

**SECOND DIVISION
MILLER, P. J.,
BROWN and GOSS, JJ.**

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February 25, 2019

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A18A2035. MIDDLETON v. THE STATE.

MILLER, Presiding Judge.

A Chatham County jury convicted Derrick Leonard Middleton of one count each of armed robbery (Count 1; OCGA § 16-8-41 (a)), hijacking a motor vehicle (Count 3; OCGA § 16-5-44.1 (b) (1)), theft by receiving stolen property (Count 8; OCGA § 16-8-7 (a)), fleeing or attempting to elude (Count 9; OCGA § 40-6-395 (b) (5) (A)), speeding (Count 10; OCGA § 40-6-181 (b)), driving without a license (Count 13; OCGA § 40-5-20 (a)), and possession of a firearm by a convicted felon (Count 14; OCGA § 16-11-131 (b)), and multiple counts of possession of a firearm during the commission of a felony (Counts 2, 4, and 7; OCGA § 16-11-106 (b)), aggravated assault (Counts 5 and 6; OCGA § 16-5-21 (a) (2)), and obstruction of an officer (Counts 11 and 12; OCGA § 16-10-24 (a)). The Superior Court of Chatham

County denied Middleton's motion for new trial as amended, and Middleton appeals. Middleton raises numerous alleged errors, primarily including the argument that his convictions for armed robbery, hijacking a motor vehicle and theft by receiving stolen property are mutually exclusive and should be vacated and that certain of his convictions should have merged. Because we conclude that Counts 2 and 7 should have merged, we vacate Middleton's convictions on those counts and remand this case for resentencing. Finding no other error, we affirm the remainder of Middleton's convictions and sentences.

Viewed in a light most favorable to the jury's verdict,¹ evidence adduced at trial revealed that the victim arrived at her apartment in Savannah at approximately 2:45 a.m. on February 15, 2014. As she sat in her car listening to a news broadcast on the radio, she saw a man dressed in dark clothing walking down the street "looking super shady." She flashed her headlights to alert the man that he was being watched; the man looked at her briefly and continued walking. She then gathered her belongings, exited her vehicle, and heard the man saying something to her. He asked her for directions to Oglethorpe Street, and then pulled out a handgun. The victim

¹ See *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

immediately dropped her belongings, and the man grabbed her purse² and her keys, saying “I know where you live now.” The man entered the victim’s car; the victim protested and approached the vehicle, and the man replied, “[y]ou’ll get your car back. I only need it for a few hours.” The man then told the victim, “[y]ou can come with me. I lick good p—y.” As he started to drive away with the driver’s side door open, he pinned the victim against a small tree with the vehicle. The man then drove forward, the victim freed herself, and the man drove away.

Officers later spotted the stolen vehicle on Interstate 16 near Savannah and initiated a pursuit of the vehicle. The vehicle sped away, but was stopped a short time later when the vehicle ran over “stop sticks.” The vehicle crashed into the median wall and the driver fled into a wooded area in the median. Officers soon captured the driver and identified him as Middleton. The victim identified Middleton from a photographic lineup, and two mobile telephones belonging to the victim, and clothing worn by Middleton as described by the victim, were found during a search of Middleton’s residence.

A Chatham County grand jury indicted Middleton for one count each of armed robbery, hijacking a motor vehicle, theft by receiving stolen property, fleeing or

² The victim’s two mobile telephones were inside her purse.

attempting to elude, speeding, driving without a license, and possession of a firearm by a convicted felon, and multiple counts of possession of a firearm during the commission of a felony, aggravated assault, and obstruction of an officer. A jury convicted Middleton of each count of the indictment, and the trial court denied Middleton's motion for new trial as amended. This appeal followed.

1. First, Middleton argues that his convictions for armed robbery (Count 1), hijacking a motor vehicle (Count 3), and theft by receiving stolen property (Count 8) are mutually exclusive and should be vacated. Specifically, Middleton contends that each conviction "related to the State's claim that . . . Middleton used a firearm to rob [the victim] and take then retain her vehicle." We disagree.

Prior to the trial court publishing the jury's verdict, Middleton's trial counsel asked to inspect the verdict form. After reviewing the form, Middleton's trial counsel argued that the trial court could not "accept that verdict because some of these charges are mutually exclusive . . ." He further stated, "[w]e can't convict somebody of armed robbery and of theft by receiving an automobile. It's the same . . . it was the same automobile involved." Outside the presence of the jury, the trial court, Middleton's counsel and the prosecutor engaged in a discussion concerning the alleged mutually exclusive verdicts on armed robbery and theft by receiving stolen

property. Middleton's trial counsel confirmed that the counts under review were Counts 1 (armed robbery) and 8 (theft by receiving stolen property). Following a recess, the trial court indicated "it will accept the verdict as rendered."

(a) *Count 3 (hijacking a motor vehicle)*. At the outset, we note that Middleton failed to raise any objection to the verdict on Count 3. "[F]ailure to object to the form of the verdict at the time it was rendered waives any complaint that the verdict was inconsistent, confusing, or otherwise irregular." (Citations omitted.) *Ellison v. State*, 265 Ga. App. 446, 449 (3) (594 SE2d 675) (2004). See also *Webb v. State*, 270 Ga. App. 817, 818 (2) (608 SE2d 241) (same). As a result, this argument presents nothing for our review.

(b) *Counts 1 (armed robbery) and 8 (theft by receiving stolen property)*. Middleton also asserts that his convictions for armed robbery and theft by receiving stolen property were mutually exclusive and should be vacated because both acts related to the theft, and subsequent retaining of, the victim's vehicle. However, Counts 1 and 8 are not mutually exclusive.

"Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. Thus, the rule against mutually exclusive verdicts applies to multiple guilty verdicts which cannot be logically reconciled."

(Citations, emphasis, and punctuation omitted.) *Shepherd v. State*, 280 Ga. 245, 248 (1) (626 SE2d 96) (2006). In this case, Count 1 charged Middleton with armed robbery for taking the victim’s purse and keys from her person using a weapon, while Count 8 alleged that Middleton retained the victim’s vehicle after hijacking the vehicle.³ “[I]t was not logically or legally impossible to convict [Middleton] of stealing the keys and receiving the victim’s stolen car.” (Citation omitted.) *Frazier v. State*, 339 Ga. App. 405, 409 (1) (b) (793 SE2d 580) (2016). It follows that Middleton’s armed robbery conviction is not mutually exclusive with his theft by receiving conviction.⁴ *Id.*

2. Middleton next contends that we must vacate his convictions for possession of a firearm during the commission of a felony (Counts 2 and 4) if we vacate his convictions for the predicate felonies upon which those charges were based (armed

³ Middleton has not enumerated as error the sufficiency of the evidence on any of his convictions.

⁴ The cases upon which Middleton relies do not require a different result. Notwithstanding that *Bonner v. State*, 339 Ga. App. 539, 542, 545 (794 SE2d 186) (2016) is physical precedent only, it examines convictions of armed robbery *in which a vehicle was stolen* and theft by receiving stolen property for retaining the stolen vehicle. See also *Ingram v. State*, 268 Ga. App. 149, 151 (5) (601 SE2d 736) (2004) (theft by taking and theft by receiving). In this case, Middleton challenged counts of armed robbery that did *not* involve the theft of a vehicle and theft by receiving the stolen vehicle. As a result, these cases are inapposite.

robbery (Count 1) and hijacking a motor vehicle (Count 3)). While this is a correct statement of the law, see generally *King v. Waters*, 278 Ga. 122, 123-124 (2) (598 SE2d 476) (2004), we have concluded in Division 1, *supra*, that Middleton's convictions for armed robbery and theft by receiving stolen property are not mutually exclusive and, therefore, are not vacated. As a result, we need not consider Middleton's enumeration.

3. Middleton also asserts that the trial court failed to merge certain offenses for sentencing and that, as a result, this case should be remanded for resentencing. Specifically, Middleton contends that: (a) his two convictions for aggravated assault should have merged with his conviction for armed robbery; (b) his convictions for three counts of possession of a firearm during the commission of a felony should have merged into a single conviction; and (c) his two convictions for obstruction of an officer should have merged into a single conviction. For the following reasons, we agree that two of Middleton's three convictions for possession of a firearm during the commission of a felony should have merged and, therefore, we vacate those convictions. Otherwise, we find no error.

(a) *Merger of aggravated assault into armed robbery.* First, Middleton contends that his convictions for aggravated assault should merge with his armed

robbery conviction because “[b]oth claims were based on the actions allegedly taken . . . during the armed robbery of [the victim].” We are not persuaded.

Under Georgia law,

[t]he important question in determining whether closely related offenses may be prosecuted and punished separately is not the number of acts involved, or whether the crimes have overlapping elements, but whether, looking at the evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged. *If one crime is complete before the other takes place, the two crimes do not merge.* However, if the same facts are used to prove the different offenses, the different crimes merge.

(Citations and punctuation omitted; emphasis supplied.) *Garibay v. State*, 290 Ga. App. 385, 386 (2) (659 SE2d 775) (2008). See also *Robinson v. State*, 271 Ga. App. 768, 769-770 (1) (610 SE2d 706) (2005). Furthermore, “[a]ggravated assault is not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merge as a matter of fact.” (Citation omitted.) *Garibay*, *supra*, 290 Ga. App. at 386 (2).

In this case, Count 1 charged Middleton with armed robbery for taking the victim’s purse and keys from her immediate presence “by the use of a hand gun, an

offensive weapon” Count 5 accused Middleton of aggravated assault “with a motor vehicle, an object which, when used offensively against a person is likely to result in serious bodily injury, by pinning [the victim] against a crepe myrtle” Finally, Count 6 alleged that Middleton committed an aggravated assault against the victim “with a deadly weapon, to wit: a hand gun, by moving it from his lap as he sat in the driver’s seat of [the victim’s] motor vehicle [and] pointing it at her after the armed robbery had been completed” Accordingly, the initial armed robbery had been completed before either aggravated assault was committed. See *Garibay*, supra, 290 Ga. App. at 387 (2); *Bunkley v. State*, 278 Ga. App. 450, 456 (2) (629 SE2d 112) (2006), abrogated on other grounds, *Drinkard v. Walker*, 281 Ga. 211 (636 SE2d 530) (2006). It follows that because separate facts were used to prove each crime, merger of the crimes was not required. See *Garibay*, supra, 290 Ga. App. at 387 (2).

(b) *Merger of convictions for possession of a firearm during the commission of a felony.* Middleton next argues that his three convictions for possession of a firearm during the commission of a felony should merge into a single conviction. In part, we agree.

Under Georgia law,

where multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every *individual victim* of the crime spree, as provided under O.C.G.A. § 16-11-106 (b) (1), and additionally once for firearm possession for every crime enumerated in subsections (b) (2) through (5).

State v. Marlowe, 277 Ga. 383, 386 (2) (c) (589 SE2d 69) (2003). In this case, Middleton was convicted of three counts of possession of a firearm during the commission of a felony against a single victim – Count 2 (during the commission of armed robbery), Count 4 (during the commission of hijacking a motor vehicle), and Count 7 (during the commission of aggravated assault). Accordingly, the trial court should have merged Counts 2 and 7. See OCGA § 16-11-106 (b) (1); *Marlowe*, supra, 277 Ga. at 387 (3); *Kirt v. State*, 309 Ga. App. 227, 232 (2) (709 SE2d 840) (2011). In contrast, “[t]he trial court properly entered a judgment of conviction and sentence on the possession charge predicated on hijacking a motor vehicle [Count 4], as that crime is enumerated in subsection (b) (3) of OCGA § 16-11-106.” *Smith v. State*, 297 Ga. 268, 269 (1) (b) (773 SE2d 269) (2015). See also *Marlowe*, supra, 277 Ga. at 387 (3). As a result, Middleton’s conviction on Count 4 is affirmed, while his convictions

on Counts 2 and 7 are vacated, and this case is remanded for resentencing on those counts.

(c) *Merger of obstruction of an officer.* Finally, Middleton contends that his two convictions for misdemeanor obstruction of an officer should merge because the convictions “were related to the same conduct from the same, single incident.” We are not persuaded.

Under Georgia law,

[t]he question of multiple punishments (as opposed to multiple prosecutions) for the same criminal conduct is addressed under the rubric of substantive double jeopardy. Whether multiple punishment is permissible requires examination of the legislative intent underlying the criminal statute. It is for the legislature to determine to what extent certain criminal conduct has demonstrated more serious criminal interest and damaged society and to what extent it should be punished. Typically, the question is whether the same conduct may be punished under different criminal statutes. In that situation, it is appropriate to apply the “required evidence” test. However, a different question is presented here: whether a course of conduct can result in multiple violations of the same statute. The United States Supreme Court has held that this question requires a determination of the “unit of prosecution,” or the precise act or conduct that is being criminalized under the statute. Accordingly, the starting point must be the statute itself.

(Citations and punctuation omitted.) *Smith v. State*, 290 Ga. 768, 772-773 (3) (723 SE2d 915) (2012).

Pursuant to OCGA § 16-10-24 (a), “a person who knowingly and willfully obstructs or hinders any law enforcement officer . . . in the lawful discharge of his or her official duties shall be guilty of a misdemeanor.” Therefore, under the plain language of the statute, the prohibited conduct is the obstruction or hinderance of “any law enforcement officer . . . in the lawful discharge of his or her official duties” As a result, it is an act against an *individual* police officer “that forms the proper ‘unit of prosecution’ under [OCGA § 16-10-24 (a)].” *Smith*, supra, 290 Ga. at 774 (3). “Accordingly, where, as here the evidence supported the jury’s conclusion that [Middleton] willfully [fled from] police [following] a dangerous high speed chase after being given clear signals by [two] separate police vehicles to stop, the trial court properly sentenced [Middleton] on [two] separate counts of [obstructing] a police officer.” *Id.*

4. Next, Middleton argues that he was improperly sentenced as a recidivist to life imprisonment for armed robbery because the trial court failed to apply the “threshold step” of first considering whether he should receive a sentence of 10-20 years “or” life in prison. This enumeration is meritless.

OCGA § 17-10-7 (a) provides, in relevant part, that

any person who, after having been convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, commits a felony punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted

“A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.” OCGA § 16-8-41 (b). In his indictment, the State notified Middleton of its intent to seek recidivist punishment and presented evidence of Middleton’s prior federal felony conviction for possession of a firearm and ammunition by a convicted felon during his sentencing hearing. As a result, the trial court sentenced Middleton to life in prison for armed robbery.

It is well settled that

[u]nder OCGA § 17-10-7 (a), the trial judge must impose the maximum sentence upon a defendant who has previously been convicted of a felony and is then found guilty of a subsequent felony. And where, as in this case, the maximum penalty for the subsequent felony is life in

prison, a trial court has no discretion to probate or suspend any part of that sentence.

(Citations and punctuation omitted.) *Bryant v. State*, 286 Ga. App. 493, 498-499 (6) (649 SE2d 597) (2007). Because the trial court was required to sentence Middleton to life in prison under the plain language of OCGA §§ 16-8-41 (b) and 17-10-7 (a), we conclude that this enumeration is without merit.

5. Finally, Middleton contends that the trial court erred in imposing both a monetary fine and a term of imprisonment on his conviction for hijacking a motor vehicle. Again, we disagree.

OCGA § 16-5-44.1 (c) (1) provides that “[a] person convicted of the offense of hijacking a motor vehicle in the first degree shall be punished by imprisonment for not less than ten nor more than 20 years *and* a fine of not less than \$10,000.00 nor more than \$100,000.00” (Emphasis supplied.)⁵ It is true that “the General

⁵ Unlike OCGA § 16-5-44.1, which specifically provides for both imprisonment and a fine as punishment for the felony of hijacking a motor vehicle, the cases upon which Middleton relies involve felonies for which imprisonment is the only prescribed punishment. See, e.g., *Hendrix v. State*, 199 Ga. App. 599, 601-602 (3) (405 SE2d 576) (1991) (violation of current OCGA § 16-13-30 (b) punishable by imprisonment only); *Castillo v. State*, 166 Ga. App. 817, 824 (7) (305 SE2d 629) (1983) (same). In those cases, we rejected attempts by trial courts, using former OCGA § 17-10-8, to add the additional punishment of a fine which was not specifically provided for by statute. Because no portion of Middleton’s sentence for

Assembly has not seen fit to permit the imposition of both a fine and imprisonment as punishment for a felony, *except in specified cases . . .*” *Taylor v. State*, 149 Ga. App. 362, 364 (3) (254 SE2d 432) (1979). The plain language of OCGA § 16-5-44.1 (c) (1) confirms that it is such a case. Accordingly, Middleton’s argument is without merit.

Judgment affirmed in part, vacated in part, and case remanded for resentencing. Brown and Goss, JJ., concur.

hijacking a motor vehicle was eligible for a sentence of probation, and because the plain language of OCGA § 16-5-44.1 (c) (1) provides for a sentence that includes both imprisonment and a fine, the cases cited by Middleton are inapposite.