Circuit Court for Montgomery County
Case No. 132860C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 378

September Term, 2019

DAVID LAGUNES-BOLANOS

v.

STATE OF MARYLAND

Leahy,
Friedman,
Shaw Geter,

JJ.

Opinion by Leahy, J.

Filed: March 25, 2020

David Lagunes-Bolanos, ("Appellant"), pleaded guilty in the Circuit Court for Montgomery County, to participation in a criminal gang and possession of a weapon in a place of confinement.[1] The court sentenced Appellant to a 15-year term of imprisonment for the gang participation conviction, and to a consecutive 10-year term of imprisonment for the weapon offense. Appellant sought leave to appeal from his guilty plea in this Court, which we granted. We then transferred the case to our regular appellate docket where Appellant presents us with the following question:[2] "Was Appellant's plea of guilty to gang participation knowing and voluntary, where the record fails to show that Appellant was informed of or understood the nature of the charge to which he was pleading guilty?"

[1] Appellant appeared before the court to enter a plea of guilty to Count 3, "Participate Criminal Gang-Felony," in criminal case number 132860; and to Count 1, "Contraband-Weapon" in criminal case number 133638.

[2] The contention Appellant raises in this appeal was not raised in his application for leave to appeal. As we explained in *Harding v. State*:

> Although Maryland Rule 8–204(b)(3) requires that an application for leave to appeal "shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court," nothing in Rule 8–204 states that, if an application is granted, only the points specified in the application may be argued on appeal.

235 Md. App. 287, 294 (2017). Appellant's case was transferred to the regular appellate docket pursuant to Rule 8-204(f)(5) and Rule 8-204(g)(1) "as if the order granting leave to appeal were a notice of appeal filed pursuant to Rule 8-202." Accordingly, we shall address the contention Appellant raises on appeal notwithstanding that he did not raise it in his application for leave to appeal.

(continued)

Because the record of the guilty plea hearing does not establish that Appellant understood the nature of the participation in a criminal gang offense, we shall vacate his guilty plea to that offense.[3]

BACKGROUND

Because Appellant attacks only his guilty plea to the participation in a criminal gang conviction, we focus only on the background related to that conviction.

On June 27, 2018, as indicated above, Appellant pleaded guilty to one count of participation in a criminal gang, in violation of Maryland Code, Criminal Law Article (2002, 2012 Repl. Vol., 2019 Supp.) ("CR") § 9-804(a), and one count of possessing a weapon in a place of confinement, in violation of CR § 9-414. The charge for possessing a weapon in a place of confinement did not arise out of the same factual scenario as the charge for participation in a criminal gang. While Appellant was in jail awaiting trial on the gang related charges, he was found in possession of a weapon and thereby accrued another criminal charge prior to his plea hearing. During the guilty plea proceeding, which was conducted through an interpreter, Appellant, who was 18 years old at the time, was advised of a variety of rights he was waiving by pleading guilty, including, the right to a jury trial, to compulsory process, to confront witnesses, and to testify or not testify. He was advised that by pleading guilty, he might suffer immigration consequences, and that he would have limited appellate rights. When the time came to advise Appellant, on the

[3] Appellant does not challenge the voluntariness of his plea to Count 1 (Contraband-Weapon) in criminal case # 133638; accordingly, that conviction is not affected by this opinion.

record, of the nature of the offenses to which he was pleading guilty, the following occurred:

> THE COURT: I think we need to cover the elements of the-
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: -offenses. Yes.
>
> [DEFENSE COUNSEL]: Do you understand that you are pleading guilty to a charge of possessing a weapon in the jail? Do you understand that?
>
> [APPELLANT]: Yes.
>
> [DEFENSE COUNSEL]: I understand the weapon was for your protection, but it was still a weapon.
>
> THE COURT: And what kind of weapon are we talking about?
>
> [PROSECUTOR]: It's the shank.
>
> THE COURT: The shank?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: You understand that?
>
> [APPELLANT]: Yes.
>
> [DEFENSE COUNSEL]: You also understand that you are charged with, and are pleading guilty to participating in a gang?
>
> [APPELLANT]: Yes.
>
> THE COURT: And the shank is something that was self-made in the jail?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And is that what you're pleading guilty to?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay. But is that what you're pleading guilty to? Okay.

[APPELLANT]: Yes.

After the court conducted some follow-up voir dire of Appellant wherein Appellant confirmed that he was freely making the choice to plead guilty and confirmed that he was satisfied with defense counsel's representation, the court determined that Appellant understood his rights, and that he had knowingly, intelligently, and voluntarily, waived them. The Court further instructed Appellant:

> THE COURT: Sir, I'm going to accept your plea subject to the prosecutor giving me a report as to the facts, so I want you to listen very carefully. When she's done, I'm going to be asking you and [Defense counsel] if you agree to those facts and if there, or if there are any changes, corrections, or additions you want to the record to reflect.

The State then provided the factual basis for the guilty plea, as follows:

> [THE STATE]: Thank you, Your Honor. Had the State gone forward to trial in [criminal case number] 132860, it would have provided evidence and testimony that on October 17th, 2017, the victim, Mr. Joshua Duarte was working as a subcontractor for the Maryland Transit Authority.
>
> He was tasked on that day with checking on homes that were due to be demolished, essentially, in purpose of, and in anticipation of construction for the Purple Line.
>
> THE COURT: Yes.
>
> [THE STATE]: One of those homes was located at 807 University Boulevard, and he was tasked with checking on it. He went into the home alone. As he proceeded through the home, he noticed a lot of graffiti and a lot of evidence that there had been recent occupation in the home to include cigarette butts, marijuana roaches, fresh feces, fresh urine, food, indicia that, perhaps, someone had been using the home recently.
>
> That home had been ceded or sold to the Purple Line and the Maryland Transit Authority for at least two years prior to Mr. Duarte entering it, and Maryland Transit Authority, through their representative, would have testified that no one had permission to be in this home, that it was marked not to be entered, that the doors were operational and closed as well.

So Mr. Duarte's proceeding through the home and he goes into the attic when two men, one masked and one non-masked, approached him. The masked one had a –

THE COURT: From within the house?

[THE STATE]; Yes. So he's in the attic –

THE COURT: Okay.

[THE STATE]: -- and it's only one entry into that room, and he turns around, and two men had followed in behind him.

One had a gun, looked at the victim, the masked one, and said, in English, are we good, then he raised the gun towards the victim. Both of the young men were described as young, Hispanic males. The victim took that to mean he should leave the home. The two men walk out first, then the victim immediately exits the home and contacts 911.

A photo array is conducted and the victim identifies the defendant before you, Mr. David Lagunes-Bolanos as the individual without the mask, so in essence, not the one with the weapon, but with the man with the weapon.

There was, the police set up a perimeter on the home later that day in an attempt to go into the home and secure it and make sure that it is not, indeed, occupied by people with weapons. As they're about the enter the home, they see four individuals fleeing from the home, one of which is the defendant before you –

THE COURT: And I'm sorry. Did this involve uniformed police?

[THE STATE]: Yes, uniformed police.

THE COURT: Okay.

[THE STATE]: You know, they spoke to the victim. They didn't want to reenter the home, obviously, without security.

THE COURT: Right.

[THE STATE]: They had a SWAT team on hand.

THE COURT: Okay.

[THE STATE]: So they waited several hours. Four people run from the home. All four are apprehended. Mr. Lagunes[-Bolanos] is one of those four.

When he's interviewed, he tells police that he had been at the home earlier during the time in question; however, denied being present for the assault.

There was another suspect by the name of Mr. Jesus Ponce, who was believed to have been the other individual; or at least involved. He was stopped on an unrelated case that same day later that night.

THE COURT: Not one of the four?

[THE STATE]: Not one of the four. So he doesn't come running out of the house, but he was wanted on a separate investigation. And because of, they had identified him, and they had identified him as a potential person of interest in this case, so both gang detectives and major crime detectives were working hand in hand towards his apprehension.

He runs from the police but tosses what is later known not to be -- I can't recall if it's a toy gun or a cap pistol or an airsoft pistol, but it looks like a gun, it's not an actual gun -- he tosses it as he's running.

He is taken to headquarters, he is interviewed, and he tells police that, yes, he had been in the home, that he had, indeed, used the weapon on the man who had entered the home.

THE COURT: Earlier that day?

[THE STATE]: Earlier that day, but his explanation is that he thought the man was there to harm him. He had just been sleeping when the man entered the home, so he was scared. I mean, he, obviously; it's a, he puts himself there, he agrees he, he showed the weapon to the victim; he just disagrees as to how it went down with the victim.

So when the gang detectives entered the home, they saw substantial graffiti, as earlier mentioned, but that they associated it with MS-13, to include shrines to a saint that they referred to as Santa Muerte, which means Saint of Death, scattered throughout the home.

And the gang detectives immediately recognized the home to be almost covered and littered with both symbols that are important to the MS-13 gang, as well as graffiti that reflected the MS-13 gang.

There would have been two experts that the State had noted, expert James Matthews and expert Michael Rodriguez, who were consulted on this case, and it was their opinion that the crime was committed by MS-13 members in furtherance of a gang goal to protect the territory of their home, which is

> referred to as a term called destroyer, as a destroyer home; and that both defendants were active participants in MS-13.
>
> And there would have been testimony, obviously, as to the nature of MS-13 –
>
> THE COURT: I'm sorry. Both participants in the crime?
>
> [THE STATE]: Were MS-13 validated members, according to the Montgomery County Police Department's validation criteria.
>
> THE COURT: Okay.
>
> [THE STATE]: And there would have been further testimony that MS-13 is a criminal organization, main purpose is violence and that it's, would have been qualified and considered a gang, as prohibited under Criminal 9-804, which is the underpinning of Count No. 3.

Thereafter, after finding that the factual basis was sufficient to support the guilty plea, the court entered a finding of guilty on the criminal gang participation count.

DISCUSSION

Appellant contends that, because the record of the guilty plea proceedings does not demonstrate that he was informed of, or understood, the nature or elements of the criminal gang participation offense, that his guilty plea was not entered knowingly and voluntarily.

The State contends that, notwithstanding that the court did not specifically explain the nature of criminal gang participation to Appellant; that Appellant was not specifically asked whether he understood the nature of that offense, and; that defense counsel did not specifically state that he had explained the nature of that offense to Appellant, the record, particularly the factual proffer, sufficiently informed Appellant of the nature or elements of the offense. We disagree.

I. Standard of Review

This Court reviews a constitutional challenge to a guilty plea by independently reviewing the entire record of the plea proceedings. *Miller v. State*, 185 Md. App. 293, 300 (2009). "We will accept the findings of fact of the trial court, unless they are clearly erroneous." *Id*. (quoting *Harris v. State*, 303 Md. 685, 698 (1985)). "Generally, we review the validity of the guilty plea as a whole under the 'totality of the circumstances' test." *Id*. (*quoting Metheny v. State*, 359 Md. 576, 604 n. 18 (2000)).

II. Nature or Elements of Offense - Generally

In *Henderson v. Morgan*, the Supreme Court observed that, in order for a guilty plea to be voluntary "in a constitutional sense[,]" *i.e.* that "it constitute[s] an intelligent admission that [the defendant] committed the offense[,]" the defendant must receive "'real notice of the true nature of the charge against him,'" which is "'the first and most universally recognized requirement of due process.'" 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

Maryland Rule 4-242(c) embodies the notion set forth in *Henderson*. It provides in pertinent part:

> The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with **understanding of the nature of the charge** and the consequences of the plea; and (2) there is a factual basis for the plea.

(Emphasis added).

In *State v. Daughtry*, after examining the jurisprudence interpreting *Henderson, supra*, over the ensuing decades, the Court of Appeals "reiterate[d] that the test … [for] determining whether a guilty plea is voluntary under current Rule 4–242(c), is whether the totality of the circumstances reflects that a defendant knowingly and voluntarily entered into the plea." 419 Md. 35, 71 (2011). "[A]n understanding of the nature of the offense requires 'a basic understanding of its essential substance, rather than of the specific legal components of the offense to which the plea is tendered.'" *Graves v. State*, 215 Md. App. 339, 355 (2013) (quoting *State v. Priet*, 289 Md. 267, 288 (1981)).

"Strong evidence" that the defendant is aware of the nature of the charges against him or her is ordinarily present if: "(1) *the defendant* informs the trial court that either he understands personally or was made aware by, or discussed with, his attorney the nature of the changes [sic] against him . . . ; (2) *the attorney* informs the trial court that he informed his client of the charges against the client . . . ; or (3) the *trial court itself* informs the defendant of the charges against the defendant[.]" *Daughtry*, 419 Md. at 74–75 (emphasis in original).

In addition, when examining the entire record of the plea proceedings to determine whether a defendant was aware of the nature of the offense to which he or she pleaded guilty to, courts take, "'into account ... among other factors, *the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea*.'" *Id.* at 72 (emphasis in original) (*quoting Priet*, 289 Md. at 277).

In the instant case: (1) Appellant did not inform the court that he personally understood "or was made aware by, or discussed with, his attorney the nature" of the offense which prohibits participation in a criminal gang; (2) Appellant's attorney did not inform "the trial court that he informed" Appellant of the nature of that offense; and (3) neither the trial court nor the State's Attorney informed Appellant of the nature of that offense. *See Daughtry*, 419 Md. at 74; *see also* Md. Rule 4-242(c). All that was said to Appellant was: "You also understand that you are charged with, and are pleading guilty to participating in a gang?" to which Appellant affirmatively responded. Moreover, the court did not announce on the record that Appellant was "pleading voluntarily, with [an] understanding of the nature of the charge" as required by Md. Rule 4-242(c).

Because there is no direct evidence that Appellant was aware of the nature of the criminal gang participation offense, we shall examine the totality of the circumstances of the plea taking "into account ... among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered" to discern whether the record demonstrates, as a whole, that Appellant was aware of the nature or elements of that offense. *Daughtry*, 419 Md. at 72 (emphasis omitted).

III. Complexity of the Charge

The Court in *Daughtry* observed that "[r]egarding the 'complexity of the charge,' *Priet* explained that '[t]he nature of some crimes is readily understandable from the crime itself.'" 419 Md. at 72. The Court of Appeals recognized, "in some cases ... the offense or the relevant element of the offense is a self-explanatory legal term, [and is] so simple in

meaning that a lay person can be expected to understand it." *Id*. (quoting *State v. Crowe*, 168 S.W.3d 731, 750 (Tenn. 2005)).

On the surface, it might seem that the crime of "gang participation," as it was referred to during the guilty plea proceedings, is not a complex charge. But that is not the case.

Criminal gang participation is prohibited by CR § 9-804(a). That subsection contains three terms which are defined in CR § 9-801. Those terms are "criminal gang[,]" "pattern of criminal gang activity[,]" and "underlying crime[.]" For clarity, they are in bold-faced type below:

> (a) A person may not:
>
> > (1) participate in a **criminal gang** knowing that the members of the gang engage in a **pattern of criminal gang activity**; and
> >
> > (2) knowingly and willfully direct or participate in an **underlying crime**, or act by a juvenile that would be an **underlying crime** if committed by an adult, committed for the benefit of, at the direction of, or in association with a **criminal gang**.

CR § 9-804(a) (emphasis added).

Section 9-801 defines "criminal gang[,]" "pattern of criminal gang activity[,]" and "underlying crime[,]" as follows:

> (c) "**Criminal gang**" means a group or association of three or more persons whose members:
>
> > (1) individually or collectively engage in a **pattern of criminal gang activity**;
> >
> > (2) have as one of their primary objectives or activities the commission of one or more **underlying crimes**, including acts by juveniles that would be **underlying crimes** if committed by adults; and

(3) have in common an overt or covert organizational or command structure.

****

(e) "**Pattern of criminal gang activity**" means the commission of, attempted commission of, conspiracy to commit, or solicitation of two or more **underlying crimes** or acts by a juvenile that would be an **underlying crime** if committed by an adult, provided the crimes or acts were not part of the same incident.

****

(g) "**Underlying crime**" means:

(1) a crime of violence as defined under § 14-101 of this article;

(2) a violation of § 3-203 (second degree assault), § 3-1102 (sex trafficking), § 3-1103 (forced marriage), § 4-203 (wearing, carrying, or transporting a handgun), § 9-302 (inducing false testimony or avoidance of subpoena), § 9-303 (retaliation for testimony), § 9-305 (intimidating or corrupting juror), § 11-304 (receiving earnings of prostitute), or § 11-307 (house of prostitution) of this article;

(3) a felony violation of § 3-701 (extortion), § 4-503 (manufacture or possession of destructive device), § 5-602 (distribution of CDS), § 5-603 (manufacturing CDS or equipment), § 5-604(b) (creating or possessing a counterfeit substance), § 5-606 (false prescription), § 6-103 (second degree arson), § 6-202 (first degree burglary), § 6-203 (second degree burglary), § 6-204 (third degree burglary), § 7-104 (theft), or § 7-105 (unauthorized use of a motor vehicle) of this article; or

(4) a felony violation of § 5-133 of the Public Safety Article.

(Emphasis added).

Suffice it to say, that the statute prohibiting participation in a criminal gang is complex and its nature is most certainly not "readily understandable from the crime itself." *Daughtry*, 419 Md. at 72 (citation omitted). As a result, this factor weighs heavily against a finding that Appellant's plea was entered knowingly and voluntarily.

IV. Personal Characteristics of the Accused

In *Daughtry*, the Court of Appeals explained that "'the personal characteristics of the accused' are important, as one with a diminished mental capacity is less likely to be able to understand the nature of the charges against him than one with normal mental faculties." 419 Md. at 73–74 (internal quotation and citation omitted). The record in this case offers scant information about the personal characteristics of Appellant. We can infer that he did not understand the English language very well, if at all, given that an interpreter appears to have been used to translate the proceedings for him. The record reveals that Appellant said he was 18 years old at the time of the guilty plea proceeding, and that he was not then under the influence of alcohol. Appellant said he understood the plea agreement, responded to the *voir dire* questions asked of him, and at one point, asked questions of his lawyer. During the State's recital of the factual basis supporting the plea, we learned that Appellant was accused of being involved in an assault inside a vacant home, that an expert would have testified he was an active participant in the MS-13 criminal gang, and that he was found in the possession of contraband weapons while incarcerated.

We learned nothing about Appellant's education, his mental capacity, his work history, his knowledge of the law, his prior contacts with the criminal justice system, or any other basic socio-economic information. In sum, very little of Appellant's personal characteristics appear in the record.

We find it significant that Appellant apparently needed an interpreter and that he was only 18 years old at the time the plea was taken. Accordingly, while this factor does

not weigh heavily one way or the other, it does weigh slightly against a finding that his plea was entered knowingly and voluntarily.

V. The Factual Basis

Finally, *Daughtry* observed that "it is possible that 'the factual basis proffered to support the court's acceptance of the plea' may describe the offenses charged in sufficient detail to pass muster under" Maryland Rule 4-242(c). 419 Md. at 74 (citation omitted).

An analysis of the factual basis proffered in the instant case, contrasted with the statute prohibiting criminal gang participation, and its three statutorily defined terms, demonstrates that the factual proffer was insufficient to inform Appellant of the nature of the complex offense to which he pleaded guilty. Again, CR § 9-804(a) provides as follows:

> (a) A person may not:
>
> (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity; and
>
> (2) knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal gang.

The factual proffer does nothing to demonstrate or explain what constitutes a "pattern of criminal gang activity" as defined by CR § 9-801(e). The factual proffer did not explain the statute's requirement that the defendant be a member of a gang, with a covert organizational or command structure and three or more members, who collectively engage in a "pattern of criminal gang activity" whose primary objective is to commit the "underlying crimes." *See* CR § 9-801(c). The factual proffer's conclusory explanation that "there would have been further testimony that MS-13 is a criminal organization, main

purpose is violence and that it's, would have been qualified and considered a gang, as prohibited under Criminal 9-804" informs us that the State's gang expert probably knew how a criminal gang is defined in the relevant statute, but did little to suggest that Appellant understood.

Furthermore, the factual proffer does not tell us which of the over forty enumerated offenses, listed in section 9-801(g), the State was asserting as the "underlying crime" that Appellant "knowingly and willfully direct[ed] or participat[ed] in" as contemplated by section 9-804(a)(1). A few years ago, in *In re Kevin T.*, 222 Md. App. 671 (2015) we reversed a juvenile's conviction for participation in criminal gang under CR § 9-804 because State failed to satisfy its burden of proof. Our review of the record indicated that there was no evidence before the circuit court regarding the "underlying crimes" that the gang either committed, attempted to commit or had conspired to commit. *Id.* at 679. We explained that references in the transcript to non-specific incidents of gang activity and attempts to fight were insufficient under statute requiring "the State to prove not only that appellant was a member of a criminal gang, but that the gang, in this instance MS–13, engaged in a pattern of criminal behavior, *i.e.*, committed, attempted to commit, or conspired to commit two or more of the specific 'underlying crimes' listed in § 9–801(f)." *Id* at 681.

CONCLUSION

Rule 4-242(c) and our decisional law make clear that the on-the-record colloquy must demonstrate that the trial court was able to determine whether a criminal defendant understands the nature of the offense that he or she is pleading guilty to, as well as the

consequences thereof. In this case, the record does not demonstrate that Appellant understood the nature of the crime of criminal gang participation under CR § 9-804(a). Accordingly, we hold that Appellant's plea was not entered knowingly, and vacate Appellant's guilty plea to criminal gang participation.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED IN CRIMINAL CASE NUMBER 132860. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY MONTGOMERY COUNTY.