UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1566

September Term, 2015

BREDERICK LEE MILES

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: July 7, 2016

Appellant, Brederick Lee Miles, was indicted in the Circuit Court for Wicomico County and charged with robbery and related offenses. He was tried by a jury and convicted of robbery, theft under $1000, and second-degree assault.[1] After he was sentenced to 15 years in prison, with all but seven years suspended, appellant timely appealed and presents the following question for review:

> Is the evidence sufficient to show that Mr. Miles engaged in acts which would put a reasonable person in a state of fear, and thus, sufficient to support Mr. Miles' convictions for robbery or second degree "intent to frighten" assault?

For the following reasons, we shall affirm.

FACTS AND LEGAL PROCEEDINGS

Kavon Parks, aged 17, testified, with some apparent difficulty, that on the evening of February 28, 2015, he and several other people rented a hotel room in Wicomico County.[2] While in the room, more than one man, including appellant, whom Parks later identified from a photo array, robbed him. One of the men told him to turn off his cell phone and empty his pockets before snatching the phone out of his hand, grabbing $90 and two cell phones from his pockets, and taking the shoes off his feet. Although he could not

[1] The trial court granted appellant's motion for judgment of acquittal on six counts of conspiracy, and the jury acquitted him of theft less than $100.

[2] During her opening statement, the prosecutor told the jury that Parks was "a little different" and "a little special," requiring the jurors to "be patient with his testimony." Although no specific information was provided regarding any type of cognitive disability, the detective who interviewed Parks after his report of robbery testified that "there was some difficulty in communicating with him." Parks did appear to have some trouble understanding and answering the questions posed to him during trial, and he admitted to being confused by the proceedings.

see whether any of the men had a weapon in the darkened hotel room, Parks recalled being scared during the encounter.

Alecsus Dupont, one of the teenagers present in the hotel room on the night in question, testified that Parks was drunk and "showing everybody his money and telling everybody he had money." She heard appellant, whom she knew by his street name "Shadow," ask Parks how much money he had.[3] Then, appellant put his own cell phone to Parks's head, and one or more of the "bunch of boys over there" told Parks to empty his pockets.[4] Although appellant said, "what you scared for, it's not even a gun," and Dupont and others present told Parks, "it just a phone," Parks "kept saying it was a gun," and Parks's brother called Dupont asking who had a gun to his brother's head.

During direct examination, Ke'Anna Mills, who had also been in the hotel room on February 28, 2015, denied recognizing appellant and denied having spoken to the police about the robbery. After admitting that she did not want to testify and being declared a hostile witness, however, the State played for the jury the video of Mills's interview with Salisbury City Police Detective Anthony Foy.

Therein, she said that Parks, who is "different" and "kind of slow," liked her and would buy things for her. On February 28, 2015, he followed her to a "little get together"

[3] Brandi Cephas, appellant's girlfriend, confirmed that his street name is "Shadow."

[4] Dupont, who did not want to testify and was declared a hostile witness, admitted that she had told the police it was appellant who told Parks to empty his pockets, but she backpedaled at trial, stating that all the boys were telling Parks to give them his money; she conceded that "Shadow" was in that group and affirmed that it was he who put his cell phone to Parks's head.

at the hotel, paying for half the cost of the room. Initially, she told the detective that a group of boys surrounded Parks and that it was a short black boy named "Poe" who held his phone like a gun in his pocket, pointing it at Parks and advising Parks to "give me your shit." She later admitted that was a lie and amended her story to say that it was "Shadow" who took the items out of Parks's pockets while pretending that the cell phone sticking out of his pocket was a gun. She also identified "Shadow" as the perpetrator from a photo array.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, arguing, as relevant to the issue he presents in this appeal, that "with regard to robbery, there has been no evidence of taking by force or threat of force." The court denied the motion on that ground. Appellant did not put on any evidence, and at the close of the entire case, he renewed his motion for judgment of acquittal, which was again denied.

DISCUSSION

Appellant argues that the evidence adduced at trial was insufficient to support the convictions of robbery and second-degree assault because the State failed to establish the intimidation or threat of force necessary to place Parks in reasonable fear of bodily harm, a required element of both crimes.[5] In appellant's view, as he was in possession of only a

[5] Appellant acknowledges that he failed to argue insufficiency of the evidence to support a conviction of second-degree assault during his motions for judgment of acquittal. Conceding that this failure renders any appellate claim of insufficiency of the evidence as it relates to that charge unpreserved, he nevertheless requests this Court to address the argument because either he substantially complied with the preservation requirement, the failure to preserve the issue constitutes ineffective assistance of counsel, or the issue warrants plain error review. For the reasons set forth below, however, (continued…)

cell phone pointed at Parks when he took Parks's belongings, and it was obvious to observers other than Parks that nothing more than a phone was employed, a reasonable person would not have been intimidated or put in a state of fear when threatened with the phone. Moreover, he concludes, there was no evidence that Parks subjectively believed that appellant employed a weapon.

In reviewing a sufficiency challenge,

> we must "determine '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.'" *Taylor v. State,* 346 Md. 452, 457, 697 A.2d 462 (1997) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). It is not our role to measure the weight of the evidence; instead, we consider "only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* (citing *State v. Albrecht,* 336 Md. 475, 478–79, 649 A.2d 336 (1994)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers,* 417 Md. 449, 466, 10 A.3d 782 (2010).

Wallace v. State, 219 Md. App. 234, 247-48 (2014).

Robbery is defined as "'the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear, or, more succinctly, as larceny from the person, accompanied by violence or putting in fear.'" *Ball v. State,* 347 Md. 156, 184 (1997) (quoting *West v. State,* 312 Md. 197, 202 (1988)). The "hallmark of robbery, which distinguishes it from theft, is the presence of force or

appellant would not prevail even had he met the preservation requirement, so we need not consider his plea for review in the absence of preservation.

threat of force, the latter of which is referred to as intimidation." *Coles v. State*, 374 Md. 114, 123 (2003). No minimum threshold of force or intimidation is required "'so long as it is sufficient to compel the victim to part with his property.'" *Spencer v. State*, 422 Md. 422, 438-39 (2011) (Harrell, J., dissenting) (quoting *West*, 312 Md. at 205).

Appellant argues that the jury should not have convicted him of robbery because a reasonable person in Parks's position would not have been intimidated or put in fear by having what everyone else in the room knew to be a cell phone placed to his head, concurrently with a demand for his belongings. We disagree.

In *Spencer*, 422 Md. at 435-36, the Court of Appeals explained that factors persuading it to uphold robbery convictions in previous cases included a demand for money, which itself created an "implicit threat" that would intimidate a reasonable person, and the "threat of a weapon," even if no weapon was actually brandished, if the defendant's conduct and appearance was such that a reasonable person may have assumed that the defendant possessed a weapon. *See also Coles*, 374 Md. at 128 ("[P]ossession of an undisclosed weapon may be inferred from the surrounding facts and circumstances." (Citation omitted)).

In the present matter, Parks testified that one of the men in the group in the hotel room, which included appellant, ordered him to empty his pockets before taking his cell phones, cash, and shoes. Parks also stated that although he could not see if appellant or the other men who surrounded him had a weapon in the darkened hotel room, he was scared during the interaction.

Dupont and Mills added that appellant employed his cell phone like a gun and told Parks to empty his pockets and give up his belongings.[6] Although Dupont and Mills said they told Parks that appellant was using his phone, Dupont stated that Parks kept saying it was a gun, and the teen apparently phoned his brother to declare that someone was pointing a gun at him. The demand for Parks's money and belongings, coupled with the implied threat of a gun the victim could not see—and which the victim perceived to be a gun—is such that a reasonable person would have been in fear, even if the observers in the room knew there was no weapon.

Moreover, the evidence tended to prove that a group of teenaged boys or men surrounded Parks in the hotel room and took part in relieving him of his belongings. Outnumbered and in an enclosed room from which he was presumably unable to flee, Parks reasonably could have been intimidated, believing that appellant and his companions had the ability to cause him injury with their bare hands if he failed to follow their directive to turn over his property. *See Montgomery v. State*, 206 Md. App. 357, 392-93 (2012).

The evidence in this case demonstrates that the applicable objective standard of fear has been satisfied because appellant's actions reasonably could have placed Parks in a state of apprehension. Accordingly, there was sufficient evidence to convince the jury of appellant's guilt of robbery beyond a reasonable doubt.

[6] The conflict between Dupont's testimony that appellant held the cell phone to Parks's head and Mills's testimony that he held the phone like a gun in his pocket was properly left for the jury to resolve and is of no moment in our determination that the evidence was sufficient to support the convictions.

Second-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), §3–203(a) of the Criminal Law Article ("CL") ("A person may not commit an assault.") and CL §3–201(b) (defining "assault" to mean "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."). The common law crime of assault includes "'(1) an attempt to commit a battery or (2) an unlawful intentional act which places another in reasonable apprehension of receiving an immediate battery.'" *Lamb v. State*, 93 Md. App. 422, 441 (1992) (quoting *Harrod v. State*, 65 Md. App. 128, 131 (1985)).

The intent to frighten variety of assault, the theory upon which the State proceeded, and the only variety upon which the jury was instructed,[7] requires that: (1) the defendant commit an act with the intent to place another in fear of immediate physical harm, with the apparent ability, at that time, to bring about the physical harm, and; (2) the victim be aware of the impending battery. *Snyder v. State*, 210 Md. App. 370, 382, *cert. denied*, 432 Md. 470 (2013).

[7] The trial court instructed the jury:

> So a second degree assault can take the form of intentionally frightening someone else with the threat of immediate offensive physical contact or physical harm. To convict the Defendant under count ten the State must prove that the Defendant committed some act with the intent to place the alleged victim in fear of immediate offensive physical contact or physical harm; and that the Defendant had the apparent ability at that time to bring about the offense of physical contact or physical harm; that the alleged victim reasonably feared immediate offensive physical contact or physical harm; and the Defendant's actions were not legally justified.

When, as here, the second-degree assault and robbery charges arise from the same criminal transaction, second-degree assault is a lesser included offense within the greater offense of robbery. *Wallace*, 219 Md. App. at 258. *See also Gerald v. State*, 299 Md. 138, 140-41 (1984) ("Simple assault is a lesser included offense of both robbery and armed robbery."). As such, if, as we have concluded, the evidence was sufficient to prove the requisite intimidation or threat of force for robbery, it was necessarily also sufficient to prove the requisite intimidation or intentional frightening for the lesser included offense of second-degree assault.

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