Circuit Court for Baltimore County
Case No. 03-K-18-004662

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1521

September Term, 2019

JAMES EDWARD JACKSON

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: November 2, 2020

Following a three-day bench trial in the Circuit Court for Baltimore County, appellant James Edward Jackson ("appellant") was convicted of multiple offenses stemming from the theft of an automated teller machine ("ATM") from a Capital One Bank located at 1309 Merritt Boulevard in Baltimore County.

Appellant presents three issues for our consideration on appeal that we have rephrased slightly as follows:

1. Whether the circuit court erred by determining that Jackson's constitutional right to a speedy trial had not been violated.

2. Whether the evidence was sufficient to support Jackson's convictions.

3. If considered, whether Jackson's convictions for theft and malicious destruction merge for sentencing purposes.

For the reasons we shall explain, we shall affirm.

FACTS AND PROCEEDINGS

On the night of September 29, 2018, Officer William Hurtt of the Howard County Police Department was working surveillance for a joint task force established by the Baltimore County and Howard County Police Departments to investigate a group of individuals suspected of stealing ATMs. Officer Hurtt was surveilling in eastern Baltimore City in the area of Lyons, Kresson, and North Macon Streets when he noticed a black Dodge Avenger that they "had followed in the past." Officer Hurtt had previously seen the appellant driving the black Dodge Avenger and had observed the Avenger located at 94 Mobile Vista Drive in Dundalk on prior occasions.

Officer Hurtt also "heard a lot of audible mechanical noises coming from the parking lot of a business called Ace Environmental Services." Around midnight, Officer Hurrt observed two individuals walk through a parking lot in the area and one entered a red Ford F-550 truck and drive onto the roadway. Officer Hurtt saw a second vehicle -- a white pickup truck with a trailer carrying a skid loader[1] -- leave the area at the same time. It was later determined that a white Ford pickup truck, a utility trailer, and a skid loader were stolen from Ace Environmental Services that night.

Officer Hurtt later observed the two trucks, the trailer, and the skid loader parked near the Capital One Bank on Merritt Boulevard in Dundalk, Baltimore County. He saw two individuals on motorcycles approach the vehicles and begin to remove the skid loader from the trailer. An individual used the skid loader to strike an ATM several times until it had detached from the ground. The individual then repositioned the skid loader and pushed the ATM into the back of a U-Haul trailer that was attached to the red Ford F-550. The individual who had been operating the skid loader than got into the Ford F-550. The Ford F-550 and the two motorcycles left the parking lot; the skid loader and the white pickup truck were left behind at the bank. The police followed the suspects to 5001 Pulaski Highway in Baltimore City, a fenced-in industrial area with very high piles of concrete.

[1] George Cooper, a former employee of Ace Environmental Services who worked there at the time of the September 2018 incident, testified about the theft. He referred to the skid loader as a "skid steerer" or "front end loader, a piece of equipment used to load dirt." Mr. Cooper explained that people often refer to this type of equipment as a "Bobcat," which is a common model. We shall refer to this piece of equipment as a skid loader for consistency and clarity.

When the police pulled into the area, several individuals fled on foot. Three suspects were arrested on September 30. The appellant was not among the three suspects.

There was no damage to the Capital One building itself, but there was visible damage to the island in the drive-through area where the ATM had been located. Detective Danielle Barber "observed a tractor type machinery running in the middle of the drive-through bank area with extensive damage where an ATM had once been." She also saw a pickup truck parked in the area. Corporal Christine Sisk recovered a cell phone from a motorcycle that was left at the scene and gave it to Detective Barber.[2] As we shall explain, this phone was later determined to be connected to the appellant.

Detective Barber interviewed several individuals on September 30, 2018, including Marcus Jackson, one of the suspects who had been arrested after the theft of the ATM.[3] During the interview, Jackson identified an individual named "Delante Jackson" as having been involved in the ATM theft. When Jackson was called as a witness at trial, he identified the appellant as Delante Jackson.

After interviewing Marcus Jackson, Detective Barber investigated the appellant and was able to find a telephone number that he had provided on an earlier occasion.[4] Officer Darryl Myers of the Anne Arundel County Police Department was the booking officer.

[2] The phone was "hooked to an attachment piece on the motorcycle." The phone was "sitting . . . right up by the handlebars" in "a little holder."

[3] Marcus Jackson and the appellant are not related. For clarity, we refer to Marcus Jackson as "Marcus" and James Edward Jackson as the "appellant."

[4] The appellant had been taken into custody on unrelated charges on May 30, 2018.

When the appellant was booked, the booking officer collected information including his name, address, date of birth, and telephone numbers. The telephone number the appellant provided when booked on May 30, 2018 matched the telephone recovered from the motorcycle at the scene of the ATM theft on September 30, 2018.

Detective Barber obtained a search warrant to investigate the contents of the phone that had been recovered from the motorcycle and linked to the appellant. When she first filed for a search warrant, Detective Barber mistakenly listed one digit of the telephone number incorrectly and subsequently received phone records unrelated to the investigation. Detective Barber subsequently obtained historical cell site records pursuant to a search warrant for the phone with the telephone number (202-878-0334) that was the same number that the appellant had provided when he was arrested on May 30, 2018.

FBI Special Agent Sean Kennedy, an expert in the field of historical cell site analysis and cellular technology, examined the records obtained for the phone linked to the appellant. Agent Kennedy determined that the telephone was connected to cellular towers in areas relevant to the investigation around the time of the incident. Agent Kennedy determined that the cell site data was consistent with the phone being in the area of 1309 Merritt Boulevard at 2:45 a.m. on September 30, 2018 and then also in the area of 94 Vista Mobile Drive at 2:55 and 2:57 a.m. on the same date.

The appellant was taken into custody in connection with the September 30, 2018 ATM theft on October 9, 2018. The appellant elected a bench trial, which began on October 15, 2018. The circuit court heard testimony from the law enforcement officers

discussed *supra* as well as from Marcus Jackson. Marcus was a reluctant witness who repeatedly invoked his Fifth Amendment privilege against self-incrimination.

After the circuit court granted Marcus immunity, Marcus testified as a compelled witness. His testimony, however, was far from clear. Marcus testified that he was unable to recall several details, including where he was arrested, with whom he spoke following his arrest, and what he was doing on September 29-30, 2018. The circuit court permitted the State to play a portion of Marcus's police interview to refresh his recollection, but Marcus continued to assert that he did not remember the interview. After concluding that Marcus was feigning memory loss and was intentionally not answering the questions posed, the circuit court permitted the State to admit the audio recording of Marcus's police interview as substantive evidence.[5] In the interview, Marcus admitted to being one of the men on the motorcycles on the night of the ATM theft and identified the person driving one of the trucks as "Delante Jackson."

During Marcus's testimony, when he was asked whether he knew the appellant, he answered, "Yes," but he continued to be uncooperative and provide inconsistent testimony. When asked whether the appellant was in the courtroom, Marcus answered, "Apparently." Marcus testified that he could not see the appellant in the courtroom. Marcus further testified that he never called the appellant by any nicknames and had never called the appellant Delante. When asked whether he had previously told Detective Barber that he

[5] Jackson's live testimony and the playing of his recorded interview were interspersed. Our recitation of the facts draws from both Jackson's testimony and the recorded interview.

referred to the appellant as "Delante," Marcus answered, "I don't remember." Marcus eventually identified Delante as the appellant in the following exchange:

> Q: Do you see the man you refer to as Delante Jackson, the man you said that you know who he is on the recording. Do you see him in the courtroom?
>
> A: Yes.
>
> Q: Can you point him out to me, please?
>
> A: To the right of me.

Marcus subsequently identified the appellant as "Delante" by describing his location in the courtroom. In the recorded interview, Marcus told the detectives that Delante operated the skid loader that knocked over the ATM and put the ATM into the trailer. Marcus told detectives that the plan was for Delante to break into the ATM after they transported it back to the parking lot.[6]

During the interview, Detective Barber showed Marcus a photograph of the appellant. Marcus identified the photograph of the appellant as the man he knew as Delante but refused to sign the photograph. On cross-examination, Marcus acknowledged that he had identified the appellant in a photograph, but that he did so "[o]ff of [the detectives'] behalf" because the detectives were "basically telling me that this is him." At trial, Marcus

[6] Marcus identified two other men involved in the incident, Marquis McWilliams and James Jeter.

testified that the photograph he had been shown was not actually Delante and that the man in the photograph was not involved in the ATM theft.[7]

[7] Marcus's testimony continued to be inconsistent. For example, the following exchange occurred during re-cross-examination:

> Q: Well, look. Maybe there's some confusion. The photograph that the detectives showed you, right. You remember that, right?
>
> A: Yes.
>
> Q: Was that person involved in the crimes that happened that night?
>
> A: No.
>
> Q: Was that a photograph of this guy, my client?
>
> A: Yes.
>
> Q: So you're saying . . . So you say the photograph they showed you was James Jackson.
>
> A: Correct.
>
> Q: And James Jackson, the guy in the photograph was not there when all of these crimes were committed?
>
> A: No.
>
> Q: He was there when all of these crimes were committed?
>
> A: No.
>
> Q: He was not there when all of these crimes were committed? Which is it?

After this exchange, the circuit court asked counsel, including the Assistant State's Attorney, the appellant's attorney, and Marcus's attorney, to approach. The court advised:

In the appellant's case-in-chief, the appellant presented testimony from the appellant's mother, Patricia Lawson. Ms. Lawson testified that the appellant was at her home with her during the time of the ATM theft. She further testified that the phone number she had for the appellant was different than the phone number linked to the telephone recovered from the scene of the ATM theft.

The appellant also elected to testify on his own behalf. The appellant testified that he was not involved in the ATM theft. He maintained that he was at his mother's house for the entire relevant time period. The appellant further testified that he never had a phone associated with the telephone number 202-878-0334. The appellant explained that this was the phone number used by his cousin, James Jeter. The appellant acknowledged that he had provided this number to police on May 30, 2018 but explained that he "did give the number to the Commissioner" as "a contact number" because he did not have a phone at the time.

> This is mostly directed at [Marcus's attorney]. On several occasions your client, Mr. Marcus Jackson, has asked to speak with you and I've certainly allowed that. I think you'll agree.
>
> He has been forced to testify as a result of a grant of immunity. Does he understand that lying in this case could subject him to perjury? He can't be prosecuted for the crime that's on trial here, but he can be prosecuted for perjury. Did you explain that to him?

There were no further questions asked of Marcus following this exchange.

The circuit court ultimately found the appellant guilty of theft ($1,500 to under $25,000), two counts of unauthorized removal of property, fourth-degree burglary, theft ($100 to $1,500), and malicious destruction of property. The appellant was found not guilty of two counts of unauthorized use of a motor vehicle.[8] Prior to sentencing the appellant, the circuit court observed that although this was a property crime, it was "a sophisticated crime" and not a "snatch and grab and run." The circuit court sentenced the appellant to five years' incarceration for the first theft offense; four years' incarceration for the first unauthorized removal of property offense, to be served consecutively; four years' incarceration for the second unauthorized removal of property offense, to be served concurrently; and three years' incarceration for the malicious destruction of property offense, to be served consecutively. For sentencing purposes, the burglary conviction merged into the first theft conviction, and the misdemeanor theft conviction merged into the unauthorized removal of property conviction. In total, the appellant was sentenced to twelve years of confinement.

Additional facts shall be set forth as necessitated by our consideration of the issues on appeal.

[8] The circuit court had previously granted the appellant's motion for judgment of acquittal as to the charge of theft over $100,000.

DISCUSSION

I.

The appellant's first allegation of error is that the trial court erred when it found no violation of his constitutional right to a speedy trial. The Sixth Amendment to the United States Constitution guarantees criminal defendants a speedy trial. The constitutional right to a speedy trial serves "'to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) (*quoting United States v. Ewell*, 383 U.S. 116, 120 (1966)). We review "without deference a trial court's conclusion as to whether a defendant's constitutional right to a speedy trial was violated." *Howard v. State*, 440 Md. 427, 446-47 (2014). We make "our own independent constitutional analysis[,]" but nonetheless accept the trial court's "findings of fact unless clearly erroneous." *Glover v. State*, 368 Md. 211, 220-21 (2002). Our analysis is "practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case." *State v. Bailey*, 319 Md. 392, 415 (1990).

When addressing an alleged violation of "a defendant's right to a speedy trial, as prescribed by the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights, Maryland courts apply the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972)." *Hayes & Winston v. State*, 247 Md. App. 252 (2020). The four factors are the "[l]ength of delay, the reason for the delay, the defendant's

assertion of his right, and prejudice to the defendant." *Id.* at 300-01 (quoting *Barker*, *supra*, 407 U.S. at 530). "None of these factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *Bailey*, *supra*, 319 Md. at 413-14 (1990) (quoting *Barker*, *supra*, 407 U.S. at 533)).

A. Length of Delay

"[T]he first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. 678, 688 (2008). Generally, when assessing the length of the delay, the "speedy trial clock starts ticking when a person is arrested or when a formal charge is filed against him." *Clark v. State*, 97 Md. App. 381, 387 (1993). Although "no specific duration of delay constitutes a *per se* delay of constitutional dimension . . . [the Court of Appeals] ha[s] employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions." *Glover*, *supra*, 368 Md. at 223. When assessing the length of the delay, the reviewing court takes into consideration the complexity of the case. *Lloyd v. State*, 207 Md. App. 322, 328-29 (2012) ("The nature of the charges levied also affects the permissible delay: the more complex and serious the crime, the longer a delay might be tolerated . . . .").

In this case, the length of time between the appellant's arrest on October 9, 2018 and the appellant's trial on October 15, 2019 was one year and six days. The length of this delay approaches the one year and fourteen-day delay discussed in *Glover*, but was not an egregious length. Furthermore, as the trial court observed, this was a complex case. The State presented testimony from eleven witnesses. One of the witnesses was an expert in the field of historical cell site analysis and cellular technology who examined the records obtained for the phone linked to the appellant and testified regarding his analysis. As the trial court explained, this was a case for which "one could not get an appreciation for the complexity . . . until one has sat through it," and although "the crime was simple in itself," the "organization to collectively develop and present the information to the [c]ourt involved a lot of witnesses." The one year and six day delay in this case must be considered in the context of the relative complexity of the case. Furthermore, the Court of Appeals has explained that "[t]he length of delay, in and of itself, is not a weighty factor." *Glover*, *supra*, 368 Md. at 225. Rather, the length of the delay is "'significant principally as it affects the legitimacy of the reasons for delay and the likelihood [that the delay] had prejudicial effects.'" *Id.* (quoting *Dickey v. Florida*, 398 U.S. 30, 48 n.12 (1970) (Brennan, J., concurring)).

B. Reason for the Delay

Different weights are assigned to different reasons for the delay. *Glover*, *supra*, 368 Md. at 225. For example, "a deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government," while "[a] more neutral reason

such as negligence or overcrowded courts should be weighted less heavily but nevertheless should [be] considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* (quoting *Bailey*, *supra*, 319 Md. at 412 (quoting *Barker*, *supra*, 407 U.S. at 531)). A "valid reason" for a delay, "such as a missing witness, would serve to justify appropriate delay." *Id.*

The appellant asserts that the one year and six day delay in this case was due entirely to negligence on the part of the Baltimore County Police Department in providing the incorrect telephone number when applying for a search warrant. In our view, the reasons for the delay are more nuanced than suggested by the appellant. We shall assess the reasons for each postponement request.

The appellant was arrested on October 9, 2018 and the trial was initially scheduled for April 2, 2019. The approximately six-month period between the appellant's arrest and his first trial date is accorded neutral status. *See*, *e.g.*, *Ratchford v. State*, 141 Md. App. 354, 361, 785 A.2d 826 (2001) (explaining that the initial six-month-eleven-day period of delay from arrest to the first scheduled trial date "was necessary for the orderly administration of justice and is not considered an unreasonable delay that calls for further accounting").

The State's first postponement request was made on March 28, 2019. The prosecutor explained that the State was "still in the process of providing supplemental discovery" to the appellant and "need[ed] additional time to finish cell mapping [the appellant's] phone records." The appellant strenuously objected to the postponement

request. The trial court granted the postponement request and reset the trial for June 27, 2019. The issue regarding the incorrect phone number for the telephone records was not raised before the trial court at the time the postponement request was granted on March 28, 2019, but it was discussed on October 15, 2019 when the trial court considered and ruled upon the appellant's motion to dismiss on the basis that he had been deprived of his constitutional right to a speedy trial.

On June 27, 2019, there was no jury available. The appellant elected a bench trial, but there were no judges available to preside over the trial. Over the appellant's objection, the trial court reset the trial for August 27, 2019. The reason for this delay is attributable to the State but does not weigh heavily against the State.

The final postponement was on August 27, 2019. The State requested another postponement when its witness, Marcus Jackson, failed to appear on August 27, 2019.[9] The reason for the third and final postponement does not weigh heavily against the State. *Barker*, *supra*, 407 U.S. at 531 ("[A] valid reason [for a delay], such as a missing witness, should serve to justify appropriate delay.").

C. Assertion of the Right to a Speedy Trial

The appellant asserted his right to a speedy trial every time his case was before the trial court.

[9] Marcus Jackson had appeared on the prior trial date.

D. Prejudice

The final factor, actual prejudice to the defendant, is directed toward a consideration of three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Vaise v. State*, 246 Md. App. 188, 234 (2020). The first two interests are "generally afforded only slight weight," *Hallowell v. State*, 235 Md. App. 484, 518 (2018), while the third interest, the impairment of the defense, is the most important. *Wilson v. State*, 148 Md. App. 601, 639 (2002) ("The most important factor establishing prejudice . . . is the inability to prepare one's defense."). The appellant does not dispute the trial court's finding that his defense was not prejudiced as a result of the delay. Indeed, the appellant concedes that pretrial incarceration and the defendant's anxiety and concern do not have decisive weight, but nonetheless the appellant asserts that these considerations should be have been given more weight than that afforded by the trial court.[10]

E Balancing of the Factors

Taking into consideration the length of the delay in this case, the reasons for the delay, the appellant's assertion of his right to a speedy trial, and the minimal prejudice stemming from the delay, we conclude that the appellant's constitutional right to a speedy trial was not violated. The one year and six day time period between the appellant's initial arrest and trial was long but not egregious, particularly in light of the relative complexity

[10] The parties disagree with respect to whether the appellant was being held on other charges at the time as well. We need not resolve this disputed issue.

of the case. Indeed, we recently observed in a case involving a much longer delay that "[a]lthough [a] delay of one year and 131 days between arrest and trial qualifies as a delay of constitutional dimension, delays of this length or greater have frequently been held not to cause a speedy trial violation." *Hayes & Winston v. State*, ___ Md. App. ___, Nos. 500 & 556, Sept. Term 2019 (filed Aug. 25, 2020). Although the reasons for the delay in this case were attributable to the State, they were due to courtroom unavailability and a missing witness in addition to any delays caused by the telephone number error. The reasons for the delay were not malicious or in bad faith. Furthermore, although the appellant asserted his speedy trial right diligently, there was no specific prejudice other than pre-trial incarceration. Under these circumstances, we hold that the appellant's constitutional right to a speedy trial was not violated.

II.

The appellant further asserts on appeal that the evidence was insufficient to support his convictions. Specifically, the appellant asserts that the testimony of Marcus Jackson was irredeemably inconsistent and that Marcus's testimony was so full of contradictions that the totality of Marcus's testimony must be discounted as a matter of law. The appellant further asserts that the sufficiency of the State's case must be considered without Marcus's testimony. As we shall explain, the circuit court appropriately considered Marcus's testimony, as well as the totality of the evidence presented at trial, and the evidence was sufficient to support the appellant's convictions.

The standard for 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. Thomas*, 464 Md. 133, 152 (2019) (quotation marks and citations omitted). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted) (brackets in *Suddith*). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). "[T]he limited question before an appellate court is not whether the evidence should have or probably would have persuaded the majority of fact finders but only whether it possibly could have persuaded any rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

In the case *sub judice*, the appellant relies upon *Kucharczyk v. State*, 235 Md. 334, 337 (1964), to support his sufficiency of the evidence claim. In *Kucharczyk*, the State presented testimony from an intellectually disabled sixteen-year-old boy with an I.Q. of

56. The witness had been deemed incompetent to testify by a defense psychologist and presented contradictory testimony about whether the crime allegedly committed by the defendant had occurred. The Court of Appeals reversed the defendant's conviction for assault and battery on the basis of insufficient evidence, holding that "where a witness testifies to a critical fact and then gives directly contradictory testimony regarding the same critical fact, the fact finder should not be allowed to speculate and select one or the opposite version." *Id.* at 337-38.

The appellant acknowledges that the limitations of the *Kucharczyk* doctrine have been repeatedly noted by this Court but asserts that it is nonetheless applicable to this case because Marcus's testimony was internally contradictory. The *Kucharczyk* doctrine is not merely subject to some limitations as suggested by the appellant -- it is so limited as to be inapplicable in virtually all other applications. We recently explained:

> It is here that we encounter, as legions of cases have encountered over the past 55 years, the massive disconnect between the case of *Kucharczyk v. State*, with its microscopically narrow holding that has never been repeated, and the so-called *Kucharczyk* Doctrine, a bloated attack on the legal sufficiency of evidence generally and based ostensibly on the *Kucharczyk* case. In the actual case, the State's entire case of guilt had consisted of the uncorroborated testimony of a single witness whose testimony was rent by unresolved contradictions about the very happening of the crime itself. The issue was not credibility *per se*. It was rather the utter absence of any plausible assertion that the crime had even taken place.
>
> In the years since 1964, however, the defense bar has created a wildly exaggerated *Kucharczyk* Doctrine that has taken on a mythic life of its own. The doctrinal mantra is that any significant attack on the credibility of a State's witness will

> serve to exclude that witness's testimony from evidence and thereby erode the legal sufficiency of the State's case by diminishing it to nothing.

Rothe v. State, 242 Md. App. 272, 276 (2019). In *Rothe*, we concluded our analysis of *Kucharczyk* explaining that "[t]he simple message of this opinion is that **the so-called *Kucharczyk* Doctrine, if it ever lived, is dead. It has been dead for a long time. Forget it. Damaged credibility is not necessarily inherent incredibility.** That is all that needs to be said." *Id.* at 285 (emphasis added).

Nonetheless, the appellant contends, despite our exhortations in *Rothe*, that *Kucharczyk* is still applicable in this case due to Marcus's "internally contradictory" testimony. We are entirely unpersuaded. In this case, Marcus provided inconsistent testimony as to whether the appellant was the person he knew as "Delante Jackson" and as to whether he had observed the appellant engaging in criminal conduct. We have explained, however, that the *Kucharczyk* doctrine does not apply "where a witness is initially hesitant about giving inculpatory testimony but subsequently does inculpate a defendant," nor does *Kucharczyk* apply "where a witness does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version." *Rothe*, 242 Md. App. at 281 (quoting *Bailey v. State*, 16 Md. App. 83, 95-97).[11] Here, Marcus, although initially hesitant to identify the appellant as "Delante Jackson" during his testimony, subsequently identified the appellant as "Delante." Furthermore, there was

[11] In *Rothe*, we quoted several additional examples from *Bailey* in which the Court of Appeals and this Court have held that *Kucharczyk* is inapplicable.

additional evidence presented to corroborate Marcus's courtroom identification of the appellant. When Marcus was interviewed by Detective Danielle Barber, he identified a photograph of the appellant as a photograph of "Delante."

The circuit court judge, who was sitting as the fact finder in this case, recognized the contradictions in Marcus's testimony and specifically explained why certain portions of Marcus's testimony were credible but not others. The court specifically explained that it was notable that "the name of Delante Jackson was not brought up by the detectives, it was initially brought up by . . . Mr. Marcus Jackson." The court recognized that defense counsel had "ma[de] a compelling argument" and had "done the best job he c[ould]," but the court did not believe that "Detective Barber orchestrated this [identification] or has framed the [appellant]." The court explained that there could be reasonable explanations for the inconsistencies in Marcus's testimony:

> Marcus Jackson got on the witness stand and testified, and [the prosecutor] argued perhaps his reluctance was because of fear. In our society today, we see that. We've all heard of individuals who are fearful of reprisal. We are all aware, those of us who participate in the criminal justice system are aware of this whole idea of snitches get stitches and the reluctance of people to come forward because they're afraid. And genuinely sometimes afraid of physical reprisal.

The circuit court, as fact finder, was entitled to believe or disbelieve all or parts of Marcus Jackson's testimony and to resolve contradictions and inconsistencies. *See Pryor v. State*, 195 Md. App. 311, 329 (2010) ("A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony."). "Contradictions in testimony go to the weight of the testimony and

credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact." *Id.* We decline to adopt the reasoning suggested by the appellant and extend the *Kucharczyck* doctrine -- which we declared dead only one year ago -- to the circumstances of this case.

Furthermore, we observe that there was additional circumstantial evidence that corroborated Marcus's identification of the appellant. A telephone was recovered at the scene of the theft that was associated with a telephone number the appellant had given as his own when he was arrested previously. The cell site analysis placed this telephone in the area from which the skid loader was stolen and then near the Capital One Bank where the ATM was stolen at the time of the offense. We reject the appellant's assertion that the guilty verdicts were supported only by speculation. Having considered the record as a whole, we conclude that the evidence presented in this case was more than sufficient to prove the appellant's agency beyond a reasonable doubt.

III.

The appellant's final contention on appeal is that his conviction for malicious destruction should have merged with the theft convictions for sentencing purposes pursuant to the doctrine of fundamental fairness. The State asserts that we should decline to consider the merger issue because it was not preserved for appellate review. We agree with the State.

The appellant acknowledges that, before the trial court, he did not argue that the malicious destruction and theft offenses should merge for sentencing purposes. He urges

us to consider this issue on appeal for two reasons. First, the appellant contends that we should address the merits of the merger issue because an issue regarding an illegal sentence can be addressed at any time. Second, the appellant urges us to exercise our discretion to undertake plain error review.

We are not persuaded by the appellant's assertion that the lack of preservation is excused because this is an issue regarding an illegal sentence. "Although a defendant may attack an illegal sentence by way of direct appeal, the fundamental fairness test does not enjoy the same 'procedural dispensation of [Md.] Rule 4-345(a)' that permits correction of an illegal sentence without a contemporaneous objection." *Potts v. State*, 231 Md. App. 398, 414 (2016) (quoting *Pair v. State*, 202 Md. App. 617, 649 (2011) (footnote omitted). We recently reiterated this reasoning in *Clark v. State*, 246 Md. App. 123, 139 (2020), holding that an appellant who did not argue at sentencing that his sentences were fundamentally unfair failed to preserve this issue for our review on appeal. Furthermore, we decline to exercise our discretion to consider the unpreserved merger issue in this case. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."). We, therefore, shall not address the merits of the merger issue.

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