

Circuit Court for Wicomico County
Case No. C-22-CR-19-000007

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1125

September Term, 2019

JESUS SAMUEL TORRES-GOMEZ

v.

STATE OF MARYLAND

Wells,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 23, 2021

*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.

Convicted by the Circuit Court for Wicomico County of first degree assault, conspiracy to commit first degree assault, second degree assault, two counts of conspiracy to commit second degree assault, and related offenses, Jesus Samuel Torres-Gomez (hereinafter “Mr. Gomez”), appellant, presents for our review two questions: whether the court erred in convicting him of multiple counts of conspiracy, and whether the court “allow[ed] the prosecutor to improperly shift the burden during cross-examination” of Mr. Gomez. For the reasons that follow, we shall remand the case with instructions to vacate the convictions of conspiracy to commit second degree assault. We shall otherwise affirm the judgments of the circuit court.

At trial, the State produced evidence that on October 6, 2018, Mr. Gomez and his brothers Juan and Rubin assaulted Natanael Perez-Silva. During the assault, Mr. Gomez produced a knife and stabbed Mr. Perez in his shoulder and buttock. Angel Ramos, who witnessed the assault, subsequently identified Mr. Gomez in a photo array, and Mr. Perez and Mr. Ramos identified Mr. Gomez in court as the person who stabbed Mr. Perez. Following the close of the evidence, the court convicted Mr. Gomez of first degree assault, conspiring with Juan to commit first degree assault, second degree assault, conspiring with Juan to commit second degree assault, conspiring with Rubin to commit second degree assault, and other offenses. At sentencing, the court sentenced Mr. Gomez to a term of twelve years’ imprisonment for the first degree assault, and merged the convictions for conspiracy and second degree assault.

Mr. Gomez first contends that the court erred in convicting him of multiple counts of conspiracy. The State concurs, as do we. *See Savage v. State*, 212 Md. App. 1, 26

(2013) (“[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”). Accordingly, we remand the case with instructions to vacate the convictions of conspiracy to commit second degree assault. *See McClurkin v. State*, 222 Md. App. 461, 491 (2015) (“we shall leave standing the conviction and sentence for conspiracy to commit the crime with the greatest maximum penalty”).

Mr. Gomez next contends that the court “erred in allowing the prosecutor to improperly shift the burden during cross-examination.” Following the close of the State’s case, Mr. Gomez testified that he did not “at any point in time participate in a fight with” Mr. Perez, and on the afternoon of October 6, 2018, Mr. Gomez “probably was shopping or with [his] family.” Mr. Gomez further testified that when he goes shopping, he is “typically” accompanied by his “wife and two kids.” During cross-examination, the prosecutor asked Mr. Gomez: “Is there any reason why your wife isn’t here today?” Defense counsel objected on the ground that the prosecutor was “shifting the burden.” The court permitted Mr. Gomez to answer, and he testified that his wife was working.

Mr. Gomez now contends that the prosecutor “shifted the burden of proof” by “impl[y]ing that it was [Mr. Gomez’s] responsibility to secure the presence of witnesses at trial.” We disagree. We have stated that when an “appellant testifie[s] in his own defense and, in his own testimony identifie[s] potential exculpatory witnesses, but call[s] none of them to the stand, questions as to their absence [do] not violate [the] appellant’s Fifth Amendment rights, and [do] not constitute improper burden shifting.” *Mines v. State*, 208 Md. App. 280, 301-02 (2012). Here, Mr. Gomez, in his own testimony, identified his wife

as a potential exculpatory witness, but did not call her to the stand. The prosecutor's subsequent question as to her absence did not violate Mr. Gomez's Fifth Amendment rights, and hence, did not constitute improper burden shifting.¹

CASE REMANDED WITH INSTRUCTIONS TO VACATE THE CONVICTIONS OF CONSPIRACY TO COMMIT SECOND DEGREE ASSAULT. JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY WICOMICO COUNTY.

¹We further note that Mr. Gomez was tried not by a jury, but by the court, and “[t]rial judges are presumed to know the law and to apply it properly.” *Ball v. State*, 347 Md. 156, 206 (1997).