Circuit Court for Washington County
Case No. C-21-CR-18-000377

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 339

September Term, 2019

MAURICE MCMILLAN

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: March 27, 2020

*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.

Following a bench trial in the Circuit Court for Washington County, Maurice McMillan, appellant, was convicted of second-degree assault, reckless endangerment, conspiracy to distribute crack cocaine, and theft between $100 and $1,500. The court sentenced appellant to five years' incarceration for assault, a consecutive five-year term for conspiracy to distribute cocaine, three years for reckless endangerment, and six months for the theft conviction, the latter two sentences to be served concurrently to the sentence for assault. In this appeal, appellant presents two questions for our review:

1. Was the evidence legally insufficient to support the convictions for reckless endangerment and conspiracy to distribute?

2. Even assuming the evidence was insufficient to support the reckless endangerment conviction, does that sentence merge into the sentence for second degree assault?

For the reasons that follow, we conclude that the evidence was sufficient to support appellant's conviction for reckless endangerment, but insufficient to support the conviction for conspiracy to distribute cocaine. We further conclude that the conviction for reckless endangerment should have been merged with the conviction for second-degree assault for sentencing purposes. Accordingly, we shall reverse the conviction for conspiracy to distribute cocaine and shall vacate the sentence for reckless endangerment.

BACKGROUND

The evidence at trial demonstrated that, in April 2018, a confidential informant, who was working with the Washington County Narcotics Task Force, was provided with a telephone number beginning with the area code 717, that, according to investigation, "appeared to be involved in CDS related activity." The informant was instructed, by the

detective in charge of the investigation, to set up a purchase of crack cocaine with the unidentified person using the 717 number (we shall refer to that individual as “717”).

The informant sent text messages to 717 and made arrangements to purchase $100 worth of cocaine on April 30, 2018. The informant was instructed by 717 to meet at or near a store located at the intersection of Ross Street and Concord Street in Hagerstown. The informant was provided with five twenty-dollar bills, the serial numbers of which were recorded, and he was outfitted with audio and visual equipment that recorded the interaction.

The informant drove his personal vehicle to the specified location and sent a text message to 717, stating that he had arrived and describing his vehicle. He received a text from 717 stating “[h]e bout [sic] to be there.” A dark green Ford Explorer pulled up in front of the informant’s vehicle, and 717 sent another text to the informant that read, “He say [sic] get in his car. That truck right there[.]”

The informant got out of his car and into the front passenger seat of the Ford Explorer. Appellant was seated in the driver’s seat. There was another individual in the back seat, but the informant did not turn to look at that person.

The events that followed were captured by the audio-visual equipment worn by the informant. The videotape of the interaction inside the Ford Explorer was admitted into evidence and was played for the court.

When the informant first entered the Ford Explorer, appellant drove away, explaining that he was “going to spin around that way” because there were “too much people right [t]here.” Appellant then asked the informant, “You have the money?” The

informant responded, “You got the stuff?” and asked to see it. Appellant responded, “of course, come on[,]” while extending his hand, and the informant handed over the money.

Appellant did not give the informant anything in return, but instead, told the informant, “You beat. . . . Yeah, you were took [sic]. This is mine.” The informant replied, “Like shit. Give me the god damn money.” Appellant then pulled out a knife, which he held by the handle, with the tip of the knife pointing down, and said, “Get the fuck out of my car.” The informant asked appellant if he was threatening him with the knife, and appellant began moving the knife up and down and then toward the informant, stating, “I’m dead ass serious, get the fuck out of my car right now. I’m not playing with you. Get the fuck out.” The informant exited appellant’s vehicle.

Moments later, nearby police officers, who were conducting surveillance while the informant was involved in the transaction, followed appellant’s vehicle into an alley and stopped it. Appellant was still seated in the driver’s seat. The person in the back seat was identified as appellant’s brother.

Appellant was placed under arrest and a search of his person and his vehicle was conducted. Police recovered $122 from appellant’s pocket, including the five twenty-dollar bills that had been provided to the informant. A knife was recovered from the driver’s side floorboard of the car. Neither the prosecutor nor defense counsel asked the police officers who testified at trial whether any drugs were recovered in the search.

At some point after the informant exited appellant's vehicle, the informant sent a text to 717 stating, "Your boy [pulled] a fucking knife on me and robbed me[.]"[1] 717 responded, "What you talkin bout[,] [h]e say he didn't even meet you [sic]." The informant replied, "Well somebody fucking rob[bed] me." 717 responded, "You don't even kno [sic] who you talkin [sic] to right now lol[.]"[2]

At the close of the State's case, defense counsel moved for judgment of acquittal on all counts.[3] The court denied the motion as to second-degree assault, reckless endangerment, conspiracy to distribute cocaine, and theft, and ultimately found appellant guilty of those charges.

DISCUSSION

Standard of Review

When an action has been tried without a jury, we review the case on both the law and the evidence. Md. Rule 8-131(c). The test of evidentiary sufficiency to support a conviction is the same in a jury trial and in a bench trial. *Chisum v. State,* 227 Md. App 118, 131 (2016). The appropriate inquiry is "whether, after viewing the evidence in the

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[1] The wording of the text message introduced into evidence is "Your boy *called* a fucking knife on me . . ." (emphasis added). We presume, from the context, that the informant meant to type "pulled" instead of "called."

[2] "LOL" is an abbreviation that is commonly used to mean "laugh out loud." *See* Urban Dictionary, https://www.urbandictionary.com/define.php?term=lol (last visited 3/12/20)

[3] In addition to the crimes that appellant was convicted of, the State had charged appellant with carrying a concealed dangerous weapon and openly carrying a dangerous weapon. The court granted appellant's motion for judgment of acquittal on those counts.

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Titus v. State*, 423 Md. 548, 557 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

"We recognize that 'the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation,' and we therefore 'defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence[.]'" *Id.* (quoting *State v. Mayers*, 417 Md. 449, 466 (2010) (internal citation omitted)). We "need not decide whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Id.* (quoting *Mayers*, 417 Md. at 466). In other words, we do not "inquire into and measure the weight of the evidence to ascertain whether the State has proved its case beyond a reasonable doubt, but merely ascertain[] whether there is any relevant evidence, properly before the [finder of fact], legally sufficient to sustain a conviction." *Lindsey v. State*, 235 Md. App. 299, 311 (2018) (quoting *Morgan v. State*, 134 Md. App. 113, 126 (2000) (additional citation omitted)).

Analysis

1. Reckless Endangerment

Reckless endangerment is a statutory offense that prohibits a person from recklessly engaging in conduct that "creates a substantial risk of death or serious physical injury to another[.]" Md. Code (2002, 2012 Repl. Vol), Criminal Law Article, § 3-204(a)(1). The elements of a prima facie case of reckless endangerment are: "1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2)

that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly." *Thompson v. State*, 229 Md. App. 385, 414 (2016) (quoting *Holbrook v. State*, 364 Md. 354, 366-67 (2001) (additional citation omitted)). "Whether the conduct in issue has, indeed, created a substantial risk of death or serious physical injury is an issue that will be assessed objectively on the basis of the physical evidence in the case." *Marlin v. State*, 192 Md. App. 134, 157 (2010) (quoting *Williams v. State*, 100 Md. App. 468, 495 (1994)).

Appellant contends that the evidence was insufficient to convict him of reckless endangerment because he only used the knife to threaten the informant, and "[d]isplaying the knife, without more, did not create the risk necessary to sustain a reckless endangerment conviction." He argues that "a knife, unlike a gun, requires intentional physical contact between the parties to inflict or create a risk of injury[,]" and that, here, the knife did not come in contact with the informant's body.

The State asserts that a rational factfinder could find that appellant's conduct in "brandishing the knife in the close confines of the vehicle[,]" in the midst of a robbery, was sufficient to prove reckless endangerment. We agree with the State that the evidence was sufficient.

Viewed objectively, and in the light most favorable to the State, the evidence showed that appellant pulled out a knife, in the middle of a drug deal, in the confined space of the front seat of a passenger vehicle, after robbing the purchaser of the drug money. Contrary to appellant's claim that he merely "displayed" the knife, the videotape of the encounter shows appellant moving the knife up and down, in what could be described as

stabbing motions, and moving the knife toward the passenger in a threatening manner. We conclude that, based on the facts of this case, a rational trier of fact could infer that appellant's actions created a substantial risk of serious injury or death.

It is immaterial that, as appellant argues, the knife did not make contact with the informant's body. As the Court of Appeals has observed, "the purpose of the reckless endangerment statute is to punish conduct that was potentially harmful, even when no actual harm has occurred." *Hall v. State*, 448 Md. 318, 330 (2016) (citing *Williams*, 100 Md. App. at 481). Nor are we persuaded by appellant's claim that he only threatened the informant with the knife, as "[g]uilt under the statute does not depend on whether the accused intended that his reckless conduct create a substantial risk of death or serious physical injury to another." *Thompson*, 229 Md. App. at 415 (quoting *Holbrook*, 364 Md. at 367 (additional citation omitted)).

2. Conspiracy to Distribute Cocaine

Appellant next contends that the evidence was insufficient to support his conviction for conspiracy to distribute cocaine because: 1) there was no evidence tying him to the text messages that were sent to the informant from 717; 2) there was no evidence that the meeting place arranged between the informant and 717 was the same location where the informant encountered appellant; 3) there was no evidence that the informant was told to get into the green Ford Explorer that appellant was driving; 4) after appellant was arrested, 717 sent a text which suggested that appellant had gotten into the wrong vehicle; and 5) no drugs were found on appellant or in his vehicle when he was arrested moments after the

informant exited the vehicle.[4] Alternatively, appellant asserts that he did not conspire to distribute cocaine but intended only to rob the informant, and that there was an "equally strong inference" that 717 had the same intent.[5] We conclude that, although there was sufficient evidence of a conspiracy between 717 and appellant, the evidence was legally insufficient to permit the trial court, as the finder of fact, to infer that the purpose of the conspiracy was to distribute cocaine.

"A criminal conspiracy is the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means." *Savage v. State*, 212 Md. App. 1, 12 (2013) (internal quotations marks and citation omitted). The essence of a criminal conspiracy is an unlawful agreement." *State v. Payne*, 440 Md. 680, 713 (2014). "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Id.*

[4] Appellant asserts that the evidence showed that no drugs were found on him or in his vehicle when he was arrested. We note, however, that neither the prosecutor nor defense counsel elicited any evidence one way or the other (although we assume that the State would have introduced evidence that drugs were found in appellant's possession, had such evidence been available).

[5] The State agrees that the evidence was insufficient to convict appellant of conspiracy to distribute cocaine, but for a different reason than those advanced by appellant. The State asserts that here, there was no evidence that the quantity of crack cocaine that the informant sought to purchase was indicative of an intent to distribute, nor was there evidence of an agreement that the informant would distribute the cocaine that he received from appellant to others. We note, however, that the State's theory of the case was not that there was a conspiracy between appellant and the informant, but between appellant and 717.

Here, the State's theory was that appellant conspired with 717 for the unlawful purpose of distributing cocaine.

There was no direct evidence at trial that connected appellant to 717 or that established a conspiracy between them.[6] But, as we have previously observed, a conspiracy may be shown through circumstantial evidence, from which a prior agreement can be inferred:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Darling v. State, 232 Md. App. 430, 466-67 (2017) (citation omitted).

But where, as in the present case, "the determination of the accused's guilt is formed entirely upon the basis of circumstantial evidence, such evidence must permit the trier of fact to infer guilt beyond a reasonable doubt, and must not rely solely upon inferences amounting to 'mere speculation or conjecture.'" *State v. Manion*, 442 Md. 419, 432 (2015) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)). "If upon all of the evidence, the defendant's guilt is left to conjecture or surmise, and has no solid factual foundation, there

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[6] Although the identity of 717 was not established at trial, we note that a conviction for criminal conspiracy may stand even when the identity of the co-conspirator is unknown. *See McMillian v. State*, 325 Md. 272, 293-94 (1992). Appellant does not dispute that 717 was someone other than himself.

can be no conviction." *Brown v. State*, 182 Md. App. 138, 173 (2008) (quoting *Taylor v. State*, 346 Md. 452, 458 (1997)).

The test to distinguish between a permissible inference and speculation has been stated as follows:

> where from the facts most favorable to the [party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists as a matter of speculation, surmise, and conjecture, and a [factfinder] will not be permitted to draw it.

Dukes v. State, 178 Md. App. 38, 47-48 (2008) (quoting *Bell v. Heitkamp*, 126 Md. App. 211, 224 (1999) (additional citation omitted)).

Here, the concerted nature of the actions of 717 and appellant, which ultimately led to the encounter between appellant and the informant, was circumstantial evidence that appellant and 717 were engaged in some sort of conspiracy. But the record is devoid of any "solid factual foundation" to support an inference that the specific purpose of the conspiracy was to sell cocaine.

The circumstantial evidence relied on by the State, viewed in the light most favorable to the State, was that 717, who "appeared to be involved in CDS related activity[,]" responded to the informant's text messages inquiring about the purchase of crack cocaine and directed the informant to a location where the informant encountered appellant. During that encounter, appellant pretended that he was going to give the informant "the stuff" after the informant gave him the money, then robbed him.

Without more, we cannot conclude that the evidence was sufficient for a finder of fact to infer the existence of an agreement to distribute cocaine, without engaging in

speculation or conjecture. We agree with appellant that it was just as probable, if not more so, that the objective of the conspiracy was not to distribute cocaine, but to set up a fake drug deal and steal the purchase money.[7] Accordingly, we must reverse appellant's conviction for conspiracy to distribute cocaine.

3. Merger

Appellant's final contention is that, under the rule of lenity and principles of fundamental fairness, his conviction for reckless endangerment should have merged with his conviction for second-degree assault for sentencing purposes because the convictions were based on the same conduct. The State agrees that the convictions merge under the rule of lenity, as do we.[8]

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Paige v. State*, 222 Md. App. 190, 206 (2015) (quoting *Brooks*

[7] Perhaps we would have reached a different conclusion if the State had introduced evidence that appellant was in possession of crack cocaine when he was arrested, as such evidence might have permitted an inference that, at some point, the object of the conspiracy was to sell cocaine, but that a decision was subsequently made to commit robbery instead. *See State v. Payne*, 440 Md. 680, 713 (2014) ("In Maryland, the crime [of conspiracy] is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.") (quoting *Townes v. State*, 314 Md. 71, 75 (1988)).

[8] Because we conclude that the sentences at issue merge under the rule of lenity, it is not necessary for us to address appellant's contention that the convictions merge pursuant to principles of fundamental fairness, or the State's assertion that the issue of fundamental fairness was not preserved for appellate review.

v. State, 439 Md. 698, 737 (2014)). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.*

The rule of lenity is a principle of statutory construction that applies when a defendant is convicted of at least one statutory offense. *Potts v. State*, 231 Md. App. 398, 413 (2016). The rule "requires merger when there is no indication that the legislature intended multiple punishments for the same act." *Id.* (citations omitted).

Here, the charges of second-degree assault and reckless endangerment, both statutory offenses, were based on the same criminal act: threatening the informant with a knife.[9] There is no indication in either statute that the legislature intended separate punishments for offenses that are based on the same conduct. Accordingly, pursuant to the rule of lenity, appellant's convictions for second-degree assault and reckless endangerment

[9] There are three types of second-degree assault: (1) intent to frighten, (2) attempted battery, and (3) battery. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 3-203. According to the prosecutor's closing argument, the State's theory regarding the second-degree assault charge was that appellant "pulled out [the] knife with intent to frighten" the informant.

should have been merged for sentencing purposes. We will vacate the sentence for reckless endangerment.[10]

CONVICTION FOR CONSPIRACY TO DISTRIBUTE COCAINE REVERSED. SENTENCE FOR RECKLESS ENDANGERMENT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY OTHERWISE AFFIRMED. TWO-THIRDS OF COSTS TO BE PAID BY WASHINGTON COUNTY, ONE-THIRD OF COSTS TO BE PAID BY APPELLANT.

[10] When the rule of lenity is applied, "the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty." *Roes v. State*, 236 Md. App. 569, 603 (2018) (citing *Miles v. State*, 349 Md. 215, 229 (1998)).