UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2121

September Term, 2015

GEORGE C. OWENS

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 5, 2016

After a bench trial in the Circuit Court for Baltimore City, George C. Owens, appellant, was found guilty of first and second-degree assault, reckless endangerment, and carrying a dangerous weapon openly with the intent to injure. He was sentenced to incarceration for a term of eight years for first-degree assault, a concurrent term of three years for reckless endangerment, and a concurrent term of three years for carrying a dangerous weapon openly with the intent to injure. The remaining assault charge was merged for sentencing. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

> I. Is the evidence insufficient to sustain the conviction for first-degree assault?
>
> II. Is the evidence insufficient to sustain the conviction for carrying a dangerous weapon openly with the intent to injury?
>
> III. Are separate sentences for both first-degree assault and reckless endangerment improper?

For the reasons set forth below, we shall hold that the evidence was sufficient to sustain appellant's convictions for first-degree assault and carrying a dangerous weapon openly with the intent to injure. We shall vacate the sentence for reckless endangerment.

FACTUAL BACKGROUND

This case arises from an altercation between appellant and John McNeil that occurred on April 15, 2015. Both men were tenants in a residence located at 1272 Glyndon Avenue in Baltimore City. In exchange for room and board, McNeil collected rent from the other tenants in the house. At approximately 7 p.m. on the date of the

altercation, McNeil was collecting rent when he saw appellant having a conversation with a neighbor. Appellant walked up to McNeil and said, "[y]ou're a fabricator." McNeil responded, "[y]es, I guess you can say that. I'm a draftsman." Appellant replied, "[n]o, no, you're a liar." McNeil asked appellant, "where you get that from[?] A fabricator does not mean to lie." Appellant then "palm-hit" McNeil in his "solar plex."

McNeil turned to his right and "uppercut" appellant in an attempt "to knock him out." McNeil hit appellant three to four times and knocked him down, "completely subdu[ing] him." At that point, a neighbor, who was a retired sheriff, told McNeil to stop hitting appellant, and he complied. McNeil told appellant to "take his drunk self in the house and go lay down."

Appellant went in the house, but came back outside carrying a butcher knife. Appellant approached McNeil, whose back was turned because he was talking to a neighbor. The neighbor said, "John, look out. He's got a knife[,]" and McNeil "ducked," put his hands up, and turned his head. Appellant struck McNeil in the back of his head with a knife that had a ten-inch long blade. McNeil "ducked" and ran about "five houses down." When he turned around, he saw appellant behind him with the knife raised above his head. McNeil "cross-blocked" the knife, meaning he crossed his hands and raised them up to block appellant's blow. Appellant "flew to the ground" still holding the knife in his hand. McNeil put his knee across appellant's arm to immobilize it. McNeil then took a folding knife from his own belt, opened it, and stuck it in appellant's side. Appellant tried to get McNeil off him and free his hand and McNeil "slit him across his face." At that point, McNeil got up and went around a nearby truck while neighbors

subdued appellant and took the knife from him. McNeil walked back to his home, sat on the front steps, and closed his knife.

The police arrived shortly thereafter and McNeil, who was "bleeding profusely," was taken to Shock Trauma. He received six or seven staples in his head, staples in his fingers, and stitches in his left hand. He had been stabbed in his left hand at the base of his thumb and the first finger on his right hand was "almost completely severed."

McNeil acknowledged that about two or two and a half hours before the altercation, he and appellant had gone to a nearby bar, purchased beer, and brought it back to the house where they drank it with a woman named Bunny. McNeil drank a 24-ounce can of "Natty Daddy." After that one can of beer, McNeil went inside the house, but he saw appellant and Bunny continue to drink beer and vodka on the front steps. At the time of the altercation, McNeil believed that appellant was "drunk" because of "[h]is change in personality," his "slurred speech," "the sound of his voice," and the fact that "[h]is equilibrium wasn't up to par." Prior to the altercation, appellant had been a tenant in the house for about three or four months. McNeil and appellant had had "quite a few" drinks together and McNeil was familiar with appellant's sober and intoxicated states.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant first contends that the evidence was insufficient to sustain his conviction for first-degree assault. He maintains that because he was "extremely intoxicated" he

was unable to form the specific intent to cause serious physical injury. We disagree and explain.

"[F]ollowing a bench trial, the test for sufficiency of the evidence is whether that evidence, if believed, directly or inferentially permits the court to be convinced, beyond a reasonable doubt, of the defendant's guilt." *Moore v. State*, 189 Md. App. 90, 97 (2009). The relevant question is "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). We give "due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *McDonald v. State*, 347 Md. 452, 474 (1997), *cert. denied*, 522 U.S. 1151 (1998). *See also* Md. Rule 8-131(c). Conflicting evidentiary inferences are left to the trier of fact. *Neal v. State*, 191 Md. App. 297, 315, *cert. denied*, 415 Md. 42 (2010).

The question presented by appellant concerns his conviction for first-degree assault. Section 3-202 of the Criminal Law Article provides, in relevant part, that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." Md. Code (2002, 2012 Repl. Vol.) §3-202(a)(1) of the Criminal Law Article ("CL"). *See also Snyder v. State*, 210 Md. App. 370, 385-86 (2013(noting that to raise a second-degree assault charge to first-degree assault, the State must prove second-degree assault and the additional requirement "that the defendant committed the assault with a firearm or with the intent to cause serious physical injury"). "Serious physical injury" is defined as physical injury that "(1) creates a substantial risk of death; or (2) causes

permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." CL §3-201(d).

Generally, voluntary drunkenness is no defense to a criminal charge. *State v. Gover*, 267 Md. 602, 606 (1973). "The only exception to this occurs when a defendant, charged with a crime requiring a specific intent, is so drunk that he is unable to formulate that *mens rea*." *Id.* at 606-07. The defendant's "intoxication then will excuse his actions and serve as a defense." *Id.* A defendant remains "criminally responsible as long as he retains control of his mental faculties sufficiently to appreciate what he is doing." *Beall v. State*, 203 Md. 380, 385-86 (1953). *See also*, *Gover*, 267 Md. at 607.

On the issue of voluntary intoxication as a defense to the first-degree assault charge, both parties direct our attention to *Bazzle v. State*, 426 Md. 541 (2012). In that case, Bazzle was convicted of attempted second-degree murder, attempted armed carjacking, and first-degree assault, all of which required a specific intent. *Id.* at 545, 548. On appeal, Bazzle challenged the trial court's decision to deny his request for a jury instruction on the issue of voluntary intoxication. *Id.* at 547-48. He argued that four pieces of evidence satisfied the "some evidence" threshold required to generate the instruction: (1) a blood alcohol content level nearly twice the legal limit; (2) his loss of memory of the night of the crime; (3) a witness's testimony that Bazzle was "almost about to pass out"; and (4) his odd behavior during the attack. *Id.* at 552.

The Court of Appeals rejected Bazzle's arguments, noting that evidence of drunkenness was insufficient to generate the voluntary intoxication instruction. The Court stated that:

> "[T]he single fact that one has consumed what some may consider to be an inordinate amount of alcohol, standing alone, with no evidence as to the [effect] of that alcohol on the defendant, would not permit a jury reasonably to conclude that he had lost control of his mental faculties to such an extent as to render him unable to form the intent[.]"

Id. at 553 (quoting *Lewis v. State*, 79 Md. App. 1, 12-13 (1989)).

The Court held that in order to generate the voluntary intoxication instruction, a defendant must do more than show that he or she was drunk:

> Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and does not rebut the presumption that a man intends the natural consequence of his act.

Id. at 553-54 (quoting *Hook v. State*, 315 Md. 25, 31 n.9 (1989))(internal emphasis, citations and quotations omitted).

The Court concluded that Bazzle's blood alcohol content and memory loss were consistent with excessive alcohol consumption, but that the evidence that he was drunk did not also constitute some evidence that he was unable to form a specific intent. *Id.* at 556.

Similarly, in the case at hand, there was no evidence of an incapacity on appellant's part to form the requisite specific intent to cause a serious physical injury to McNeil. Evidence that appellant acted illogically, slurred his speech, lost his balance, and made decisions he would not have made when sober merely established that he was

"drunk and exhibited the typical characteristics of being drunk." *Bazzle*, 426 Md. at 555-56. That evidence, standing alone, was inadequate to establish that appellant was so intoxicated that he could not form the requisite specific intent. Moreover, there was evidence that prior to the stabbing appellant engaged in a meaningful conversation with McNeil about the word "fabricator." Appellant then took the specific and calculated steps of going inside the house, retrieving a knife with a blade that was ten inches long, sneaking up on McNeil, and stabbing him from behind. After doing that, appellant chased McNeil about five houses down the street. These facts were sufficient to support the court's conclusion that appellant was in control of his mental faculties when he intentionally stabbed McNeil and that he fully intended the natural consequence of his act.

II.

Appellant next contends that the evidence was insufficient to sustain his conviction for carrying a dangerous weapon openly with the intent to injure. The offense of carrying a dangerous weapon with the intent to injure is set forth in CL §4-101(c)(2), which provides that "[a] person may not wear or carry a dangerous weapon, chemical mace, pepper mace, or a tear gas device openly with the intent or purpose of injuring an individual in an unlawful manner." Carrying a dangerous weapon openly with the intent to injure is a specific intent crime. *Somers v. State*, 156 Md. App. 279, 316 (2004). Appellant maintains that because of his intoxication he was unable to form the requisite specific intent. He further asserts that even if the evidence could support a finding that he

had the specific intent to injure McNeil, the act of carrying the knife was merely incidental to the first-degree assault. Both arguments are without merit.

For the same reasons we rejected appellant's sufficiency argument with respect to the specific intent to commit first-degree assault, *supra*, we reject his contention that because of his intoxication he was unable to form the specific intent to injure McNeil required for the carrying a dangerous weapon charge. There was ample evidence to support the trial court's conclusion that appellant "intended the natural consequences of his actions in this case."

We also reject appellant's assertion that the act of carrying the knife was merely incidental to the first-degree assault. Appellant argues that the evidence showed he carried the knife only a short distance and had no purpose other than to injure McNeil such that the carrying of the knife was merely incidental to the assault. In support of this argument, appellant directs our attention to two cases, *Thomas v. State*, 143 Md. App. 97 (2002) and *Chilcoat v. State*, 155 Md. App. 394 (2004), in which we held that the evidence was insufficient to establish that the defendant carried a weapon openly with the intent to injure.

In *Thomas*, the defendant hit the victim with a hammer. *Thomas*, 143 Md. App. at 105-06. The incident occurred in a one-room apartment and it could be inferred from the evidence that the hammer just happened to be in the same room. *Id.* at 103-06. We concluded that Thomas obtained the hammer and used it in the same location to strike the victim and, as a result, the evidence was insufficient to establish that he committed the separate crime of carrying it openly with the intent to injure. *Thomas*, 143 Md. App. at

123. In reaching that conclusion, we noted that if we were to hold otherwise, "it would mean that almost any time a person commits an offense with a dangerous weapon, he or she could also be convicted of having carried the weapon openly, with intent to injure." *Id*.

In *Chilcoat*, the defendant "merely pick[ed] up a beer stein that was convenient to him and walk[ed] a few steps with it to reach the victim." *Chilcoat*, 155 Md. App. at 409. We noted that "most assaults of the battery type involve at least a few steps or other advancement toward the victim" and that "Chilcoat's movement while holding the beer stein was necessary to commit the assault[.]" *Id.* at 412.

In contrast to *Thomas* and *Chilcoat*, in the instant case, appellant did not merely come across the knife in the heat of his argument with McNeil. The evidence established that after engaging in a physical altercation with McNeil, appellant went inside the house, retrieved a knife with a ten-inch blade, and then approached McNeil from the back and stabbed him in the back of his head. Moreover, after the stabbing, appellant chased McNeil the distance of about five houses while wielding the knife over his head. This evidence was sufficient to support appellant's conviction for carrying a weapon openly with the intent to injure.

III.

Appellant was sentenced to incarceration for a term of eight years for first-degree assault and to a concurrent term of three years for reckless endangerment. He argues that the sentences imposed for first-degree assault and reckless endangerment must be merged. The State agrees and so do we.

In *Williams v. State*, 100 Md. App. 468 (1994), we held that convictions for assault with intent to maim and reckless endangerment were not inconsistent where they were based on the "same act." *Williams*, 100 Md. App. at 510. Nevertheless, we concluded that merger was required because "the subjective *mens rea* of reckless indifference to a harmful consequence" had ripened "into the even more blameworthy specific intent to inflict the harm" that was required for the assault conviction. *Id.*

Similarly, in *Marlin v. State*, we concluded that "under principles of fundamental fairness or the rule of lenity," reckless endangerment merges into first-degree assault by firearm where the defendant's "conduct as to the reckless endangerment involved the same conduct that formed the basis for the first degree assault[.]" *Marlin*, 192 Md. App. 134, 171 (2010). We explained that because "the evidence at trial pertained solely to a single act of shooting a single victim" and "no other conduct was involved in proving either offense," only one sentence was warranted. *Id.*

As in *Williams* and *Marlin*, appellant's convictions for first-degree assault and reckless endangerment were based on the same act, namely stabbing McNeil with a knife. As a result, appellant's three-year sentence for reckless endangerment must be vacated.

SENTENCE FOR RECKLESS ENDANGERMENT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED.
COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.