Circuit Court for Wicomico County
Case No.: C-22-CR-21-000215

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1458

September Term, 2021

MICHAEL JEROME MOSS

v.

STATE OF MARYLAND

Graeff,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: June 1, 2022

*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 trial in the Circuit Court for Wicomico County, a jury found Michael Jerome Moss, appellant, guilty of attempted robbery, two counts of second-degree assault, and trespassing on private property. That same day, the court sentenced him to 15 years' imprisonment for attempted robbery, plus 10 years' imprisonment for one count of second-degree assault to be served consecutively. For sentencing, the court merged the other count of second-degree assault into attempted robbery.[1]

Appellant noted an appeal. In it, he claims that, for sentencing, both counts of second-degree assault should have merged into attempted robbery instead of just one of them. The State agrees and so do we.

BACKGROUND

Because appellant does not contest the legal sufficiency of the evidence against him, "we need only recite a summary of the facts that gave rise to this prosecution, or that may be necessary to the resolution of issues raised in this appeal." *Martin v. State*, 165 Md. App. 189, 193 (2005) (citing *Whitney v. State*, 158 Md. App. 519, 524 (2004)).

The facts adduced at trial pertinent to the issue raised in this appeal revealed that, on March 23, 2021, appellant entered a clothing store a little before 9:00 p.m., where the store's manager, Adrian Cannon, and another employee, Tyisha Stewart, were closing for the day. Appellant approached Stewart from behind, who was preparing to vacuum the floor, grabbed her by the hair and threw her to the ground. He then ran towards Cannon and said "give me the money." Cannon, who recognized appellant from earlier encounters

[1] The court imposed no sentence for trespassing.

in the store, refused, stating "I'm not giving you anything, and I know who you are." Appellant then picked up a "heavy duty stapler" from the counter, threw it at her striking her on the arm, and left the premises running.

As indicated earlier, the jury found appellant guilty of, *inter alia*, two counts of second-degree assault, and one count of attempted robbery. The record makes clear that the attempted robbery pertained to Cannon, one count of second-degree assault pertained to Cannon, and the other count of second-degree assault pertained to Stewart.

During the sentencing proceeding, the parties agreed that the second-degree assault on Stewart, which occurred when appellant threw her to the ground by her hair, was part of the attempted robbery and therefore merged for sentencing. The parties disagreed, however, about whether the second-degree assault on Cannon merged into attempted robbery for sentencing. Ultimately, the court determined that when appellant threw the stapler at Cannon, that act constituted a separate criminal act from the attempted robbery and, consequently, it imposed a separate ten-year consecutive sentence for that second-degree assault offense.

On appeal, appellant contends that, *inter alia*, the record is not clear whether appellant's assault on Cannon stemmed from his intent to frighten her by committing a battery on Stewart in her presence, and therefore was part of the attempted robbery, or whether the assault on Cannon was a separate battery committed when he threw the stapler at her. As a result of that alleged ambiguity, appellant claims that he is entitled to the

benefit of the doubt and to have the sentence for the second-degree assault on Cannon merged into the attempted robbery of her. As noted above, the State agrees and so do we.[2]

DISCUSSION

"When a court fails to merge a sentence when it is required, this constitutes an illegal sentence as a matter of law." *White v. State*, 250 Md. App. 604, 643 (2021). Under Rule 4-345(a), a court may correct an illegal sentence "at any time."

When two criminal offenses are based on the same act or acts, the general rule for deciding whether one offense merges into another or whether one is a lesser-included offense of the other, is the so-called "required evidence test." *State v. Lancaster*, 332 Md. 385, 391 (1993).

The Court of Appeals has described the required evidence test as follows:

> If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Twigg v. State, 447 Md. 1, 13 (2016) (quoting *Nightingale v. State*, 312 Md. 699, 703 (1988) (abrogated by statute)).

Robbery is the "'felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear.'" *Hall v. State*, 233 Md. App. 118, 138 (2017) (quoting *Metheny v. State*, 359 Md. 576, 605 (2000)). In other words, robbery is a compound crime accomplished by committing a combination of theft

[2] Appellant also argues that the sentences should have merged under other alternative theories. However, in light of our resolution of this case, we need not address them.

and assault. *Tilghman v. State*, 117 Md. App. 542, 568 (1997). In Maryland, the crime of assault encapsulates the common law crimes of: (1) an attempted battery; (2) a consummated battery; and (3) placing the victim in fear of an immediate battery. *Watts v. State*, 457 Md. 419, 435 (2018), *Snowden v. State*, 321 Md. 612, 617 (1991).

It is therefore clear that, when based on the same criminal act or acts, second-degree assault merges, under the required evidence test, into robbery because only one offense (robbery) requires proof of a fact which the other (second-degree assault) does not. *Gerald v. State*, 299 Md. 138, 140 (1984). The same rule applies to assault and attempted robbery. *See Morris v. State*, 192 Md. App. 1, 44 (2010).

Moreover, "when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Brooks v. State*, 439 Md. 698, 739 (2014).

Having conducted our own independent review of the record in this case, we agree with the parties that, because the factual basis for the jury's guilty verdict for the second-degree assault on Cannon is not readily apparent, we must resolve the ambiguity in the favor of appellant and merge the sentence for it into the sentence for the attempted robbery of her.

Consequently, we vacate the ten-year consecutive sentence imposed for second-degree assault and remand the case with instructions to amend appellant's commitment record and docket entries consistent with this opinion.

SENTENCE FOR SECOND-DEGREE ASSAULT VACATED. CASE REMANDED WITH INSTRUCTIONS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WICOMICO COUNTY.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1458s21cn.pdf