Circuit Court for Wicomico County
Case No. C-22-CR-17-000554

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1838

September Term, 2023

BRANDI DENISE UPSHUR

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Tang,

JJ.

Opinion by Friedman, J.

Filed: March 24, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

After a court trial, Brandi Upshur was convicted of fourteen crimes stemming out of an attack on Tavon Molock that resulted in his death. Upshur was sentenced to life in prison. Although she didn't note a timely appeal from those convictions, after a post-conviction proceeding, she was permitted to file a belated appeal. In that belated appeal, Upshur raises two issues: (1) whether the evidence of her larcenous intent was sufficient to sustain her convictions for robbery, armed robbery, and felony murder; and (2) whether her various conspiracy convictions must be merged.

I. SUFFICIENCY OF THE EVIDENCE

A group of seven individuals, including Brandi Upshur, assaulted Tavin Molock, and took some money in his possession and the contents of his wallet. Upshur argues that the money that she intended to take from Molock was her own money and that, as a result, she lacked the requisite larcenous intent to convict her of robbery and armed robbery. As this is an argument based on an alleged insufficiency of the evidence, our review is limited and we will affirm if, 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." *Fuentes v. State*, 454 Md. 296, 307 (2017) (citation omitted).

Robbery is "the felonious taking and carrying away of the personal property of another from [the victim's] person by the use of violence or by putting in fear." *Metheny v. State*, 359 Md. 576, 605 (2000) (citation omitted). If the robbery occurs with a dangerous weapon or under the threat of a dangerous weapon, it is considered armed robbery. MD. CODE, CRIMINAL LAW § 3-403(a). Both require the "intent to permanently deprive the

owner of property," or more succinctly put, a larcenous intent. *Coles v. State*, 374 Md. 114, 123 (2003); *Fetrow v. State*, 156 Md. App. 675, 687 (2004).

Here, although there was a factual dispute about whether or not Molock had taken some money that belonged to Upshur and if so, what amount of money he had taken,[1] there was no claim that Molock's wallet, driver's license, and credit cards belonged to Upshur. That these items were recovered from the glove compartment of Upshur's car was sufficient to support the court's finding of larcenous intent. *See Metheny*, 359 Md. at

[1] It is not clear to this panel whether a defendant can have the requisite larcenous intent to support a robbery conviction if that defendant verifiably engages in self-help to recover only goods stolen from that defendant. Put more simply, can you rob a thief? In 1991, this Court said quite plainly that "a defendant cannot rob a person who the defendant knows in fact has no … interest in the property." *Miles v. State*, 88 Md. App. 248, 259 (1991). This seems to preclude the possibility that a thief can be the victim of a robbery. Further, the comments to the Maryland Pattern Jury Instructions on Robbery cite to *Miles* as establishing that a "robbery victim must have some lawful interest in the goods taken." MARYLAND PATTERN JURY INSTRUCTIONS—CRIMINAL 4:28. Before and after that statement in *Miles* was made, however, this Court has also held that mere possession of the property by the victim is sufficient to demonstrate larcenous intent. *Martin v. State*, 174 Md. App. 510, 525 (2007) (quoting *Cates v. State*, 21 Md. App. 363, 369 (1974)) ("[O]nly the prior possession of the victim is required, [and] the defendant may be guilty of robbery even though the victim had himself stolen the property from another person."); *Jupiter v. State*, 328 Md. 635, 641 (1992) (citing *Burgess v. State*, 161 Md. 162, 167-68 (1931)) ("[O]ne can be guilty of larceny of property [that] is not legally subject to ownership by the possessor."); *Cates*, 21 Md. App. at 372 (1974) ("[The Supreme Court of Maryland] has never held that … a party to an illegal transaction may take property from the possession of another merely because he believes or claims that he has a right to do so."); *see also Wieland v. State*, 101 Md. App. 1, 44-45 (1994) (narrowing *Miles*); *Hartley v. State*, 4 Md. App. 450, 465 (1968) (holding that actual possession or custody of the property taken by the victim is sufficient against the defendant). Thus, both before and after *Miles,* we held that even a thief can be the victim of a robbery. Because additional items were stolen from Molock, however, we need not reach this interesting question.

609 (holding that removing and discarding some of victim's clothing was sufficient evidence of larcenous intent). As a result, we affirm her convictions for robbery, armed robbery, and, as a result, for felony murder.[2]

II. MERGER OF CONSPIRACY CONVICTIONS

Upshur was convicted of numerous counts of conspiracy.[3] She argues here that because "'[t]he unit of prosecution for conspiracy is the agreement[,] [not] each of its criminal objectives,'" *Savage v. State*, 212 Md. App. 1, 13 (2013) (quoting *Tracy v. State*,

[2] Critics of the felony murder rule argue that it permits (and in some cases requires) punishment that is disproportionate with culpability, is often applied in a racially or sexually discriminatory fashion, and has none of the deterrent effects that it is claimed to provide. *See, e.g.*, Perry Moriearty, Kat Albrecht, & Caitlin Glass, *Race, Racial Bias, and Imputed Liability Murder*, 51 FORDHAM URB. L.J. 675, 688-91 (2024); Kat Albrecht, *The Stickiness of Felony Murder: The Morality of a Murder Charge*, 92 MISS. L.J. 481, 485-87, 505-07 (2023); G. Ben Cohen, Justin D. Levinson, & Koichi Hioki, *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 DENV. L. REV. 65, 88-90, 93-102 (2023); Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 VILL. L. REV. 51, 70-73 (2023). Upshur's case—especially the way in which it bootstraps robbery to armed robbery to felony murder—seems to support some of these arguments. In some of our sister states, these sorts of criticisms have led to the legislative or judicial abrogation or limitation of the felony murder rule. *See* Moriearty et al., *supra*, at 693 (discussing legislatively-imposed limitations in, among others, California and Minnesota, and judicially-imposed limitations in Massachusetts); *see also* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 551-59 (2011) (discussing the requirements for and limitations on the felony murder rule in various jurisdictions).

[3] Specifically, Upshur was convicted of conspiracy with Edward Winder to commit robbery (Count 25); conspiracy with Raymond Murray to commit robbery (Count 27); conspiracy with Eddie Dean Smith to commit second-degree assault (Count 32); conspiracy with Edward Winder to commit second-degree assault (Count 33); conspiracy with Genequa Winder to commit second-degree assault (Count 34); conspiracy with Raymond Murray to commit second-degree assault (Count 35); and conspiracy with Hammond Taylor to commit second-degree assault (Count 37).

319 Md. 452, 459 (1990)), all but one of her conspiracy convictions must be vacated.[4] The State agrees that there was only one conspiracy to rob Molock. And so do we. Because the conviction "with the greatest maximum penalty" is preserved, *McClurkin v. State*, 222 Md. App. 461, 491 (2015), we vacate all but one count of conspiracy to commit robbery.

ALL CONVICTIONS FOR CONSPIRACY TO COMMIT SECOND-DEGREE ASSAULT VACATED. ONE CONVICTION FOR CONSPIRACY TO COMMIT ROBBERY VACATED. ALL OTHER CONVICTIONS AFFIRMED. COSTS TO BE DIVIDED EQUALLY.

[4] Because the conspiracy convictions were merged during sentencing, vacating all but one conspiracy charge does not require resentencing. *See Carroll v. State*, 202 Md. App. 487, 518 (2011).