UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0244

September Term, 2014

NICHOLAS SKEET JONES

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: February 11, 2015

Nicholas Skeet Jones was convicted by jury in the Circuit Court for Prince George's County of assault in the first degree, assault in the second degree, use of a handgun in the commission of a felony or a crime of violence, and carrying a handgun, and was sentenced on all charges. Mr. Jones appeals from his convictions and sentences, arguing that the evidence was insufficient to sustain his convictions and that his assault sentences should merge under prevailing constitutional standards. We affirm Mr. Jones's convictions. But the State agrees, and so do we, that his assault sentences merge, and so we vacate his sentences and remand.

I. BACKGROUND

The facts are largely undisputed. Ricardo Scott, Jr., a professional DJ, testified at trial that late January 19, 2012 into the early morning hours of January 20, he was a patron at the La Fontaine Bleue night club in Lanham, Maryland—a venue at which he has performed. Mr. Scott contended that he left the club between 1:40 and 1:45 A.M. on January 20, accompanied by his sister. He said that just after exiting, two men walking behind them began "flirting" and "making advances" toward his sister, to which she was not receptive. Mr. Scott intervened, and the situation became hostile.

Mr. Scott testified that a gentleman then came up from behind him, and from inches away, pointed a gun in his face saying "Don't even fucking do it, Slim."[1] Mr. Scott

[1] Mr. Scott testified that the assailant was so close that the gun touched his cheek.

admitted that he could not see the assailant's face at that moment, but saw clearly that the man was wearing a blue and black jacket with a white North Face logo on the back.

Mr. Scott testified that after pointing the gun in his face, the assailant walked off. But as an occasional performer at the venue, Mr. Scott was familiar with one of the police officers there at closing time, Officer Johnson. Mr. Scott called out to Officer Johnson as soon as the assailant began to walk away, yelling "[g]et that mother fucker right there in that North Face coat. He just put a gun in my face." The assailant then began to run, but Mr. Scott testified that he did not lose sight of him at any time. He testified that he watched the assailant "[b]end down, slide the gun . . . up under [a] vehicle and you could hear it hit concrete plain as day."

Mr. Scott told the court that within a minute-and-a-half of the gun hitting the ground, Officer Johnson apprehended "the same person that had pointed the gun at [him] moments earlier." He further testified that the scene was very well lit and he had no trouble at all seeing the assailant from the time he finished pointing the gun until he was apprehended. Mr. Scott identified that assailant in court as Mr. Jones. Over the course of vigorous cross-examination, Mr. Scott did not qualify or reconsider that identification.

The State next called Officer Johnson, who at the time in question saw an individual in a black and blue North Face jacket stoop down next to a parked car, then heard the sound of metal hitting the ground. Officer Johnson testified that he and other officers on the scene "immediately detained" that individual after he heard that sound, and said that he watched his fellow officer recover a silver handgun from underneath the same parked car. Officer

Johnson corroborated Mr. Scott's testimony that the parking lot was well lit on the night in question, and testified that after Mr. Scott pointed out the man in the North Face to him, he never lost sight of him—other than the moment the gentleman stooped down—up to the time he was apprehended. Officer Johnson identified this gentleman as Mr. Jones.

After roughly three-and-a-half hours of deliberation, the jury returned guilty verdicts against Mr. Jones on first-degree assault, second-degree assault, use of a handgun in the commission of a felony or a crime of violence, and wearing or carrying a handgun. The court sentenced Mr. Jones to twenty years with all but five years suspended on the first-degree assault charge, and five years with all but six months suspended on the second-degree assault charge, to run concurrently.[2]

II. DISCUSSION

Mr. Jones poses two questions on appeal:

1. Is the evidence sufficient to support the guilty verdicts in this case?

2. Did the lower court err in imposing separate sentences for Mr. Jones's convictions for assault in the first degree and assault in the second degree?

Mr. Jones argues that the chaos surrounding the crowded nightclub in the early morning hours, coupled with Mr. Scott's admission that he did not look at the face of his assailant as he was being assaulted, makes the witness testimony unreliable and the

[2] Mr. Jones was also given concurrent sentences for his other two convictions, but he has not appealed from them.

evidence insufficient to support his convictions. He argues also that the circuit court's failure to merge his conviction for second-degree assault into his conviction for first-degree assault violates the Fifth Amendment proscription against double jeopardy. Both questions are answered easily, one in the State's favor and the other in Mr. Jones's.

A. Mr. Jones's Convictions Are Founded On Sufficient Evidence.

Mr. Jones was convicted of assault in the first degree and second degree under Criminal Law §§3-202 and 3-203, respectively. The main difference between the two, which will matter for Mr. Jones's second issue, is whether the assault involved a firearm:

> §3-202. *Assault in the First Degree*
> (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:
> (i) a handgun
>
> §3-203. *Assault in the Second Degree*
> (a) A person may not commit an assault.[3]

Md. Code (2002, 2012 Repl. Vol.), §§3-202 to 3-203 of the Criminal Law Article ("CL"). Mr. Jones was also convicted of wearing or carrying a firearm and use of a handgun in commission of a crime of violence, under Criminal Law §§4-203 and 4-204 respectively:

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[3] The Code provides that "[a]ssault means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." CL §3-201. The Court of Appeals has included in the definition of assault the "placing of a victim in reasonable apprehension of an imminent battery," where battery is defined as "the unlawful application of force to the person of another." *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (citations omitted).

> 4-203. *Wearing, Carrying, or Transporting a Handgun*.
> (a)(1) Except as provided in subsection (b) of this section, a person may not:
>
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person[4]
>
> 4-204. *Use of Handgun or Antique Firearm in Commission of Crime*
> (b) A person may not use a firearm in the commission of a crime of violence[5]

CL §§4-203 to 4-204.

When an appeal challenges the sufficiency of the evidence underlying a conviction, a reviewing court asks 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." *Haile v. State*, 431 Md. 448, 465 (2013) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). Circumstantial evidence alone can, and often does, meet this standard, and "[i]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence." *Hebron v. State*, 331 Md. 219, 227 (1993) (quoting *Gilmore v. State*, 263 Md. 268, 293 (1971)). Finally, with respect to in-court testimony, "[w]eighing the credibility of witnesses and resolving any conflicts in the

[4] The prohibition in this section is subject to many caveats, CL §4-203, but Mr. Jones does not claim to have fallen within any of them on the night in question.

[5] Assault in the first degree and second degree are both among the qualifying crimes of violence. CL §5-101.

evidence are tasks proper for the fact finder," not for this court. *Smith*, 374 Md. at 533-34 (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)).

A rational trier of fact could readily have found Mr. Jones guilty on these facts. Although Mr. Scott did not see his assailant's face, he saw and identified a specific clothing item the assailant was wearing—a jacket that features a recognizable logo on the back—and called out to an officer who apprehended Mr. Jones contemporaneously, in the same parking lot. Both Mr. Scott and the officer saw Mr. Jones stoop to the ground and heard the sound of metal falling onto concrete right where the gun was recovered in real time. The jury made a credibility determination that was not in Mr. Jones's favor, but nonetheless was well-supported by the evidence. His convictions must be affirmed.

B. Mr. Jones's Assault Convictions Must Merge.

Mr. Jones is right, though, that his separate sentences on the two assault charges raise double jeopardy concerns, and the State, to its credit, recognizes this. The Supreme Court's test for double jeopardy under the merger doctrine was established in *Blockburger v. United States*, 284 U.S. 299 (1931):

> 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 (citations omitted); *see also Brown v. Ohio*, 432 U.S. 161 (1977) (holding that if two charged offenses are "only one" under the *Blockburger* test, the Double Jeopardy Clause prohibits prosecution for both offenses). The Court of Appeals has adopted the

Blockburger test, under the heading of the "required evidence" test. *State v. Jenkins*, 307 Md. 501, 517 (1986). As the Court of Appeals has reformulated the test for merger purposes, we look at whether all of the elements of one charged crime fit within another crime, and if "the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Id.* (citations omitted).

Mr. Jones's sentence for second-degree assault in this case fits squarely within the required evidence test. On one count, Mr. Jones was convicted of "commit[ting] an assault," and on another, he was convicted of "commit[ting] an assault with a firearm." As a result, his conviction for second-degree assault must merge into his conviction for first-degree assault. For that reason, and although we affirm his convictions, we vacate Mr. Jones's sentences for assault and remand.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED AS TO CONVICTIONS, VACATED AS TO SENTENCES, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT BETWEEN THE PARTIES.