Circuit Court for Montgomery County
Case No.: 132701C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 805

September Term, 2018

LAKEISHA EBONY BURRISON

v.

STATE OF MARYLAND

Fader, C.J.,
Wright,
Shaw Geter,

JJ.

Opinion by Fader, C.J.

Filed: March 22, 2019

A jury in the Circuit Court for Montgomery County convicted Lakeisha Burrison, the appellant, of two counts of conspiracy to commit theft in the amount of $1,000 to $10,000. The court imposed a five-year sentence for each count, to be served consecutively, for a total of ten years. The court suspended the entire sentence, less 42 days served, and placed Ms. Burrison on a five-year term of probation. Ms. Burrison now argues that the evidence at trial was insufficient to convict her of conspiracy. We agree with the State and the circuit court that the evidence was more than sufficient to convict her of conspiracy.

Ms. Burrison also argues that one of her two conspiracy convictions should be vacated because the State proved the existence of only one conspiracy. The State concedes that it proved only one conspiracy and, therefore, that we must vacate one of Ms. Burrison's sentences. However, the State argues that we should allow both convictions to stand. We will remand with instructions that the circuit court vacate one of the two conspiracy convictions.

BACKGROUND

Ms. Burrison, Jennifer DeSouza, and Nelson Leiva arrived together at Pour House, a bar in Gaithersburg. Ms. Burrison left the others and, at some point in the evening, approached two men, Qasim Bilal and Mohammad Khan, and engaged in a discussion with them about, among other things, high-end watches they were wearing. Later in the evening, as the two men were leaving, Ms. Burrison called Mr. Bilal and asked if he and Mr. Khan would like to smoke a cigarette with her. The men agreed and picked Ms. Burrison up in Mr. Khan's car. Ms. Burrison instructed them to park in a parking garage

near Pour House to smoke. Almost immediately after Mr. Bilal exited the car to smoke, Mr. Leiva, who was wearing a mask, approached with a gun and demanded that the men give him their watches, as well as their wallets, keys, and phones. Although Ms. Burrison was also there with her purse and phone, Mr. Leiva did not demand anything from her before fleeing with the men's belongings.

The State charged Ms. Burrison with two counts of armed robbery, two counts of conspiracy to commit armed robbery, two counts of theft in the amount of $1,000 to $10,000, and two counts of conspiracy to commit theft in the amount of $1,000 to $10,000. The State's theory of the case at trial was that Ms. Burrison "took advantage of" Messrs. Bilal and Khan, who "appeared to be easy marks" and "arranged a robbery with Ms. DeSouza and with Mr. Leiva." Counsel for Ms. Burrison argued that only Ms. DeSouza and Mr. Leiva were involved in the robbery, and that Ms. Burrison just happened to be with them. As relevant to this appeal, Mr. Leiva, Messrs. Bilal and Khan, and Detective Robert Scire testified as witnesses for the State. At the conclusion of the State's evidence, Ms. Burrison moved for a judgment of acquittal, arguing that the State had not met its burden of proof. The court denied the motion. The jury found Ms. Burrison guilty on the two counts of conspiracy to commit theft in the amount of $1,000 to $10,000, but acquitted her of the other six charges. As Ms. Burrison's challenge turns on the sufficiency of the evidence produced at trial, we review relevant portions of testimony in detail here.

Testimony of Mr. Bilal

Mr. Bilal testified that Ms. Burrison was one seat away from Mr. Khan at the bar. When Mr. Bilal first noticed her, Ms. Burrison was sitting with a blonde woman. Ms.

Burrison would periodically get up from the bar and then return. When the blonde woman left, Ms. Burrison turned to Messrs. Bilal and Khan and struck up a conversation. She asked the two men about their occupations. When they revealed that they were high-end watch dealers, Ms. Burrison became "really curious about [their] watches, and start[ed] to ask what their values were . . . how much each watch was independently worth, and their prices." That night Mr. Bilal was wearing a watch worth approximately $6,800. He gave Ms. Burrison his business card with his cell phone number on it. Mr. Bilal and Ms. Burrison took a photo together, and then she left. Sometime later, Messrs. Bilal and Khan started to leave. When they walked outside, Ms. Burrison called Mr. Bilal's cell phone and asked if they would come smoke a cigarette with her.

After picking Ms. Burrison up, she told the men to park the car in a parking garage, which they did.[1] As soon as Mr. Bilal stepped out of the car to smoke his cigarette, "all of a sudden someone ran towards [him] with a gun." The first thing the gunman demanded was Mr. Bilal's watch. While still pointing the gun at Mr. Bilal, the gunman also demanded Mr. Khan's watch, saying "I know you guys have two watches; give me the other watch." The gunman, who also demanded the men's cell phones, wallets, and car keys, never addressed Ms. Burrison at all, even though she was standing outside the car by the trunk with her purse.

When the gunman ran and Mr. Khan chased after him, Mr. Bilal turned to Ms. Burrison and accused her of setting the men up. Ms. Burrison responded by telling Mr.

[1] Mr. Bilal testified that they had already been intending to park in a garage and take an Uber home.

Bilal that "this is not safe for you; you should leave." She then began "slowly walking away from the scene." When Mr. Khan returned, the men went back to the bar and called the police.

Testimony of Mr. Khan

Mr. Khan's testimony largely mirrors that of Mr. Bilal. He testified that sometime after he and Mr. Bilal arrived at the bar, Ms. Burrison was seated nearby talking to a woman. Then, "as soon as the other female got up and left, [Ms. Burrison] immediately, very abruptly turned to" Mr. Khan and struck up a conversation. He noted that Ms. Burrison "was very much interested in our watches, and what we did for a living." Ms. Burrison left and came back to talk several times. Ms. Burrison was not there when Messrs. Bilal and Khan decided to leave for the night. As they were leaving, with the intent of parking their car in a garage for the night, Mr. Khan noticed Ms. Burrison talking with people outside. Soon after, Ms. Burrison called Mr. Bilal. The two men then picked Ms. Burrison up in front of the bar and "she asked [them] to drive to a parking garage" to smoke a cigarette.

Soon after Mr. Khan parked the car he heard Mr. Bilal say, "there is a gunman approaching us." While still sitting in the car, Mr. Khan took his watch off and hid it under the seat. He was forced to turn the watch over when the gunman specifically demanded it, along with his cell phone, wallet, and cash. Mr. Khan noticed that Ms. Burrison had her purse and cell phone, but the gunman "[d]idn't demand anything of her." After the gunman "took off running," Mr. Khan ran after him, but could not catch up.

Testimony of Detective Scire

Detective Scire was the lead detective assigned to investigate the robbery. He testified how he used the phone number used to contact Mr. Bilal to locate Ms. Burrison's driving record. After one of the men identified Ms. Burrison by her MVA photo, Detective Scire obtained a search warrant for her cell phone, on which he found photos of Ms. Burrison with both Mr. Leiva and Ms. DeSouza. Those photographs were admitted as evidence at trial.

Testimony of Mr. Leiva

Mr. Leiva testified that he met Ms. Burrison through Ms. DeSouza. The three were not together "very often," although at one point they had taken a trip together to North Carolina to visit Ms. Burrison's family. Mr. Leiva and Ms. DeSouza became friends while working together at a restaurant. On the evening of the robbery, Mr. Leiva and Ms. DeSouza met up with Ms. Burrison and went together to Pour House in Ms. Burrison's car, which Ms. DeSouza was driving. They walked inside together and then Mr. Leiva and Ms. DeSouza split off. Mr. Leiva did not see where Ms. Burrison went.

Mr. Leiva left Ms. DeSouza inside at one point to go outside and smoke a cigarette. While he was outside, Ms. DeSouza came out and they walked together to Ms. Burrison's car. Ms. DeSouza drove them to a second parking garage nearby, "mentioned [Ms. Burrison]," and told Mr. Leiva "that something was going to happen." Ms. DeSouza explained that "[Ms. Burrison] had met two guys at the bar, and they seemed to have, you know, money." Ms. DeSouza instructed Mr. Leiva to rob the men and gave him a mask and a gun, although she first removed the ammunition clip. Ms. DeSouza specifically told

Mr. Leiva that the two men they were going to rob had watches and that Ms. Burrison would be there, but that he should "ignore" her.

Mr. Leiva agreed to follow Ms. DeSouza's instructions because "he felt like [he] owe[d]" her. About 10-15 minutes after leaving the bar with Ms. DeSouza, Mr. Leiva approached Messrs. Bilal and Khan, took out the gun, and demanded their watches. He also took their phones and wallets. As instructed, he did not say anything to Ms. Burrison. He later found Ms. Burrison and Ms. DeSouza together inside Ms. Burrison's car, which was parked near Ms. DeSouza's apartment. Mr. Leiva gave the watches, phones, and wallets to Ms. DeSouza.

A week after the robbery, Mr. Leiva moved to Arkansas, but was only there for two weeks before Ms. DeSouza contacted him and he returned. By the time he returned, Ms. Burrison had been arrested for the robbery. Ms. DeSouza instructed Mr. Leiva to turn himself in "to get [Ms. Burrison] out" and then, along with another woman, drove him to the police station. Ms. DeSouza instructed Mr. Leiva "not to mention [Ms. Burrison] at all."

Mr. Leiva initially lied to the police and told them he did not know Ms. Burrison and that he had thrown the watches, gun, wallets, and phones into a pond next to Pour House. He told the police the fabricated story because he "was afraid" and that Ms. DeSouza had "kind of" threatened him. Later, he admitted that both Ms. Burrison and Ms. DeSouza were part of the robbery.

DISCUSSION

The standard for our review of evidentiary sufficiency is "whether[,] after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). That same "standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (quoting *Mora v. State*, 123 Md. App. 699, 727 (1998)). In making our determination, "[w]e 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." *Perez v. State*, 201 Md. App. 276, 286 (2011) (second alteration in *Perez*) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)). We therefore "defer to any reasonable inferences a jury could have drawn in reaching its verdict, and determine whether there is sufficient evidence to support those inferences." *Lindsey v. State*, 235 Md. App. 299, 311, *cert. denied*, 458 Md. 593 (2018).

I. THE EVIDENCE WAS LEGALLY SUFFICIENT TO CONVICT MS. BURRISON OF CONSPIRACY.

Ms. Burrison argues that the evidence presented at her trial was insufficient to convict her of conspiracy because the evidence instead supports the alternative theory of the robbery that Ms. DeSouza and Mr. Leiva planned the robbery on their own without Ms. Burrison's help or involvement. Ms. Burrison argues that "it is impossible for a rational trier of fact to find beyond a reasonable doubt and without engaging in speculation that Ms. Burrison" conspired with Ms. DeSouza and Mr. Leiva to commit the robbery. To the contrary, the evidence in support of Ms. Burrison's involvement in the conspiracy, though circumstantial, was strong.

"Maryland has long held that there is no difference between direct and circumstantial evidence." *Hebron v. State*, 331 Md. 219, 226 (1993). "A conviction may be based on circumstantial evidence alone." *Jensen v. State*, 127 Md. App. 103, 117 (1999). A jury may base its guilty verdict on "reasonable, *i.e.*, rational, inferences from extant facts." *State v. Smith*, 374 Md. 527, 547 (2003). So long as "there are evidentiary facts sufficiently supporting the inference made by the trial court, [we] defer[] to that fact-finder . . . ." *Id.*

The evidence presented at trial, construed in the light most favorable to the State, was sufficient for the jury to reasonably conclude that Ms. Burrison conspired to rob Messrs. Bilal and Khan. At the bar, Ms. Burrison inquired specifically about the monetary value of the men's watches. She left the men several times throughout the night, which were opportunities for her to speak with Ms. DeSouza. Ms. DeSouza then conveyed to Mr.

Leiva information about Messrs. Bilal and Khan that seemingly came from Ms. Burrison, and then directed him to rob the two men but leave Ms. Burrison alone. Mr. Leiva then did exactly that, meeting the car where Ms. Burrison told the men to go and robbing the men of their watches, wallets, phones, and keys while ignoring Ms. Burrison. When Mr. Bilal accused her of having set them up for the robbery, she did not deny it, but instead warned him to leave. And she was with Ms. DeSouza when Mr. Leiva turned over the stolen items. Mr. Leiva also testified that Ms. Burrison and Ms. DeSouza were "part of this," which, in context, the jury could have understood to refer to the robbery.

From this evidence, the jury could reasonably infer that Ms. Burrison had agreed with at least Ms. DeSouza to rob the two men and that her role in the robbery involved gathering information about the two men, conveying that information to Ms. DeSouza, and then luring the men to the right location. *See Bridges v. State*, 116 Md. App. 113, 141 (1997) (concluding that the jury could have reasonably inferred that the "appellant's role in the conspiracy was to lure [the victim] to the location where [another person] could rob him," where the appellant told the victim to meet her under a false pretense).

Ms. Burrison asserts that the evidence was insufficient to conclude that she conspired with Ms. DeSouza or Mr. Leiva because: (1) "there were no inculpatory call records or text messages introduced to suggest that Ms. Burrison spoke with Ms. DeSouza or Mr. Leiva after arriving at Pour House and parting ways," (2) the information that Ms. DeSouza had acquired about the men's watches and their apparent wealth could have come from another source, and (3) if Ms. Burrison had been involved in the robbery, then Ms. DeSouza would not have had to instruct Mr. Leiva to ignore her. Although these arguments

postulating a different explanation for the evidence presented might be well taken as closing argument, they do nothing to undermine the substantial evidence pointing toward Ms. Burrison's participation in the conspiracy and the jury's role in choosing who to believe. *See State v. Suddith*, 379 Md. 425, 430 (2004) ("A trial court fact-finder . . . possesses the ability to 'choose among differing inferences that might possibly be made from a factual situation' and this Court must give deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference.") (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). Viewing that evidence in the light most favorable to the State, we conclude that the evidence is sufficient to sustain Ms. Burrison's remaining conspiracy conviction.

II. ONE OF MS. BURRISON'S SENTENCES FOR CONSPIRACY AND ITS UNDERLYING CONVICTION MUST BE VACATED.

Ms. Burrison argues that her convictions for two counts of conspiracy to commit theft under $10,000 violated the Double Jeopardy Clause of the United States Constitution because the State proved only one conspiracy. Thus, she argues, one of her convictions and its accompanying sentence must be vacated. The State concedes that it did not prove two separate conspiracies—one to rob Mr. Bilal and the other to rob Mr. Khan—and that one of Ms. Burrison's sentences should be vacated, but nevertheless argues that both convictions should stand. We agree with both parties that one of the sentences must be vacated and we agree with Ms. Burrison that the underlying conviction must also be vacated.

This Court explained in *Savage v. State* that "[i]f [the State] seeks to establish multiple conspiracies, it 'has the burden of proving a *separate* agreement for each conspiracy.'" 212 Md. App. 1, 15 (2013) (quoting 16 Am. Jur. 2d Conspiracy § 40). We held that "[i]f a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Savage*, 212 Md. App. at 26. When such a violation occurs, "one of [the] two conspiracy convictions must be vacated." *Id.*

In *Savage*, a jury convicted the defendant of two counts of conspiracy to commit first-degree burglary and the court sentenced him on each count. *Id*. at 12. We concluded that the State proved only a single conspiracy, not two different conspiracies, because it never argued to the jury that there were two separate conspiracies, and the jury was never instructed that it could only convict the defendant of two conspiracies if the State proved two different agreements. *Id.* at 27-29. Similarly here, the State never argued that Ms. Burrison engaged in more than one conspiracy and the court never instructed the jury that the State had to prove the existence of two separate agreements for it to convict Ms. Burrison of two different conspiracies.

Savage dictates that, in this circumstance, in which the State proved the existence of only one conspiracy, we vacate one of Ms. Burrison's conspiracy convictions. The State, however, argues that *Savage* was incorrectly decided and that we should depart from it. To support that proposition, the State cites several cases that it claims contradict the holding of *Savage*. We discuss each of those cases in turn.

The State relies most prominently on *Henry v. State*, 324 Md. 204 (1991). There, a jury convicted Mr. Henry of both conspiracy to commit robbery and conspiracy to commit murder. *Id.* at 239. The trial court sentenced Mr. Henry to life imprisonment for the conspiracy to commit murder and a consecutive ten-year sentence for the conspiracy to commit robbery. *Id.* at 239-40. The Court of Appeals held that this was error and vacated the sentence, but not the underlying conviction, for the conspiracy to commit robbery. *Id.* at 240. For two reasons, the State's reliance on *Henry* is misplaced. First, the Court never discussed, or appeared to consider, whether the underlying conviction should be vacated. It appears that the issue was just not raised because the parties agreed as to the appropriate remedy: "As Henry argues, and the State concedes, the sentence for conspiracy to commit robbery should be vacated." *Id.* at 240. Thus, *Henry* did not actually decide this issue.

Second, *Henry* was the third case decided by the Court in a little over a year in which a circuit court had convicted and sentenced a defendant for two different conspiracies even though the State had proved only one. In both of those earlier cases, the Court vacated the improper conspiracy convictions as well as the sentences. First, in *Tracy v. State*, 319 Md. 452, 455-56 (1990), the jury had convicted the defendant of conspiracy to commit murder and conspiracy to commit robbery with a deadly weapon, and imposed separate sentences for each conviction. The Court opened its discussion of the issue by observing that "[i]t is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Id.* at 459. After reviewing the case and determining that the State had proved only a single conspiracy, the Court remanded the case to the circuit court with instructions to vacate the

conviction, not just the sentence, for the lesser of the two conspiracies. *Id.* at 460. Thus, although the Court originally described the problem as relating to the imposition of multiple sentences, the relief it awarded was to vacate the second conviction.

The following year, the Court decided *Jordan v. State*, 323 Md. 151 (1991). There, the jury convicted the defendant of two conspiracies even though, the Court determined, the State proved only one. *Id.* at 152-53, 161. The State argued that the defendant had acquiesced in the two convictions by not objecting at trial, but "concede[d] that if there was only one conspiracy and if the issue had been preserved for review, then under *Tracy* . . . only one conspiracy conviction would be upheld." *Id.* at 160-61. The Court first held that because an illegal sentence may be corrected at any time, the defendant's failure to raise the issue at trial did not preclude relief on appeal. *Id.* at 161. Then, after determining that the State had, in fact, proved only one conspiracy, the Court held that, "[a]s in *Tracy*, the *conviction* for conspiracy to commit robbery must be vacated." *Id.* at 162 (emphasis added).

The Court's decision in *Henry* followed its decision in *Jordan* by less than four months. In *Henry*, the Court first expressly incorporated its reasoning in *Jordan* and *Tracy*, without any hint of disagreement with the resolution of those earlier cases. The Court then stated that the parties agreed that the defendant's "sentence for conspiracy to commit robbery should be vacated," and so that is what it ordered. *Henry*, 324 Md. at 240. We do not interpret the Court's decision in *Henry*, which was authored by the same judge who had also authored *Jordan* and *Tracy*, to have implicitly overruled those earlier decisions as to the appropriate relief in such cases. To the contrary, it appears that the Court entered

the relief that both parties in that case agreed was appropriate. Had the Court intended to diverge from those recent precedents, it certainly would have said so. At most, therefore, these Court of Appeals decisions left unresolved the question of the proper remedy for multiple convictions and sentences for a single conspiracy.

The State cites three other decisions from this Court that, like *Henry*, vacated only the sentence for the second conspiracy without considering, at least expressly, whether the conviction should also have been vacated. *See Carroll v. State*, 202 Md. App. 487, 519 (2011); *Simpson v. State*, 121 Md. App. 263, 291 (1998); and *Allen v. State*, 89 Md. App. 25, 54 (1991). None of these cases decided the issue presented here because, it appears from the decisions, the issue was not raised.[2] As a result, none of them persuade us that we can or should disregard the holding of *Savage*.

Wilson v. State, 148 Md. App. 601 (2002) and *Enzewa v. State*, 82 Md. App. 489 (1990), also cited by the State, are even less helpful to it. Although the State quotes accurately from our statement in *Wilson* that because there was a single conspiracy, "all of

[2] In both *Carroll* and *Allen*, it appears that the parties agreed that the circuit courts should have simply merged the convictions for sentencing purposes, rather than vacate one of them. *Carroll*, 202 Md. App. at 519 ("[T]he parties agree that the sentences should merge, and so do we."); *Allen*, 89 Md. App. at 53-54 ("David Allen, who was sentenced to concurrent terms for his convictions of conspiracy to import cocaine and conspiracy to distribute cocaine, argues that these convictions should merge. The State properly concedes the point."). In *Simpson*, we identified the parties' contentions as: "Appellant . . . contends that his conviction and sentence for one of the conspiracies should be vacated. Again, the State agrees." 121 Md. App. at 291. We then quoted the rule of law as stated in *Tracy*, agreed that the evidence only established a single conspiracy, and concluded that "one of the sentences for appellant's convictions of conspiracy must be vacated." *Id.* Our opinion does not explain why we deviated from the relief requested by the appellant, with which we said the State agreed and which was also the identical relief awarded in *Tracy*. Regardless, the opinion does not contain any analysis of this particular issue.

the sentences for conspiracy with the exception of one must be vacated," 148 Md. at 641, the State ignores our mandate from that case, which, as in *Jordan* and *Tracy*, vacates the underlying convictions, not just the sentences, *id.* at 670. In *Enzewa*, we did the opposite. In the body of our decision, we state that "we will vacate the . . . conviction." 82 Md. App. at 504. Our mandate, however, vacates the sentence only. *Id.* at 518. The decision does not explain that apparent inconsistency. In any event, neither of these decisions directly confronted the issue of whether a conviction, as opposed to only a sentence, should be vacated in this circumstance. As a result, neither persuades us that we should revisit the decision made in *Savage* that the conviction must be vacated.

Finally, the State's reliance on *Lovelace v. State*, 214 Md. App. 512 (2013), is also misplaced, as that case involved the different issue of the merger for sentencing purposes of a lesser-included offense into a greater offense under the required evidence test. Here, by contrast, the question is whether we can let stand convictions for two separate conspiracies when the State only proved—and, indeed, only attempted to prove—the existence of a single criminal conspiracy. The State made no attempt to prove that Ms. Burrison separately conspired to rob both Mr. Bilal and Mr. Khan. Instead, the State attempted to prove, successfully, that Ms. Burrison was part of a single conspiracy to rob both men. Under *Savage*, a single agreement to engage in a criminal act can support only a single conviction for conspiracy. One of the two convictions must be vacated.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART. REMANDED WITH INSTRUCTIONS TO VACATE ONE CONSPIRACY CONVICTION AND ITS SENTENCE. COSTS ASSESSED 75% TO APPELLANT AND 25% TO MONTGOMERY COUNTY.