Circuit Court for Montgomery County
Case No. 134605C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1933

September Term, 2019

HUGH NII-NUE ADDO

v.

STATE OF MARYLAND

Graeff,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 29, 2021

Appellant, Hugh Nii-Nue Addo, was convicted by a jury in the Circuit Court for Montgomery County of second-degree assault, resisting arrest, and indecent exposure. The court sentenced appellant to ten years' incarceration, all but 504 days suspended, on the conviction for second-degree assault, and three years concurrent, all but 504 days suspended, on the conviction for resisting arrest. The court imposed a suspended sentence on the conviction for indecent exposure, with credit for time served, to be followed by three years' supervised probation.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly as follows:

1. Should second-degree assault have merged into resisting arrest for sentencing purposes?

2. Was the evidence sufficient to sustain the convictions for second-degree assault and resisting arrest?

For the reasons set forth below, we answer both questions in the affirmative, and therefore, we shall vacate in part and affirm in part the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2018, Charles Lambi was outside his single-family residence in Silver Spring, Maryland, when he saw on his property an African American man wearing a "very bright white bucket hat," dark pants, and a gray t-shirt. Mr. Lambi told the man: "[G]et off my property and get out of my yard." The man ignored Mr. Lambi and did not leave. Instead, he walked up to the house and put his hands on the sliding glass door of the residence. Fearing a home invasion, Mr. Lambi called 911.

After he made his report, Mr. Lambi saw that the man had wandered over to some nearby houses and was "milling around." Approximately 20 minutes after he called 911, Mr. Lambi saw a number of police cars near the end of the street. When Mr. Lambi approached the scene, he saw that the man he reported to the police was detained on the ground. He informed the officers.

Officer My Le,[1] a member of the Montgomery County Police Department, testified that he responded to Mr. Lambi's home, in uniform, after hearing the police dispatcher call for a "suspicious situation." The report described a "[b]lack male, 20 to 30's, white hat, gray shirt, blue jeans." When he arrived on the scene, Officer Le observed an individual who matched the description and was exposing himself.

Officer Le testified that he observed appellant's "pants below his crotch level and his penis exposed, his hand on his penis in a jerking motion." Asked whether he was sure that appellant had not been playing with "keys or a yo-yo or some other object," Officer Le confirmed: "It was definitely his penis." Officer Le identified appellant, in court, as this individual.

Officer Le approached appellant and asked him what he was doing. Appellant replied that he was "playing with it." Officer Le "told him multiple times, no, can't." After at least two such admonishments, appellant "eventually put it away and pulled up his

[1] We note that the transcripts spell the officer's name as "Mi Lee," whereas charging documents and motions made by the State and defense counsel spell the officer's name as "My Le." For purposes of consistency, we shall use the spelling used in the charging documents.

pants." At that point, Officer Le put on his gloves and testified that he "tried to remove [appellant] from the street because he seemed a little bit dazed and confused." Officer Le was wearing a body camera, and footage from that camera was admitted at trial, without objection, as State's Exhibit 1.

Officer Le further testified that, after the initial encounter, he asked appellant to sit down. Officer Le explained that appellant "was walking towards the street. He seemed a little bit dazed. I didn't want him going anywhere that could potentially hurt me and him." Officer Le had decided to arrest appellant for indecent exposure, but because appellant had a "bigger build," Officer Le called for additional units to assist "in case he wanted to go south." He initially did not ask appellant to place his hands behind his back because it appeared that appellant was able to "listen to a few of my commands," was "willing to walk back to my car," and appeared, at least initially, not to be "combative in any way."

The body camera footage showed that Officer Le eventually asked appellant to "[d]o me a favor and put your hands behind your back."[2] Appellant then called the officer an "asshole" and grabbed Officer Le's left forearm and wrist area hard enough "to feel shock throughout" Officer Le's left forearm. Officer Le was unable to move his left arm freely.

Appellant kept berating Officer Le, calling him an "asshole" and a "fucking asshole" while pushing against him. Officer Le repeatedly ordered appellant to "[g]et on the ground," but the struggle continued. Officer Le was concerned for his personal safety, and

[2]According to that portion of the video replayed during closing, Officer Le stated: "I have my brother here, do me a favor, put your hands behind your back – hey, hey, hey – come on."

he hit the emergency signal button on his chest because he was "not able to get a control on him at this point" and wanted backup to arrive. Officer Le then pulled out his pepper spray to "minimize [appellant's] combative behavior." His pepper spray "ran out," however, so he was unable to successfully use it.

Eventually, Officer Le got appellant on the ground and placed him in a chokehold. Appellant still did not place his hands behind his back. The body-camera recording was interrupted at some point because the force of appellant's resistance caused the camera to be knocked off Officer Le's chest. During the entire struggle, appellant did not place his hands behind his back. Instead, he was "reaching for his waistband." Officer Le was concerned because "[w]eapons are normally stored" in one's waistband. No weapons, however, were found on appellant's person.

On cross-examination, Officer Le admitted that he had resolved to place appellant under arrest at the time he was guiding appellant back towards his patrol car. He did not, however, explicitly tell appellant that he was being arrested for indecent exposure for exposing his penis.

Officer Rachel Hopko responded to Officer Le's call for assistance and arrived to find both Officer Le and the appellant on the ground. In her opinion, Officer Le did not have appellant under control, and he appeared to be struggling. Officer Hopko was wearing a body camera, and footage from that recording was admitted at trial without objection. With Officer Hopko's assistance, the officers were able to place appellant in handcuffs.

Officer Marcus Roberts, the officer who spoke to Mr. Lambi at the scene, also responded. Officer Robert's body camera footage was admitted into evidence without objection.

At the conclusion of the State's case-in-chief, and as relevant to this appeal, appellant's counsel moved for judgment of acquittal on the charges of second-degree assault and resisting arrest. With respect to the second-degree assault charge, counsel argued:

> And Your Honor, with regard to second degree assault, I don't believe the State has made a prima facie case. [Appellant] is, as you can see in the video, in front of the police officer. The police officer places his hands, without letting [appellant] know that he's being arrested, on [appellant] and [appellant] tries to get his hands off of him. It's a struggle to free himself rather than to assault or engage in combat with the officer. Even though second degree is a general attempt [sic] crime there's no mens rea to assault the officer. He was just trying to get the officer off of himself. And so I do not believe that the State has made a prima facie case with regard to the second degree assault.

The court denied defense counsel's motion. It explained as follows:

> Okay. The [c]ourt's going to deny that motion. At a minimum the response from [appellant] was excessive to the mere laying of a hand by the police officer. He doesn't have to tell him he's under arrest. [Appellant] aggressively grabbed the arm. He's a much larger person, clearly a stronger person. And I think that's sufficient for, putting all those things together is sufficient for the finding of second degree assault by a reasonable juror.
>
> Also separate from that is they were involved in the prolonged struggle during which it would be reasonable to infer that the police officer, and he testified at least in so many words, if not directly, that he was placed in fear of bodily harm. And therefore, separate from the physical response there was a second degree assault in placing in fear.

Defense counsel then moved for judgment of acquittal for the charge of resisting arrest. Counsel argued as follows:

> And Your Honor, with regard to resisting arrest, I don't believe the State has made a prima facie case. According to the officer's body worn camera the officers actuated [sic] the arrest. [Appellant] was placed in handcuffs. He was told to get on the ground. He is on the ground already. He's being pepper sprayed and told to put his arms behind his back while the officer is striking him and holding him. It does not appear that [appellant] in the video has the ability or the physical capacity to comply with the officer's orders. And so he is restrained the way that he is and is kind of in the position that he is in but not actively resisting.

The court denied this motion. It explained:

> Okay. That motion is denied as well. The officer's in uniform. He merely placed a hand on [appellant] and [appellant] responded in a very aggressive, highly physical way that could be characterized as a fight with the police officer very easily. It was a pitched battle basically and I would say that, having seen the body cam, that it is a classic and a very serious classic resisting of arrest by use of physical means.

After the court denied appellant's motion for judgment of acquittal, appellant sought to introduce Defense Exhibit 1, a thumb drive that contained footage from the sliding door of Mr. Lambi's home. According to counsel, "Mr. Lambi was able to authenticate" the footage. The court admitted the evidence without objection.

The following day, on March 1, 2019, after some housekeeping matters, appellant rested his case. The court delivered jury instructions, and as pertinent for this appeal, instructed the jury as follows:

> I'm now going to explain to you that the [appellant] is charged with the crime of resisting arrest, and I will talk about that. In order to convict the [appellant] of resisting arrest, the State must prove beyond a reasonable doubt that a law enforcement officer arrested or attempted to arrest the [appellant]. Two, that the [appellant] knew that a law enforcement officer

> arrested him or was attempting to arrest him. Three that the [appellant] intentionally refused to submit to the arrest, and resisted the arrest by force or threat of force. And four, that the arrest is lawful. That is, that the officer had probable cause to believe that the defendant had committed, in this case, the crime of indecent exposure.
>
> * * *
>
> And I'm going to talk to you now about the charge of second-degree assault, with which the [appellant] has been charged. Assault is causing offensive physical contact to another person. In order to convict the [appellant] of second-degree assault, the State must prove beyond a reasonable doubt that the [appellant] caused offensive physical contact with, or physical harm to, Officer Le[]. Also, that the contact or injury was the result of an intentional or reckless act of the [appellant], that was not accidental. And three, that the contact was not consented to by Officer Le[], and was not legally justified.

Counsel then proceeded to closing arguments. In its closing argument, the State played Officer Le's body camera footage. It argued that appellant committed an assault the moment he grabbed Officer Le's hand. The State noted that appellant, who was physically stronger than Officer Le, continued to struggle and resist arrest, stating: "[Appellant] is still not responding to the officer's direction to get on the ground. . . . [Appellant] is still pulling away from Officer Le[], still pulling him in a circle, still refusing to comply."

Defense counsel argued that resisting arrest and second-degree assault went "hand-in-hand, in this particular case." Counsel argued that the State did not prove that appellant was guilty of resisting arrest because, to prove that, the arrest had to be lawful, and it was not here because "playing with yourself, penis in pants, unseen, is not a crime." Moreover, with respect to second-degree assault, defense counsel argued that appellant placing his

hands on Officer Le was not second-degree assault, but rather, appellant was "freeing [him]self from an unlawful arrest."

As indicated, the jury found appellant guilty of resisting arrest, second-degree assault, and indecent exposure. At sentencing on November 8, 2019, the court advised that it would not require appellant to spend any additional time in jail, but it would "have to put a lot of time over [appellant's] head, while [he was] on probation." Accordingly, the court sentenced appellant to 10 years' incarceration for the conviction of second-degree assault, all but time served suspended, three years concurrent for resisting arrest, all but time served suspended, and a suspended sentence on the conviction for indecent exposure.

Additional facts will be included as necessary in the discussion that follows.

DISCUSSION

I.

Appellant first contends that his sentence for second-degree assault should merge with his sentence for resisting arrest. The State agrees, observing that the jury was not instructed on what facts to consider in distinguishing between the two offenses. We also agree, and therefore, we shall vacate appellant's sentence for second-degree assault.

Although appellant did not object to his sentence, Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." A motion to correct an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it.'" *Johnson v. State*, 427 Md. 356, 371 (2012)

(quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Whether a sentence is illegal is a question of law that we consider *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015).

For sentencing purposes, "[t]he merger of convictions . . . 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 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.*

The parties recognize that this case is controlled by *Nicolas v. State*, 426 Md. 385 (2012). In that case, three officers responded to a 911 call. *Id.* at 387. Mr. Nicolas assaulted two of the officers, but it was unclear whether the officers attempted to arrest him after the first of those two assaults or after both had been committed. *Id.* at 390–95. As the officers attempted to arrest Mr. Nicolas, a scuffle ensued, during which Mr. Nicolas resisted arrest by committing additional assaults upon the officers. *Id.* Mr. Nicolas was convicted of resisting arrest and assaulting two of the officers, both of whom testified that he had assaulted them before and after he was arrested. *Id.* at 396.

The Court of Appeals stated that the question of whether the offenses, resisting arrest and the assault on the officers, merged depended on two issues: "(1) whether the offenses merge under the required evidence test and (2) whether a reasonable jury would have concluded that the offenses were based on the same acts or on acts that were separate

and distinct." *Id.* at 400. Considering the statutory offenses at issue, including the fact that the assaultive behavior at issue was a battery, the Court of Appeals held "that the offense of second degree assault merges into the offense of resisting arrest under the required evidence test." *Id.* at 407. The Court explained:

> All of the elements of second degree assault are included within the offense of resisting arrest. The "force" that is required to find a defendant guilty of resisting arrest is the same as the "offensive physical contact" that is required to find a defendant guilty of the battery variety of second degree assault. Furthermore, there is no element required to satisfy the offense of second degree assault that is different from or additional to the elements required to satisfy the offense of resisting arrest.

Id.

Here, the jury was not instructed to consider whether the resisting arrest and second-degree assault charges were based on separate and distinct acts. The charging document simply indicates that both acts were against Officer Le. Additionally, the State did not argue in closing that there were separate acts involved, even after defense counsel argued that the resisting arrest and second-degree assault charges "go hand-in-hand, in this particular case." Accordingly, as in *Nicolas*, *supra*, 426 Md. at 412, we conclude that the sentence for second-degree assault merges with the sentence for resisting arrest under the required evidence test.

II.

Appellant next contends that the evidence was insufficient to sustain his convictions for second-degree assault and resisting arrest. With respect to the second-degree assault conviction, appellant asserts that Officer Le grabbed his arm without advising that he was

under arrest, and the mere act of "simply struggling to free himself from an officer's grasp" was not an assault.[3] With respect to appellant's conviction for resisting arrest, appellant argues that the State failed to establish that he knew he was being arrested and intentionally resisted arrest.

The State contends that the evidence was sufficient to support both convictions. Regarding the assault conviction, it asserts that the evidence showed that appellant, "a much larger person" than Officer Le, aggressively grabbed Officer Le's arm. With respect to appellant's conviction for resisting arrest, the State argues that, given the officer's testimony that appellant's penis was exposed, it was clear that appellant was guilty of indecent exposure, a general intent crime, and a reasonable person would have known that he was being placed under arrest under the circumstances. Moreover, appellant forcibly resisted that arrest by grabbing the uniformed officer's arm, calling him an "asshole," and continuing to resist even when another uniformed officer arrived to assist with the arrest.

A.

Preservation

Before addressing the merits of the contention, we address whether the issue is preserved for this Court's review. At the end of the State's case-in-chief, and after his motion for judgment of acquittal was denied, appellant presented additional evidence by

[3] He further argues that, if the jury found that the assault was a part of the resisting arrest, his assault conviction cannot stand. This argument is one of merger, rather than sufficiency, and we have already addressed the merger issue.

moving in an exhibit for admission, namely a thumb drive containing body camera footage from a different officer who responded to the scene.

Following admission of this evidence, the court then advised appellant of his right to testify and informed him that the court and the jury would recess and give him a chance to consider the issue overnight. The court and the parties then spent the rest of the day considering jury instructions, with one exception. The court modified its earlier ruling on the motion for judgment of acquittal on the second-degree assault charge, stating as follows:

> Okay. Let me make it clear then. I did make reference in ruling on the motion for judgment of acquittal that I made reference to the apprehension of contact and I think the ruling is still correct without that reference. And clearly, just to make it clear on the record, it's the actual battery that the Court believes was appropriate to remain in the case rather than be the subject of judgment of acquittal.

The court recessed until the next trial day, whereupon the parties resumed with a discussion about jury instructions. Appellant elected not to testify in his defense. The jury returned to the courtroom, and the defense rested. Importantly, for the purposes of this appeal, appellant did not renew his previous motion for judgment of acquittal.

A prerequisite to raising a claim of evidentiary insufficiency on appeal is making a motion for judgment of acquittal at the close of all the evidence. *Haile v. State*, 431 Md. 448, 464 (2013). *See also Ennis v. State*, 306 Md. 579, 585 (1986) (Appellate courts are precluded "from entertaining a review of the sufficiency of the evidence, in a criminal case tried before a jury, where the defendant failed to move for judgment of acquittal at the close of all the evidence."). Where, as here, a defendant makes a motion for judgment of

acquittal after the State's case-in-chief, the motion is denied, and the defendant presents evidence on his or her behalf, the motion is withdrawn. Md. Rule 4-324(c). Failure to renew the motion for judgment of acquittal at the close of all evidence "effectively precluded the trial court from considering [the] insufficiency contention. Consequently, there [is] nothing for [this Court] to consider[.]" *Haile*, 431 Md. at 464–65 (quoting *Ennis*, 306 Md. at 587).

Here, although appellant made a motion for judgment of acquittal at the end of the State's case, that motion was effectively withdrawn after appellant presented evidence on his own behalf. Appellant failed to renew his motion at the close of all the evidence, and therefore, his sufficiency claim is not preserved for appellant review.

B.

Merits Argument

Even if his contention was preserved, we would conclude that it is without merit. Evidence is considered sufficient if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 430 (2015) (quoting *Taylor v. State*, 346 Md. 452, 457 (1997)). *Accord State v. McGagh*, 472 Md. 168, 194 (2021). An appellate court does not re-weigh the evidence, but instead, we "seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Haile*, 431 Md. at 466 (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

1.

Second-Degree Assault

Maryland Code Ann., Criminal Law Article ("CR") § 3-203 (2012 Repl. Vol.), prohibits a person from committing an assault. An "assault" is defined as "the offenses of assault, battery, and assault and battery, which retain their judicially determined meanings." CR § 3-201(b). A second-degree assault can occur in one of three ways: "1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery." *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992)).

This case concerns a battery. A battery is an "unlawful application of force to the person of another," which "may be the result of an intentional or reckless act of the defendant." *Id.* "This type of assault requires proof that the (1) defendant caused a harmful physical contact with the victim, (2) the contact was intentional, and (3) the contact was not legally justified." *Cooper v. State*, 128 Md. App. 257, 265 (1999), *superseded by statute on other grounds, as recognized in Britton v. State*, 201 Md. App. 589, 243 (2011).

Here, the evidence, including the testimony and the body camera video, was sufficient for the jury to find that appellant caused harmful physical contact to Officer Le. That appellant kept calling the officer an "asshole" allowed the jury to infer that the contact was intentional. There was sufficient evidence to support the conviction for assault.

2.

Resisting Arrest

Resisting arrest was a common law offense in Maryland until 2004. *Rich v. State*, 205 Md. App. 227, 239 (2012). It is now codified at CR § 9-408(b)(1), which provides that "[a] person may not intentionally resist a lawful arrest." As this Court has explained, "[t]he elements of the crime that the State must prove are: (1) a law enforcement officer arrested or attempted to arrest the defendant; (2) the arrest was lawful, and; (3) the defendant refused to submit to the arrest and resisted the arrest by force." *DeGrange v. State*, 221 Md. App. 415, 421 (2015) (footnote omitted). *Accord McNeal v. State*, 200 Md. App. 510, 526 (2011) ("Section 9-408 did not . . . change the elements as they existed at common law for the crime of resisting arrest."), *aff'd*, 426 Md. 455 (2012).

To establish the elements of its case, the State must show that "the defendant knew that a police officer was trying to arrest him and that the defendant had the necessary intent to resist the arrest." *Williams v. State*, 208 Md. App. 622, 641 (2012), *aff'd in part, rev'd in part on other grounds*, 435 Md. 474 (2013). "The degree of 'force' that is required to find a defendant guilty of resisting arrest is the same as the 'offensive physical contact' that is required to find a defendant guilty of the battery variety of second degree assault." *Williams*, 208 Md. App. at 641 (quoting *Rich*, 205 Md. App. at 249).

Appellant argues that the State failed to establish: (1) that he knew he was being arrested; and (2) that he intentionally resisted arrest. Appellant relies heavily on the fact that Officer Le did not specifically state that he was arresting appellant for indecent

exposure. He fails to cite, however, any case holding that a specific announcement that a suspect is being arrested is required to prove knowledge to sustain a conviction for resisting arrest. Other jurisdictions have rejected such an argument. *See, e.g.*, *Shorty v. State*, 214 P.3d 374, 384 (Alaska Ct. App. 2009) ("[I]t is not always necessary for the State to prove that a person was explicitly told that he was under arrest, but the State must prove that the defendant was aware that the officer was making an arrest."); *State v. Flores*, 260 P.3d 309, 312 n.1 (Ariz. Ct. App. 2011) ("The law requires only that a reasonable person would know that he was under arrest, not that the arresting officer tell the defendant, 'you are under arrest[.]'"); *State v. Nickels*, 598 S.W.3d 626, 639 (Mo. Ct. App. 2020) ("The offense of resisting arrest requires that the officer be in the process of making an arrest, though '[i]t is not necessary for the officer to tell the person he is under arrest if the circumstances show that the officer is attempting an arrest[.]'"); *People v. Hamm*, 680 N.Y.S.2d 21, 23 (N.Y. App. Div.) ("It is 'not necessary that [a] defendant be specifically informed that he was to be arrested in order for a resisting arrest conviction to stand; it is sufficient that such knowledge was inferable from the surrounding facts and circumstances[.]'") (quoting *People v. Gray*, 592 N.Y.S.2d 814, 923 (N.Y. App. Div. 1993)), *appeal denied*, 706 N.E.2d 751 (N.Y. 1998).

Knowledge of a defendant "may be proven by circumstantial evidence and by inferences drawn therefrom." *Smith*, 415 Md. at 187 (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988)). The evidence indicated that appellant was walking in a residential neighborhood with his penis exposed. Officer Le approached him and told him that he

could not do that. He then told appellant to put his hands behind his back. Here, based on the evidence presented, the jury could infer that appellant knew he was under arrest when the officer told him to place his hands behind his back.

With respect to appellant's claim that he was not intentionally resisting arrest, the fact finder had the testimony and the body camera footage available and clearly concluded to the contrary. Their finding is supported by the law that intent need not be proven by direct evidence, it "may be inferred as a matter of fact from the actor's conduct and the attendant circumstances." *In re David P.*, 234 Md. App. 127, 138 (2017) (quoting *Young v. State*, 303 Md. 298, 306 (1985)). As the Court of Appeals has further explained, "[s]ince 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." *Spencer v. State*, 450 Md. 530, 568 (2016) (quoting *Davis v. State*, 204 Md. 44, 51 (1954)). Determination of appellant's intent was "classic grist for the jury mill." *Cerrato-Molina v. State*, 223 Md. App. 329, 337, *cert. denied*, 445 Md. 5 (2015). The evidence here, particularly the length of time that the struggle continued, was sufficient for the jury to find that appellant intentionally resisted arrest.

SENTENCES FOR ASSAULT CONVICTION VACATED. JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY OTHERWISE AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND MONTGOMERY COUNTY.