UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1495

September Term, 2014

MAHDI LAWSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Wright,

JJ.

Opinion by Woodward, J.

Filed: April 7, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Mahdi Lawson, appellant, was convicted by a jury in the Circuit Court for Prince George's County of various offenses arising out of his efforts to have drugs delivered into jail while he was incarcerated.

On appeal, appellant presents two questions for our review, which we have slightly rephrased:

1. Was there sufficient evidence to convict appellant of conspiracy to distribute marijuana and conspiracy to deliver marijuana to a person detained in a place of confinement?

2. Did the trial court err by failing to vacate one of appellant's two conspiracy convictions on the grounds that the conspiracy charges were multiplicitous?

For the reasons that follow, we shall affirm the conviction and sentence for conspiracy to deliver marijuana to a person detained in a place of confinement and vacate the conviction and sentence for conspiracy to distribute marijuana. We shall also remand the case to the circuit court for sentencing on the conviction for possession of marijuana, which had been merged for sentencing purposes into the conviction for conspiracy to distribute marijuana.

BACKGROUND

On August 22, 2013, appellant was indicted on the following charges: (1) possession with intent to distribute marijuana, (2) possession of marijuana, (3) conspiracy to distribute marijuana, (4) conspiracy to deliver marijuana to a person detained in a place of confinement, (5) attempted possession of contraband in a place of confinement, and (6) attempted possession of marijuana in a place of confinement. A jury trial on those charges was conducted in the circuit court from May 12-15, 2014. The State sought to

prove that appellant conspired with Correctional Officer Rashaad Jones and others to have marijuana brought into the jail where appellant was an inmate.

At the beginning of trial, the parties stipulated that appellant was incarcerated at the Prince George's County correctional center during the time of the alleged conspiracy. Kristen Johnson, appellant's ex-girlfriend, testified about phone conversations that she had with appellant while he was incarcerated. During one of the calls, appellant asked Johnson to pick up "some money and a little bag of weed" from "Boochie," an acquaintance of appellant. The next day, Johnson met with Boochie, who gave her forty dollars and a little bag of marijuana. After picking up the money and marijuana, Johnson met with Earl Robinson and gave the marijuana to him. Robinson is the father of a child by appellant's sister. Appellant's sister, Kalila Lawson, testified that she let Robinson borrow her car once in February 2013 and again in March 2013. When he borrowed the car, Robinson informed her that "he was going to meet somebody for [appellant]."

In February 2013, Sergeant Lynn Grant was asked to investigate a prison guard for possibly smuggling drugs into the county jail. As part of the investigation, Sergeant Grant reviewed several hours of jail calls made by appellant. By March 3, 2013, Sergeant Grant had identified appellant, Officer Jones, and Robinson as being involved in the criminal scheme. Based on her investigation, Sergeant Grant instructed officers to conduct surveillance of Robinson and Officer Jones. Detective Howard Black conducted the surveillance of Robinson.

On March 3, 2013, Detective Black watched Robinson leave Lawson's residence in her car at around 11:00 p.m. At the same time, Sergeant Grant observed Officer Jones leave the jail. Phone records showed that Officer Jones called Robinson at 11:04 p.m. and that Robinson called Officer Jones at 11:21 p.m. As they were being surveilled, Robinson and Officer Jones proceeded to drive to the same Exxon gas station. They then parked next to each other and were seen engaging in a hand-to-hand transaction.

The next day, March 4, 2013, Detective David Blazer conducted a traffic stop of Officer Jones as he was driving to work at the correctional facility. A subsequent K-9 scan of the car alerted the officer to narcotics in the vehicle. A search of the car revealed marijuana and rolling papers in the glove compartment, along with cigarettes and money.

Officer Jones testified that he was working as a correctional officer for the Prince George's County Department of Corrections during the relevant time frame. While appellant was an inmate at the jail, Officer Jones spoke with him about bringing drugs into the jail. On two separate occasions, Officer Jones agreed to bring drugs into the jail for appellant in exchange for $150.[1] The first time, in February 2013, appellant arranged for Officer Jones to meet with Robinson, from whom Officer Jones obtained marijuana and cigarettes. A few days later, Officer Jones delivered the marijuana and cigarettes to appellant in jail. The next month, Officer Jones met with Robinson at an Exxon gas station and obtained marijuana and cigarettes from him again. This was the transaction

[1] The agreements were for $150; however, Robinson only brought $100 for Officer Jones and told him he would get the rest later.

that was observed by the police. Officer Jones was stopped by police the next day before he could deliver the marijuana to appellant in jail.

Appellant made a motion for judgment of acquittal at the close of the State's case. Appellant argued that there was no evidence to support counts three and four, conspiracy to distribute marijuana and conspiracy to deliver marijuana to a person detained in a place of confinement, because there was no evidence that he intended to distribute the drugs. Appellant contended that he only intended to purchase and possess the marijuana for himself. The State countered that appellant "set up everything in motion" and clearly had "the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime." Moreover, the State argued that "there was clearly evidence that there was an agreement among the three defendants [appellant, Officer Jones, and Robinson] to bring drugs into the detention center. And there was an agreement that they would be distributed throughout that long chain of witnesses."

Appellant also argued that counts five and six were multiplicitous. Count five was attempted possession of contraband in a place of confinement, and count six was attempted possession of marijuana in a place of confinement. The court granted the motion as to count five. The court denied the motion as to the other counts.

After the defense presented its case, the jury deliberated and came back with a guilty verdict on counts two, three, four, and six.[2] On August 1, 2014, appellant was sentenced. The circuit court merged count two, possession of marijuana, into count three,

[2] The jury found appellant not guilty on count one, possession with intent to distribute marijuana.

conspiracy to distribute marijuana, and sentenced appellant to eighteen months of incarceration. The court then merged count six, attempted possession of marijuana in a place of confinement, into count four, conspiracy to deliver marijuana to a person detained in a place of confinement, and sentenced appellant to eighteen months of incarceration to be served concurrently with the first sentence. Appellant noted his appeal that day.

DISCUSSION

I. Sufficiency of the Evidence

A. Standard of Review

> The standard of review for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. We view the evidence in the light most favorable to the prosecution. We give due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses. Although our analysis does not involve a re-weighing of the evidence, we must determine whether the jury's verdict was supported by either direct or circumstantial evidence by which any rational trier of fact could find [appellant] guilty beyond a reasonable doubt of the various [ ] charges.

Moye v. State, 369 Md. 2, 12-13 (2002) (citations and internal quotation marks omitted).

B. Contentions

Appellant argues that the evidence considered by the jury was insufficient to support his convictions for conspiracy to distribute marijuana and conspiracy to deliver marijuana to a person detained in a place of confinement. Appellant asserts that the evidence shows that he "was nothing more than the purchaser of marijuana," and not a

distributor or deliverer. According to appellant, the instant case is controlled by this Court's recent decision in *Kohler v. State*, 203 Md. App. 110, 126-27 (2012), where we held that the appellant could "not be convicted of distribution based solely on his role as buyer and receiver of the marijuana." Appellant points out that, although he made arrangements for other individuals to deliver marijuana to him in jail, there was no evidence that he was going to distribute the marijuana to other inmates, and thus he was just a buyer.

The State responds that this case is factually and legally distinguishable from *Kohler*. Specifically, the State asserts that this case is different, because the convictions here were conspiracy convictions, whereas *Kohler* involved distribution of a controlled dangerous substance ("CDS") as the underlying felony for a felony murder conviction. According to the State, appellant conspired with Robinson and Officer Jones to have Robinson obtain and distribute marijuana to Officer Jones and then to have Officer Jones deliver the marijuana to appellant in jail. Thus, the State argues, appellant is not a mere buyer of drugs.

C. Analysis

Appellant was convicted in the instant case of both conspiracy to distribute marijuana and conspiracy to deliver marijuana to a person detained in a place of confinement. The elements of conspiracy have been well defined in the State of Maryland:

> "A criminal conspiracy consists of **the combination of two or more persons to accomplish some unlawful purpose**, or to accomplish a lawful purpose by unlawful means. **The essence of a**

> **criminal conspiracy is an unlawful agreement**. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. **In Maryland, the crime is complete when the unlawful agreement is reached**, and no overt act in furtherance of the agreement need be shown."

Mitchell v. State, 363 Md. 130, 145 (2001) (emphasis added) (quoting *Townes v. State,* 314 Md. 71, 75 (1988)).

Appellant's argument that he should not have been convicted of the conspiracy charges because of insufficient evidence is based on this Court's *Kohler* decision. In *Kohler*, "[a]fter using mostly fake money to purchase marijuana, [the appellant] immediately fled from the seller." 203 Md. App. at 114. "Upon discovering the deception, [the seller] ran after [the appellant] and fired a shot that killed . . . an innocent bystander." *Id.* At trial, the State successfully argued that the appellant aided and abetted in the distribution of marijuana in order to establish the predicate felony for a felony murder conviction. *Id.* This Court overturned the appellant's conviction, concluding that "treating drug buyers as second-degree principals in the drug sellers' distribution stretches the concept of 'participation' and 'aiding and abetting' too far." *Id.* at 126. We held that the prohibition against the distribution of CDS "encompass[es] only those who deliver CDS, not those to whom CDS is delivered." *Id.* Moreover, a defendant "may not be convicted of distribution based solely on his role as buyer and receiver of the marijuana," nor may a buyer who is in a distribution chain be convicted as an aider and abettor of the seller's distribution. *Id.* at 126-27.[3]

[3] This Court came to that conclusion after examining other similar decisions, (continued . . .)

In *Kohler*, the appellant was also convicted of conspiracy to distribute marijuana. The appellant argued that being a "mere purchaser" was not a sufficient basis for him to be guilty of conspiracy to distribute marijuana. *Id.* at 130. The State countered that the evidence was sufficient for the conspiracy conviction, because the appellant, "along with [the seller], acted together to accomplish the unlawful act of transferring [ ] four pounds of marijuana from [the seller] to [the appellant]." *Id.* We agreed with the appellant and held the following:

> **Appellant was charged with conspiring, on the date of the transaction, to distribute marijuana with Griffin and Yates, who were the sellers. In accordance with the State's "buyer as distributor" theory, the trial court instructed the jury** that it could convict appellant if he and Yates "entered into an agreement with at least one other person to commit the crime of distribution of marijuana." But, on the facts of this case, there appears to be no meeting of the minds to engage in a sale of drugs because Kohler was acting in bad faith from the outset. His pretended offer of the purchase price was nothing but a charade to facilitate his theft of the marijuana. Kohler cannot have conspired to purchase marijuana

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namely *Abuelhawa v. United States*, 556 U.S. 816 (2009), *Hyche v. State*, 934 N.E.2d 1176 (Ind. Ct. App. 2010), and *State v. Oliveira*, 882 A.2d 1097 (R.I. 2005). All three of those cases involved distribution convictions as the underlying offense for felony murder charges. In *Abuelhawa*, the Supreme Court held that a drug buyer who used his phone to arrange and purchase drugs could not be convicted of facilitating the seller's felony drug distribution. 556 U.S. at 818. In *Hyche*, the appellant made phone arrangements with a seller to purchase drugs. 934 N.E.2d at 1177. During the exchange, the appellant's accomplice shot and killed the seller. *Id.* The appellant was convicted of felony murder based on the underlying offense of drug distribution. *Id.* at 1178. The Indiana Court of Appeals found the record to be "devoid of any evidence that [the appellant] was acting in any capacity other than that of purchaser," and therefore the evidence was "insufficient to support a dealing conviction." *Id.* at 1180. In *Oliveira*, the Rhode Island Supreme Court held that distribution does "not encompass one who attempts to purchase or receive a controlled substance from a seller, distributor, or deliverer, absent proof that the purchaser or receiver has taken a substantial step toward reselling, redelivering, or redistributing the controlled substances." 882 A.2d at 1117-18.

> when he obviously never intended to purchase it. Moreover, even if the State proved that appellant conspired with his cohorts to *buy* marijuana from appellees, the State's evidence was insufficient to convict appellant of conspiring with Yates and Griffin to *distribute* marijuana. We must therefore reverse appellant's conspiracy conviction as well.

Id. at 131 (bold emphasis added) (italics in original) (footnote omitted).

Although this Court held in *Kohler* that the appellant could not be convicted of conspiracy to distribute marijuana, we conclude that the instant case is distinguishable from *Kohler* in two ways. First, as we pointed out in *Kohler*, there was never a "meeting of the minds" to engage in the sale of drugs, because the appellant's "pretended offer of the purchase price was nothing but a charade to facilitate his theft of the marijuana." *Id.* If there was any conspiracy in *Kohler*, it was that the appellant conspired to steal from the seller. In the case *sub judice*, on the other hand, there was a clear intent on the part of appellant and his co-conspirators to have Robinson commit the crime of distribution of marijuana and Officer Jones commit the crime of delivering marijuana to a person detained in a place of confinement. Therefore, there was a meeting of the minds here.

Second, and more importantly, the State's theory underlying the conspiracy in *Kohler* was different from the State's theory behind the conspiracy in the instant case, in a legally significant way. In *Kohler*, the State's theory for the crime of felony murder was that the appellant acted with the seller, as a principal in the second degree, to distribute marijuana from the seller to the appellant, during the course of which an innocent bystander was killed. *See id.* at 120, 130. It was necessary for the State to assert such theory as to the appellant, because the appellant had to have committed the

crime of distribution of marijuana in order to be found guilty of felony murder. *See id.* at 117; *see also Roary v. State*, 385 Md. 217, 227 (2005) ("To obtain a conviction for felony-murder, the State is required to prove the underlying felony and that the death occurred during the perpetration of the felony."). Similarly, the State used the "buyer as distributor theory" to charge the appellant "with conspiring, on the date of the transaction, to distribute marijuana *with* [the seller]." *Kohler*, 203 Md. App. at 131 (emphasis added).

By contrast, the conspiracy here was for third parties to commit the crimes, not appellant. The unlawful agreement between the parties was for Robinson to distribute the marijuana to Officer Jones, and then for Officer Jones to deliver the marijuana to appellant in jail. It is clear that Robinson could commit the crime of distribution of marijuana to Officer Jones, and that Officer Jones could commit the crime of delivering marijuana to appellant in jail. The trial court articulated this concept in its rationale for denying appellant's motion for a new trial:

> The evidence is that [appellant] could not have received marijuana unless he put into play by way of thought and conspiracy a plan to have someone associated with him obtain marijuana to be distributed to Correctional Officer Jones.
>
> Those were criminal actors. That was distribution there, and **the Court is satisfied** that the evidence is **that there was a conspiracy on the part of [appellant]** in terms of sufficiency of evidence **to cause other persons to be engaged in the distribution of marijuana and its delivery into the jail for his ultimate use.** And while we can talk about the fact that **they** were just—**were passing down the bucket, each pass down of the bucket is a criminal act**.

(Emphasis added).

In sum, unlike in *Kohler*, appellant's role in the conspiracy in the case *sub judice* was *not* to participate with Robinson to distribute drugs, nor to participate with Officer Jones in the delivery of drugs. The unlawful purpose of the conspiracy was for Robinson alone to distribute marijuana and Officer Jones alone to deliver the marijuana. Thus the theory of appellant being the "buyer as distributor" of marijuana, which theory this Court rejected in *Kohler*, was *not* the basis of the conspiracy to distribute and to deliver in the instant case. Accordingly, the evidence was sufficient to convict appellant of both conspiracy to distribute marijuana and conspiracy to deliver marijuana to a person detained in a place of confinement.

II. Multiplicitous Convictions

Appellant argues that his convictions for the two conspiracies "encompass[ed] the same criminal act, and thus are multiplicitous" in violation of the Double Jeopardy Clause of the Fifth Amendment. According to appellant, "there was but one continuous conspiratorial relationship between [appellant], Officer Jones, [ ] Robinson," and others. Appellant contends that the proper remedy is for one of the conspiracy convictions to be vacated. The State agrees that there was only one agreement; however, it argues that the proper remedy is vacating the sentence for one of the conspiracies, not vacating the conviction.

"A single agreement to commit several crimes constitutes one conspiracy. By the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies." *United States v. Broce*, 488 U.S. 563, 570-71 (1989). "In other words, the conviction of a defendant for more than one conspiracy turns on whether there exists

more than one unlawful agreement." *Savage v. State*, 212 Md. App. 1, 13 (2013) (citations and internal quotation marks omitted). But "multiple agreements can be part of a single conspiracy, because a single conspiracy can include subgroups or subagreements." *Id.* (citations and internal quotation marks omitted). "If [the State] seeks to establish multiple conspiracies, it has the burden of proving a *separate* agreement for each conspiracy." *Id.* at 15 (italics in original) (citations, footnote, and internal quotation marks omitted).

"Multiplicity is the charging of the same offense in more than one count." *Brown v. State*, 311 Md. 426, 432 n.5 (1988). "When a defendant contends that only one conspiracy exists, while the [prosecution] insists there are at least two, he challenges [his] conviction[s] on the ground of double jeopardy[.]" *Savage*, 212 Md. App. at 15 (alterations in original) (citations and internal quotation marks omitted). The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "The theory underlying the double jeopardy challenge is that, '[t]o convict [him] severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice.'" *Savage*, 212 Md. App. at 15 (alterations in original) (quoting *United States v. Palermo,* 410 F.2d 468, 470 (7th Cir. 1969)).

At trial, there was no evidence presented of separate agreements to distribute marijuana and to deliver marijuana to a person detained in a place of confinement.

Moreover, the State never argued that there were separate agreements. In closing argument at trial, the prosecutor described the unlawful agreement between the parties:

> [C]onspiracy to distribute, I know when [appellant's counsel] made his opening statement, he talked about that you will never find drugs in this case on [appellant]. Again, that is not required. What did I say at the beginning? **The conspiracy is an agreement to commit a crime. And what were they doing? [Appellant], [Officer] Jones, and [ ] Robinson were in agreement to bring drugs into the jail, okay? They all agreed to make this happen, and that is all that is required.**

(Emphasis added).

With only one agreement, there can be only one conspiracy. A single conspiracy means that there is only one crime. If there is only one crime, then there can be only one conviction. As this Court has stated, "[t]o convict [appellant] severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice." *Savage*, 212 Md. App. at 15 (citations and internal quotation marks omitted). In *Savage*, we determined that the defendant had been "convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven." *Id.* at 26. We held that the appropriate remedy was for one of the two conspiracy convictions to be vacated. *Id.* Similarly, in the instant case one of appellant's conspiracy convictions must be vacated to avoid double jeopardy. Because "the same penalty was assessed for both [conspiracy convictions], we may vacate one of the

convictions and allow the other to stand." *Ezenwa v. State*, 82 Md. App. 489, 504 (1990). We choose to vacate the conviction for conspiracy to distribute marijuana.[4]

CONVICTION AND SENTENCE FOR CONSPIRACY TO DISTRIBUTE MARIJUANA VACATED. JUDGMENT ON CONVICTION FOR CONSPIRACY TO DELIVER MARIJUANA TO A PERSON DETAINED IN A PLACE OF CONFINEMENT AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR SENTENCING ON CONVICTION FOR POSSESSION OF MARIJUANA. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.

[4] Because the conviction for possession of marijuana was merged for sentencing purposes into the conviction for conspiracy to distribute marijuana, the trial court is required to impose a sentence on the former conviction when the latter conviction is vacated. *See Moore v. State*, 198 Md. App. 655, 692 (2011) (holding that a conviction for a lesser included offense survives merger).