UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0854

September Term, 2014

LAMAR MAURICE WILLIAMS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: May 1, 2015

Lamar Williams was convicted in the Circuit Court for Howard County of first-degree burglary, third-degree burglary, and theft of goods having a value under $100. On appeal, Mr. Williams argues that he received an improper sentence and that there was insufficient evidence to support his convictions. We disagree and affirm.

I. BACKGROUND

On the evening of March 20, 2013, Tanya Antonille and her husband went to sleep in their home in Fulton. When she awoke the next day, Ms. Antonille went downstairs to the kitchen and discovered that a bag containing her wallet, her laptop, and miscellaneous personal items was missing. She then observed that the door leading into the kitchen from the outside was wide open, even though the door had been closed when she went to bed.[1] Concerned that her home had been burglarized, Ms. Antonille contacted the police. Officer Philip Champagne of the Howard County Police Department reported to the scene. After making a record of the missing items, Officer Champagne performed an area check of the nearby roads and was able to locate several of the missing items, which were apparently discarded by the burglar.

Two weeks later, on April 3, 2013, Detectives Frank Springer and Mark Frazier of the Montgomery County Police Department conducted a search of a residence in Greenbelt

[1] Ms. Antonille testified that because the door leading to the kitchen could only be accessed through the garage, she normally leaves the door unlocked. On the evening in question, Ms. Antonille testified that she neglected to put the garage door down or lock the door leading to the kitchen, which left her home accessible.

pursuant to a search warrant. The detectives recovered twelve items, including a laptop, that they believed were stolen. Detective Springer contacted Detective William Cutsail of the Howard County Police Department about the laptop, believing it was connected to a Howard County burglary. Detective Cutsail retrieved the laptop and determined that its serial number matched the serial number of the laptop stolen from Ms. Antonille's residence. Ms. Antonille later confirmed that the recovered laptop was, indeed, hers.

The police arrested Mr. Williams in connection with the burglary of Ms. Antonille's residence as well as a number of other burglaries. After Mr. Williams was read his *Miranda* rights, Detective Cutsail questioned him. During the course of the interview, Mr. Williams told Detective Cutsail that he purchased the laptop from someone on the street, although he was unable to specify when, where, or from whom he made the alleged purchase.

On April 12, 2013, Mr. Williams was charged with first-degree burglary, third-degree burglary, fourth-degree burglary, and theft. After a bench trial, Mr. Williams was convicted of all charges. On May 30, 2014, the circuit court sentenced Mr. Williams to fifteen years' incarceration for the first-degree burglary and a concurrent sentence of ninety days incarceration for the theft.[2] Mr. Williams noted a timely appeal.

[2] The circuit court merged the third-degree burglary conviction with the first-degree burglary conviction.

II. DISCUSSION

Mr. Williams contends that the circuit court erred in two ways. *First*, he argues that his conviction for theft should merge into his conviction for first-degree burglary and that his conviction for first-degree burglary should merge into his conviction for third-degree burglary. *Second*, he asserts that there was insufficient evidence to support his convictions.[3] We disagree with both arguments.

A. Mr. Williams Was Properly Sentenced.

Mr. Williams contends that his theft conviction should have merged with his first-degree burglary conviction because theft is a lesser included offense of first-degree burglary and the "two offenses arose out of precisely the same conduct." He claims that a "straightforward application of the required evidence test mandates merger of the first-degree burglary sentence into burglary in the third degree." We find that Mr. Williams was sentenced properly.

"[T]he usual rule for deciding whether one criminal offense merges into another or whether one is a lesser included offense of the other, . . . when both offenses are based on

[3] Mr. Williams phrased the questions as follows:

> 1. Is [Mr. Williams] entitled to merger of first-degree burglary into third-degree burglary, and theft into first-degree burglary, for sentencing purposes?
>
> 2. Was the evidence legally insufficient to sustain the convictions?

the same act or acts, is the so-called 'required evidence test.'" *State v. Lancaster*, 332 Md. 385, 391 (1993) (citations omitted). This test compares the elements of the two crimes:

> The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, . . . merger follows.

Id. at 391-92 (citations and quotations omitted). This does not end the merger inquiry, however:

> [E]ven though offenses may be separate and distinct under the required evidence test, courts occasionally find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction.

Brooks v. State, 284 Md. 416, 423 (1979); *see also Jones v. State*, 357 Md. 141, 156 (1999) ("Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, unless the legislature clearly intended to impose multiple punishments."). When two statutory crimes arise out of the same act,

> [i]t is purely a question of reading legislative intent. If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If

> the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so-called "Rule of Lenity," by which we give the defendant the benefit of the doubt.

Walker v. State, 53 Md. App. 171, 201 (1982) (citations omitted). Accordingly, we undertake a two-step analysis to determine whether to merge two offenses under the rule of lenity: (1) *first*, we ask whether the two offenses arise out of the same criminal conduct; and (2) *second*, we ask whether the Legislature has expressed an intention to impose multiple punishments.

Mr. Williams argues that his convictions for theft and for first-degree burglary merge under the required evidence test. We disagree. Mr. Williams was convicted of first-degree burglary, which required the State to prove that (1) he broke into the dwelling of another; and that (2) he did so with the intent to commit theft. *See* Md. Code (2002, 2012 Repl. Vol.), § 6-202(a) of the Criminal Law Article ("CL") ("A person may not break and enter the dwelling of another with the intent to commit theft."). Mr. Williams was also convicted of theft, which required the State to prove that he (1) knowingly exercised unauthorized control over another's property; and that he (2) did so with the intent to deprive the owner of the property. *See* CL § 7-104(a)(1) ("A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person . . . intends to deprive the owner of the property."). Because Mr. Williams's first-degree burglary conviction required proof of breaking and entering the dwelling of another, which is not required for a theft conviction, and because his theft conviction required proof that he

exercised unauthorized control over another's property, which is not required for a first-degree burglary conviction, the two offenses are not merged under the required evidence test. *See Walker*, 53 Md. App. at 200 ("Each crime has a required element which the other does not. They are clearly not 'the same offense.'" (citations omitted)).

He argues next that these same convictions merge under the rule of lenity because they arose out of the same conduct. He notes that "trial courts have routinely merged theft into burglary" and directs our attention to three instances in which a trial court merged a theft conviction into a burglary conviction: *Tucker v. State*, 407 Md. 368, 377-78 (2009); *Pitt v. State*, 152 Md. App. 442, 446 (2003), *aff'd*, 390 Md. 697 (2006); and *Bryan v. State*, 63 Md. App. 210, 212 (1985). To be sure, the trial courts in *Tucker*, *Pitt*, and *Bryan* did, in fact, merge the defendants' theft convictions into burglary convictions. However, the mergers of these convictions were not at issue on appeal in those cases and, accordingly, the appellate courts in those cases did not express an opinion on the trial courts' use of the merger doctrine. At most, the cases cited by Mr. Williams could be construed to *permit* a trial court to merge a theft conviction into a burglary conviction, not to *require* merger.

In any event, the rule of lenity is no help to Mr. Williams here because *his* theft conviction did not arise out of the same conduct as his first-degree burglary conviction. Mr. Williams committed a first-degree burglary when he broke into Ms. Antonille's residence with the intent to steal her property. If, after breaking in, he had a change of heart and decided not to steal Ms. Antonille's property, he still had committed a first-degree burglary. By contrast, Mr. Williams committed theft when he actually took possession of

and stole Ms. Antonille's property. Because the two offenses did not arise out of the same criminal conduct, the rule of lenity is inapplicable and Mr. Williams was not entitled to have his theft conviction merge with his first-degree burglary conviction. *See Johnson v. State*, 223 Md. 479, 482 (1960) ("[B]reaking and entering with intent to steal and larceny, even though part of the same occurrence, are separate crimes which may be charged in separate counts of the same indictment or information, and for which there may be separate sentences." (citation omitted)); *Jennings v. State*, 8 Md. App. 312, 319 (1969) ("[C]onvictions of common law burglary and grand larceny do not merge nor are they inconsistent." (citation omitted)).

Finally, Mr. Williams contends that his first-degree burglary conviction should have merged into his third-degree burglary conviction rather than the other way around.[4] Again, Mr. Williams's first-degree burglary conviction required the State to prove that (1) he broke into the dwelling of another; and that (2) he did so with the intent to commit theft. *See* CL § 6-202(a). On the other hand, his conviction for third-degree burglary required the State to prove that (1) he broke into the dwelling of another; and that (2) he did so with the intent to commit a crime. *See* CL § 6-204(a) ("A person may not break and enter the dwelling of another with the intent to commit a crime."). Third-degree burglary is a lesser included offense of first-degree burglary—the *actus reus* of each crime is identical and the

[4] Mr. Williams argues in the alternative that his third-degree burglary conviction should have merged into his first-degree burglary conviction. There is nothing for us to analyze here, however, because that is what the circuit court in fact did.

only distinction between them is the less culpable *mens rea* that attaches to third-degree burglary. *See Bass v. State*, 206 Md. App. 1, 7-8 (2012). As a result, a conviction for third-degree burglary merges into a conviction for first-degree burglary, *Lancaster*, 332 Md. at 391 ("[I]f all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." (citation omitted)), and the circuit court sentenced Mr. Williams properly when it merged his third-degree burglary conviction into his first-degree burglary conviction.

B. There Is Sufficient Evidence To Support Mr. Williams's Convictions. [5]

On appeal, we review the sufficiency of evidence to support a conviction by looking at 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.'" *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*,

[5] The State asks us not to consider Mr. Williams's sufficiency challenge because he failed to provide us with a transcript of an audio recording that the State played during the presentation of its case-in-chief. *See* Md. Rule 8-411(3) ("Unless a copy of the transcript is already on file, the appellant shall order in writing from the court reporter a transcript containing . . . if relevant to the appeal and in the absence of a written stipulation by all parties to the contents of the recording, a transcription of any audio or audiovisual recording or portion thereof offered or used at a hearing or trial."). Because Mr. Williams failed to supply us with a transcript of an audio recording played during his trial, dismissal of his appeal would be justifiable pursuant to Md. Rule 8-602(a)(6) and (8). *See Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 347-48 (2007). However, due to our preference to reach a decision on the merits of Mr. Williams's case, we decline to exercise our discretion to dismiss Mr. Williams's appeal and instead consider his sufficiency argument on the merits. *See id.*

375 Md. 435, 454 (2003)). Our concern is not with whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). And we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)).

With respect to the crimes of theft and burglary in particular, "'[w]e have long and consistently held that exclusive possession of recently stolen goods, absent a satisfactory explanation, permits the drawing of an inference of fact strong enough to sustain a conviction that the possessor was the thief.'" *Molter v. State*, 201 Md. App. 155, 163 (2011) (quoting *Brewer v. Mele*, 267 Md. 437, 449 (1972)). Moreover, "the permitted inference that the possessor [of recently stolen goods] was the thief coupled with evidence that the theft was a compound theft has regularly been held to be legally sufficient to convict the possessor of the compound theft in all of its compounded manifestations." *Id.*

at 169 (citations omitted); *see also Boggs v. State*, 228 Md. 168, 172 (1962) ("Appellant's possession of the stolen property . . . was enough to give rise not only to the inference of fact that he was the thief . . . but would also tend to support an inference that as the possessor he was the burglar as well as the thief.").

In this case, the police recovered the laptop during a search of an apartment where Mr. Williams stayed with his girlfriend only thirteen days after Ms. Antonille's residence was burglarized and her laptop was stolen. As they questioned him, the police informed Mr. Williams that the laptop recovered from his apartment was stolen during a Howard County burglary (its serial number matched Ms. Antonille's), and Mr. Williams responded that he had purchased the laptop on the street.[6] But Mr. Williams was unable to specify when, where, or from whom he purchased the laptop beyond indicating that he may have purchased it in Riverdale. Thus, by his own admission, Mr. Williams was in exclusive[7]

[6] In his brief, Mr. Williams disputes that he told the police that he purchased the laptop recovered from his apartment on the street and instead claims that he "told the police that he possessed *a* Dell laptop [but] did not tell them that he possessed the specific laptop owned and identified by [Ms.] Antonille." However, the record amply supports a factual finding that Mr. Williams told police that he purchased the laptop recovered from his apartment, as opposed to some other hypothetical laptop he acquired on the street. During trial, Mr. Williams's counsel repeatedly questioned Detective Cutsail on this point, prompting him to respond: "Mr. Williams received a list of what was actually taken from his home, and he indicated that the laptop that was taken from the home was the one that he purchased in the street."

[7] During both his questioning by Detective Cutsail and the trial, Mr. Williams never sought to implicate his girlfriend, with whom he shared the apartment the stolen laptop was found. Nor does he dispute on appeal that if he was in possession of the stolen laptop, he was also in *exclusive* possession of the laptop.

possession of a recently stolen laptop. *See Butz v. State*, 221 Md. 68, 77 (1959) ("[T]he testimony disclosed that [the defendant] was in possession of [the stolen goods] approximately fourteen days after the first burglary . . . [and we] have no hesitation in holding that the defendant's possession [of the stolen goods] was 'recent' for the purposes of the rule being considered."). At that point, a fact-finder could readily infer that Mr. Williams was the thief or the burglar who took the laptop from its owner. *See Molter*, 201 Md. App. at 169.

Mr. Williams claims that he explained why he possessed the laptop when he told the police that he purchased it on the street. But it was not enough for Mr. Williams simply to provide *an* explanation for how he came into possession of the recently stolen laptop; instead he was required to provide a *reasonable* explanation for his possession. *See Howard v. State*, 238 Md. 623, 624 (1965) ("When he was arrested, appellant was wearing a pair of shoes which had been recently stolen and he could give no *reasonable* explanation of how they came into his possession. The trial judge could properly draw from the circumstances the inference of fact that he was the burglar." (emphasis added)); *Felkner v. State*, 218 Md. 300, 305 (1958) ("The possessor of stolen goods soon after the theft must give a *reasonable* explanation of how he came into possession or face the inference that he is the thief." (emphasis added)). The trial court found Mr. Williams's explanation not credible because he was unable to specify when, where, or from whom he made the alleged purchase, even though he came into possession of the laptop less than two weeks before he was questioned by the police. The trial court was free to believe him or not, but was not

required to credit Mr. Williams's explanation over the permissible inference that he was the burglar. *See Lewis v. State*, 225 Md. 474, 475 (1961) ("[The appellant] claimed that he was not the thief and further stated that his possession [of the recently stolen bonds] was part of a scheme whereby he was to try to cash the bonds for Freddy; that Freddy had given him the bonds and wallet . . . [but t]he trial court rejected this explanation as unreasonable . . . [and because] the trial court was not required to believe the explanation proffered by the appellant, the convictions were proper under the evidence.").

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.