suddenly, there was still time for, as the trial court found, Nkemtitah to "carefully walk" to the search room and close the door. Furthermore, the trial court was entitled to believe or disbelieve Nkemtitah's testimony that he assumed Deputy Rogers was using reasonable force, as well as Nkemtitah's testimony that he closed the door only because he believed he had been ordered to do so by Sergeant Porter.

As the Court of Appeals has explained, "exculpatory statements by an accused are not binding upon, but may be disbelieved by, the trier of facts." *Johnson v. State*, 227 Md. 159, 163 (1961). The trial court could reject Nkemtitah's testimony with respect to the reasonableness of force because, as the video demonstrated, Nkemtitah was located in a place from which he had a clear view of the incident. Furthermore, the trial court was free to reject Nkemtitah's testimony with respect to an alleged order from Sergeant Porter because Sergeant Porter testified that he gave no such order. The trial court could further reject Nkemtitah's assertion that he closed the door in order to prevent the disturbance from escalating because the other detainees were in the process of leaving the processing area before Nkemtitah closed the door.

Viewing all of the evidence in the light most favorable to the State and resolving any ambiguities in the light most favorable to the State, we are persuaded that the evidence --

though scant -- is sufficient to support the trial court's conclusion that Nkemtitah closed the door for the sole purpose of permitting Deputy Rogers's assault of Spriggs to continue. Based upon this inference, the circuit court's conclusion that Nkemtitah aided, counseled, commanded, or encouraged, either actually or constructively, the commission of the second-degree assault was not unreasonable when the act of closing the door allowed the assault to continue, shielded from public view. Accordingly, we hold that the evidence was sufficient to support Nkemtitah's conviction for second-degree assault.

II.

Nkemtitah further argues that there was insufficient evidence to convict him of misconduct in office, or alternatively, the trial judge rendered legally inconsistent verdicts by convicting him of two counts of misconduct in office under different theories. Regardless of how Nkemtitah has framed the issues in this appeal, he argues that there is a fundamental unfairness in convicting him of two counts of misconduct in office based on the same conduct.

The issues raised by Nkemtitah on appeal regarding the inconsistent verdicts and sufficiency of the evidence for the misconduct in office convictions contain a faulty premise that Nkemtitah may properly be convicted of two identical counts of misconduct in office for the same conduct. The State, for its part, argues that this issue is not adequately preserved, and, therefore, we should not address it on review. Alternatively, the State argues that it was not improper to convict Nkemtitah for two counts of misconduct in officer for the same

conduct. We reject the State's argument that this issue is not adequately preserved, and we further agree with Nkemtitah's underlying assertion that it was error for him to be convicted of misconduct in office twice for the same conduct.

A. Preservation

Maryland Rule 8-131(c) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." The State argues that Nkemtitah failed to preserve his objection to being sentenced twice for the same crime involving the same instance of conduct. We disagree.

After the presentation of the State's case-in-chief, Nkemtitah moved for a judgment of acquittal. At that time, Nkemtitah argued "[a]s for Counts II and III, Your Honor, if you look at the language in here in terms of the misconduct, there is one specific act in both of these. There are two theories in them. But the specific act is shutting the door." In response, the State declared: "counsel seems to be arguing here that the State can't charge misfeasance and malfeasance in one indictment, but we can proceed certainly under different theories and that's simply all we're doing here." After hearing argument from Nkemtitah and the State regarding the motion for acquittal, the trial judge accurately articulated the elements of misconduct in office, but nevertheless failed to dismiss one of the identical charges. This colloquy demonstrates that not only was it the State's understanding that Nkemtitah could

only be convicted on one unit of prosecution for misconduct in office, but it further illustrates that the trial court was presented with an adequate opportunity to consider this issue.

Before us at oral argument, the State argued that preservation analysis is somehow affixed to whether the judge adequately understood the implication of his ruling or whether it was foreseeable that this ruling would result in two convictions of identical crimes for the same conduct. These arguments, however, are not in accordance with the reason why we demand preservation. We insist on preservation:

> "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possible correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation."

Md. State Bd. of Elections v. Libertarian Party of Md., 426 Md. 488, 517 (2012) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). Indeed, whether an argument is preserved hinges on whether it was adequately presented by the litigant, not whether it was adequately considered by the judge. In the case *sub judice*, Nkemtitah sufficiently raised the issue of the propriety of multiple sentences for misconduct in office so as to give the trial court the opportunity to pass on the question in the first instance. We, therefore, hold that the issue was preserved.[5]

[5] In arguing that rendering an inconsistent verdict does not give rise to an exception to our preservation requirement, the State cites us to *Price v. State*, 405 Md. 10 (2008) for the proposition that "a defendant must note his or her objection to allegedly inconsistent verdict prior to the verdicts becoming final and the discharge of the jury." *Id.* at 40 (Harrell, J., concurring). For the reasons stated above, we do not reach the question as to whether this (continued...)

B. Interpreting Common Law Offenses

Generally, issues involving multiple punishments for criminal conduct require us to discern whether it was the intent of the legislature for the offender to receive multiple convictions or punishments for the prohibited conduct. *Newton v. State*, 280 Md. 260, 274 n.4 (1977); *Spitzinger v. State*, 340 Md. 114, 121-27 (1995); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the intent of "[l]egislatures, not courts, prescribe the scope of punishments"); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot,* 77 U. Colo. L. Rev. 595, 596-97 (2006) (arguing that issues of multiple punishment involve questions of legislative intent rather than double jeopardy). Accordingly, if the present question involved a statutory crime, we would employ principles of statutory construction, and we would seek to discern whether the legislature intended for malfeasance and misfeasance to receive separate punishments. *See Spitzinger*, *supra*, 340 Md. at 119-20 ("'[W]hen dealing with the question of multiple punishment imposed after a single trial, and based on the same conduct, a critical question is one of legislative intent.'" (alterations in original) (quoting *Randall Book Corp. v State*, 316 Md. 315, 324 (1989)).

The crime of misconduct in office, however, exists under the common law and applies under Article 5 of the of the Maryland Declaration of Rights. MD. Const., art. V ("[T]he

[5] (...continued)
error is one for which preservation is not required, because, this issue was, in fact, preserved. Furthermore, for the reasons state in Part II(C), *infra*, *Price* is not on point because this case is properly framed as an issue of merger of convictions rather than one regarding inconsistent verdicts.

inhabitants of Maryland are entitled to the Common Law of England."). We inherit the common law from England, subject to legislative alterations, as well as our holdings, the emanations from both form a penumbra which accommodates changed circumstances. *See Danforth v. Groton Water Co.*, 178 Mass. 472, 477, 59 N.E. 1033, 1034 (1901) (Holmes, J.) (noting "common law [rules] end in a penumbra" subject to limitations on the state police power). Indeed:

> The common law of *England* is derived from immemorial usage and custom, originating from acts of parliament not recorded, or which are lost, or have been destroyed. It is a system of jurisprudence founded on the immutable principles of justice, and denominated by the great luminary of the law of *England*, the perfection of reason. The evidence of it are treatises of the sages of the law, the judicial records and adjudications of the courts of justice of *England*.

State v. Buchanan, 5 H. & J. 317, 365 (1821).

Because the common law lacks the statutory text necessary to articulate the precise confines of the law, the judiciary is enlisted to insure that the common law is not "inconsistent with, or repugnant to the spirit and principles of republican institutions, whose strength lies in the virtue and integrity of the citizen." *Id.* at 358. Indeed, in the context of common law offenses, it is the duty of the courts to not only interpret the law, as is the case with statutory offenses, but to "ascertain[] and declare[] the common law." *State v. Reese*, 283 Md. 86, 97 (1978). "However flexible and forward-looking the common law may be and indeed ought to be in other contexts, . . . courts should, for reasons rooted primarily in constitutional law, be extremely reluctant to enlarge the limits of substantive criminal liability

through the device of ascertaining and declaring the common law." *Id.* With these principles in mind, we endeavor to ascertain and declare the boundaries of this common law offense.

C. Defining Misconduct in Office

The common law crime of misconduct in office has been defined as "a corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." *Leopold v. State*, 216 Md. App. 586, 604 (2014) (quoting *Duncan v. State*, 282 Md. 385, 387 (1978)). Corrupt behavior may be proved by showing, "(1) the doing of an act which is wrongful in itself--malfeasance, or (2) the doing of an act otherwise lawful in a wrongful manner--misfeasance; or, (3) the omitting to do an act which is required by the duties of the office--nonfeasance." *Francis v. State*, 208 Md. App. 1, 22 (2012) (citing *Duncan*, *supra*, 282 Md. at 387).

As one popular treatise observes, however, "[c]onfusion has been injected into this area of law by resort to a multiplicity of names or terms with varying degrees of generality or specificity."[6] Rollin M. Perkins & Ronald N. Boyce, Criminal Law 543 (3rd ed. 1982). Additionally, varying terms are employed to describe the manner in which misconduct in office is committed. *Id.* ("In addition to the terms used to represent the entire area will be found others intended to indicate certain parts thereof."). Indeed:

[6] Any one of the following phrases have been used to identify what is referred to as misconduct in office: "[O]fficial misconduct, misbehavior in office, malconduct in office, malpractice in office, misdemeanor in office[,] and corruption in office. No doubt others have found their way into the cases." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 543 (3rd ed. 1982).

> The distinction between malfeasance in office and misfeasance in office is much less sharp in the actual cases than it is in legal theory, and since *the reference is not to two different offenses, but merely to two different modes of committing the offense*, the courts have had little occasion to indulge in hairsplitting discussions of the problem . . . . Since, however, nothing is involved other than the use of legal labels it is better to employ some such term as "misconduct in office" or "official misconduct" than to labor the distinction between "malfeasance" and "misfeasance."

Id. at 545 (emphasis added). Furthermore, oftentimes,

> "malfeasance, nonfeasance or misfeasance in office" is referred to as the "common-law offense." *Ex parte Amos*, 93 Fla. 5, 19-20, 112 So. 289, 294 (1927). In one case the language might be thought of as referring to different offenses but the court is merely following the wording of counsel while refuting counsel's contention that the offense shown by the evidence was not the offense charged. *Fuson v. Commonwealth*, 241 Ky. 481, 44 S.W.2d 578 (1931).
>
> Probably the most careless statement to be found in the cases in this regard is the reference to "the *common law offenses* of malfeasance, misfeasance, nonfeasance, and misdemeanor in office." *Commonwealth v. Mecleary*, 147 Pa. Super. 9, 21-[2]2, 23 A.2d 224, 229 (1941). One unfamiliar with the field might assume this had reference to three different felonies and one misdemeanor. As there was no common-law felony in this field no more need be said.

Id. at 545 n.99. Accordingly, one may engage in malfeasance, misfeasance, or nonfeasance to satisfy the corruption element of the common law crime of misconduct in office. *Francis*, *supra*, 208 Md. App. at 22. Notably, it is sufficient to prove corruption under either a theory of malfeasance, misfeasance, or malfeasance. The fact that one instance of misconduct in office may be proved by multiple theories, however, does not mean that multiple offenses

have been committed. Indeed, "the name of the crime given in an indictment does not determine the offense alleged to have been committed, but such offense is determined from the facts stated in the indictment." *Francis*, *supra*, 208 Md. App. 23 (quoting *State v. Carter*, 200 Md. 255, 262 (1952)). Accordingly, the crime of misconduct in office is one unit of prosecution regardless of the particular theory by which it is proved.

Our most recent reported case on misconduct in office is *Leopold v. State*, 216 Md. App. 586 (2014). The case involved allegations against the former County Executive of Anne Arundel County. *Id.* at 591. Under the color of his office, Leopold compelled his assistant to drain his urine collection bag and enlisted his executive protection officers to campaign on his behalf. *Id.* at 595-96. Thereafter, Leopold was charged with two counts of misconduct in office, both under theories of misfeasance. *Id.* at 597. Leopold argued that the State inappropriately "switched from a misconduct prosecution based on misfeasance to one based on malfeasance," but the court rejected this argument because "in the end analysis, the crime of misconduct in office . . . encompasses both misfeasance and malfeasance." *Id.* at 607 n.9. Indeed, *Leopold* illustrates how malfeasance and misfeasance are merely terms used to aid litigants and the courts in articulating the means by which the element of corrupt behavior is satisfied. These terms, however, are not necessary elements of the unit of prosecution, that is, the substantive offense of misconduct in office.

Furthermore, Leopold was convicted of successive counts of misconduct in office because the gravamen of each count stemmed from separate conduct. To the contrary, in the

case *sub judice*, Nkemtitah's convictions stem from the same conduct, that is, serving as an accomplice to an assault by shutting the door to the adjacent search room.

Regardless of whether the State seeks multiple counts of the same offense, or whether the State allegedly charges multiple crimes in a single count, courts consistently look to "the facts stated in the indictment" to ascertain the offense charged. *Carter*, *supra*, 200 Md. at 262. In *Carter*, the State issued an indictment charging the defendant of misconduct in office under theories of malfeasance, misfeasance, and nonfeasance in a single count. *Id.* at 258-59. The appellee argued that it was duplicitous to charge the separate crimes of malfeasance, misfeasance, and nonfeasance in a single count. *Id.* at 262. The court rejected appellee's argument, holding that regardless of whether the conduct is classified as malfeasance, misfeasance, or nonfeasance, "it is a clear charge of misconduct in office, and it is the only charge contained in the indictment. All that precedes it are statements of motive and method leading up to the description of the crime." *Id.* at 267.

The instant case is distinguishable from *Carter* because we seek to determine whether it is permissible to convict a defendant of multiple counts of an identical crime for the same conduct, rather than determine whether differing means of committing misconduct in office are identical crimes. *Carter* is nevertheless instructive because it illustrates how, regardless of the name the state attributes to the particular conduct, "the offense is determined by the facts stated in the indictment." *Id.* at 262.

Here, Nkemtitah was charged with two counts of misconduct in office. The charging document reads as follows:

COUNT 2

> . . . **DAVID NKEMTITAH** . . . WHILE ACTING AS A PUBLIC OFFICIAL, ENGAGED IN CORRUPT BEHAVIOR BY DOING AN ACT THAT IS OTHERWISE LAWFUL IN A WRONGFUL MANNER, TO WIT: CONCEALING THE ASSAULT OF GEORGE RODGERS ON LUTHER LEE SPRIGGS, BY SHUTTING A DOOR IN VIOLATION OF THE COMMON LAW AND AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE. **(MISCONDUCT IN OFFICE-Misfeasance)**

COUNT 3

> . . . **DAVID NKEMTITAH** . . . WHILE ACTING AS A PUBLIC OFFICIAL, ENGAGED IN CORRUPT BEHAVIOR BY DOING AN UNLAWFUL ACT, TO WIT: ACTING AS AN ACCOMPLICE TO THE ASSAULT OF GEORGE RODGERS ON LUTHER LEE SPRIGGS, BY SHUTTING A DOOR IN VIOLATION OF THE COMMON LAW AND AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE..[sic] **(MISCONDUCT IN OFFICE-Malfeasance)**

Our review of the charging document demonstrates that the only differences in the alleged conduct is that the second count accuses Nkemtitah of "concealing [an] assault" whereas the third court alleged that he "acted as an accomplice to the assault." The State argues that Nkemtitah may properly be convicted of both counts two and three because his conduct can be characterized as both misfeasance (shutting a door) and malfeasance (acting as an accomplice to the assault). We are unpersuaded.

The trial judge found that "the defendant knowingly aided and encouraged the commission of the crime." The court continued to find that "[b]y kicking that door shut, he knowingly aided and encouraged the deputy to continue with the assault." The court's factual findings clearly indicate that the only conduct that gave rise to counts two and three was the shutting of the door. The State's assertion that Nkemtitah may be charged with two counts of misconduct in office resulting from concealing an assault and encouraging an assault ignores the practical reality that both alleged offenses are based upon the exact same conduct. The State admitted this much when, while arguing against the motion for acquittal, the State acknowledged that "[Nkemtitah] seems to be arguing that the State can't charge misfeasance and malfeasance in one indictment, but we can proceed certainly under different theories and that's simply all we're doing." For the reasons that follow, misconduct in office is one crime, notwithstanding the manner in which it was committed. Accordingly, Nkemtitah may only be convicted of this offense once for the conduct that serves as the basis for both alleged offenses. Unlike *Leopold*, there were no other findings that would sustain a charge for misconduct in office other than the findings sufficient to sustain a single count.

For the reasons stated above, the elements of the crime alleged in count two and three are identical. Furthermore, the conduct alleged by the state--and found by the trial judge--in count two and three consist of identical conduct with the same requisite intent. We are well aware that the same conduct may be charged as two crimes under certain circumstances.[3]

[3] In such circumstances, "the legislature [has] indicate[d] an express intent to punish (continued...)

Likewise, a single crime may be charged twice for two separate instances of conduct.[4] Here, however, charging Nkemtitah for the same crime twice for the same conduct is inherently inconsistent with this criminal offense. We, therefore, vacate the conviction for misconduct in office-misfeasance under count two of the indictment.[5]

D. Sufficiency of the Evidence

Nkemtitah further argues that there was insufficient evidence to convict him of misconduct of office under a theory of malfeasance. Nkemtitah avers that there was no evidence in the record which indicates that he possessed the requisite corruption or bad intent

[3] (...continued)
certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test." *Newton*, *supra*, 280 Md. at 274 n.4 (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)). In this case, the merger of sentences may be appropriate. *See Spitzinger*, *supra*, 340 Md. at 121-27.

[4] This is what occurred in *Leopold*, *supra*, 216 Md. App. 586.

[5] We recognize that counts two (misconduct in office-misfeasance) and three (misconduct in office - malfeasance) merely reflect one unit of prosecution. We vacate count two rather than count three, however, because there is sufficient evidence to sustain a conviction of misconduct in office premised on a theory of malfeasance through the conviction for second degree assault. *See* Part II(D), *infra*. Further, counts one and three were merged by the trial judge at sentencing. Therefore, by vacating the conviction for count two, we need not remand the case for re-sentencing.

Additionally, Nkemtitah argues that by convicting him of two counts of misconduct in office under both theories, the trial judge rendered legally inconsistent verdicts. In light of our holding that Nkemtitah can only be convicted of one count of misconduct in office for one instance of the same conduct, the issue regarding whether the two verdicts were inconsistent is moot.

to commit this offense. We review challenges to the sufficiency of the evidences under the standard articulated in Part I(A), *supra*.

We agree, as does the State, that corruption requires a willful abuse of authority, and not merely negligence or a mistake of judgment. *Leopold*, *supra*, 216 Md. App. 586, 605 (2014) (citing *Chester v. State*, 32 Md. App. 593, 606 (1976)); *see also Friend v. Hamill*, 34 Md. 298, 304 (1871); *Hiss v. State*, 24 Md. 556, 562 (1866); Hyman Ginsberg & Isidore Ginsberg, Criminal Law and Procedure in Maryland 152 (1940) ("This does not mean a mere error of judgment, but rather a wilful abuse of authority . . . . "). Nkemtitah avers, however, that there is no evidence to support the conclusion that his conduct rises to the level of a willful abuse of authority, but, at most, is the result of mere negligence. In support of his argument, Nkemtitah relies on his own testimony and that of Lt. Col. Crumbacker for the proposition that Nkemtitah properly shut the door pursuant to departmental policy. Indeed, it is Nkemtitah's theory that at the time of the incident he did not have the intent to engage in a wilful abuse of authority, but rather he acted under a good faith belief he was acting "in accordance with the DOC's policies and procedures and in accordance with Sergeant Porter's orders . . . ."

The State cites to non-binding authority, including the Maryland Criminal Pattern Jury Instructions, out-of-state case law, and a dictionary definition in arguing that the intent requirement for a corrupt act does not impose any heightened intent requirement beyond that needed to commit a "willful, evil, depraved, corrupt act." We need not, however, further

opine on the definition of corrupt or willful abuse of authority. The Committee drafting the Maryland Criminal Pattern Jury Instruction on misconduct in office noted that it expressly "did not define or explain 'corrupt' or 'corruptly,' believing that the words 'corrupt' or corruptly' communicate their meaning better than a definition would." *Maryland Criminal Pattern Jury Instructions* 4:23 at 675 (2d ed. 2012). Accordingly, to commit misconduct in office Nkemtitah must have acted corruptly, which is synonymous with a willful abuse of authority. The intent requirements from count one[6] and count three of the indictment exist independent of each other, but the factual findings used to infer intent regarding count one can serve as evidence of the requisite intent in order to convict Nkemtitah under count three of the superceding indictment.

Upon rendering its verdict, the circuit court properly identified the elements of misconduct in office. Further, the judge observed that corruption under a theory of malfeasance requires the commission of an unlawful act. It may be that not all unlawful acts are corrupt. Indeed, one who acts negligently or recklessly may not necessarily be corrupt. In concluding that Nkemtitah willfully abused his authority, however, the judge incorporated his findings of intent in convicting Nkemtitah for second-degree assault on an aiding and abetting theory. By incorporating those findings, the judge concluded that "the defendant *knowingly* aided and encouraged the commission of the crime." (emphasis added).

[6] The intent requirement for being an accomplice to an assault was to act "'knowingly, voluntarily, and with common interest with the principal offender.'" *Owens*, *supra*, 161 Md. at 99-100 (quoting *Woods v. State*, 315 Md. 591, 615 n. 10 (1989)).

For the reasons stated in Part I(B), *supra*, there was sufficient evidence to find the Nkemtitah acted with the requisite intent to be an accomplice to an assault. This finding necessarily precludes the possibility that Nkemtitah's conduct was the result of negligence or a mistake in judgment. The trial judge rejected Nkemtitah's theory that he was acting pursuant to a State policy. Such is permitted because, "a trier of fact is no obliged to believe all that it hears . . . . [He] may believe or disbelieve, credit or disregard, any evidence introduced and a reviewing court may not decide on appeal how much weight must be given to each item of evidence. *Sessoms v. State*, 357 Md. 274, 293 (2000). Thereafter, the judge drew the negative inference that shutting the door, in the absence of a legitimate reason to do so, in light of the context of the video, was done with a corrupt intent. Such inference is permissible because, "'intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence.'" *Galloway v. State*, 365 Md. 599, 650 (2001) (quoting *State v. Raines*, 326 Md. 582, 591 (1992)).

We need not address whether all unlawful acts committed with a higher degree of culpability than mere negligence or a mistake in judgment are corrupt. It is sufficient to hold that upon viewing all the evidence in a light most favorable to the state, a fact-finder might reasonably conclude that Nkemtitah acted corruptly. We emphasize that we do not sit as the trier-of-fact, and we defer to the fact-finder so long as their conclusions are supported by some evidence after drawing all inferences in favor of the prevailing party. *Smith*, *supra*,

415 Md. at 184. We are persuaded that the evidence -- again, though thin -- is sufficient to support the trial court's conclusion that Nkemtitah willfully abused his authority. We, therefore, hold that there was sufficient evidence that Nkemtitah acted corruptly. As a result, we affirm Nkemtitah's conviction for misconduct in office under count three of the indictment.[7]

III.

Nkemtitah's final contention is that the trial judge's conduct was "so egregious as to deprive [him] of his due process right to a fair and impartial trial." Nkemtitah asserts that the totality of the judge's actions gave the appearance that the judge was no longer an impartial arbiter of fact. Nkemtitah makes various sub-arguments, arguing, *inter alia*, that the trial court: (1) improperly conflated the elements of misconduct in office and improperly emphasized Nkemtitah's failure to act; (2) improperly adopted the State's arguments and failed to adequately articulate its reasons when denying Nkemtitah's motions; (3) improperly

[7] Nkemtitah further argues that there was insufficient evidence to find him guilty of malfeasance because the act of shutting a door is not *per se* illegal. For the reasons stated in Part II(A), *supra*, the offense charged is misconduct in office, and the particular means by which the State proves that offense is immaterial, be it under a theory of malfeasance or misfeasance. Assuming, *arguendo*, that the State is limited to a theory of malfeasance, this argument nevertheless fails because the unlawful act was not merely shutting a door, but by serving as an accomplice to the assault. *See* Part I, *supra*.

limited testimony about Nkemtitah's motive and intent[8]; and (4) impermissibly shifted the burden of proof to the defendant.[9]

In large part, the issues raised by Nkemtitah with respect to the trial judge's conduct are unpreserved. Nkemtitah tacitly admits as much in his brief, noting that "[t]he courts have frequently invoked the doctrine of 'plain error' in reviewing allegations of unobjected to judicial bias." As Nkemtitah acknowledges, however, appellate courts will only exercise their discretion to undertake plain error review "when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Kelly v. State*, 195 Md. App. 403, 431 (2010) (internal quotations omitted). Accordingly, "appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.* (internal quotations and citations omitted). Indeed, this court has commented that "a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7-11." *Garner v. State*, 183 Md. App. 122, 152 (2008), *aff'd*, 414 Md. 372 (2010).

We decline to exercise our discretion to undertake plain error review in the present case. Our review of the record does not lead us to believe that the trial court was biased or

[8] Nkemtitah does not raise arguments with respect to whether individual objections to testimony were improperly sustained by the trial court. Rather, he points to various objections sustained by the trial court as examples of improper judicial bias.

[9] Nkemtitah avers that the trial court's comments when denying his motion for mistrial indicated that the trial court had impermissibly shifted the burden of proof to the defendant. Nkemtitah does not assert on appeal that the trial court erred by denying the motion for mistrial.

that Nkemtitah was deprived of a fair trial. Simply put, our review of the record as a whole leads us to conclude that Nkemtitah received a fair trial and that the trial court made appropriate factual findings and applied appropriate legal standards. Because the unobjected to errors are not "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial," we will not address each alleged example of judicial bias identified by Nkemtitah.

For the reasons stated above, we hold that there was sufficient evidence to sustain Nkemtitah's conviction for aiding and abetting an assault and for one count of misconduct in office. We, therefore, vacate Nkemtitah's conviction under count two of the indictment. Finally, the issue presented as to whether the circuit court's findings were legally inconsistent is moot in light of out holding in Part II(B), *supra*. Additionally, we decline to invoke plain error review of the remaining allegations of error. We, therefore, affirm in part and vacate in part the judgment of the Circuit Court for Prince George's County.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND VACATED IN PART. CONVICTION AND SENTENCE FOR MISCONDUCT IN OFFICE - MISFEASANCE (COUNT II) VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY PRINCE GEORGE'S COUNTY.