Circuit Court for Montgomery County
Case No: 127526C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3353

September Term, 2018

RODERICK LOWE

v.

STATE OF MARYLAND

Berger,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 27, 2020

In 2015, a jury sitting in the Circuit Court for Montgomery County convicted appellant, Roderick Lowe, of attempted robbery and theft under $1000. The court sentenced him to 10 years' imprisonment for the attempted robbery and to a concurrent term of 18 months for the theft. This Court affirmed the judgments. *Lowe v. State*, No. 2477, September Term, 2015 (Md. App. August 17, 2016) (*Lowe I*).

In 2017, Mr. Lowe, representing himself, filed a motion to correct an illegal sentence in which he sought to have his sentence for attempted robbery vacated. The circuit court denied the motion by order entered on January 25, 2019. Mr. Lowe appeals that decision and, in essence, maintains that the conviction for attempted robbery was invalid (and hence the sentence was illegal) because the trial court had acquitted him of robbery by "verbally agreeing to a judgment of acquittal on the record" and/or by not including the offense of robbery on the verdict sheet submitted to the jury. He also claims that he was not charged with attempted robbery. We disagree, and because his sentence is legal, we shall affirm the judgment of the circuit court.

An indictment filed on June 25, 2015 charged Mr. Lowe with three counts, including:

> Count One: ROBBERY.
>
> The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that RODERICK ALLEN LOWE, on or about June 1, 1995, in Montgomery County, Maryland, did attempt to feloniously rob Ly Mai in violation of Section 3-402 of the Criminal Law Article against the peace, government, and dignity of the State.

Section 3-402 of the Criminal Law Article provides that "[a] person may not commit or attempt to commit robbery." The penalty for robbery and attempted robbery is the same. Crim. Law, § 3-402(b). By stating in the body of Count One that he "did attempt to feloniously rob Ly Mai," the indictment charged Mr. Lowe with attempted robbery. *Shannon v. State,* 241 Md. App. 233, 244 (2019) ("When determining 'the character of the offense,' courts look at 'what is stated in the body of the indictment, not the statutory reference or caption.'" (quoting *Thompson v. State*, 371 Md. 473, 489 (2002)).

After the State presented its case in chief, defense counsel moved for judgment of acquittal, arguing that "there was no attempt to rob her, he took the phone from her daughter, at least according to her." The prosecutor responded that the evidence established that Mr. Lowe had "the intent to rob her[.]" The court noted that the indictment "says, 'did attempt to feloniously rob'" and denied the motion for judgment of acquittal. After the defense rested its case, defense counsel "renew[ed]" the motion for judgment of acquittal, which the court denied.

In reviewing the proposed jury instructions, the court and counsel engaged in a discussion regarding the instructions to be given for Count One. In looking at the indictment, the court again observed that the charge was captioned "robbery," but the language used was "did attempt to feloniously rob[.]" The court then suggested that the jury should be instructed on both robbery and attempt, with the jury instructed that Mr. Lowe was "charged with the crime of attempted robbery." The prosecutor agreed, noting that he "was going to argue to them that this was an attempt, as opposed to a completed robbery." Defense counsel responded: "Normally, what I would be asking for is for a

judgment of acquittal that it's not a robbery or lesser included offense of attempt; they turn out to be same thing." Counsel continued: "Punishment-wise and sentence-wise. So, if the court could make it simpler, and just grant the JOA down to an attempted robbery, then everything gets much simpler." The court replied: "Yeah. Yeah." When defense counsel then continued speaking, the court interrupted, saying: "Hold on one moment please." The prosecutor opined that "what's in the language of the indictment controls" and explained that the jury's role is to consider whether Mr. Lowe attempted to rob the victim and, therefore, the jury should be instructed on attempt in deciding whether he "intended to commit the crime of robbery." The court agreed with the prosecutor, and also confirmed that the verdict sheet should "say attempted robbery." Defense counsel did not disagree. In sum, the transcript does not support Mr. Lowe's claim that the court granted a motion acquitting Mr. Lowe of robbery. Moreover, the docket entries do not reflect the granting of any motion for judgment of acquittal. *See* Rule 4-324(b) ("If the court grants a motion for judgment of acquittal . . . it shall enter the judgment or direct the clerk to enter the judgment and to note that it has been entered by the direction of the court.").

We also find no merit to Mr. Lowe's claim that, by not including robbery on the verdict sheet, the court acquitted him of that offense which had the effect of acquitting him of attempted robbery. The short answer is that Mr. Lowe was charged with attempted robbery and the court properly included that charge on the verdict sheet. But as the State points out, even if Mr. Lowe had been charged with both robbery and attempted robbery and assuming, for the sake of argument, that the trial court had acquitted Mr. Lowe of the robbery charge, it would not have been improper for the jury to consider attempted robbery

because a jury may convict on a lesser included offense after an acquittal of the flagship offense. *See Skrivanek v. State,* 356 Md. 270, 284 (1999) (holding that the lesser included offense of attempted possession with intent to distribute was properly submitted to the jury even though the court granted the defendant's motion for judgment of acquittal on possession with intent to distribute). We reached this same conclusion in *Lowe I*; *see* slip opinion at 14.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.