

STATE OF MAINE

v.

ZACHARY R. CONWAY

Submitted on Briefs December 28, 2022  
Decided February 9, 2023

Panel: STANFILL, C.J., and MEAD, JABAR, HORTON, and CONNORS, JJ.

MEMORANDUM OF DECISION

Zachary R. Conway appeals from a judgment of conviction for three counts of robbery (Class A), 17-A M.R.S. § 651(1)(C)-(E) (2022), one count of kidnapping (Class A), 17-A M.R.S. § 301(1)(B)(1) (2022), one count of aggravated assault (Class B), 17-A M.R.S. § 208(1)(B) (2022), and one count of theft by unauthorized taking (Class E), 17-A M.R.S. § 353(1)(A) (2022), entered by the trial court (Cumberland County, *McKeon, J.*) after a jury trial.<sup>1</sup>

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<sup>1</sup> The three robbery charges appear to have been based on alternative theories relating to a single incident (although the record does not contain an express statement to that effect). If they were, the three guilty verdicts should have been merged into one conviction for imposition of a single sentence, to avoid violating Conway's right to be free from double jeopardy. *See State v. Allard*, 557 A.2d 960, 962 (Me. 1989); *State v. Armstrong*, 2020 ME 97, ¶¶ 7, 10-12, 237 A.3d 185; Alexander, *Maine Jury Instruction Manual* § 4-13 at 4-41 to 4-42 (2023 ed. 2023). Although Conway received concurrent sentences on the robbery convictions, multiple convictions for the same offense are unlawful even if the sentences imposed are concurrent. *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *Allard*, 557 A.2d at 962; *Armstrong*, 2020 ME 97, ¶ 7, 237 A.3d 185. Because Conway has not raised the issue in the trial court or as part of this appeal, however, we leave any resolution to the parties and the trial court. *See* M.R.U. Crim. P. 35.

Conway's sole contention on appeal is that the court erred by denying his motion for a judgment of acquittal on the misdemeanor theft charge.<sup>2</sup> In that motion, he argued that the State failed to present sufficient evidence to support a finding that the stolen property was owned by the person alleged to be the owner in the indictment. We discern no error. "The name of the owner of stolen property does not constitute an essential factual element of the offense of theft; it is the fact that the stolen property is the property of one other than the defendant which is a necessary ingredient of this charge." *State v. Brasslett*, 451 A.2d 890, 893 (Me. 1982); accord *State v. Kimball*, 359 A.2d 305, 307-08 (Me. 1976); *State v. Smith*, 618 A.2d 208, 210 (Me. 1992) ("In the absence of prejudicial variance, the State is not bound by the words of the indictment."); 17-A M.R.S. § 353(1)(A) (providing that a person is guilty of theft if the person "obtains or exercises unauthorized control over the property of *another* with intent to deprive the other person of the property" (emphasis added)). Moreover, the State's evidence was sufficient to support a finding that the person named in the indictment as the owner of the property was in constructive possession of the property when the theft occurred. See 15 M.R.S. § 752 (2022); *State v. Carter*, 391 A.2d 344, 346 (Me. 1978). The court therefore did not err when it denied Conway's motion for a judgment of acquittal on the theft charge. See *State v. Adams*, 2015 ME 30, ¶ 19, 113 A.3d 583.

The entry is:

Judgment affirmed.

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Seth Berner, Esq., Portland, for appellant Zachary R. Conway

Jonathan Sahrbeck, District Attorney, Liam Harrigan, Stud. Atty., and Carlos Diaz, Asst. Dist. Atty., Cumberland County District Attorney's Office, Portland, for appellee State of Maine

Cumberland County Unified Criminal Docket docket number CR-2019-5690  
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<sup>2</sup> He does not argue that the court's jury instructions were erroneous; he in fact assented to the content of the court's oral and written instructions and has therefore "waive[d] his ability to challenge [the jury instructions] on appeal." *State v. McLaughlin*, 2020 ME 82, ¶ 25, 235 A.3d 854.