UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1506

September Term, 2013

GARY STOKES

v.

STATE OF MARYLAND

Hotten,
Arthur,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 23, 2015

Following a jury trial in the Circuit Court for Baltimore County, appellant, Gary Stokes, was convicted of first-degree assault, robbery with a dangerous weapon, theft under $1,000, and use of a handgun in the commission of a crime of violence. He was acquitted of charges of attempted first-degree murder and attempted second-degree murder.

After merging the theft conviction, the court imposed a sentence totaling 60 years' incarceration, which consisted of consecutive 20-year terms for the armed robbery, first-degree assault, and the handgun offense.

In his appeal, appellant presents the following questions, as restated for clarity:

1. Did the trial court err in denying appellant's *Batson* challenge?

2. Did the trial court err in declining to merge the first-degree assault conviction into the armed robbery conviction for sentencing purposes?

3. Did the trial court impose a grossly disproportionate sentence?

For the reasons discussed below, we answer "yes" to the second question, and "no" to the first and the third questions. Thus, we shall affirm the judgments of the circuit court, but remand to that court for re-sentencing.

FACTUAL BACKGROUND

Obie James Blackmon, the victim, worked at the Social Security Administration in Baltimore County, and lived within walking distance of the office. Each day, he walked home for lunch along a trail through a nearby wooded area. On October 3, 2011, he left his office for lunch at about 11:30 a.m.

While walking through the wooded area, he observed a young man, identified at trial as appellant, standing along the trail, and holding a gun down to his side. As Blackmon

walked past him, appellant raised his gun and ordered Blackmon to "give me everything that you got." Blackmon, who was holding a cell phone, responded by saying, "All I have is my cell phone." Appellant proceeded to check Blackmon's pockets and asked whether he had anything else of value, which he denied.

After appellant took the phone, the two walked "on for a bit." Blackmon insisted that the phone was all he had, and asked appellant to return it because it contained important personal information. Although prepared to walk away, Blackmon testified that he did not feel safe in doing so. Rather, he was "just really trying to gauge" what appellant was thinking and planning to do. Appellant told Blackmon: "Don't make me shoot you," then cocked the gun as he took a few steps toward him, instructing Blackmon to turn around. Blackmon turned around and began to walk away.

To avoid being shot, Blackmon turned back around and began walking toward appellant, "pretending" that the robbery incident was a practical joke initiated by some friends. Appellant told him, "no, it's not a joke, don't make me shoot you, turn around and go up the hill." At this point, they were only two feet apart. As Blackmon turned away from appellant, he could see appellant raise his arm, so he attempted to stop appellant from shooting him. Blackmon testified: "As soon as I turned back he shot and ... I got hit in the arm, in the forearm."

Momentarily unaware at first that he had been shot in the arm, Blackmon "slammed" appellant to the ground, and the two "struggled for a bit" among some trees located about ten

to 15 feet from the trail. Hearing some joggers approaching, Blackmon pushed appellant toward the trail, at which point appellant ran away. Blackmon was able to call 911 on a second cell phone he was carrying, and waved down a police officer driving along the road. Officer Kevin Cox, on patrol at the time, having learned of the crime, arrested appellant in the area.

During jury selection, appellant exercised seven peremptory strikes and the State exercised two. After exercise of the peremptory strikes, appellant affirmatively indicated that he was satisfied with the jury panel. Four of the seated jurors were African-American: two women and two men.

Thereafter, during selection of alternate jurors, appellant exercised three peremptory challenges and the State exercised one. At this point appellant raised a *Batson* challenge and the following colloquy took place:

> [DEFENSE COUNSEL]: This is the State's third challenge. If my number is correct, that would mean that [Prosecutor] has stricken three African-American females using his only strikes. So, therefore, Judge, I believe there is cause for a Batson challenge with strikes that he has made so far.
>
> THE COURT: All right. Mr. [Prosecutor].
>
> [PROSECUTOR]: Your Honor, this juror, for the record is lists herself as a social worker to DSS. [sic] I don't have a problem with that, the race.
>
> The record should also reflect that I've sat two African-American females, and two African-American males. I don't see that as a pattern.
>
> THE COURT: All right. So the – just to be clear, ... [defense counsel] is saying that with respect to the last juror who was stricken as an alternate, that is ... [prosecutor's] third strike of an African-American female.

[Prosecutor] has replied that the reason he struck Alternate Number 1 was that she is employed by the Department of Social Services as a social worker and he says that he has not objected to having two other jurors ... two other African-American females seated on this jury. So he submits that that is not a pattern.

* * *

THE COURT: He did not strike African-Americans that the Court pointed out had requested to be excused, and he declined to excuse them, as did the defense. So they're on our jury. One of them seems to be somewhat unhappy about it.

[DEFENSE COUNSEL]: The first strike by [Prosecutor] was an African female whose father worked for the DOC, and did not answer any other questions.

The second strike was an African female who was an educator –

* * *

[PROSECUTOR]: I have problems – I generally strike teachers and I'm not [a] big fan[] of DOC employees.

THE COURT: All right. [Prosecutor] generally strikes teachers and he is not a fan of Division of Corrections employees, he says.

[PROSECUTOR]: Race neutral reasons.... Those are race neutral reasons.

THE COURT: Race neutral reasons, he says.

[DEFENSE COUNSEL]: I think [Prosecutor] has pulled the wool over our eyes, Judge. I think it is about it. And when he tells me it's okay for a Police Officer to sit, okay for a spouse of a State's Attorney that he works with to sit, and all of a sudden people who are not answering towards the defense, they come from law enforcement, that's okay ... It doesn't make sense, Judge.

THE COURT: Well, then it's hardly a pattern. All right. The challenge is denied.

* * *

THE CLERK: Is the jury panel as presently constituted acceptable to the State?

[PROSECUTOR]: Acceptable to the State.

THE CLERK: And acceptable to the defense?

[DEFENSE COUNSEL]: **Acceptable.** (emphasis added)

After the court ruled that the prosecutor's reason for striking the prospective alternate jurors was not based on race, and counsel for each party again agreed that the final jury panel was acceptable, the trial proceeded. The alternate jurors were not called upon to serve in the final deliberation.

DISCUSSION

Appellant's *Batson* challenge

Appellant argues that the trial court committed reversible error by failing to grant his challenge pursuant to *Batson v. Kentucky,* 476 U.S. 79, 83-84 (1986), made after the State used each of its peremptory strikes, during the selection of alternate jurors, in a discriminatory manner to exclude only African-American women from the jury. The State maintains that the trial court properly addressed and denied appellant's *Batson* challenge, and, because appellant twice accepted the jury panel without qualification, he has waived appellate review of this claim. Moreover, the State posits, appellant forfeited this issue by failing to create any adequate record to support a *Batson* challenge as to the remaining venire panel.

We first take up the State's argument that appellant has failed to preserve his challenge to the court's denial of his *Batson* challenge.

The Court of Appeals has long taken the position that "a defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors 'is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process.'" *Gilchrist v. State,* 340 Md. 606, 617 (1995) (quoting *Mills v. State,* 310 Md. 33, 40 (1987), *vac'd on other grounds,* 486 U.S. 367 (1988)); *State v. Tejada,* 419 Md. 149, 169 (2011) (When party complains about the exclusion of a juror, and "thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury.") As the case law makes clear, "a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire if the objecting panel accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process." *State v. Stringfellow,* 425 Md. 461, 469 (2012).

The State, relying on *Gilchrist v. State, supra*, raises a preservation issue as to appellant's *Batson* challenge, asserting that on two occasions – after the panel was seated, and again after alternates were seated – appellant indicated his acceptance of the jury.

Appellant, in his reply brief, responds that (1) appellant did not waive appellate review, and (2) if he did, we ought to conduct a plain error review. Appellant suggests that because "[d]efense counsel raised a *Batson* challenge, and that challenge was denied on the

merits[,] [i]t would exalt form over substance to say that, immediately after rejection of the *Batson* challenge, defense counsel had an obligation to raise it again." Of course counsel would not have been required to again raise the *Batson* challenge – counsel need only have declared the jury, as empaneled, to be unacceptable and note an appropriate exception. To suggest that preservation depended upon a renewal of the *Batson* challenge would potentially lead to unending challenges and rulings.

Therefore, because appellant twice indicated his acceptance and satisfaction with the jury as empaneled, without qualification, he has waived appellate review of his claim that the State exercised its peremptory challenges in violation of *Batson*.[1]

Merger

Appellant next argues that because assault is a lesser included offense of armed robbery under clearly established Maryland law, the trial court erred by rejecting his merger motion and imposing consecutive 20-year sentences for those offenses.

Specifically, appellant argues that, because it is impossible to determine from the record whether the jury viewed the armed robbery as concluding before the victim was shot, or as a continuing activity throughout their "extended struggle," a period which included the shooting, the two offenses cannot clearly be interpreted as "completely separate" acts for

[1]Moreover, we are at a loss to determine how appellant was prejudiced when his challenge related only to the selection of alternate jurors, none of whom were called upon to engage in deliberations. Whether a defendant is prejudiced under those circumstances we leave to another day.

which separate sentences may be imposed. Appellant continues that, in light of ambiguity in the record, which shows that neither the charging document, the jury instructions, nor the prosecutor's closing argument indicated separate factual bases for the two offenses, any uncertainty regarding whether the jurors believed the robbery had concluded before or after the shooting took place must be resolved in appellant's favor.

The State responds that the court properly imposed separate sentences, arguing that the record reveals that the jury's verdicts for armed robbery and assault were based on evidence of separate and distinct criminal acts. Appellant's act of shooting the victim was not only unnecessary to the commission of the robbery, but was committed "after the robbery had already been completed." As a result, the State argues that "it would thus not offend principles of fairness or the Double Jeopardy Clause for Stokes to face separate punishment for both acts."

On this sentencing question, we find appellant's position more persuasive.

Our review of a court's failure to merge offenses for sentencing purposes is *de novo*. *Pair v. State,* 202 Md. App. 617, 625 (2011) (review of court's decision regarding merger pursuant to the "required evidence" test or "the rule of lenity" is decided "as a matter of law"). A trial court's failure to merge offenses for sentencing purposes amounts to an illegal sentence within the meaning of Md. Rule 4-345(a), which allows a court to "correct an illegal sentence at any time." *Campbell v. State,* 65 Md. App. 498, 510 (1985).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects defendants from multiple punishments stemming from the same criminal offense. *Purnell v. State,* 375 Md. 678, 691 (2003). Where merger is required, the trial court's failure to do so amounts to the imposition of an illegal sentence. *Id.* at 691-92.

In *Blockburger v. United States,* 284 U.S. 299 (1932), the Supreme Court set forth the standard for determining whether two offenses may be considered "the same." In its rejection of a petitioner's contention that multiple sentences arising out of a single sale of morphine to the same purchaser violated double jeopardy, the Court wrote:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304. The *Blockburger* "required evidence" test has been adopted in Maryland. *Thomas v. State,* 277 Md. 257, 267 (1976) (If all elements of one offense are present in the other, they are deemed the same for purposes of double jeopardy and merger). The required evidence test is appropriate for determining whether different offenses growing out of the same criminal transaction are to merge. This test examines the weight of evidence

> 'which is minimally necessary to secure a conviction for each ... offense. If each offense requires proof of a fact that the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy [and merger] purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the

> other, the offenses are deemed to be the same for double jeopardy [and merger] purposes.'

Holbrook v. State, 364 Md. 354, 370 (2001) (quoting *Williams v. State,* 323 Md. 312, 317-18 (1991) (quoting *Thomas,* 277 Md. at 267)).

Applying this test, Maryland courts have consistently held that where convictions for first-degree assault and robbery with a dangerous weapon are based on the same conduct, for sentencing purposes, the assault offense must merge into the offense for armed robbery. *Morris v. State,* 192 Md. App. 1, 39-40 (2010) ("As this Court has previously held, first-degree assault is 'a lesser included offense of robbery with a dangerous weapon.'" (quoting *Williams v. State,* 187 Md. App. 470, 476, *cert. denied,* 411 Md. 602 (2009)); *Gerald v. State,* 137 Md. App. 295, 312 , *cert. denied,* 364 Md. 462 (2001) (merging conviction for first-degree assault into conviction for armed robbery); *Snowden v. State,* 321 Md. 612, 617 (1991) (convictions for offenses of assault and robbery required to merge). The "dispositive inquiry" is whether appellant's first-degree assault conviction was a distinct act or whether it "arose out of the act of armed robbery[.]" *Morris,* 192 Md. App. at 40.

Appellant and the State agree that where a person has been convicted of two offenses, one of which is a lesser-included offense of the other, but the record is unclear whether the convictions are based upon the same conduct, a court may not impose separate sentences.

The indictment described the offenses of armed robbery and first-degree assault in a generic manner, without apparent articulation of separate factual bases for each offense.[2] Although the State now argues that the robbery ended when Blackmon surrendered his cell phone to appellant, at trial the State did not differentiate these offenses based upon the victim's surrender of his cell phone. The trial court instructed the jury regarding the relevant offenses as follows:

> The Defendant is charged with the crime of first degree assault. To convict the Defendant of first degree assault, the State must prove that the Defendant caused physical harm to Obie Blackmon, 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 Obie Blackmon, that the Defendant used a firearm to commit the assault or that the Defendant intended to cause physical injury in the commission of the assault.
>
> Assault is causing offensive physical contact to another person.
>
> A firearm is a weapon that propels a bullet by gunpowder or a similar explosive.
>
> Serious physical injury means injury that creates a substantial risk of death or causes serious and permanent, or serious and protracted disfigurement or loss or impairment of the function of any bodily member or organ.
>
> The Defendant is also charged with the crime of robbery with a dangerous weapon. To convict the Defendant of robbery with a dangerous

[2] Count Three alleged that appellant "did unlawfully and feloniously, with a dangerous and deadly weapon, rob Obie Blackmon and violently did steal from said person cell phone, in violation of Criminal Law Article 3-403 of the Annotated Code of Maryland." Count Five alleged that appellant "did unlawfully assault Obie Blackmon in the first degree, in violation of Criminal Law Article 3-202 of the Annotated Code of Maryland; against the peace, government, and dignity of the State."

> weapon the State must prove all of the elements of robbery and also must prove that the Defendant committed the robbery by using a dangerous weapon.
>
> A dangerous weapon is an object that is capable of causing death or serious bodily harm. Robbery would require the State to prove the Defendant took the property from Obie Blackmon, the Defendant took the property by force or threat of force, and that the Defendant intended to deprive Obie Blackmon of the property.

The jury instructions did not require that the convictions be based upon separate factual bases, nor was there further clarification as to what, if any, relationship existed between the two offenses. *Compare, Graham v. State,* 117 Md. App. 280, 289-90 (1997) (offenses did not merge where trial court clearly explained the differences between the offenses, and prosecutor explained factual allegations supporting each offense during closing argument).

"[W]hen the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Morris,* 192 Md. App. at 40; *Williams,* 187 Md. at 477. If we cannot discern which particular behavior upon which the jury relied to support its verdicts, "we must resolve the ambiguity in favor of appellant and assume that the jury based all of the convictions upon the same conduct." *Jones v. State,* 175 Md. App. 58, 88 (2007), *aff'd,* 403 Md. 267 (2008); *Snowden,* 321 Md. at 618-19. "As cogent as the State's theory may be on appeal, it is not at all clear that the jury considered the evidence in accordance with that theory." *Gerald,* 137 Md. App. at 312 (where charging documents and jury instructions did not provide the jury

a basis for distinguishing the conduct relating to each offense, the first-degree assault conviction was required to merge into the armed robbery conviction).

As the parties agree, the jury instructions make clear that appellant's first-degree assault conviction was based exclusively on his act of shooting the victim. However, the trial record contains no clear evidence to support the State's position that appellant's shooting of the victim was not also included in the jury's decision to convict appellant of armed robbery. The verdict is necessarily ambiguous because the court specifically instructed the jury that a guilty verdict for armed robbery would require proof that appellant "took property *by force* or threat of force[.]" (Emphasis added).

Because we must resolve any ambiguity in appellant's favor, we shall remand for re-sentencing, with instructions to merge the sentence for first-degree assault into the sentence for robbery with a dangerous weapon.

A grossly disproportionate sentence?

Finally, appellant argues that the sentence imposed by the court was "grossly disproportionate to the offense" and therefore unconstitutional.

In *Thomas v. State*, 333 Md. 84 (1993), the Court of Appeals opined that

> [i]n order to be unconstitutional, a punishment must be more than very harsh; it must be *grossly* disproportionate. This standard will not be easily met.
>
> * * *
>
> A criminal sentencing decision is never one easily made, and involves a plethora of considerations, both obvious and subtle. Thus, it would be illogical to conduct any review of a sentence using stringent and rigid standards. Only rarely should a

> reviewing court interfere in the sentencing decision at all, especially because the sentencing court is virtually always better informed of the particular circumstances. Thus, we emphasize that challenges based on proportionality will be seriously entertained only where the punishment is truly egregious.

333 Md. at 96-97. (Italics in original).

The Court has suggested guidelines to be applied when there is an appellate challenge to an allegedly "grossly disproportionate" sentence:

> In considering a proportionality challenge, a reviewing court must first determine whether the sentence appears to be grossly disproportionate. In doing so, the court should look to the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court.
>
> If these consideration do not lead to a suggestion of gross disproportionality, the review is at an end.

333 Md. at 95.

In sentencing appellant, the trial court considered appropriate factors, including the seriousness of the offense, that the victim was shot and wounded, recidivist factors, public safety, and the non-binding sentencing guidelines. In our view, those considerations do not

lead to a suggestion of gross disproportionality in the sentences imposed upon appellant.

Thus, our review is at an end.[3]

JUDGMENTS OF CONVICTION AFFIRMED;

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR RE-SENTENCING CONSISTENT WITH THIS OPINION;

COSTS TO BE PAID 50% BY APPELLANT AND 50% BY BALTIMORE COUNTY.

[3] Given that appellant's sentence will be reduced by 20 years as the result of our ruling on the merger issue, his proportionality argument may well be moot.