Circuit Court for Cecil County
Case No. C-07-CR-18-1360

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1192

September Term, 2019

DAVID EMMONS STONE

v.

STATE OF MARYLAND

Shaw Geter,
Gould,
Maloney,
(Specially Assigned),

JJ.

Opinion by Maloney., J.

Filed: February 11, 2021

A jury empaneled in the Circuit Court for Cecil County, acquitted appellant, David Stone, of second-degree burglary, malicious destruction of property, and theft, based on a theory of unauthorized control. The jury was unable to reach a verdict on a charge of fourth-degree burglary. The jury did convict appellant of one count of theft of property valued between $25,000 - $100,000, predicated on a theory of a continuing course of conduct. Later, the State entered a charge of fourth-degree burglary nolle prosequi. The court sentenced appellant to eight years' incarceration and ordered him to pay restitution in the amount of $50,000.

Appellant filed a timely appeal and presents three questions for our consideration which we shall reorder and rephrase slightly:

1) Did the Trial Court give an instruction on a lesser-included offense when neither side requested it, in violation of *Hagans*?

2) Was the Appellant convicted of a "non-existent" charge?

3) Did Appellant's trial counsel provide ineffective assistance of counsel?

Both parties assert, and we agree, that appellant's convictions should be reversed because the trial court allowed the jury to consider a lesser-included charge of theft despite the fact that neither party made such a request. The court's action was contrary to the holding in *Hagans v. State*, 316 Md. 429 (1989), which specifically prohibits the court from placing lesser included charges before the jury absent a request from counsel. Consequently, we vacate appellant's convictions and

remand for a new trial. Even though we remand, for the benefit of the trial court, we hold that appellant was not convicted of a "non-existent" offense, but an actual crime. Finally, we decline to address appellant's ineffective assistance of counsel claim on direct appeal.

FACTUAL BACKGROUND

Danilo Cabahug, a former owner of a sports memorabilia store, kept a large supply of collectible sports cards and comic books at Whalen's Storage in Elkton, Maryland. He discovered that the memorabilia had been stolen on October 24, 2018 when he visited the storage facility for the first time since July 2018.[1] His rental unit, #16, had a large circular hole cut out from where the lock had been, which enabled anyone to enter the unit.

Upon discovering the theft, Mr. Cabahug reported it to the Elkton Police Department. Officer Andrew Tuer would later testify that while investigating the break-in, he noticed that another unit, #35, was left open. Mr. Cabahug identified some of the items in unit #35 as being his property.

Officer Tuer and Cabahug also looked into locker #15, which was an open locker next to Cabahug's and found more of his stolen property. Locker #15 belonged to appellant. Officer Tuer had been patrolling the unit weeks earlier on

[1] He also reported tools, a watch and fentanyl patches had been stolen from the storage unit but none of those items were listed in the indictment.

October 3, 2018, and found that locker, #15, had been "forced open." Appellant met the police at the storage facility and told Officer Tuer that he was abandoning the locker because of the burglary. Later, on October 15, 2018, Officer Tuer was patrolling another Elkton storage facility, Cecil Mini Storage, when he encountered appellant with a cart of baseball cards "in booklets" as used by "collectors."

On October 29, 2018, locker #9 at the Whalen facility was the subject of a police search warrant. Cabahug identified several items found in the storage locker as being his stolen property. This locker belonged to Miguel Small. Later that day, the police executed a search warrant on the locker that appellant had rented at the Cecil Mini Storage facility and Cabahug identified more items as being stolen from his storage locker.

Officer Joshua Leffew interviewed appellant after executing the search warrant on appellant's locker. Appellant said he moved his items to the Cecil Mini Storage because of the break-in at his Whalen locker. Appellant claimed that he saw a box of baseball cards when moving his items out of the Whalen facility and took them. Leffew asked Appellant to unlock his phone so he could look at it and appellant refused, saying that he would "shoot himself in the foot" if he did so and that he "didn't want to incriminate himself."

Appellant and Small were indicted for various counts of burglary, malicious destruction of property and theft. At trial, the State called co-defendant Small as a

witness pursuant to a plea agreement. Small testified that he rented locker #9 at the Whalen facility and that he did not know that the items found in his locker were stolen. He had seen Cabahug's locker left open for at least a month with many people rummaging through it. He did not see appellant in that locker, but he did at one point help appellant move 60 to 100 containers of baseball cards and comic books from appellant's locker at Whalen's to a vehicle "in exchange for drugs."

Cabahug testified that his property found in appellant's possession was worth "over $50,000" and that his total loss was "more than $1.5 million." The evidence showed that that he had previously told officers different amounts for his total loss: $7,880 to the responding officer and later $250,000 to Officer Leffew.

Appellant testified that he had only rented his locker at Whalen's for a month in September 2018 before moving out because of it being burglarized repeatedly. He denied stealing any of Cabahug's property or burglarizing his locker. He further testified that the baseball cards and comic books found in his Cecil Mini Storage locker were all his and that he had collected those since he was a child. Neither appellant nor Cabahug had receipts for any of the stolen items.

The jury was instructed to consider five charges in the indictment: Second-Degree Burglary, Fourth-Degree Burglary, Malicious Destruction of Property, Felony Theft ($100,000 or more) and Theft in a Continuing Course of Conduct

($100,000 or more). On five counts of conspiracy to commit these same charges with Miguel Small, appellant was granted a judgment of acquittal by the court.

The judge instructed the jury concerning the theft charges:

> Then lastly there is a charge of theft, two different versions. The first version or definition is theft, unauthorized control. The defendant, Mr. Stone, is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that the defendant willfully or knowingly obtained or exerted unauthorized control over the property of the owner, and that the defendant had the purpose of depriving the owner of the property, and the value of the property was over $100,000.

After the court instructed the jury on the definitions of "property," "owner," "deprive," "exert control," and "value" from Maryland Pattern Jury Instruction 4:32, it instructed the jury on a second theft charge:

> Mr. Stone is also charged with the crime of theft greater than $100,000 pursuant to a continuing course of conduct. In order to convict the defendant under this charge of theft pursuant to a continuing course of conduct, the State must prove all the elements of theft. Course of conduct means a persistent pattern composed of a series of acts over time that shows a continuity of purpose.

Defense counsel objected to the instruction, insisting that the State had to pick one or the other of the theft charges. The prosecutor disagreed, arguing that "it's a question of fact for the jury to determine if it was one act of theft or if it was pursuant to a continuing course." Defense counsel suggested in his closing argument that the State had failed to prove that his client committed the theft but spent the bulk of his

argument insisting that "there is no indication whatsoever that this property was worth over $100,000."

During deliberations, the jury sent a note to the trial judge asking whether the course of conduct count would "also include the element of value of $100,000?" While both the State and defense counsel believed that the question should be answered in the affirmative, the court disagreed, stating that "value is not an element of the offense. The value only deals with the punishment."[2]

In response to the jury's question, the court answered, "No, see attached verdict sheet for Question 5." In response, defense counsel told the court, "Well, I would note that both the State and the defense are objecting." The new verdict sheet sent to the jury in response to their question read in the pertinent part:[3]

> How do you find with regard to Theft – unauthorized control?
>
> Not Guilty _____ Guilty _____

[2] The court was incorrect as a matter of constitutional law when it stated that value is not an element of an offense but rather a sentencing consideration. The Supreme Court of the United States interpreted a New Jersey hate crime statute that increased a sentence if a trial judge, not the jury, found by a preponderance of the evidence that a defendant committed a crime with the intent to intimidate a person or group based upon race. The Court held that anything that raises the statutory maximum is an "element" of the offense, and thus violates the Due Process Clause if the jury does not so find that it occurred beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000); *see also Counts v. State*, 444 Md. 52, 64 (2015) (citing *Hagans v. State*, 316 Md. 429 (1989) and *Spitizinger v. State*, 340 Md. 114 (1995)) (explaining that the value of the property (or services) stolen is an element of felony theft).

[3] The unified theft statute, Md. Code Ann., Crim. Law section 7-104 (2002, 2012 Repl. Vol), divides theft into five different levels by the value of the amount stolen with corresponding different levels of punishment.

If your answer to 4 is not guilty go to question 5. If your answer to question 4 is guilty contact the bailiff.

5. How do you find with regard to Theft?

Not Guilty _____ Guilty _____

If your verdict is guilty please also answer the following:

_____ theft – having a value of at least $1,500 but less than $25,000

_____ theft – having a value of at least $25,000 but less than $100,000

_____ theft – having a value of $100,000 or more

The jury acquitted appellant of Second-Degree Burglary, Malicious Destruction of Property and Theft- unauthorized control. The jury was unable to reach a verdict on the Fourth-Degree Burglary and convicted appellant of the Theft in a Continuing Course of Conduct ($25,000- $100,000). The State entered the Fourth-Degree Burglary charge nolle prosequi. Appellant was sentenced to eight years of incarceration and ordered to pay restitution in the amount of $50,000.

DISCUSSION

I. The court erred in sending the jury the second verdict sheet, which contained charges that were neither indicted nor requested by either party.

Appellant's first contention is that the trial court's response to the jury's note indicating that the jury could consider thefts less than $100,000 violated *Hagans.* Normally, a jury can be instructed on a charge that was not formally charged but is

a lesser-included charge of what was indicted. The Court of Appeals "has held, consistent with 'virtually every jurisdiction in the United States which has passed upon the issue,' that 'a defendant, charged with a greater offense, can be convicted of an uncharged lesser included offense.'" *Skrivanek v. State*, 356 Md. 270, 281 (1999) (quoting *Hagans*, 316 Md. at 447).[4]

There are some exceptions to this rule: 1) the lesser-included offense must not be more serious in terms of the maximum penalty prescribed by the legislature; 2) the statute of limitations must not have run for the lesser included offense; and 3) the lesser included offense must be of the same nature as the greater offense. *See Williams v. State*, 200 Md. App. 73 n.2 (2011) (citing *Hagans*, 316 Md. at 451-53)); *see also Hook v. State*, 315 Md. 25 (1989) (addressing the authority of the State to enter nolle prosequi of a lesser-included offense to preclude that charge from consideration by the jury).

Those exceptions do not apply to this appeal. Rather, another exception explained in *Hagans* does. That is, whether the court may instruct a jury on a lesser-

[4] To be considered a "lesser-included offense," Maryland courts have applied the "required evidence" or "elements test" where each charge is examined in the abstract. "All of the elements of the lesser included offense must be included in the greater offense. Therefore, it must be impossible to commit the greater without also having committed the lesser." *Hagans*, 316 Md. at 449. This same test is used to determine whether two offenses should be deemed the same for Double Jeopardy purposes. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

included charge if neither the State nor the defense asks the court to do so. *Hagans* clearly indicates that it may not:

> [T]he trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction. It is a matter of prosecution and defense strategy which is best left to the parties. There is no requirement that the jury pass on each possible offense the defendant could have committed. We permit, for example, the State to nolle prosequi an offense, and we allow plea bargains. When counsel for both sides consider it to be in the best interests of their clients not to have an instruction, **the court should not override their judgment and instruct on the lesser included offense**.

Hagans, 316 Md. at 455 (emphasis added).

The reasoning for this rule is that it allows both sides to attempt to get the jury to come to a "desired result when it has an 'all or nothing' choice." *Smith v. State*, 412 Md. 150, 170 (2009) (citing *Hagans*, 316 Md. at 454–55). The State concedes that this case should be remanded for a new trial because the requirements of *Hagans* were not followed when the court sent the jury the second verdict sheet with potential findings of theft less than $100,000, since those charges were neither indicted nor requested by a party. We agree.

But that does not end our inquiry. Appellant claims that the matter should not merely be reversed, but dismissed based upon two related errors: 1) the sole count that he was convicted of is not a criminal offense, and 2) trial counsel was so deficient for not moving for a judgment of acquittal on the non-existing crime that

this court should find ineffective assistance of counsel, thus preserving that issue for this court.

II. The Appellant Was Not Convicted of a Non-Existing Charge.

Appellant and the State appear to agree that Maryland Code Ann. Crim. Law Article ("CL") section 7-103(f) allows the State to aggregate the value of thefts that occur over a period of time to determine the value of the theft if they are committed as part of a common scheme or continuing course of conduct. That seems rather obvious from the plain language of the statute.[5]

Where the parties differ is that appellant asserts that he should not have been charged[6] or convicted of a theft with language alleging a "continuing course of conduct" from CL section 7-103(f), since this statue does not create a new substantive offense. Appellant readily concedes that the issue was not objected to at trial but urges this court to address the matter either 1) because it is a challenge to

[5] **CL section 7-103(f) provides:**

When theft is committed in violation of this part under one scheme or continuing course of conduct, whether from the same or several sources:

(1) the conduct may be considered as one crime; and

(2) the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor.

[6] Any objection to the indictment is not before us because there was not a timely objection. *See* Md. R. 2-252(A)(2).

this court's subject matter jurisdiction that can be raised at any time, or 2) as plain error.

Without conceding or addressing the waiver issue, this Court holds that appellant was *not* convicted of a non-existent crime. His indictment read as follows:

INDICTMENT

> THE GRAND JURY, for the State of Maryland, sitting in Cecil County, upon its oath and affirmation, charges **DAVID EMMONS STONE**, Defendant with having committed the following offenses and incorporates by reference the following allegations, information, and particulars in the counts below as therein referred:
>
> **DATE**: On or about August 1, 2018 through October 24, 2018
>
> **LOCATION**: Whalens Storage Unit #16, 201 W. Main Street, Elkton, Cecil Co., MD
>
> **VICTIM**: Danilo Cabahug
>
> **PROPERTY DAMAGED**: Lock
>
> **PROPERTY STOLEN**: Various Sports Collectibles and Comic Books

NINTH COUNT[7]

> THE GRAND JURY on its oath and affirmation also charges that the aforesaid Defendant, on or about the aforesaid date, at the aforesaid location, in the aforesaid County, did, between the dates of August 1, 2018 and October 24, 2018, **pursuant to one scheme and continuing**

[7] Cecil County apparently lists the date, location, name of victim, and property damaged and stolen at the beginning of the indictment for reference by each count.

> **course of conduct**, steal the aforesaid property of the aforesaid Victim having a value of One Hundred Thousand ($100,000) or more.
>
> CL 7-104; CJIS 1-1303 (Theft Scheme: $100,000 Plus) (emphasis added).

The indictment tracks almost exactly with the short form indictment proscribed by the legislature in CL section 7-108:

> An indictment, information, warrant, or other charging document for theft under this part, other than for taking a motor vehicle under § 7-105 of this part, is sufficient if it substantially states:
>
> "(name of defendant) on (date) in (county) stole (property or services stolen) of (name of victim), having a value of (less than $1,500, at least $1,500 but less than $25,000, at least $25,000 but less than $100,000, or $100,000 or more) in violation of § 7-104 of the Criminal Law Article, against the peace, government, and dignity of the State."

Appellant's contention is that the indictment somehow is defective if the State clarifies the allegations by stating "pursuant to one scheme and continuing course of conduct." He cites no authority for his proposition and this court could find none. In fact, there is authority that such language *must* be added in some circumstances. *See State v. Hunt*, 49 Md. App. 355, 361(1981).

Regardless, appellant's argument was not about the charging document per se, but about actually being convicted of a non-existent crime. In short, he was convicted of theft pursuant to CL section 7-104. The fact that he was informed in the indictment and the jury was instructed that the theft was pursuant to a continuing

course of conduct is permitted under CL section 7-103(f). This does not detract from his theft conviction.

Appellant also argues in his reply brief that his conviction violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and Maryland common law because he was found not guilty of theft (unauthorized control) while being found guilty of theft (continuing course of conduct). His argument is that since it is the taking of the same property in each count and also charged pursuant to the same consolidated theft statute, the not guilty verdict in the former bars conviction in the latter.

This issue is not before us. Appellant did not plead this issue in his initial brief. "We have long and consistently held to the view that 'if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it.'" *Oak Crest Vill., Inc. v. Sherwood Murphy*, 379 Md. 229, 241 (2004) (quoting *DiPino v. Davis*, 354 Md. 18, 56 (1999); *see also* Md. R. 8–504(a)(5). Appellant does mention Double Jeopardy in passing at the conclusion of his initial argument. He states that the trial court erred in correcting the verdict sheet to include lesser-included amounts in violation of *Hagans*. The precise issue raised by appellant in the second claim in his brief is the following:

II. The Trial Court Erred in Submitting Lesser-Included Offenses[8] to the Jury Over the Objections of the State and the Defense

Somehow, appellant tries to convert the above claim into a Double Jeopardy issue for this court to address. It is only after the State concedes on the *Hagans* argument in its answer does appellant make Double Jeopardy the full thrust of his argument in his reply brief. It does not alter the law that the State did respond in their brief to appellant's passing mention of the Double Jeopardy issue, although surely not how they would have desired if they saw the full contours of appellant's argument that came in his reply. "An appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief. It is impermissible to hold back the main force of an argument to a reply brief and thereby diminish the opportunity of the appellee to respond to it." *Oak Crest Vill.* 379 Md. at 241–42. And one of the State's responses correctly points out that this issue was also not objected to by trial counsel. (Appellee's brief, p. 34-35.) Therefore, this argument would not have prevailed even if it had been preserved.

[8] As previously addressed, the lesser-included offenses referred to here are the different valuations of the theft charges, not the substantive charges as appellant addresses in Double Jeopardy claim.

Appellant was put in jeopardy of two charges that were, as he says, different "species" of the consolidated theft statute. (Reply brief, p. 5). Appellant, however, fails to cite any authority for his proposition that being found not guilty of one aspect of a consolidated statute precludes a guilty finding of every other aspect of the consolidated statute.

Our review of Maryland case law would suggest just the opposite. The theft statute brought together numerous larceny related offenses into a singular statute.

> By chapter 849 of the Acts of 1978, codified as 340–344 of Art. 27, the General Assembly of Maryland, effective July 1, 1979, consolidated a number of theft-related offenses (not involving force or coercion) into a single newly created statutory offense known as theft. Section 341 specifies that "[c]onduct designated as theft" under the Act's provisions "constitutes a single crime embracing, among others, the separate crimes heretofore known as larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting, and receiving stolen property." Section 342 enumerates five different types of criminal conduct as constituting theft under the statute, *i.e.*, (a) obtaining or exerting unauthorized control; (b) obtaining control by deception; (c) possession of stolen property; (d) obtaining control of lost, mislaid or mistakenly delivered property; and (e) obtaining services by deception.

Jones v. State, 303 Md. 323, 326–27 (1985).

The crime of theft is codified currently at CL section 7–101 et seq. The purpose of bringing the various larceny crimes together in a single statute was "to eliminate these technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special provisions in the criminal law

[because] an "unintelligible body of statutory and case law" that had "crept into the statutory and common law of larceny over the centuries." *State v. White*, 348 Md. 179, 195-6 (1997) (quoting Joint Subcommittee on Theft Related Offenses, *Revision of Maryland Theft Laws and Bad Check Laws* at 2 (Oct. 1978)).

The consolidation was not designed to change the substantive law of the various crimes brought together under the singular umbrella of the theft statute. *Id.* It is one crime defined in a multitude of ways. *Rice v. State*, 311 Md. 116, 136 (1987). Thus, it does not create a Double Jeopardy situation if the jury accepts one version of the statute and rejects another.

The fact that we are comparing one aspect of the statute and the continuing course of conduct form of theft pursuant to CL section 7-103(f) does not change the analysis. The jury still had different elements to decide with the two charges. Both sides argued the different aspects of the two charges: whether the property was stolen on one isolated instance or at different times pursuant to a common scheme. It was an either-or proposition since objects cannot be stolen on a lone, singular occasion and also as a continuing course of conduct. The jury had to pick one version unanimously.

This manner of proceeding worked to appellant's favor since normally the jury does not have to agree upon a version of a crime that has different manners of establishing proof. *See Rice*, 311 Md. 116 (noting that the theft statute was construed

as not requiring jury unanimity as to which version); *see also Kouadio v. State*, 235 Md. App. 621, 632–33 (2018) (holding that as long as all jurors find all of the elements of any one of the alternative manners that can prove second-degree murder beyond a reasonable doubt, then a guilty verdict will stand, but this is "notwithstanding that some jurors may have found an intent to kill while others found an intent to commit grievous bodily harm or the elements of depraved heart murder").

The fact that the jury, if they were to be unanimous at all, would by necessity have to reject one of the two theories does not create a Double Jeopardy[9] situation.

III. Appellant Did Not Receive Ineffective Assistance of Counsel.

Appellant asks us to find that trial counsel was ineffective. We decline to do so.

As the Court of Appeals and this Court have repeatedly held, direct appeals are rarely the appropriate venue to determine ineffective assistance of counsel claims. "Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction

[9] The State also argues that appellant has not yet been put in Jeopardy a second time, thus this issue is not ripe. Having rejected the Double Jeopardy contention, we need not address this argument.

of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003).

In *Mosley*, this court determined that "the adversarial process found in a post-conviction proceeding generally is the preferable method" when evaluating an ineffective assistance of counsel claim. *Id.* at 562. This court also acknowledged that there are limited circumstances in which this court will review a claim on direct review. *Id.* at 567 ("We have been willing, thus, to consider these claims on direct review only when the facts found in the trial record are sufficiently developed to clearly reveal ineffective assistance of counsel and that counsel's performance adversely prejudiced the defendant.").

For the reasons stated, by not objecting as appellant thinks his trial attorney should have, appellant avoided the situation that would allow the jury to be able to split on which theory applies and still convict him. That is but one reason that this is not the "exceptional" case where post-conviction review would be appropriate because of a "blatant and egregious" performance by trial counsel. *Id.* at 562.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY IS REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY CECIL COUNTY.