UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1167

September Term, 2014

NATHANIEL FAISON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 10, 2015

Following a jury trial in the Circuit Court for Baltimore City, appellant, Nathaniel Faison ("Faison"), was convicted of robbery with a dangerous weapon, first-degree assault, use of a handgun in the commission of a felony or crime of violence, first-degree burglary, conspiracy to commit robbery with a dangerous weapon, conspiracy to commit first-degree assault, conspiracy to use a handgun in the commission of a felony or crime of violence, and conspiracy to commit first-degree burglary. The court sentenced Faison to 20 years for robbery with a dangerous weapon and 20 years, concurrent, for each of the remaining charges.[1]

Faison filed a timely appeal and presents three questions for review, as follows:

1. Was the evidence legally insufficient to support appellant's convictions?

2. Did the trial court err in instructing the jury on robbery?

3. Did the trial court err in failing to merge appellant's convictions?

Because we conclude that the court erred in failing to merge several of Faison's convictions, we vacate Faison's sentences for first-degree assault, conspiracy to commit robbery with a dangerous weapon, conspiracy to use a handgun in the commission of a felony or crime of violence, and conspiracy to commit first-degree burglary. We affirm the circuit court's judgments in all other respects.

[1] The first five years of the sentence for use of a handgun in the commission of a felony or crime of violence were to be served without the possibility of parole.

BACKGROUND

On the afternoon of July 6, 2013, Gregory Valentine ("Valentine") and his cousin, Travis Dixon ("Dixon"), picked Faison up at the Gulf gas station on Loch Raven Boulevard and drove to a street off of Sinclair Lane in Baltimore City.[2] Once in the car, Faison gave Dixon around $1,150 to purchase marijuana. After Faison gave Dixon the money, Dixon decided not to go through with the transaction because he was on probation and he "didn't have a good feeling" about Faison. Instead of giving Faison his money back, Dixon told Faison that he needed to "go and clarify things with [his] people[,]" and that Faison should meet him in the alleyway around the corner in five minutes. When Faison got out of the car, Valentine drove away, Dixon was nowhere to be found, and Faison was left stranded without his money and without any marijuana.

An hour or two later, Faison showed up at Valentine's house banging at the front door and yelling that he wanted his money back. Dixon secured the backdoor, called 911, and hid downstairs. Eventually, Faison and another man gained entry to the house and found Dixon in the basement. Faison aimed a gun at Dixon's head and said, "bitch you thought I wasn't going to find you . . . you all trying to play with me. You all trying to play with my money[.]" Faison hit Dixon across the head several times with the gun and then took all the money that Dixon had in his pocket, which was between $500 and $1,000.

[2] Valentine worked for Coca-Cola and he became acquainted with Faison because Faison worked at the Bi-Rite market on Belair Road, which was one of Valentine's daily delivery stops.

The men asked Dixon where the rest of the money was and Dixon responded that he did not have it, but stated that Valentine might have more money upstairs.

The men went upstairs and were immediately met by police, who had arrived at the scene. Police arrested Faison and recovered $793 from one of his pockets.[3]

Additional facts will be discussed below, as they pertain to the issues on appeal.

DISCUSSION

I.

Faison argues that the evidence was insufficient to sustain his convictions for robbery and the related charges because he "was only attempting to reclaim his own property[.]" The State responds that the contractual relationship was void ab initio because the underlying transaction was illegal and, therefore, "the money was not Faison's and the conviction for robbery with a deadly weapon was supported by the evidence."

To determine sufficiency of the evidence on appeal, we consider "'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.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)) (emphasis in original). "The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case." *Id.* "Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to

[3] The other man that was with Faison escaped through the back door. Dixon was unable to identify the man and only recalled that he was "dark-skinned" and had "a regular haircut".

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." *Id.*

The court instructed the jury that "[r]obbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property." The intent "must be a larcenous intent, which requires 'the fraudulent taking and carrying away of a thing without claim of right[.]'" *Ashton v. State*, 185 Md. App. 607, 614 (2009) (quoting *Metheny v. State*, 359 Md. 576, 605 (2000)).

Faison argues that he could not be guilty of robbery because he had a claim of right to the money that was superior to Dixon's. Faison, however, ignores the fact that the underlying transaction was for the sale of marijuana, which is illegal in Maryland "unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice[.]" Maryland Code (2002, 2012 Repl. Vol.), Criminal Law ("CL"), § 5-601(a)(1). "Courts have held that the [claim of right] defense does not apply where the defendant attempted to retake the proceeds of illegal activity." *Jupiter v. State*, 328 Md. 635, 645 (1992). Further, "[i]t is an ancient rule of law that parties to an illegal transaction can obtain no relief in the courts." *Cates v. State*, 21 Md. App. 363, 370 (1974). Finally, "if we were to find merit in appellant's contentions and overturn his conviction, the decision would have the practical effect of condoning an otherwise illicit activity." *Martin v. State*, 174 Md. App. 510, 525 (2007) (footnotes omitted). Accordingly, Faison's claim of right to the money is not a defense to the robbery charges.

The evidence, viewed in the light most favorable to the State, was sufficient for a rational trier of fact to find that Faison took and carried away $793 from Dixon's person

with the intent to deprive Dixon of the property. This Court in *Cates* held that "[i]t is not necessary that the person from whom the property is taken be the owner thereof. It is sufficient that the victim had prior possession, without regard to whether he had title to or any interest or right in the property." 21 Md. App. at 368. Accordingly, a "defendant may be guilty of robbery even though the victim had himself stolen the property from another person or the money stolen was the proceeds from the sale of property which had been stolen." *Id.* at 369.

Because Faison forcibly took the money from Dixon's pocket and the claim of right defense did not apply, there was more than sufficient evidence to support Faison's convictions for robbery with a deadly weapon and the related offenses.

II.

The court gave the State's requested jury instruction for robbery over defense counsel's objection. The instruction was, as follows, with the disputed portion highlighted in bold:

> Robbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property.
>
> So . . . to convict the Defendant of robbery the State must prove, one, that the Defendant took the property from Travis Dixon. Two, the Defendant took the property by force or threat of force. And three that the Defendant intended to deprive Travis Dixon of property.
>
> Property means anything of value. **It is essential only that the victim have possession without regard to whether**

> **he has title. And even though that possession resulted from stealing the property.**

See Martin, 174 Md. App. at 525. (Emphasis added).

Faison argues that the court erred in giving this instruction because the instruction was not a correct statement of the law "where it is undisputed that the victim did not have a right to the property superior to that of the defendant[.]" The State responds that this Court's holding in *Martin* remains dispositive and that the court did not abuse its discretion in instructing the jury.

Maryland Rule 4-325(c) provides, in relevant part: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." As such, "[a] trial court must give a requested jury instruction where '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Cost v. State*, 417 Md. 360, 368-69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)).

On appeal, Faison only argues the first prong, that the instruction was not a correct statement of law. The disputed portion of the jury instruction in this case is identical to the disputed portion of the jury instruction for robbery given in *Martin*. In that case, this Court held that the disputed portion was a correct statement of law and noted that "the disputed portion of the instruction is virtually a direct quote from *Cates*."[4] 174 Md. App. at 526.

[4] In *Martin*, we pointed to the following language in *Cates*: (continued…)

We, therefore, concluded that "the trial court did not err by including the aforementioned sentence in its given jury instruction." *Id.*

The holding in *Martin* remains good law and, therefore, we likewise conclude that the disputed sentence of the robbery instruction given in this case is a correct statement of law. Accordingly, the judge did not err in giving the State's requested instruction.

III.

Faison argues, and the State concedes, "that the trial court should have merged multiple conspiracies into a single sentence for conspiracy, and that first-degree assault and robbery with a deadly weapon should likewise have merged."

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* "Sentences for two convictions must be merged when: (1) the convictions are based on the same act

(…continued)

> While the capacity of the victim is immaterial, it is essential that he have possession or custody, for by definition, goods cannot be taken from "the person of another or in his presence" unless he has possession or custody of the goods. Since only the prior possession of the victim is required, *the defendant may be guilty of robbery even though the victim had himself stolen the property from another person or the money stolen was the proceeds from the sale of property which had been stolen.*

Martin, 174 Md. App. at 525-26 (quoting *Cates*, 21 Md. App. at 368-69) (Emphasis in original).

or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id.*

This Court has previously held that, under the required evidence test, "first-degree assault is 'a lesser included offense of robbery with a dangerous and deadly weapon.'" *Morris v. State*, 192 Md. App. 1, 39-40 (2010) (quoting Williams v. State, 187 Md. App. 470, 476 (2009)). Accordingly, "[t]he dispositive inquiry is whether appellant's first-degree assault convictions were distinct acts or whether they arose out of the acts of [the] armed robbery[.]" *Id.* at 40. Here, the robbery with a dangerous weapon and the first-degree assault were based on the same conduct during the home invasion and, therefore, the sentence for first-degree assault should have been merged into the sentence for robbery with a deadly weapon.

As to the conspiracy charges, "'[i]t is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit.'" *McClurkin v. State*, 222 Md. App. 461, 490 (2015) (quoting *Jordan v. State*, 323 Md. 151, 161 (1991)). This is because the unit of prosecution, "'is the agreement or combination rather than each of its criminal objectives.'" *Id.* (quoting *Jordan*, 323 Md. at 161). Here, there was no evidence that Faison and the other man engaged in four separate agreements and, therefore, only one of the conspiracy sentences can stand.

In determining which sentence to keep, "we shall leave standing the conviction and sentence for conspiracy to commit the crime with the greatest maximum penalty" and shall vacate the remaining sentences. *McClurkin*, 222 Md. App. at 491. Because the maximum

penalty for first-degree assault is twenty-five years and the maximum penalty for the remaining convictions is twenty years, we leave the sentence for conspiracy to commit first-degree assault and vacate the remaining conspiracy sentences. *See Carroll v. State*, 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged without ordering a new sentencing hearing."). Thus, Faison's sentence of 20 years for robbery with a dangerous weapon remains the same. As a result of the merger, Faison is left with concurrent 20 year sentences for use of a handgun in the commission of a felony or crime of violence, first-degree burglary, and conspiracy to commit first-degree assault.

SENTENCES FOR FIRST-DEGREE ASSAULT, CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON, CONSPIRACY TO USE A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE, AND CONSPIRACY TO COMMIT FIRST-DEGREE BURGLARY ARE VACATED. ALL REMAINING JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE CITY.