UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2697

September Term, 2015

DORAIN JEREAL GROGAN

v.

STATE OF MARYLAND

Wright,
*Krauser,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: August 24, 2017

*Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Charged with multiple offenses in the Circuit Court for Montgomery County, for his role in two armed carjackings involving two different victims — Anna Cruz and Andreas Piedra — Dorain Jereal Grogan, appellant, entered into a plea agreement with the State. In accordance with that agreement, Grogan pleaded guilty to eight of the ten offenses with which he was charged, namely: armed carjacking, robbery with a dangerous weapon, kidnapping, first-degree assault, and conspiracy to commit armed carjacking with respect to Ms. Cruz; and armed carjacking, robbery with a dangerous weapon, and conspiracy to commit armed carjacking with respect to Mr. Piedra. The State, in return, nolle prossed the remaining two charges.[1]

The circuit court subsequently sentenced Grogan to a total of forty-eight years of imprisonment. But, five days later, the sentencing court recalled the case because of the clerk's confusion over the pronouncement of sentence. In an attempt to clarify the sentences it had imposed, the circuit court modified Grogan's sentence so that it now amounted to a total of seventy-three years of imprisonment.

Grogan thereafter filed a motion to correct an illegal sentence, raising two separate claims of illegality: first, that the circuit court, in issuing its clarification of his sentence, illegally increased that sentence from forty-eight to seventy-three years' imprisonment; and, second, that his conviction for first-degree degree assault of Anna Cruz should have been merged into his conviction for robbery, with a dangerous weapon, of Ms. Cruz. That

[1] The two offenses, which were nolle prossed, were first-degree assault of Andreas Piedra and use of a handgun in the commission of that crime.

merger would have required that his sentence for first-degree assault be vacated, thereby reducing his total sentence by eight years.[2]

The circuit court thereafter granted the relief Grogan requested as to the first claim, a ruling that the State does not contest, but denied Grogan's second claim, demanding a merger of his first-degree assault conviction into his conviction for robbery with a dangerous weapon. Challenging the latter of the two rulings, Grogan then noted this appeal, which, for the reasons set forth below, we conclude is without merit.

Plea Hearing

At the beginning of Grogan's plea hearing, the court questioned Grogan as to his understanding of the nature of the charges against him. In response to those judicial queries, Grogan acknowledged, among other things, that he understood "the nature of the charges to which [he was] offering to plead guilty," that he had "received a copy of the charging document" and understood "what [he was] charged with," and that he had "discussed the nature of these charges and the elements of the various crimes to which [he was] pleading guilty" with his lawyer.

[2] "It is clear under case law of the United States Supreme Court and Maryland that, for purposes of resentencing, the remedy is to vacate only the sentence imposed upon the lesser included offense, not the conviction itself." *Twigg v. State*, 447 Md. 1, 19 n.10 (2016). Nonetheless, we say that the offenses merge or that they are "the same offense" for double jeopardy purposes. *Id.* at 14.

Satisfied with Grogan's responses, the circuit court then directed the State to proceed with its factual proffer. In response to that directive, the State made the following proffer:

"[O]n October 27th, 2007, at approximately 6:52 p.m., Montgomery County Police units responded to a situation" in Silver Spring, Maryland, where they encountered Anna Cruz, a victim of one of the two carjackings committed by Grogan. Ms. Cruz told police that, after parking her car, in a parking garage in Silver Spring, and exiting her vehicle, she was approached by "two males who were masked and armed with what appeared to be a black semiautomatic handgun." One of those two males was Grogan. Then, pointing "what appeared to be a gun" at Ms. Cruz, Grogan "demanded the keys to her 2005 black Honda Accord."

Upon obtaining the keys from Ms. Cruz, Grogan and his companion, "Clayton Glenn," forced Ms. Cruz into the back seat of her car. After the two men climbed into the car, Grogan, who was sitting in the driver's seat of that vehicle, handed the gun to Glenn, who was sitting in the back seat with Ms. Cruz. Glenn then held Ms. Cruz down "as he placed the gun to her head." As they drove away, Grogan handed a roll of "clear plastic boxing tape" to Glenn and told him "to tape up" Ms. Cruz, which he did, taping Ms. Cruz's head, hands, and feet.

During the drive that ensued, the two men threatened "several times" to kill Ms. Cruz. "[M]ost" of those threats were made by Grogan, who, according to Ms. Cruz, gave

"most of the orders." Although she "begged for her life," Grogan "said that they would kill her nonetheless."

Eventually, Grogan stopped the car and ordered Ms. Cruz to get out of the vehicle. When she did, Grogan, who was now standing outside of the vehicle, "demanded that she get into the trunk of the car." Ms. Cruz resisted, but Grogan took the gun from Glenn, placed it against Ms. Cruz's forehead, and repeated his demand that she get into the trunk of the car. When she finally did, Grogan or Glenn closed the trunk. Grogan then drove off, with Ms. Cruz in the trunk. But, while the car was in motion, Ms. Cruz found a wrench, which had been lying in the trunk, opened the trunk lock, and (having apparently unbound her feet) jumped out of the moving vehicle and ran toward the nearest house, "screaming for help." Grogan then stopped the car and ran after Ms. Cruz. When Grogan caught up with Ms. Cruz, he "began beating her about the head and face, causing a large laceration above her left eye and breaking her nose."

A resident of a nearby house overheard Ms. Cruz's screams for help and "observed the assault." When that resident then left his house to assist Ms. Cruz, Grogan climbed back into Ms. Cruz's vehicle, and he and Glenn drove off. "As a result of the beating" she sustained, Ms. Cruz suffered, among other things, a broken nose, for which she later underwent surgery, and a knee injury, which occurred when she fell during her flight from her assailants.

After abandoning Ms. Cruz's vehicle, Grogan and Glenn traveled, by bus, to another Silver Spring parking garage. There, several hours later, they selected their next victim, Andres Piedra.

As Mr. Piedra was walking toward his Toyota Corolla, which was parked on the third level of a parking garage, Glenn, brandishing "a black handgun," demanded that Piedra give him his car keys. When, in response, Mr. Piedra tossed his keys to the ground, Glenn picked them up and gave them to Grogan, who entered Mr. Piedra's car and turned on the ignition. Glenn then demanded Piedra's wallet, whereupon Mr. Piedra emptied his pockets and tossed his cell phone to the ground. After retrieving those items, Glenn climbed into Mr. Piedra's vehicle, and that vehicle then drove off, with Grogan at the wheel.

Two days later, in the afternoon of October 30, 2007, members of the Washington Area Vehicle Enforcement team spotted Mr. Piedra's stolen car in Washington, D.C. They observed that the driver of the stolen car "matched the description of one of the suspects in Mr. Piedra's carjacking," and they arrested the driver of that vehicle, Grogan.

Following his arrest, Grogan gave a statement to police, admitting to having committed armed carjackings with respect to both Mr. Piedra and Ms. Cruz and identifying Clayton Glenn, as his accomplice, in the commission of those crimes. Furthermore, the police found Grogan's DNA on the steering wheel of Ms. Cruz's car and on a skull cap found on the front seat of her vehicle. And they retrieved from Mr. Piedra's car a check, belonging to Ms. Cruz but written by and made out to Grogan, a laptop computer owned

by Ms. Cruz, some movies that she had rented from a video store, and several of her credit cards that had been stolen during the carjacking.

Upon the conclusion of the State's proffer, the court asked if there were "any changes or additions to the proffer by the defendant." Defense counsel responded that, among other things,[3] Grogan would insist that "the weapon in question wasn't a real gun" but, rather, was a "BB gun."

The court then discussed "the various charges" with Grogan and ascertained from him to which charges he was pleading guilty. As for first-degree assault of Ms. Cruz, the subject of this appeal, the court asked: "To the charge of assault in the first degree, on October 27, 2007, upon the body of Anna [Cruz], how do you plead? Guilty or not guilty?" Grogan replied: "Guilty." In accepting those pleas, the circuit court found that Grogan had "freely, intelligently, voluntarily, and understandingly offered to waive his rights." It further found, based upon its determination that the State had "demonstrated a prima facie case from which a fact finder could find the defendant guilty beyond a reasonable doubt," that "the proffer support[ed] the plea[s]."

Discussion

Grogan contends that the circuit court erred in sentencing him to two separate and consecutive terms of imprisonment for robbery with a dangerous weapon and first-degree

[3] Defense counsel noted several other representations made by the State that he disagreed with, but none of those representations are relevant to this appeal.

degree assault with respect to Anna Cruz, because the convictions for those two offenses merge under Maryland law, unless the two crimes were based on separate and distinct acts. And, as the record, he maintains, is ambiguous as to whether the two offenses were based on distinct acts, that ambiguity must be resolved in his favor, and, accordingly, he should not have received separate, consecutive sentences for the two crimes.

Unfortunately for Grogan, though first-degree assault committed with a firearm merges with robbery with a dangerous weapon, first-degree assault with intent to cause serious physical injury does not, and that, as the record plainly discloses, is the crime to which Grogan pleaded guilty.

The merger doctrine posits that, "[w]here two offenses are based on the same act or acts, and the two offenses are deemed to be the same under the required evidence test, merger follows as a matter of course," unless "the legislative intent to authorize the imposition of cumulative sentences is clear." *Williams v. State*, 323 Md. 312, 318 (1991). And the required evidence test provides that, if "each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge," but, "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." *Dixon v. State*, 364 Md. 209, 237 (2001) (citations omitted).

But, when applying the required evidence test to "a multi-purpose criminal statute," that is, a statute that "proscribes several different types of conduct, which may be treated as separate statutory offenses for double jeopardy purposes," *Nightingale v. State*, 312 Md.

699, 706 (1988), *superseded by statute as stated in Fisher v. State*, 367 Md. 218, 242 (2001), such as the first-degree assault statute, *Dixon*, 364 Md. at 243, we must "refine it by looking at the alternative elements relevant to the case at hand." *Nightingale*, 312 Md. at 705. That is to say, the reviewing court

> "must construct from the alternative elements within the statute the particular formulation that applies to the case at hand. It should rid the statute of alternative elements that do not apply. It must, in other words, treat a multi-purpose statute written in the alternative as it would treat separate statutes. The theory behind the analysis is that a criminal statute written in the alternative creates a separate offense for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would."

Id. at 706-07 (quoting *Pandelli v. United States*, 635 F.2d 533, 537 (6th Cir.1980)). Indeed, at the core of this dispute is whether it can be clearly determined from the record which "particular formulation" of the first-degree assault statute "applies to the case at hand," *id.*, because only one of the two distinct varieties of first-degree assault merges into robbery with a dangerous weapon.

Section 3-202 of the Criminal Law Article ("CL")[4] defines first-degree assault as follows:

> (a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.
>
> (2) A person may not commit an assault with a firearm, including:

[4] The statute, in effect at the time the offenses were committed in this case, Maryland Code (2002, 2007 Supp.), Criminal Law Article, § 3-202, is identical to the current version of the statute, in the 2012 Replacement Volume of the Criminal Law Article.

> (i) a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in § 4-201 of this article;
> (ii) an assault pistol, as defined in § 4-301 of this article;
> (iii) a machine gun, as defined in § 4-401 of this article; and
> (iv) a regulated firearm, as defined in § 5-101 of the Public Safety Article.

Thus, to sustain a conviction for the two varieties of first-degree assault — that is, first-degree assault of the "serious physical injury" variety, under CL § 3-202(a)(1), and first-degree assault committed with a firearm, under CL § 3-202(a)(2) — the State must prove not only all of the elements of second-degree assault but, as to the former, that "the defendant intended to cause serious physical injury in the commission of the assault," while, as to the latter, that "the defendant used a firearm to commit assault." Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:01.1 (2d ed. 2012).

Because it is undisputed that all of the elements of second-degree assault were set forth in the State's proffer, we shall not dwell on those elements[5] but shall turn, instead, to

[5] There are three varieties of second-degree assault: intent to frighten, attempted battery, and battery. Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:01 (2d ed. 2012). Intent-to-frighten second-degree assault is "the doing of an act that places the victim in apprehension of immediate bodily harm *with the intent to cause such apprehension*," *Wieland v. State*, 101 Md. App. 1, 38 (1994), which means that "the victim must be aware of the impending contact." *Harrod v. State*, 65 Md. App. 128, 138 (1985) (citation omitted). On the other hand, attempted-battery second-degree assault comprises "a substantial step toward the completion of a battery, with the apparent present ability to do so." *Hickman v. State*, 193 Md. App. 238, 251 (2010). But, "[u]nlike the intent to frighten variety of assault, there is no need for the victim to be aware of the impending battery in the attempted battery variety of assault." *Id.* And, finally, common law battery is the "unlawful application of force to the person of another." *Epps v. State*, 333 Md. 121,

the aggravating element of "intent-to-cause-serious-bodily-harm" first-degree assault, under CL § 3-202(a)(1), and "use-of-a-firearm" first-degree assault, under CL § 3-202(a)(2), either of which elevates second-degree assault to an assault in the first degree. We shall then apply the required evidence test to each of the two forms of first-degree assault, *Nightingale*, *supra*, 312 Md. at 705, to determine whether first-degree assault, of either variety, is a lesser included offense of robbery with a dangerous weapon.

Robbery is "a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)," *Snowden v. State*, 321 Md. 612, 618 (1991), or, in other words, it is "a larceny from the person" combined with a second-degree assault. *See* CL § 3-201(b) (defining "assault," under the Maryland statutory scheme, as "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings"). Robbery with a dangerous weapon includes all of the elements of robbery as well as the employment of a "dangerous weapon" in the commission of the robbery. A "dangerous weapon" is defined as any instrument that satisfies any of the following three criteria: that such instrument is "anything used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat"; that, "under the circumstances of the case," it is "immediately useable to inflict serious or deadly harm (*e.g.*, unloaded gun or starter's pistol useable as a bludgeon)"; or that it is

127 (1993), *superseded by statute on other grounds as stated in Robinson v. State*, 353 Md. 683 (1999).

"actually used in a way likely to inflict that sort of harm (*e.g.*, microphone cord used as a garrote)." *Handy v. State*, 357 Md. 685, 693 (2000) (citation omitted).

The intent "to cause serious physical injury in the commission of the assault," MPJI-Cr 4:01.1, is an element of assault in the first degree, of the "serious physical injury" variety, but it is not an element of robbery with a dangerous weapon. And, while the commission of a larceny is an element of robbery with a dangerous weapon, it is not an element of assault in the first degree. Therefore, assault in the first degree of the "serious physical injury" variety and robbery with a dangerous weapon are not the "same offense" under the required evidence test and thus, under that test, do not merge.

The use of a "firearm," as noted earlier, is an element of assault in the first degree committed with a firearm. And, a "firearm," as defined by the first-degree assault statute, is a "dangerous weapon" for purposes of robbery with a dangerous weapon. Consequently, an assault in the first degree committed with a firearm includes all of the elements of second-degree assault plus the use of a "dangerous weapon" and, therefore, is a lesser-included offense of robbery with a dangerous weapon, which includes all of the elements of second-degree assault and larceny from the person, as well as the use of a "dangerous weapon." Decisions of this Court in *Gerald v. State*, 137 Md. App. 295, 311-12 (2001), *Williams v. State*, 187 Md. App. 470, 476 (2009), and *Morris v. State*, 192 Md. App. 1, 39-40 (2010), which Grogan cites for the unqualified assertion that first-degree assault is a lesser-included offense of robbery with a dangerous weapon, must be read with this limitation in mind — their holdings do not apply to all varieties of first-degree assault, but

only to the form of first-degree assault, under CL § 3-202(a)(2), that requires the use of a firearm. Thus, assault in the first degree committed with a firearm, under CL § 3-202(a)(2), and robbery with a dangerous weapon are the "same offense," under the required evidence test, and do merge.

The question before us therefore becomes: Which variety of assault in the first degree did Grogan plead guilty to having committed? And, if that question does not have a definitive answer, then, of course, he would be entitled to "the benefit of the doubt," and a merger of the assault and the robbery would be required. *Snowden*, 321 Md. at 619.

In resolving Grogan's "ambiguity" claim, we consider the indictment and the transcript of the plea hearing. The indictment, standing alone, does not resolve the purported ambiguity, as the pertinent count, Count 4, tracks the language of the short-form indictment, *see* CL § 3-206(a), and does not specifically allege which form of first-degree assault it was charging Grogan with.

Fortunately, however, the plea hearing transcript resolves this issue. It discloses that, during the plea colloquy, the circuit court asked Grogan whether he had discussed the nature and elements of the offenses with his attorney. He replied that he had. Furthermore, the State's proffer expressly referred to the physical attack upon Ms. Cruz as "the assault" and to the injuries she sustained (which included a broken nose and "a large laceration above her left eye") "[a]s a result of the beating." But, most important of all, during the circuit court's examination of Grogan, following the State's proffer, to determine whether he was pleading guilty to having committed the first-degree assault as to Anna Cruz, the

circuit court asked: "To the charge of assault in the first degree, on October 27, 2007, upon the body of Anna [Cruz], how do you plead? Guilty or not guilty?" Grogan responded: "Guilty." That response, which plainly referred to a first-degree assault, of the "serious physical injury" variety, establishes that there was no ambiguity as to the charges to which he was pleading guilty.

And, finally, Grogan's claim, during his plea hearing, that the weapon he bore during the carjackings at issue was a BB-gun, only further confirms that he understood that he was pleading guilty, as the State's proffer suggested and the court subsequently confirmed, to first-degree assault of the "serious physical injury" variety and not first-degree assault committed with a firearm, as a BB-gun, under Maryland law, does not constitute a "firearm," for purposes of first-degree assault.[6] Consequently, we conclude that the separate sentences imposed for those two offenses were not illegal and affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[6] Subsections 3-202(a)(2)(i)-(iv) of the Criminal Law Article define "firearm" by reference to other sections of that Article and, ultimately to section 5-101 of the Public Safety Article ("PS"). According to the latter, a "firearm" is a "weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive." Md. Code (2003), Public Safety Article ("PS") § 5-101(h)(1)(i). A BB-gun is not a "weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive" and is therefore not a "firearm."