UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2439

September Term, 2013

RONALD HORALD USSEL, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
**Zarnoch,
Reed,

JJ.

Opinion by Reed, J.

Filed: October 6, 2015

**Zarnoch, Robert A.J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

A jury in the Circuit Court for Baltimore County convicted Robert Horald Ussel, Jr., appellant, of two counts of second-degree assault and one count of resisting arrest. He received a 10-year sentence for one of the assault convictions and a consecutive 3-year sentence for resisting arrest. The other second-degree assault conviction was merged into the resisting arrest conviction for sentencing purposes. Appellant timely appealed and presents two questions for our review, which we rephrased:[1]

1. Did the trial court err in failing to merge appellant's conviction for second-degree assault on Officer Seckens into his resisting arrest conviction?

2. Was the evidence sufficient to support the guilty verdict reached by the jury on the two second-degree assault charges?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Therefore, we affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2013, Appellant's drinking caused him to get into an argument with his girlfriend about how she was disciplining her children. During the dispute, he called 911 and indicated to the operator that he wanted his girlfriend to leave the house they rented together. At approximately 7:00 p.m., Officer Joseph Seckens was the first to respond to the call, followed by Officers Joseph Harden and Michael Bowman, all of the Baltimore

[1] Appellant presented the following questions:

1. Did the trial court err in failing to merge both of appellant's second-degree assault convictions into his resisting arrest conviction?

2. Was the evidence sufficient to convict appellant of second-degree assault?

County Police Department. Conflicting testimony was given regarding the events that followed.

Officer Seckens testified that he entered the house and first had a brief conversation with Appellant's girlfriend in the living room. Officer Seckens also testified that during that conversation, Appellant was sitting at the dining room table, being uncooperative, and yelling and screaming. He then entered the dining room and approached Appellant. He immediately smelled a strong odor of alcohol and observed Appellant's glossy eyes and slurred speech. He testified that Appellant continued to act in an aggressive and hostile manner and kept screaming that he wanted his girlfriend out of the house. He also testified that Appellant threatened him, saying "I'm going to fuck you up. You and your family are gonna get yours." In the meantime, Officers Harden and Bowman arrived. Officer Seckens testified that he then tried to convince Appellant to leave; however, instead of leaving, Appellant spit in Officer Seckens' face. Immediately thereafter, Officer Seckens advised Appellant that he was under arrest and, with the help of Officers Harden and Bowman, took him from the chair he was sitting on to the floor. The officers advised Appellant to put his hands behind his back, but he refused to do so. Instead, he made several attempts to stand up and repeatedly kicked his feet. Several of his kicks struck Officer Harden's legs and chest.

Officer Harden also testified. He stated that he witnessed Appellant spit in the face of Officer Secken. In addition, he confirmed Officer Secken's account of what occurred while the officers were attempting to place Appellant under arrest.

Officer Bowman was the last officer to testify. He testified that, because of where he was standing at the time, he did not see Appellant spit on Officer Seckens. However, he confirmed that Appellant refused to allow his hands to be cuffed and wrestled with the officers when they attempted to place him under arrest.

Both Appellant and his girlfriend testified for the defense. Appellant admitted that he was drinking and that an argument ensued between him and his girlfriend over how she was disciplining her children. He also admitted that he called 911, but stated that he doesn't actually remember doing so. He testified that the first thing he remembers is being awakened at his dining room table by Officer Seckens. He stated that after a brief conversation, Officer Seckens took his I.D. and would not give it back. He testified that he asked Officer Seckens why he could not have his I.D. back, and that Officer Seckens' response was something to the effect of: "Don't worry about it, you alcoholic. I'll give you the fucking I.D. back when I feel like it." Appellant indicated that he proceeded to attempt to stand up, but stumbled in doing so. He stated that the sudden movement of his stumbling might have been perceived as a threat by Officer Seckens, who immediately threw him to the ground, causing him to hit his eye on the corner of the wall and become unconscious.

Appellant's girlfriend also testified that Appellant was asleep at the dining room table when the police arrived. She stated that she did not hear any commotion or see Appellant spit or kick at any of the officers. She testified that Appellant fell to the ground after attempting to stand up. She stated that the officers told her to get a towel because

Appellant's eye was bleeding. After she brought them the towel, they placed Appellant in handcuffs and took him outside to an ambulance.

On December 13, 2013, after hearing all of the above testimony, a jury in the Circuit Court for Baltimore County convicted Appellant of second-degree assault on Officer Seckens, second-degree assault on Officer Harden, and resisting arrest. He was sentenced on the same day to 10 years of imprisonment for his assault on Officer Seckens and 3 consecutive years for resisting arrest. However, his assault on Officer Harden was merged with the resisting arrest for sentencing purposes. Appellant filed a timely appeal on January 7, 2014.

DISCUSSION

I. MERGER OF CONVICTIONS

A. Parties' Contentions

Appellant argues that the trial court erred in not merging his conviction for assault on Officer Seckens into his conviction for resisting arrest. His argument is based on what he perceives to be two significant ambiguities in the record. First, he asserts that the evidence presented at trial could have allowed the jury to conclude that his assault on Officer Seckens, like his assault on Officer Harden, occurred during the arrest while the officers were wrestling with him on the floor. Second, he contends that neither the verdict sheet nor the court's instructions provided any clarity as to whether the assault charge relating to Officer Seckens was based solely on his pre-arrest act of spitting. Because we are required to resolve any ambiguities in his favor, and because assault merges with resisting arrest if it occurred during the arrest, Appellant argues that the trial court should

have merged both of his assault convictions–not just his conviction for assault on Officer Harden–into his resisting arrest conviction. Therefore, he asserts that we must vacate his 10-year sentence for assault and remand for a sentence not to exceed 3 years for resisting arrest.

The State argues that the trial court did not err in giving Appellant separate sentences for assault on Officer Seckens and resisting arrest. The State's preliminary argument is that merger of second-degree assault and resisting arrest is never required – even where the assault occurs during the arrest – because, under the required evidence test, each offense contains an element not required by the other. In the alternative that merger is required where the assault occurs during the arrest, the State asserts that merger is still not required in the present case because the record clearly indicates that the jury's sole basis for convicting Appellant of assault on Officer Seckens was his pre-arrest conduct (*i.e.*, his act of spitting Officer Seckens' face). The State concedes that neither the jury instructions nor the verdict sheet clarified the basis for the charge of assault on Officer Seckens, but points out that in closing argument the prosecutor clearly indicated that Appellant was being charged with assault on Officer Seckens for the spitting and assault on Officer Harden for the kicking. And lastly, in the event the first two arguments fail because Appellant is correct that the record is ambiguous as to whether the assault and resisting arrest convictions were based on separate conduct, the State argues that "his three-year sentence for resisting arrest must be merged into his 10-year sentence for second-

degree assault" instead of the other way around, and requests that we remand for a new trial rather than simply a new sentencing hearing.

B. Standard of Review

In *Britton v. State* we noted that "when the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error." 201 Md. App. 589, 598-99 (2011). This is because failure to merge convictions for sentencing purposes when required to do so results in "the imposition of a sentence 'not permitted by law,'" *Id.* (citing *Campbell v. State*, 65 Md. App. 498, 510 (1985)), in which "the illegality . . . 'inheres in the sentence itself.'" *Britton*, 201 Md. App. at 599 (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). As we explained in *Bishop v. State*, where the illegality inheres in the sentence itself, "[w]e 'address the legal issue of the sentencing . . . under a *de novo* standard of review.'" 218 Md. App. 472, 504 (2014), *cert. denied*, 441 Md. 218 (2015) (quoting *Blickenstaff v. State*, 393 Md. 680, 683 (2006)).

C. Analysis

First and foremost, we reject the State's argument that second-degree assault and resisting arrest do not merge under the required evidence test when the assault occurs during the arrest. In *Nicolas v. State*, the petitioner, like Appellant, was convicted of one count of resisting arrest and two counts of second-degree assault in connection with a physical altercation he had with two police officers. 426 Md. 385, 387-88 (2012). In that case, the Court of Appeals addressed for the first time whether second-degree assault and

resisting arrest merge under the required evidence test.[2] *See Id.* at 399-408. After performing a comprehensive analysis of the elements of both offenses, the Court of Appeals concluded that "[a]ll of the elements of second degree assault are included within the offense of resisting arrest[,] . . . [and] 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.* at 407. Therefore, the Court held that "when the force used by a defendant to resist arrest is the same as the offensive physical contact with a law enforcement officer attempting to effectuate that arrest, the convictions merge under the required evidence test." *Id.* at 407-08 (emphasis omitted). Thus, the *Nicolas* court affirmed what we held over a decade prior,[3] which is why we find no merit in the State's argument that second-degree assault and resisting arrest do not merge when the assault occurs during the arrest.

This brings us to the bottom line of whether the trial court erred when it handed Appellant separate sentences for second-degree assault on Officer Seckens and resisting arrest:

[2] The required evidence test states that "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." *Snowden v. State*, 321 Md. 612, 617 (1991) (quoting *State v. Jenkins*, 307 Md. 501, 517 (1986)).

[3] *See Cooper v. State*, 128 Md. App. 257, 266 (1999) (holding that because "the only force applied to [the officers] was that utilized by appellant to resist arrest[,] . . . the two offenses are based on the same acts . . . [and] appellant's convictions for second degree assault merge into his conviction for resisting arrest."); *Grant v. State*, 141 Md. App. 517, 541 (2001) (affirming our holding in *Cooper* that second-degree assault convictions merge with resisting arrest convictions when the assault occurs during the arrest).

> If the assault on Officer [Seckens] occurred prior to any attempt to arrest [Appellant], the conviction would not merge into the resisting arrest conviction; if the assault occurred during the resisting arrest, such that the convictions were based on the same underlying act or acts perpetrated by [Appellant], the offenses would merge.

Id. at 412. Because Appellant's assault on Officer Seckens occurred before any attempt was made to place him under arrest, we hold that Appellant did not receive an illegal sentence.

In *Cooper v. State*, the police attempted to place Cooper under arrest after he engaged in a drug transaction with an undercover officer. 128 Md. App. 257, 262-63 (1999). During the arrest, Cooper punched one officer repeatedly in the head and struck another in the face. *Id.* at 263. Because "the only force applied to [the] Officers . . . was that utilized by [Cooper] to resist arrest," we held that both second-degree assault convictions should merge into the resisting arrest conviction. *Id.* at 266.

In *Grant v. State*, three police officers reported to Grant's apartment after an "open" 911 call,[4] in which "sounds of fighting [were heard] in the background," that was made from his address. 141 Md. App. 517, 522 (2001). After entering the apartment and speaking to some of its occupants, the police heard a door shut in the hallway. *Id.* at 523. One of the officers walked over, knocked on the door, and requested that whoever had just entered the room step outside. *Id.* Eventually, Grant opened the door. *Id.* The same officer entered the room to look about while Grant stood outside with another officer. *Id.* at 523-24. When

[4] An "open" 911 call is where an individual calls 911 and remains silent throughout the duration of the call rather than using words to describe their situation to the operator.

officers' search of the room revealed drug paraphernalia therein, Grant assaulted the two officers who immediately attempted to place him under arrest. *Id.* at 524. The officer who was performing the search was interrupted so that he could assist the other officer with the arrest, and in the process of providing assistance he was struck by Grant's arms and legs. *Id.* at 524-25. We held that Grant's conviction for assault on the searching officer should merge with his resisting arrest conviction because that assault occurred while the officers were trying to place him in handcuffs. *Id.* at 541-42. However, we further held that Grant's conviction for assault on the officer who stood outside the door should not merge because that assault occurred before any attempt at arrest was made. *Id.*

The case presently before us is similar to *Grant,* in that Appellant assaulted Officer Seckens by spitting in his face before any attempt was made to arrest him. Appellant argues that while the evidence could have led the jury to determine that he assaulted Officer Seckens by spitting in his face prior to the arrest, the evidence also could have led the jury to convict him of assault on Officer Seckens based on the struggle that ensued while the officers were trying to place him in handcuffs. He argues that neither the verdict sheet nor the court's instructions provide any clarity as to whether the jury was supposed to consider his act of spitting as the sole basis on which to determine his criminal agency with respect to the assault on Officer Seckens.

However, at the conclusion of his closing argument, the prosecutor had this to say to the jury:

> The Defendant threatened Officer Seckens, the Defendant spit in his face, the Defendant resisted arrest and the Defendant

> assaulted Officer Harden by kicking him during the arrest. As a result of this Defendant's actions, this Defendant is – I'm asking you to hold him accountable for his actions, and you do that by finding him guilty of *second-degree assault on Officer Seckens for the spitting, second-degree assault on Officer Harden for the kicking and resisting arrest.*

Appellant addresses this by arguing that, although the Court of Appeals looked at the prosecutor's closing argument to determine the rationale underlying the jury's verdict in *Brooks v. State*, 439 Md. 698, 741-42 (2014), a closing argument cannot "completely make up for ambiguity in the evidence, jury instructions, and the verdict sheet." Whether or not that is true, the evidence in this case is not as ambiguous as Appellant contends. The State correctly points out that "[n]either the prosecutor nor the defense counsel addressed whether Officer Seckens was assaulted at any point during [Appellant's] resistance of the arrest." In addition to the lack of a statement by either attorney that Appellant assaulted Officer Seckens during the arrest, no such statement can be found in the transcript of the testimony of the three officers. While Officers Seckens, Harden, and Bowman all testified that they assisted in the arrest, they all only indicated that Officer Harden was kicked or otherwise assaulted by Appellant during that event.

In conclusion, no evidence was presented that Appellant assaulted Officer Seckens during the arrest. Furthermore, the prosecutor's closing statement made clear to the jury that Appellant was charged with "second-degree assault on Officer Seckens for the spitting [and] second-degree assault on Officer Harden for the kicking." Therefore, we conclude that the sole basis for Appellant's conviction of assault on Officer Seckens was his act of spitting in the officer's face. Because this act occurred before any attempt was made to

place Appellant under arrest, we hold that merger was not required and the trial court did not err in imposing separate sentences for second-degree assault on Officer Seckens and resisting arrest.

II. SUFFICIENCY OF THE EVIDENCE

A. Parties' Contentions

Appellant argues that the evidence was insufficient to convict him of the two second-degree assaults because neither Officer Seckens nor Officer Harden testified that they did not consent to his harmful and offensive contact. Appellant asserts that because the reasonable doubt standard is high and lack of consent is an element of assault, his conviction should be overturned. He acknowledges that the State's rebuttal closing argument was almost entirely devoted to the officers' lack of consent, but contends that this does not save the State because closing arguments are not evidence.

The State argues that the evidence was more than sufficient to support the convictions for assault on the officers. The State asserts that as long as any rational trier of fact could have determined beyond a reasonable doubt that Officers Seckens and Harden did not consent to being spit upon and kicked, respectively, then we should uphold the convictions. The State admits that neither officer testified explicitly as to their lack of consent, but contends that such testimony is not required because their lack of consent can be inferred from the circumstances surrounding the incident. The State also argues that Appellant does not claim that the evidence was insufficient to support his resisting arrest conviction.

B. Standard of Review

We recently laid out the applicable standard of review for determining whether sufficient evidence exists to support a conviction on appeal:

> The test of appellate review of evidentiary sufficiency 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.'" *State v. Coleman,* 423 Md**.** 666, 672 [33 A.3d 468] (2011) (quoting *Facon v. State,* 375 Md**.** 435, 454 [825 A.2d 1096] (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht,* 336 Md**.** 475, 479 [649 A.2d 336] (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.' " *Cox v. State,* 421 Md**.** 630, 657 [28 A.3d 687] (2011) (quoting *Bible v. State,* 411 Md**.** 138, 156 [982 A.2d 348] (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State,* 206 Md. App. 357, 385 [47 A.3d 1140 (2012)] (quoting *Morris v. State,* 192 Md. App. 1, 31 [993 A.2d 716] (2010)), *cert. denied,* 429 Md**.** 83 [54 A.3d 761] (2012).

Kyler v. State, 218 Md. App. 196, 214-15 (2014) (quoting *Donati v. State*, 215 Md. App. 686, 716, *cert. denied*, 438 Md. 143 (2014)).

C. Analysis

Our determination as to whether Appellant's convictions for second-degree assault were supported by sufficient evidence depends solely on whether the "evidence . . .

supported a rational inference of facts which could fairly convince a trier of fact of [his] guilt . . . beyond a reasonable doubt." *Albrecht*, 336 Md. at 479. Because "the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation[,] . . . we defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence." *Holmes v. State*, 209 Md. App. 427, 438, *cert. denied*, 431 Md. 445 (2013) (internal citations and quotations omitted). Appellant argues that no reasonable jury could have inferred from the evidence that all the elements[5] of second-degree assault were satisfied. While he concedes that the State proved two out of three of the elements, he argues that no evidence was presented that could lead a reasonable jury to infer lack of consent by either officer. We disagree.

Officer Seckens testified that he was the first officer to arrive at the house, and that from the moment he entered the house, Appellant was being hostile and aggressive, and was yelling and screaming. The State writes in its brief that "[i]t is simply absurd to suggest that a person, let alone an officer attempting to defuse a potentially volatile situation, would consent to the degrading act of being spit upon by a hostile stranger." Regardless of whether

[5] The trial judge instructed the jury regarding the elements of second-degree assault as follows:

> Assault is causing offensive physical contact to another person. In order to convict the Defendant of an assault of either or both of the officers, the State must prove that the Defendant caused offensive physical contact with the officer, that the contact was the result of an intentional or reckless act of the Defendant and was not accidental, and that the contact was not consented to by the officers.

such a notion is absurd, we find that it was not unreasonable for the jury to infer that Officer Seckens did not consent to the spitting. He testified that he tried to convince Appellant to leave the house, and that Appellant responded by making threats to him and his family and asking: "Why won't you take your gun and badge off and go outside and I'll fuck you up?" Officer Seckens stated that Appellant proceeded to spit in his face, and that immediately thereafter he and his fellow officers took Appellant to the floor in order to place him under arrest. Viewing this evidence in the light most favorable to the State, we find that it was sufficient to support the jury's inference that Officer Seckens did not consent to being spit upon. Therefore, we uphold Appellant's conviction for second-degree assault on Officer Seckens.

With regard to the assault on Officer Harden, the State writes: "It belies common sense to suggest that a person would consent to being kicked repeatedly, especially where the person is an officer attempting to arrest someone and the kicking is being done to thwart the officer's attempt to accomplish that task." Again, it is irrelevant to our analysis whether the notion that a police officer would consent to being kicked while attempting to make an arrest is absurd or not. All that concerns us is whether in this instance it was reasonable for the jury to infer that Officer Harden did not consent to being kicked. Officer Harden testified that he witnessed Appellant "cursing belligerently" at Officer Seckens before spitting in his face. This is how Officer Harden describes what happened next:

> Officer Seckens advised him he was under arrest and took the Defendant to the ground where him and Officer Bowman tried to place him – place his hands behind his back. As I was trying to assist in doing the same, the Defendant started kicking

> about, kicking me about my chest and legs. So I held on to his legs while they were able to eventually get him secured and in handcuffs.

This description of events, which Officers Seckens and Bowman confirmed in their testimony, includes facts that could support a rational inference that Officer Harden did not consent to being kicked by Appellant. For example, he testified that he was placing Appellant, who had just cursed at, threatened, and spit on his fellow officer, under arrest. The officer's efforts to restrain his legs also indicated a lack of consent. To infer, based on these circumstances, that Officer Harden did not consent to Appellant kicking him repeatedly in the chest and legs is far from unreasonable.

Again, the bar on appeal is low: if the "evidence . . . supported a rational inference of facts which could fairly convince a trier of fact [that all the elements of second-degree assault were satisfied] beyond a reasonable doubt," *Albrecht*, 336 Md. at 479, then we must affirm the conviction. Because a reasonable jury could have inferred from the evidence that neither officer consented to Appellant's harmful and offensive contact, we hereby affirm both of Appellant's second-degree assault convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.