UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0291

September Term, 2015

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ANDREW ROBINSON

v.

STATE OF MARYLAND

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Krauser, C.J.,
Berger,
Reed,

JJ.

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Opinion by Berger, J.

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Filed: July 7, 2016

*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.

On February 26, 2015, a jury sitting in the Circuit Court for Prince George's County convicted the appellant, Andrew Robinson ("Robinson"), of attempted voluntary manslaughter, first-degree assault, use of a handgun in a crime of violence, wear carry and transport a handgun, and five counts of reckless endangerment. The court sentenced him to a total of twenty years of incarceration, all but five years suspended, with those five years to be served without the possibility of parole.[1] Robinson presents the following questions on appeal:

1. Whether the evidence is sufficient to sustain the convictions.

2. If the evidence is sufficient, whether the sentence for wearing, carrying and transporting a handgun must merge into the sentence for use of a handgun in a crime of violence.

3. If the evidence is sufficient, whether the sentence for reckless endangerment of Mr. Holmes must merge into the sentence for either first-degree assault or attempted voluntary manslaughter of Mr. Holmes.

For the reasons discussed herein, we shall hold that the evidence is sufficient to sustain Robinson's convictions but that certain counts must merge for sentencing purposes.

[1] The court sentenced Robinson to ten years of incarceration for the attempted voluntary manslaughter, and suspended all but five years. The court also sentenced him to ten years of incarceration for the first-degree assault, and suspended all but five years of that sentence as well. He was sentenced to twenty years of incarceration for the use of a handgun in the commission of a crime of violence and suspended all but five years, which was to be served without the possibility of parole. Robinson was sentenced to three years of incarceration on the wear, carry, and transport a handgun offense, and five years on each reckless endangerment offense. All of these sentences were imposed concurrently.

Accordingly, we shall vacate the concurrent sentences for wearing, carrying, and transporting a handgun and reckless endangerment of Gerald Holmes. The judgments of conviction are otherwise affirmed.

**BACKGROUND**

In August 2013, Alfreda Buchanan and her fiancée Gerald Holmes[2] were living in the basement apartment of her mother and stepfather's home at 9803 Dale Drive in Upper Marlboro. On August 31, 2013, Buchanan's adult daughter, Asia, and adult son, Arthur, were staying at the apartment for the Labor Day holiday weekend. Asia's boyfriend, Robinson, their young daughter, Aminah Robinson, and two other grandchildren were also staying at the apartment that weekend.

That afternoon, Asia and Arthur went to the store, while Robinson, Buchanan, Holmes and the three grandchildren (ages two years, three years, and 8 months) remained in the basement apartment of the home.[3] At approximately 4:00 p.m., Holmes asked Robinson, who was "just laying around chilling," to help clean up the house. After "mumbling" in response, Robinson got up and argued with Holmes. Holmes told Robinson that they could "take it outside," because in Holmes's view, they were "getting ready to fight." Holmes then went to an adjacent bedroom to put his shoes on. Buchanan then saw

[2] By the time of trial, Alfreda Buchanan and Gerald Holmes had married. For the sake of clarity, she is referred to as Alfreda Buchanan throughout this opinion.

[3] Holmes testified that there were three children in the basement apartment at the time of the shooting, while Buchanan testified that she thought there were only two. Detective Neal testified that when he arrived on scene there was one infant and two toddlers present.

Robinson grab a gun from "behind a radio."[4] As Holmes exited the bedroom, he heard Buchanan tell him "[d]on't come back out here . . . he's got a gun, he's got a gun" and then heard her tell Robinson to "get out." Holmes ran back into the bedroom and heard "maybe seven, or nine shots." Upon hearing the gunshots, Holmes "jumped on the floor, and [] crawled in the closet and just stayed there." After the shooting, Robinson left the home and drove away from the scene in Buchanan's sister's vehicle.

The police were called to the home and found a total of "six spent shells and one un-shot . . . .40 caliber round[]." Some shells were found inside the basement apartment, and others were found outside the home. Three of those rounds penetrated the living room wall and entered the bedroom to which Holmes had retreated. One bullet was found lodged in a dresser in the bedroom. A bullet hole was found in the exterior of the house, and two bullet holes were found in the bedroom window. Holmes was not injured in the shooting but was transported to the hospital afterwards because of "stress" brought on by the incident. Holmes testified that he did not own a gun or know that there was a gun in the basement apartment.

## DISCUSSION

### I. Sufficiency of Evidence

Robinson argues that the evidence presented was insufficient to prove attempted voluntary manslaughter because "no rational trier of fact could have found the essential

[4] Buchanan testified at trial that she did not see the gun. Nevertheless, her written statement to police was admitted as substantive evidence. In her written statement, Buchanan wrote that she had seen Robinson grab the gun from behind a radio.

element of intent to kill beyond a reasonable doubt." Robinson further argues that the evidence was insufficient to prove the first-degree assault, use of a handgun in a crime of violence, and reckless endangerment counts because "no one saw him with a gun, no one saw him fire a gun, and no gun was found."

The State responds that "[e]vidence of the number of shots, as well as the manner in which [Robinson] fired the shots (from inside toward the bedroom and again from outside the house into the bedroom) would permit a rational trier of fact [to] find that [Robinson] intended to kill Mr. Holmes." The State contends that Robinson did not preserve his challenge to the sufficiency of the evidence as to the first-degree assault and use of a handgun in a crime of violence counts. The State additionally argues that Buchanan's statement to the police that she saw Robinson grab a gun from behind a radio was "sufficient to permit the jury to find that [Robinson] was in possession of a gun when the shots were fired inside and outside" the home, and therefore sufficient to support a conviction for wear, carry and transport a handgun.

Our review for sufficiency of evidence requires us to determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[O]ur concern is not with whether the trial court's verdict is in accord with the weight of the evidence, but only with whether the verdict was supported by sufficient evidence—evidence which could fairly convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt." *State v. Pagotto*, 361 Md. 528, 534 (2000) (internal citations omitted).

The jury convicted Robinson of attempted voluntary manslaughter, which "requires a specific intent to commit a homicide." *Dixon v. State*, 364 Md. 209, 239 (2001). "Since 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." *Davis v. State*, 204 Md. 44, 51 (1954). "Therefore, intent must be determined by a consideration of the accused's acts, conduct and words." *State v. Raines*, 326 Md. 582, 591 (1992). "[T]he law presumes that one intends the natural and probable consequences of his act." *Davis*, 204 Md. at 51. We may infer an intent to kill "from the use of a deadly weapon directed at a vital part of the human body." *State v. Earp*, 319 Md. 156, 167 (1990).

In *Raines*, *supra*, the accused shot at the driver's window of a tractor-trailer driving on a highway. The Court of Appeals held that because the accused knew that the driver was behind the window, his "actions in directing the gun at the window, and therefore at the driver's head on the other side of the window, permitted an inference that Raines shot the gun with the intent to kill." 326 Md. at 592-93.

Similarly, in *People v. Vang*, 104 Cal. Rptr. 2d 704 (2001), the California Court of Appeals upheld convictions for eleven counts of attempted murder where the defendants had committed drive-by shootings at two occupied residences. In upholding the convictions, the court stated that "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up." *Id.* at 710. The defendants' inability to "see all of their victims

did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." *Id.* at 711.

In the present case, Robinson shot several .40 caliber rounds at the wall of the room he had seen Holmes enter just moments before the shooting. Three of these shots penetrated the wall and entered the room. One lodged in a dresser in the room. Then, it appears from the shell casings found outside the house, Robinson exited the house and shot through the window and into the room to which Holmes had retreated. Based upon these circumstances, as in *Raines*, *supra*, the jury was free to draw an inference that Robinson shot the gun with the intent to kill when Robinson fired the gun toward the window of the room in which Holmes was hiding. *See* 326 Md. at 592-93. Robinson further argues that the evidence was insufficient to prove that he possessed a gun. As such, he argues that he could not be convicted of first-degree assault, use of a handgun in a crime of violence, and reckless endangerment.[5] The State contends that Robinson did not preserve his challenge to the sufficiency of the evidence as to the first-degree assault and use of a handgun in the commission of a crime of violence counts because, "when he moved for judgment of acquittal, [Robinson's] counsel argued only that the State failed to produce evidence that he possessed a firearm as it related to the charge of wearing and carrying."

"[W]hen a jury is the trier of fact, appellate review of sufficiency of evidence is available only when the defendant moves for judgment of acquittal at the close of all the

[5] The jury had been instructed on the assault with a firearm version of first-degree assault and was not instructed on the intent to cause serious physical injury version of first-degree assault. The indictment charged Robinson with five counts of reckless endangerment for "firing a handgun."

evidence and argues precisely the ways in which the evidence is lacking." *Anthony v. State*, 117 Md. App. 119, 126, *cert denied*, 348 Md. 205 (1997). "The issue of sufficiency of the evidence is not preserved when [an] appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal." *Id.*

During the motion for judgment of acquittal, defense counsel argued as follows:

> [For] Count 13, wear, carry, and transport of a handgun, there was no specific – there was no evidence, really, that anybody actually saw him with a gun. While there might be certain – obviously, there is circumstantial evidence that a gun was fired, but no particular person has stated that my client was wearing a gun on his person, was carrying a gun on his person or that he transported a gun.
>
> There's no testimony that a gun was ever found in a vehicle that [Robinson] was in. So we believe that an MJOA should be granted as to Count 13.

When moving for judgment of acquittal, defense counsel did not address the charges associated with first-degree assault or the use of a handgun in the commission of a crime of violence. Consequently, Robinson did not preserve his claim of insufficiency of evidence with regard to those offenses. Assuming *arguendo* that Robinson's challenge to the sufficiency of the evidence had been preserved as to all of the offenses he now raises, we nevertheless hold that there was sufficient evidence presented for the jury to find that Robinson possessed a gun during this incident.

Indeed, there was both direct and circumstantial evidence in this case that Robinson possessed a gun. Both Holmes and Buchanan testified that they, in addition to Robinson,

were the only adults present in the apartment at the time of the shooting.[6] Buchanan's statement to police that Robinson had grabbed a gun from behind a radio was admitted as substantive evidence. Further, Holmes testified that after his argument with Robinson, and just prior to hearing the gunshots, he heard Buchanan say, "He has a gun." Thereafter, Robinson fled the scene immediately after the shooting. Finally, there was physical evidence in the form of bullet holes and shell casings that corroborated Buchanan's and Holmes's testimony that there had been a shooting in the apartment. Accordingly, assuming *arguendo* that the sufficiency of the evidence issues were preserved, we hold that the direct and circumstantial evidence presented at trial was sufficient to support the jury's verdicts.

**II. Merger: Wearing, Carrying and Transporting a Handgun And Use of a Handgun in a Crime of Violence**

Robinson's next contention is that his conviction for wearing, carrying, and transporting a handgun should merge into his conviction for use of a handgun in the commission of a crime of violence. To determine whether one offense merges into another, we use the "same evidence test" or "required evidence test." *State v. Jenkins*, 307 Md. 501, 517 (1986). In applying this test, we focus "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." *Id.* Where the offenses merge, "separate sentences for each offense are prohibited." *Snowden v. State*, 321 Md. 612, 617 (1991). "[I]n cases where the required evidence test is not

[6] Holmes and Buchanan's infant and toddler grandchildren were present as well.

satisfied," the rule of lenity acts as an alternate basis for merger, and "is applied to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. 134, 167 (2010).

Robinson relies upon *Wilkins v. State*, 343 Md. 444 (1996), and *Hunt v. State*, 312 Md. 494 (1988), and accurately points out that, in both cases, the Court of Appeals merged convictions for wearing, carrying, and transporting a handgun with convictions for use of a handgun in the commission of a crime of violence for sentencing purposes. The accused in *Hunt* "put the gun in his jacket at approximately 3:30 p.m., drove around for two hours, and then shot [a police officer] with the gun at 5:30 p.m." *Id.* at 510. The Court vacated Hunt's sentence for wearing, carrying, and transporting a handgun, explaining:

> [W]e think separate and consecutive sentences were improperly imposed in this case. The doctrine of merger by legislative intent (the Rule of Lenity) operates as a rule of statutory construction. In enacting § 36B,[7] the legislature made clear its purpose to restrict the carrying of handguns as a measure to control the use of such weapons in the commission of crimes of violence. Section 36B(d) expressly provides for consecutive sentences for both the use of a handgun in the commission of a crime of violence and for the underlying crime itself. Section 36B(b) contains no express language authorizing multiple punishments. We think it plain that the legislature did not intend, under circumstances like those now before us, that a separate punishment would be imposed for carrying, wearing, and transporting a handgun consecutive to that imposed for using a handgun during commission of a crime of violence. We thus find in this case that the § 36B(b) offense

[7] Robinson was charged with wearing, carrying, or transporting a handgun under § 4-203 which replaced Art. 27, § 36B(b). He was charged with using a handgun in the commission of a crime of violence under Md. Code Ann., Crim. Law § 4-204 which replaced Art. 27, § 36B(d). These sections did not make substantive changes to former Art. 27, § 36B.

> merged into the greater § 36B(d) offense of using a handgun in the commission of a crime of violence.

*Id.* (internal citations omitted).

The State maintains that Robinson's reliance upon *Wilkins* and *Hunt* is misplaced because a jury could have inferred, from the evidence presented, that Robinson "initially wore/carried/transported the gun when he brought it into the house" or had "carried the handgun into the house on a prior occasion." While we agree with the State that a rational trier of fact could have found that Robinson brought the gun into the house, we nevertheless conclude that separate sentences should not be imposed for the two offenses. Critically, there was evidence presented that Robinson reached for a gun behind a radio and then used it to shoot through a wall at Holmes. Holmes testified that he did not own a gun or know that a gun was present in the apartment. This evidence supports an inference that Robinson carried the gun into the apartment. There was no evidence presented, however, that Robinson brought the gun on a separate occasion and stored the gun in the apartment. Indeed, the facts in the present case are not significantly different from those in *Hunt*, where the accused walked around while carrying a gun for hours before using it. Accordingly, we hold that Robinson's sentence for wearing, carrying, and transporting a handgun should be merged into his sentence for use of a handgun in the commission of a crime of violence.

## III. Merger: Reckless Endangerment and First-Degree Assault

Robinson argues that "under principles of fundamental fairness or the rule of lenity" his conviction for reckless endangerment of Holmes should have merged with his conviction for first-degree assault of Holmes. The State concedes that Robinson

improperly received a separate sentence for reckless endangerment of Holmes, and we agree.

The rule of lenity is "an alternate basis for merger in cases where the required evidence test is not satisfied, and is applied to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction." *Marlin*, *supra*, 192 Md. App. at 167. In *Marlin*, *supra*, we determined that a conviction for reckless endangerment and first-degree assault (aggravated by the use of a handgun) did not merge, under the required evidence test, because each offense at issue "contain[ed] elements not required for conviction of the other." *Id.* We determined however, that "under principles of fundamental fairness or the rule of lenity, the singular act of shooting . . . properly resulted in two convictions but warranted only one sentence." *Id.* at 171.

The present case is factually similar to *Marlin*. Both the reckless endangerment and first-degree assault upon Holmes were based upon the act of shooting. As such, we hold that the trial court erred when it failed to merge Robinson's sentence for reckless endangerment on Holmes with his sentence for first-degree assault on Holmes.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND REVERSED IN PART. SENTENCES FOR WEARING, CARRYING, AND TRANSPORTING A HANDGUN AND RECKLESS ENDANGERMENT OF GERALD HOLMES VACATED. JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-THIRD BY APPELLANT AND TWO-THIRDS BY PRINCE GEORGE'S COUNTY.**