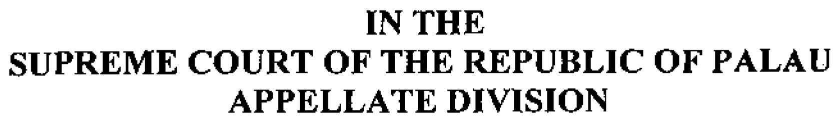

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

WELDON GIDEON,	:	**CRIMINAL APPEAL NO. 12-002**
	:	(Criminal Case No.11-057 & 11-100
Appellant,	:	
	:	**OPINION**
v.	:	
	:	
REPUBLIC OF PALAU,	:	
	:	
Appellee.	:	

Decided: May 21, 2013

Counsel for Appellant: Siegfried B. Nakamura
Counsel for Appellee: R. Victoria Roe, Timothy S. McGillicuddy

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE. Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the TRIAL DIVISION, the Honorable ARTHUR NGIRAKLSONG, Chief Justice; and the Honorable ALEXANDRA FOSTER, Associate JUSTICE, presiding.[1]

PER CURIAM:

This is an appeal from the Trial Division, in which Appellant Weldon Gideon ("Gideon") was convicted of various crimes arising from a break-in of the Asia Pacific Commercial Bank in May 2011. Gideon challenges the sufficiency of the evidence supporting his convictions and the sentence imposed by the Trial Division. For the reasons set forth below, we **AFFIRM in part and REVERSE in part.**

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[1] Justice Foster presided over the trial, and Chief Justice Ngiraklsong presided over the sentencing.

BACKGROUND

I. Factual Background

On the night of May 1, 2011, a burglary occurred at the Ministry of Finance ("MOF"). It is believed the perpetrator (or perpetrators) entered the building through a barred plexi-glass window by removing the bars and breaking the glass. Although the MOF's safe was damaged, only a set of computer speakers were stolen during the burglary.

Less than three weeks later, on the morning of May 19, 2011, Elsie Nestor, an employee at the Asia Pacific Commercial Bank ("the Bank"), reported to work. Before entering the bank building, she noticed a silver Mazda Demio with rear-tinted windows parked near the Bank. Shortly after entering the Bank and clocking in at 6:55 a.m., Nestor was accosted by a male who she described as "built" and approximately 5'3" in height. The male threatened her with a screwdriver, blindfolded her with a bandana and bound her with a blue nylon rope. Nestor then heard what sounded like banging. When the banging ceased, Nestor freed herself, called the police and observed that the second drawer of the safe had been pried open. It is estimated the second drawer contained approximately $42,000 in cash.

Sometime later, Officer John Gabriel questioned Weider Rechuld Debengek ("Debengek") regarding the bank robbery. During questioning, Debengek implicated Gideon in the bank robbery and MOF burglary. Following an investigation, the

Government filed a nine-count information, charging Gideon with: (1) robbery (Count I); (2) grand larceny (Count II); (3) conspiracy to commit robbery (Count III); (4) money laundering (Count IV); (5) false arrest (Count V); (6) assault (Count VI); (7) two counts of malicious mischief (Count VII and Count IX); and (8) burglary (Count VIII). Counts I-VII charged conduct relating to the Bank robbery ("the Bank Counts") while Counts VIII and IX related to the MOF burglary ("the MOF Counts"). In a separate criminal matter, the Government charged Gideon with obstruction of justice. The criminal cases were consolidated and tried before the Trial Division.

II. Trial

At trial Daniel Masang ("Masang") testified that, in mid-April 2011, Gideon approached him about robbing "Pacific Bank." According to Masang, Gideon offered Masang a sketch of the exterior of the Bank and proposed a plan in which Masang would threaten a bank employee named "Gina," use her to get into the safe, tie her up, and then rob the safe. Gideon stated that he would wait with a get-away car.

Debengek recounted a series of similar conversations with Gideon in which Gideon proposed robbing the "Asia Pacific Bank." Specifically, Gideon described a plan in which: (1) Gideon and Debengek would rob the Bank "in the morning when the lady goes in;" (2) Debengek would walk up the stairs, threaten the employee with a fake gun, and tie her up; and (3) once Debengek was finished in the Bank, Gideon would pick him up in a getaway car. In aid of this plan, Gideon discussed ways to crack the safe. Bray

Morkesieu Ngiruchelbad ("Ngiruchelbad") testified that Gideon approached him with a plan to rob the Bank in a similar fashion.

Imma Salii testified that, between 7:15 and 7:30 a.m. on the morning of the robbery, she saw a man walking down the stairs from the bank and then heard a car door slam. Salii turned and assumed the man had entered the nearby silver Mazda Demio, which she then saw driving away. The prosecution presented testimony that Gideon had rented a 1999 silver Mazda Demio from May 16, 2011, through May 25, 2011. Officers testified that a June 15, 2011, search of Gideon's home uncovered photographs of the Bank safe and blue rope. In addition to the foregoing testimony, evidence also revealed that in May and June of 2011, Gideon and his wife spent or transferred more than $16,000 at various venues.

PH (a minor) testified that Gideon admitted to PH that Gideon's men had committed the bank robbery and that Gideon had turned off the Bank's cameras. Gideon told PH that if anyone found out about Gideon's involvement with the Bank robbery, Gideon or "his men" would shoot PH.

Following the close of testimony, the Trial Division issued a written verdict finding Gideon guilty of the Bank Counts (as an aider and abetter), money laundering, and obstruction of justice. Specifically, the Trial Division found:

> Gideon was the mastermind [of the Bank robbery]: he planned the place, the time, the transportation, and the clothes. He coached the principal on how to jump over the counter, where to find the safe, what drawer to open, how to handle the Bank employee, and to ignore the non-

> operational cameras . . . . The Court finds beyond a reasonable [doubt] that Gideon recruited the principal to burglarize the bank, break the safe drawer, steal the money, and tie up Nestor and drag her to the back. He also rented the get-away car, and bought tint and tinted two or four of the car windows. Finally, he supplied the rope to tie Nestor up, knowing that his rope would be used for that purpose.
>
> As to conspiracy . . . the Court finds that Gideon conspired with the principal to rob the Bank, and then they both performed acts to effect the object of the conspiracy (the robbery). As to money laundering . . . the Court finds that Gideon transferred property (money to his wife, his brother, Bank Pacific, Surangel's) for the purpose of concealing the illegal origin of that money.

Finally, the Trial Division found that Gideon committed obstruction of justice when he threatened PH. Trial Division found Gideon not guilty on the MOF Counts.

Following the verdict, the case proceeded to sentencing, where the Trial Division sentenced Gideon to a prison sentence of nineteen years for his eight convictions, with all but seven years suspended.

Gideon appealed his convictions and the accompanying sentence.

STANDARD OF REVIEW

Gideon challenges not only the sufficiency of the evidence supporting his convictions but also the Trial Division's sentence, insofar as it punished him for convictions of crimes that should have been merged.

Appellate review of the sufficiency of evidence supporting a conviction is "very limited." *Aichi v. ROP*, 14 ROP 68, 69 (2007). Under this standard, we review the record only to determine "whether, viewing the evidence in the light most favorable to the

prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." *Id.* The merger of crimes is a determination of law, which we review de novo. *Remengesau v. ROP*, 18 ROP 113, 118 (2011).

DISCUSSION

I. Sufficiency of the Evidence Supporting Gideon's Convictions

The Trial Division convicted Gideon as an aider and abettor of robbery, grand larceny, false arrest, assault and malicious mischief. It convicted him as a principal of obstructing justice, conspiracy to commit robbery, and money laundering.

A. Aiding and Abetting Convictions

"Every person is punishable as a principal who commits an offense against the Republic or aids, abets, counsels, commands, induces, or procures its commission or who causes an act to be done, which, if directly performed by him, would be an offense against the Republic." 17 PNC § 102. "To be guilty of aiding and abetting, the defendant must participate in a criminal offense as something he wishes to bring about and must seek by some act to make it succeed." *Blailes v. ROP*, 5 ROP Intrm. 36, 39 (1994).

"[T]he government need not prove the actual identity of the principal, provided the proof shows that the underlying crime was committed by someone." *U.S. v. Horton*, 921

F.2d 540, 543 (4th Cir. 1990) (internal punctuation omitted).[2] Rather, "[i]n order to obtain a conviction, the prosecution need only prove that the substantive offense had been committed by someone and that the defendant aided and abetted him." *Id.* at 543–44 (internal punctuation omitted). "The test for aiding and abetting comprises two prongs: association and participation. To prove association, the prosecution must establish that the defendant shared the criminal intent of a principal in acting to bring about the criminal offense. To prove participation, the prosecution must establish that the defendant engaged in some affirmative conduct designed to advance the success of the venture." *Ngiraked v. ROP*, 5 ROP Intrm. 159, 173 (1996) (internal citations omitted).

Here, there is no dispute that the crimes of robbery, grand larceny, false arrest, assault and malicious mischief were perpetrated by an unknown individual during the Bank robbery.[3] Accordingly, the question becomes whether Gideon associated and participated with such individual in the commission of the crimes. *See Ngiraked*, 5 ROP Intrm. at 173. There is ample evidence he did both.

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[2] Where we are required to interpret a statute or the Constitution, we are "not bound to mechanically embrace United States case law, [but] are certainly free to adopt the rationale set forth therein if we find it persuasive." *Yano v. Kadoi*, 3 ROP Intrm. 174, 184 (1992).

[3] The theft of the $42,000 constituted grand larceny. 17 PNC § 1902. The damaging of the safe constituted malicious mischief. 17 PNC § 2101. The physical restraint of the employee constituted assault and false arrest. 17 PNC §§ 501, 1401. The theft of the money in the presence of the restrained employee constituted robbery. 17 PNC § 2701.

1. The Evidence of Aiding and Abetting

The Government presented evidence showing that, prior to the robbery, Gideon approached multiple people with a plan to rob the Bank. Specifically, Gideon proposed that: (1) an accomplice would enter the Bank brandishing a toy gun; (2) the accomplice would restrain the female employee on duty with rope; and (3) following the robbery Gideon would pick up the accomplice in a getaway vehicle.

The evidence showed that, on May 16, 2011, Gideon rented a 1999 silver Mazda Demio. Three days later, a man robbed the Bank by following a female employee into the building, threatening her with a weapon (albeit with a screwdriver, not a toy gun), restraining her with rope, and breaking into the safe. The same morning, a man matching the description of the robber was seen on the stairs coming from the Bank. A witness heard a car door slam and then observed a gray Demio drive away. The same witness believed the man entered the Demio. In the wake of the robbery, Gideon spent approximately $16,000. His wife made multiple cash deposits to a new bank account. Gideon boasted of his role in the robbery. A June 15, 2011, search of Gideon's home discovered pictures of the Bank's safe.

2. Sufficiency of the Evidence

Gideon challenges the foregoing evidence by arguing: (1) the rope found at his home was different from the rope used to restrain Nestor; (2) "there were 31 silver Mazda Demios registered in the Republic of Palau;" (3) the pictures of the safe were planted

during the police investigation; (4) in May and June of 2011 Gideon and his wife had obtained additional money through legal means and "[t]he Court cannot assume that the money he and his wife spent were proceeds of the Asia Pacific Commercial Bank Robbery;" and (5) the testimony by Debengek, Ngiruchelbad, and Masang was unreliable insofar as each was a convicted felon with a motive to frame Gideon.

The "weighing and evaluating [of testimony] is precisely the job of the trial judge, who is best situated to make such credibility determinations." *Kotaro v. Ngotel*, 16 ROP 120, 125 (2009) (internal quotation marks and citations omitted). Accordingly, a party seeking to set aside a credibility determination must establish "extraordinary circumstances" for doing so. *Iyekar v. ROP*, 11 ROP 204, 206–07 (2004).

Gideon argues Masang and Debengek "would have the motive to frame Gideon because they were probably involved in the robbery and now this was their opportunity to come up with these stories and frame an innocent bystander." Gideon further contends that Ngiruchelbad "does not like Gideon." However, the existence of bias does not preclude a positive credibility determination. *See Iyekar*, 11 ROP at 207 (While possible that witness was biased, "[t]o acknowledge that [his] credibility was subject to legitimate attack, however, does not by itself make it so untrustworthy that no reasonable fact-finder could credit his testimony."). Based on the record, we conclude the testimonies of Masang, Debengek and Ngiruchelbad were not so devoid of credibility as to warrant reversal. *Cf. ROP v. Tmetuchl*, 1 ROP Intrm. 443 (1988) (reversing credibility

determination where witness told three different stories to the police; had told at least three different versions of the facts incriminating the defendants; and had failed three separate polygraph tests, twice recanting her statements and admitting she had lied only to re-recant twice more).

Gideon next challenges the evidentiary value of certain items recovered during the search of his home—a segment of blue rope and pictures of the Bank's safe. Specifically, Gideon submits that the rope was different from the rope used to tie up Nestor. However, the Trial Division found, and we agree, that "the rope is not an essential piece of evidence in this case."

Next, pointing to two pictures of a black bag found during the search of his home (Exhibits JJ and KK), one of which shows pictures of the safe, one of which does not, Gideon suggests that the pictures of the Bank's safe were planted by the police. Second, Gideon contends that, at most, Exhibits JJ and KK show that the pictures of the safe were moved during the investigation. The exhibits do not call into question the uncontradicted testimony that the pictures of the safe were discovered at Gideon's home.

Gideon's remaining arguments—that there are innocent reasons for Gideon's increased spending and that the Demio at the crime scene was unrelated to his rental—concern the inferences drawn from the evidence. In essence, Gideon offers reasons why the pieces of evidence were not indicative of guilt. However, when weighing the sufficiency of a conviction, "the evidence must be viewed in conjunction, not in

isolation." *U.S. v. Eppolito*, 543 F.3d 25, 45 (2nd Cir. 2008); *see also U.S. v. Valerio*, 676 F.3d 237, 245 (1st Cir. 2012) ("[W]hen this Court reviews a jury verdict for sufficiency of evidence, 'it matters not whether the defendant can raise a plausible theory of innocence: if the record as a whole justifies a judgment of conviction, it need not rule out other hypotheses more congenial to a finding of innocence." (internal punctuation omitted)).

Viewed in the light most favorable to the verdict, the evidence of record—Gideon's attempt to recruit individuals into a plan that mirrored the actual robbery, the presence of photographs of the Bank's safe at Gideon's home, Gideon's rental of a car matching the description of one fleeing the crime scene immediately after the robbery,[4] his June 2011 spending, and his admission that the robbers were "his men"—could lead a reasonable fact finder to conclude that Gideon associated with the bank robber by developing and implementing a robbery scheme that involved the robber restraining a Bank employee and then breaking into the safe. The same reasonable fact finder could have concluded that Gideon participated in the execution of the plan by providing, if not driving, the getaway car.

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[4] As the Trial Division observed, "[o]nly one silver Demio was rented out at [the] time [of the crime]. That was the Demio rented to [Gideon]." *See ROP v. Kikuo*, 1 ROP Intrm. 254, 255 (1985) ("Circumstantial evidence is evidence which proves a fact or facts from which inferences may be drawn which lead to the conclusion in the mind of the fact finder that another fact or facts are necessarily true.").

Because a reasonable fact finder could have found the elements of aiding and abetting for each aiding and abetting conviction beyond a reasonable doubt,[5] we affirm the Trial Division in this regard. *See ROP v. Sisior*, 4 ROP Intrm. 152, 156 (1994) ("[A] crime may be proved beyond a reasonable doubt by purely circumstantial evidence, which may be as satisfactory as direct evidence and even outweigh it."). *See also U.S. v. Fadayani*, 28 F.3d 1236, 1240 (D.C. Cir. 1994) (circumstantial evidence sufficient to support aiding and abetting convictions).

B. Principal Convictions

Gideon also raises challenges to the sufficiency of the evidence supporting his convictions for money laundering, obstruction of justice and conspiracy to commit robbery.

1. Money Laundering

Money laundering is defined as "the conversion or transfer of property for the purpose of concealing or disguising the illegal origin of such property or assisting any person who is involved in the commission of a predicate offense to evade the legal consequences of his or her actions." 17 PNC § 3802(a). "Knowledge, intent, or purpose is required as an element of the offense of money laundering and may be inferred from objective factual circumstances." 17 PNC § 3802(b). The Trial Division found that

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[5] *See supra* note 2.

Gideon "transferred property (money to his wife, his brother, BankPacific, Surangel's) for the purpose of concealing the illegal origin of that money." We reluctantly disagree.

The evidence presented establishes that, following the robbery, Gideon gave away and spent money. That is all. We see nothing in the record from which one could infer that the Government proved that Gideon's intent of parting with the money was to conceal its illegal origins (as opposed to mere spending). To allow the Trial Division's interpretation of money laundering to stand given the lack of evidence presented by the Government of Gideon's improper purpose to conceal the money's illegal origins would be to expand the definition of the crime of money laundering to encompass almost any situation in which stolen money is spent or given away after the commission of a crime. This simply goes too far based on a fair reading of 17 PNC § 3802(a) and (b) and unnecessarily dilutes the elements of the crime itself. Even viewed in the light most favorable to the verdict, reversal of the money laundering conviction is required. *See generally*, *United States v. Dobbs*, 63 F.3d 391, 398 (5th Cir. 1995) ("where the use of the money was not disguised and the purchases were for family expenses and business expenses . . . there is . . . insufficient evidence to support the money laundering conviction."); *see also U.S. v. Naranjo*, 634 F.3d 1198, 1208 (11th Cir. 2011) ("The spending of illegal proceeds alone is insufficient to prove concealment money laundering."); *U.S. v. Stephenson*, 183 F.3d 110, 120–21 (2nd Cir. 1999) (collecting cases).

2. Obstructing Justice

17 PNC § 2501 provides "[e]very person who shall . . . unlawfully endeavor to influence, intimidate or tamper with a witness . . . shall be guilty of obstructing justice." The Trial Division found that Gideon obstructed justice by threatening PH with violence if he told anyone of Gideon's involvement in the robbery. Gideon submits that it was error for the Trial Division to credit PH's testimony in light of the fact that PH had once been detained for slashing Gideon's tires.

As explained above, credibility determinations will not be disturbed except in the absence of extraordinary circumstances. *Iyekar*, 11 ROP at 206–07. We conclude Gideon has failed to show extraordinary circumstances for reversing the Trial Division's credibility determination regarding PH. *Id.* We thus affirm Gideon's conviction for obstructing justice. *See United States v. Hoskins*, 628 F.2d 295, 296 (5th Cir. 1980) ("A . . . conviction . . . can be based on the uncorroborated testimony of a single witness.").

3. Conspiracy to commit robbery

17 PNC § 901 provides:

> If two or more persons conspire . . . to commit any crime against the Republic, . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be guilty of conspiracy, and upon conviction thereof shall be imprisoned for a period of not more than five years, or fined not more than $2,000.00, or both . . . .

Thus, "[a] criminal conspiracy is an agreement between two or more persons to accomplish together a criminal or on unlawful act . . . accompanied by an overt act in

furtherance of the agreement." *ROP v. Bells*, 13 ROP 216, 222 (Tr. Div. 2005) (quoting 16 Am. Jur. 2d Conspiracy § 2 (1998)). As with aiding and abetting, the Government is not required to identify a co-conspirator. *Rogers v. United States*, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951) ("Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown."). However, conspiracy and aiding and abetting are distinct crimes. *U.S. v. Wise*, 221 F.3d 140, 150 (5th Cir. 2000).

> The essence of conspiracy is proof of a conspiratorial agreement while aiding and abetting requires there be a 'community of unlawful intent' between the aider and abettor and the principal. While a community of unlawful intent is similar to an agreement, it is not the same. Thus a defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act. As a matter of law, aiding and abetting the commission of a crime and conspiracy to commit that crime are separate and distinct offenses.

Id. at 150 (internal punctuation omitted).

Gideon contends that his conspiracy conviction must be overturned because "[t]here is no evidence of conspiracy that Gideon conspired with the person who robbed the bank."

In considering whether a conspiracy has been formed, "[a] formal agreement is not necessary; rather, the agreement may be inferred from the defendants' acts pursuant to the scheme, or other circumstantial evidence." *U.S. v. Chao Fan Xu*, 706 F.3d 965, 980 (9th

Cir. 2013). We conclude that the evidence supports a conclusion that Gideon and an unidentified individual entered into an agreement to rob the Bank. Likewise, we conclude that the evidence supported a conclusion that an unidentified co-conspirator committed an act in furtherance of the conspiracy, namely the robbing of the Bank. Accordingly, we affirm Gideon's conviction for conspiracy.

II. Sentencing

Gideon contends that his convictions of grand larceny, false arrest, malicious mischief, and assault should have merged into his conviction for robbery. The Government actually agrees, having entered into a stipulation with Gideon during the sentencing phase. However, parties may not stipulate to legal conclusions. *Weston v. Washington Metropolitan Area Transit Authority*, 78 F.3d 682, 685 (D.C. Cir. 1996) ("[w]hile parties may enter into stipulations of fact that are binding upon them . . . parties may not stipulate to the legal conclusions to be reached by the court."); *see also Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir.2002) ("Parties may not stipulate to . . . legal conclusions"); *In re Foster*, 188 F.3d 1259,1266 n. 7 (10th Cir. 1999) ("Parties may not of course bind [the] court by stipulating to a rule of law."). Thus, merger will be warranted only if the facts and law require it.

Article IV, section 6, of the Constitution of the Republic of Palau, provides "[n]o person shall be placed in double jeopardy for the same offense." This provision prohibits: (1) a second prosecution for the same offense; and (2) multiple punishments for the same

offense at a single trial. *Remengesau v. Republic of Palau*, 18 ROP 113, 122–23 (2011). Because Palau's double jeopardy clause is similar to the double jeopardy clause in the United States Constitution, courts in Palau look to United States case law as an aid in interpreting the scope of double jeopardy protection. *See id.*

In order to protect against the imposition of multiple punishments for the same offense, Palauan courts will "merge" same offenses into a single conviction. *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 269 (1991). Offenses are the "same" where the same act or transaction gives rise to a violation of two distinct statutory provisions, unless each statutory provision requires proof of a fact which the other does not. *Kazuo v. ROP*, 3 ROP Intrm. 343, 347–48 (1993) (adopting the test set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932)); *see also* 21 Am. Jur. 2d Criminal Law § 301 ("A double jeopardy claim cannot succeed unless the charged offenses are the same in fact and in law."). Thus, a double jeopardy challenge to multiple convictions invokes two inquiries: (1) whether the crimes charged involved distinct elements of proof; and (2) whether, as charged, the crimes arose from a single act or transaction. *Id.*; *see also ROP v. Avenell*, 13 ROP 268, 270 (Tr. Div. 2006) ("If the double jeopardy issue arises from multiple convictions of different statutes, courts utilize the same elements test derived from *Blockburger*.").

Here, it is beyond dispute that all of the relevant conduct occurred during the same transaction (the robbery of the Bank). Thus, double jeopardy will prohibit multiple

convictions (and sentences) based on such conduct, unless the offenses require distinct elements of proof. *Kazuo v. ROP*, 3 ROP Intrm. at 347–48.

A. Robbery and Grand Larceny

The elements of robbery are: (1) the unlawful stealing, taking and carrying away of personal property of another; (2) from his person or presence and against his will; (3) by the use of force or intimidation; (4) with the intent to permanently convert said property to his own use. 17 PNC § 2701. The elements of grand larceny are: (1) unlawfully stealing, taking and carrying away of personal property of another; (2) of the value of fifty dollars ($50) or more; (3) without the owner's knowledge or consent, and (4) with the intent to permanently convert it to his own use. 17 PNC § 1902. We conclude that robbery and grand larceny are separate offenses because an essential element of robbery—force or intimidation—is not an element of grand larceny from the person, while an essential element of grand larceny—proof of value—is not an element of robbery. *See Ali v. Virginia*, 701 S.E.2d 64, 67 (Va. 2010) (holding robbery and grand larceny are separate offenses under *Blockburger* test).

B. Robbery and Malicious Mischief

Malicious mischief requires: (1) the willful destruction, damaging or otherwise injuring of property belonging to another; (2) without consent. 17 PNC § 2101. Thus, malicious mischief requires an element that robbery does not (destruction of property) and

robbery requires an element that malicious mischief does not (unlawful taking). Accordingly, the two are separate offenses and do not run afoul of double jeopardy.

C. Robbery and False Arrest

False arrest requires the detention of another by force and against his or her will without authority to so detain. 17 PNC § 1401. Robbery and false arrest are thus separate defenses insofar as robbery requires unlawful taking (which false arrest does not) and false arrest requires wrongful detention (which robbery does not).

D. Robbery and Assault

The assault statute contains two elements: (1) an "offer or attempt;" (2) with force or violence to strike, beat, wound, or to do bodily harm to another. 17 PNC § 501. In turn, robbery requires the use of force *or* intimidation. 17 PNC § 2101. Where a statute contains elements in the alternative, a court considering a double jeopardy challenge "must construct from the alternative elements within the statute the particular formation that applies to the case at hand." *Pandelli v. U.S.*, 635 F.2d 533, 536–37 (6th Cir. 1980) (articulating test pronounced in *Whalen v. U.S.*, 445 U.S. 684 (1980)). If, as charged, proof of one crime requires conviction of the other, then the two statutes *do not* contain distinct elements. *Id.*

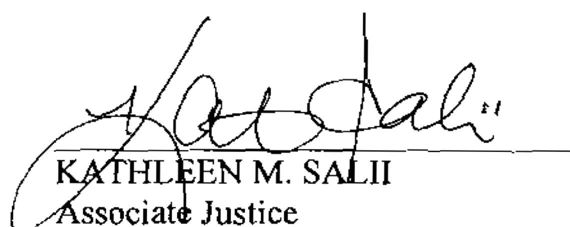
Here, the government charged robbery based in part on the threatening of Nestor with a screw driver. If proven, this charge would have required a conviction of assault. See 17 PNC § 501. Accordingly, we conclude that, as charged, the crimes of robbery and

assault contained the same elements and that, therefore, the assault conviction should have merged into the conviction of robbery. *Pandelli*, 635 F.2d at 536–37.

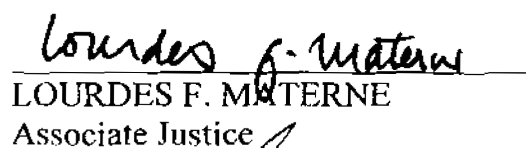
CONCLUSION

For the foregoing reasons, Gideon's conviction for money laundering and his sentence are **REVERSED**. The Trial Division's decision is **AFFIRMED** in all other respects. This matter is **REMANDED** for resentencing consistent with this opinion.

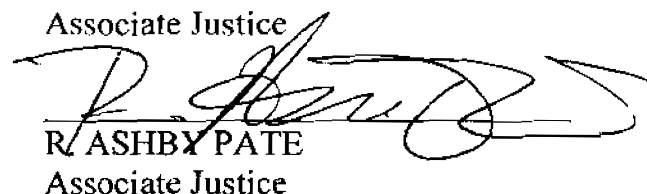
SO ORDERED, this 21st day of May, 2013.



KATHLEEN M. SALII
Associate Justice



LOURDES F. MATERNE
Associate Justice



R. ASHBY PATE
Associate Justice