Circuit Court for Wicomico County
Case No. C-22-CR-19-000246

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1135

September Term, 2021

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AZIZ NALLA SECK

v.

STATE OF MARYLAND

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Reed,
Friedman,
Albright,

JJ.

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Opinion by Albright, J.

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Filed: July 1, 2022

A jury, in the Circuit Court for Wicomico County, convicted Aziz Seck, the Appellant, of two counts of conspiracy to commit first-degree assault and one count of possession of a shotgun by a prohibited person. The Court sentenced Mr. Seck to a term of 10 years' imprisonment on one of the conspiracy convictions and a consecutive term of three years' imprisonment, all suspended, on the conviction of possession of a shotgun. The court merged the other conspiracy conviction for sentencing purposes.

In this appeal, Mr. Seck presents four questions, which we have rephrased for clarity.[1] They are:

1. Did the trial court err when, prior to *voir dire*, it overruled defense counsel's objection to the fact that Mr. Seck was wearing a stun cuff?

2. Was the evidence adduced at trial sufficient to sustain Mr. Seck's convictions for conspiracy to commit first-degree assault?

3. Assuming that the evidence was sufficient to sustain Mr. Seck's convictions for conspiracy, should one of those convictions be vacated on the ground that the State presented evidence of only one agreement?

[1] The issues as presented in Mr. Seck's brief are as follows:

1. Where the record lacks evidence that Appellant needed to be restrained, and where the trial judge delegated the decision to courtroom security personnel, did the court err by allowing Appellant to be restrained in a visible stun cuff during his trial?
2. Is the evidence insufficient to sustain the convictions for conspiracy, because the State failed to prove that Appellant formed an agreement with his alleged co-conspirator to commit first-degree assault?
3. Assuming *arguendo* that the evidence is sufficient to sustain a conviction for conspiracy, must one of the conspiracy convictions be vacated because there was only one agreement?
4. Did the Circuit Court plainly err by failing to instruct the jury on the alleged objectives of the conspiratorial agreement?

4. Did the trial court plainly err in instructing the jury on the crime of conspiracy?

For the reasons to follow, we hold that the trial court did not err in overruling defense counsel's objection to the stun cuff. We also hold that the evidence was sufficient to sustain Mr. Seck's convictions. As to question 3, we agree that one of Mr. Seck's conspiracy convictions should be vacated. Finally, we decline to exercise plain error review regarding the court's conspiracy instruction. We therefore affirm in part and remand in part with instructions to vacate one of Mr. Seck's conspiracy convictions.

## BACKGROUND

On January 29, 2019, Randall Dornon drove his girlfriend, Allison Cavoli, and their minor child, L.D., to 613 Light Street in Salisbury, Maryland to finish a drug deal. Upon arriving at the location, Mr. Dornon observed multiple individuals, all of whom were armed, standing outside of the residence. After Mr. Dornon drove away, one or more of the individuals fired at Mr. Dornon's vehicle. Several shots struck the vehicle, and Mr. Dornon was struck in the face. Mr. Dornon then drove to a nearby hospital for treatment.

Mr. Seck was later arrested and charged with various counts related to the shooting. Those counts included: two counts of attempted first-degree murder; two counts of attempted second-degree murder; three counts of first-degree assault; three counts of conspiracy to commit first-degree assault; three counts of second-degree assault; three

counts of reckless endangerment; one count of use of a firearm in a crime of violence; and one count of possession of a shotgun by a prohibited person.

***Stun Cuff***

On the first day of trial, just prior to *voir dire*, the State requested a bench conference to discuss the pending charges. After the parties approached the bench, defense counsel informed the trial court that Mr. Seck was "wearing a visible stun cuff." A stun cuff is a small device that is strapped to a person's wrist or ankle and is used to remotely administer an electric shock to the person wearing it.[2] The record does not disclose why Mr. Seck was wearing the stun cuff, or whether it was on Mr. Seck's ankle or wrist.

After alerting the trial court to the presence of the stun cuff, defense counsel stated: "I'm objecting to this, it's prejudicial." The court responded: "I'll leave that up to security." The bench conference was then concluded, and the proceedings resumed with *voir dire*. No further discussion of the stun cuff occurred.

***Trial Evidence***

At trial, Randall Dornon testified that, on the day of the shooting, he drove his girlfriend, Allison Cavoli, and his daughter, L.D., to 613 Light Street so that Ms. Cavoli could sell methadone to a friend, Adriana Smith, for $30. Mr. Dornon testified that, upon arriving at the residence, he parked his vehicle in the driveway and encountered Ms. Smith, who got in the vehicle's rear passenger seat. Ms. Cavoli gave Ms. Smith the

[2] *See* http://www.stun-cuff.com/page/919508 (last visited April 28, 2022); *see also Shifflett v. State*, 229 Md. App. 645, 654 n. 2 (2016).

methadone, and in return Ms. Smith gave Ms. Cavoli some Xanax as partial payment. Ms. Smith stated that her boyfriend would be home later in the day and that Ms. Cavoli would need to come back to get the $30. Ms. Smith then got out of the vehicle, and Mr. Dornon drove away.

Later that day, Mr. Dornon returned to 613 Light Street with Ms. Cavoli and L.D. to collect the $30. Mr. Dornon testified that, as he drove down the street toward the residence, he observed several individuals standing in the yard wearing ski masks and holding "big guns" at their sides. Mr. Dornon then observed another individual, who was not wearing a mask, walk out toward his vehicle and signal him to stop. Mr. Dornon stopped his vehicle in front of the residence and rolled down his window. The unmasked individual, whom Mr. Dornon could not identify, then leaned his head in the window and asked: "[A]re you looking for Adriana?" After Mr. Dornon responded in the affirmative, the individual stated: "[W]ell, she's not here. You can't be driving around here like that; we work around here." Mr. Dornon said, "okay," and then drove away slowly. When he got about three houses away, Mr. Dornon heard shooting, and he and his vehicle were struck by gunfire.

Ms. Smith testified that, at the time of the shooting, she lived at 613 Light Street with her boyfriend, Elijah Cowart, and another friend, Dwight Nichols. Ms. Smith testified that a third friend, Kyle Hall, stayed at the residence periodically. Ms. Smith testified that, prior to the shooting, Mr. Cowart, Mr. Nichols, and Mr. Hall had obtained a rifle and two shotguns and had brought them to the residence.

Ms. Smith testified that, on the day of the shooting, she, Mr. Cowart, Mr. Nichols, and Mr. Hall were all at the residence when she contacted Ms. Cavoli to obtain methadone for $30. Following that conversation, Ms. Smith met Mr. Dornon and Ms. Cavoli outside of the residence and, upon obtaining the methadone, told Ms. Cavoli to come back later to get the $30. After Mr. Dornon and Ms. Cavoli left, Ms. Smith went back into the residence and took the methadone. At some point, Ms. Smith, Mr. Cowart, Mr. Nichols, and Mr. Hall began talking about the $30, and they all agreed that Ms. Smith would not pay Ms. Cavoli the money. During that conversation, Mr. Seck entered the residence. Approximately 20 to 30 minutes later, Mr. Dornon and Ms. Cavoli returned to the residence.

Ms. Smith testified that, when Mr. Dornon and Ms. Cavoli returned to the residence, Mr. Cowart and Mr. Hall "started wrapping things around their faces." Ms. Smith testified that Mr. Cowart grabbed a rifle and Mr. Hall grabbed a shotgun. Ms. Smith testified that she believed Mr. Seck had also wrapped something around his face and grabbed a weapon. Ms. Smith, who was armed with a BB gun, then went outside with Mr. Cowart, Mr. Hall, and Mr. Seck.

Ms. Smith testified that, upon going outside and seeing Mr. Dornon's vehicle, "everybody started shooting at once." Ms. Smith testified that she saw Mr. Seck point a shotgun at Mr. Dornon's vehicle and fire. After approximately six to seven shots were fired, Mr. Dornon drove away from the scene, and Ms. Smith, Mr. Cowart, Mr. Hall, and

Mr. Seck went back into the residence. Ms. Smith testified that, upon entering the residence, Mr. Seck stated: "I hit that bitch."

Mr. Nichols testified that he, Ms. Smith, Mr. Cowart, and Mr. Hall were all at the residence on the morning of the shooting. Mr. Nichols testified that Mr. Seck came to the residence around 5:00 or 6:00 p.m. that evening. Mr. Nichols stated that, after Mr. Seck arrived, "the group" had multiple conversations in the hallway. Mr. Nichols testified that he was not involved in any of those conversations. At some point, Ms. Smith told the group that "they were there." Mr. Nichols testified that Mr. Cowart grabbed a rifle and Mr. Hall and Mr. Seck both grabbed shotguns. Shortly thereafter, the group, Mr. Seck included, left the residence while Mr. Nichols remained inside. A few minutes later, Mr. Nichols heard shots, and the group returned to the residence. Mr. Nichols testified that Mr. Seck was carrying a shotgun when he returned.

Mr. Seck testified in his own defense. He admitted that he went to 613 Light Street on the day of the shooting but claimed that he left before the shooting occurred. Mr. Seck denied being involved in the shooting.

### *Trial Court's Conspiracy Instruction*

As noted, Mr. Seck was charged with, among other things, three counts of first-degree assault and three counts of conspiracy to commit first-degree assault. One count of assault and one count of conspiracy was for each of the alleged victims: Randall Dornon, Allison Cavoli, and L.D. During trial, at the close of the evidence, the State submitted the following proposed instruction on the elements of conspiracy:

> The defendant is charged with the crime of conspiracy. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy, the State must prove: (1) that the defendant entered into an agreement with at least one other person to commit the crime; and (2) that the defendant entered into the agreement with the intent that the crime be committed.
>
> It is not necessary that a formal agreement be shown nor that it be manifested by formal words, either written or spoken. An agreement exists if the parties to a conspiracy tacitly come to an understanding with regard to an unlawful act or purpose. Both the agreement and the specific intent may be inferred from the surrounding circumstances.

After receiving the parties' proposed instructions, but before giving those instructions to the jury, the trial court asked the parties to make sure they "follow me on these instructions … in case I give something I shouldn't or omit … something."

The court thereafter read to the jury, verbatim, the instruction on the crime of conspiracy submitted by the State. The court also instructed the jury on the elements of first-degree assault. At the conclusion of its instructions, the court asked the parties if there were any exceptions. Defense counsel responded: "No, Your Honor, thank you."

***Verdict***

Following jury instructions and arguments by counsel, the trial court excused the jury to the jury room for deliberations. In so doing, the court provided the jury with a verdict sheet, which set forth the conspiracy counts as: "COUNT 23: Conspiracy Assault in the First Degree (Conspiracy with Elijah Cowart to assault Randall Dornon); COUNT 26: Conspiracy Assault in the First Degree (Conspiracy with Elijah Cowart to assault Allison Cavoli; COUNT 29: Conspiracy Assault in the First Degree (Conspiracy with Elijah Cowart to assault L.D., a minor)."

The jury eventually convicted Mr. Seck on Count 23, conspiracy to assault Mr. Dornon, and Count 26, conspiracy to assault Ms. Cavoli. The jury also convicted Mr. Seck of the charge of possession of a shotgun by a prohibited person. The jury acquitted Mr. Seck on all the other charges.

### *Sentencing*

The trial court subsequently sentenced Mr. Seck to a term of 10 years' imprisonment on the conviction of conspiracy to assault Ms. Cavoli (Count 26), and a consecutive term of three years' imprisonment, all suspended, on the possession conviction (Count 36). The court merged, for sentencing purposes, the conviction of conspiracy to assault Mr. Dornon (Count 23) into the other conspiracy conviction.

## DISCUSSION

### I. The Stun Cuff

Mr. Seck first contends that the trial court erred in deferring to courtroom security officials about whether Mr. Seck would wear a stun cuff during trial. Mr. Seck claims that the presence of the stun cuff was inherently prejudicial and that, before implementing such a measure, the court was required to find that the use of a stun cuff was justified by a compelling state interest. Mr. Seck argues that the court did not make any such finding, but instead delegated the decision to courtroom security. Mr. Seck asserts, moreover, that the record does not disclose any evidence that the use of a stun cuff was necessary.

The State contends that Mr. Seck failed to preserve his claim because he did not make a sufficient proffer as to the circumstances of the stun cuff's use and its visibility to

the jury, nor did he object to the trial court's failure to make specific findings as to the need for the stun cuff. The State contends further that, even if Mr. Seck preserved his claim, he has not established reversible error. Noting that the use of restraints is not prejudicial unless the restraints are visible to the jury, the State argues that the record in this case does not show whether the stun cuff remained on Mr. Seck following *voir dire*, or whether it was visible to the jury at any point during trial.

Before addressing the merits of Mr. Seck's claims, we first address the State's non-preservation argument, which we reject. It is undisputed that defense counsel objected to Mr. Seck wearing the stun cuff. It is also undisputed that the trial court ruled on that objection. Nothing more was required to preserve the issue. *See* Md. Rule 4-323(c) (To preserve any non-evidentiary ruling or order by the trial court, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court."). The State has provided no relevant authority to support its position that Mr. Seck was required to make a formal proffer or lodge an additional objection after the court failed to make an on-the-record finding as to the need for the stun cuff. Rather, the State relies on several cases that are distinguishable, either because the case involved a specific issue not applicable here, *see Grandison v. State*, 341 Md. 175, 207 (1995) (defendant's failure to make a formal proffer as to the contents and relevancy of excluded evidence), or because the case involved a defendant who failed to lodge any objection. *See, e.g.*, *State v. Westray*, 444 Md. 672, 686 (2015); *Nalls v. State*, 437 Md. 674, 691 (2014);

*Rivera v. State*, 248 Md. App. 170, 183 (2020). Thus, we conclude that the instant issue was preserved.

We now turn to the merits of this issue. "'[T]he conduct of a criminal trial is committed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse.'" *Choate v. State*, 214 Md. App. 118, 151 (2013) (citation omitted). "In exercising that discretion, however, the decision must be made by the judge personally; it may 'not be delegated to courtroom security personnel.'" *Wagner v. State*, 213 Md. App. 419, 476 (2013) (quoting *Whittlesey v. State*, 340 Md. 30, 84 (1995)).

Moreover, "an accused has a right to be tried [] without being shackled, chained, bound, handcuffed, gagged, or otherwise physically restrained." *Lovell v. State*, 347 Md. 623, 639 (1997). "Visible physical restraints during trial are inherently prejudicial to criminal defendants because they highlight the need to separate the defendant from the community at large, and undermine the presumption of innocence and the fairness of the fact-finding process." *Shifflett v. State*, 229 Md. App. 645, 667 (2016) (citations and quotations omitted). "For that reason, the Due Process Clause 'prohibits the use of physical restraints visible to a jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* (citing *Deck v. Missouri*, 544 U.S. 622, 629 (2005)).

Here, the record is silent as to who made the decision to place a stun cuff on Mr. Seck and the circumstances that led to that decision. The only time the stun cuff was

mentioned was just prior to *voir dire*, when defense counsel objected to the stun cuff and the trial court responded that it would "leave that up to security." From that exchange, it appears that Mr. Seck was brought into court wearing the stun cuff and that the decision to do so was made by someone other than the trial judge. Regardless, there is nothing in the record to indicate that the court made an "individualized evaluation" in allowing the stun cuff to be placed, or remain, on Mr. Seck, *see Miles v. State*, 365 Md. 488, 569 (2001) (quotation omitted), *nor* is there anything to indicate that the use of the stun cuff was based on any particular need for such a security measure. It is the trial court's duty to ensure that the record is sufficient to support Mr. Seck's restraint. *See Wagner*, 213 Md. App. At 476-78 ("The trial judge must ensure that the record reflects the reasons for the imposition of extraordinary security measures.") (quotation and citation omitted). Further, we caution the trial court that while it may seek security advice from courthouse security officers, it may not allow them to decide and must, itself, balance the needs of security against the needs of a fair trial. Given the limited facts, we must hold that the trial court abused its discretion.

That, however, does not end our inquiry, as we must now determine "whether 'the scene presented to the jurors,' and what they saw, 'was so inherently prejudicial as to pose an unacceptable threat to [the] defendant's right to a fair trial[.]" *Id.* at 478 (citing *Bruce v. State*, 318 Md. 706, 721 (1990)). "[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Id.* (citations and quotations omitted).

In *Knott v. State*, 349 Md. 277 (1998), for instance, the Court of Appeals held that the defendant was prejudiced by being compelled to stand trial "while garbed in his orange, prison-issued jumpsuit." *Id.* at 284, 292-93. The Court explained that "[c]ompelling a defendant to stand trial in identifiable prison attire impairs [the presumption of innocence] because it serves as a 'constant reminder' that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict." *Id.* at 286-87 (citing *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976)). In *Holbrook v. Flynn*, 475 U.S. 560 (1986), by contrast, the United States Supreme Court held that allowing four uniformed officers to sit behind the defendant during trial was not inherently prejudicial. *Id.* at 562, 568-69. The Supreme Court explained that the use of security guards was not inherently prejudicial because such a practice is subject to a "wider range of inferences" than other practices such as shackling and prison clothes, which are "unmistakable indications of the need to separate a defendant from the community at large[.]" *Id.* at 569.

Similarly, in *Williams v. State,* 137 Md. App. 444 (2001), this Court held that the trial court did not err in allowing the defendant to stand trial wearing a Department of Corrections' identification bracelet. *Id.* at 453. We explained that, "[a]lthough a person in an orange jumpsuit might stand out like the proverbial sore thumb, the same cannot be said when a person wears an institution's identification bracelet." *Id.* at 452. We also noted that there was "no evidence in the record as to the size of the courtroom or the distance between the jurors and [the defendant], which might have shed light on the

question of the visibility of the bracelet[,] … [n]or do we know whether [the defendant] wore the kind of clothing that would have helped to conceal the bracelet[.]" *Id.*

In *Wagner v. State*, we held that the trial court erred in failing to make the necessary findings to justify the use of shackles on a defendant during the rendition of the verdict and polling of the jury. *Wagner*, 213 Md. App. at 478. We ultimately concluded, however, that the defendant was not prejudiced by the court's decision and that, consequently, reversal was unwarranted. *Id.* at 482. We reasoned that the shackling was not inherently prejudicial because "the record [did] not reflect that the shackles were visible to the jury." *Id*. at 479-80. We noted that, as a general rule, "security measures that are not observed … by the jury generally do not offend due process rights to a fair trial." *Id.* at 480 (citing *Bruce*, 318 Md. at 716-18); *see also Deck*, 544 U.S. at 628 ("[A] criminal defendant has a right to remain free of physical restraints *that are visible to the jury*[.]") (emphasis added).

Against that backdrop, we hold that Mr. Seck was not prejudiced by the trial court's decision regarding the stun cuff. As noted, the only indication in the record as to the circumstances of the stun cuff came prior to *voir dire* when defense counsel informed the court that Mr. Seck was "wearing a visible stun cuff." From that limited description, we are unable to discern whether the stun cuff was visible to the jury. Although defense counsel claimed that the stun cuff was visible, he was standing next to Mr. Seck when he made the comment. There is nothing in the record to show whether the stun cuff was visible to anyone else, including the members of the jury. The record does not disclose

where the stun cuff was on Mr. Seck's body, where Mr. Seck was positioned in relation to the jury, or where the jury was located when defense counsel made the comment.

Moreover, as the State correctly notes, jury selection occurred at a separate location because of COVID safety procedures, after which the jury and the parties moved to the courthouse for trial. Upon arriving in court for the start of trial, but before the jury was brought into the courtroom, the prosecutor mentioned that he was planning on instructing two witnesses not to make comments about Mr. Seck being incarcerated. After Mr. Seck asked if the jury would know that he was incarcerated, defense counsel stated: "No, no, that's why you're wearing civilian clothes." From that exchange, and given that neither defense counsel nor Mr. Seck mentioned the stun cuff at any point after defense counsel's initial objection, it is entirely possible that the stun cuff was not used at the courthouse or was, at the very least, hidden by Mr. Seck's "civilian clothes." Thus, had the jury been able to see the stun cuff during *voir dire*, the opportunity to observe the stun cuff may have been relatively brief and therefore not inherently prejudicial. *See State v. Latham*, 182 Md. App. 597, 616-17 (2008) ("[O]ne inadvertent viewing of a defendant in handcuffs, even while in the courtroom, does not necessarily establish a need for corrective measures."); *see also Estelle*, 426 U.S. at 504-05 (compelling a defendant to stand trial in an orange, prison-issue jumpsuit is prejudicial because "the *constant* reminder of the accused's condition … may affect a juror's judgment" and because such attire "is so likely to be *a continuing influence throughout the trial* that … an

unacceptable risk is presented of impermissible factors coming into play") (emphasis added).

Finally, even if we assume that one or more jurors saw the stun cuff, we cannot say with any certainty whether they would have known what it was, much less that they would have associated it with Mr. Seck's incarceration. Like the prison identification bracelet in *Williams*, the presence of a small device on Mr. Seck's wrist or ankle is subject to a wider range of inferences than other inherently prejudicial indicators like shackles or prison clothes. Again, there is no evidence in the record to suggest that the jury would have inferred anything from the presence of the stun cuff, nor that "what they saw was so inherently prejudicial as to pose an unacceptable threat to [Mr. Seck's] right to a fair trial[.]" *Bruce*, 318 Md. at 721 (citing *Holbrook*, 475 U.S. at 572). As such, we cannot say that Mr. Seck was prejudiced.

**II. The Sufficiency of the Evidence**

Mr. Seck next claims that the evidence adduced at trial was insufficient to sustain his conspiracy convictions. He argues that the State failed to prove that he formed an agreement to shoot either victim. The State counters that sufficient evidence was presented from which the jury could have inferred the existence of an agreement.

"The test of appellate 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)).

"[T]he limited question before an appellate court 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.'" *Darling v. State*, 232 Md. App. 430, 465 (2017) (citations and quotations omitted) (emphasis in original). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). Moreover, "[w]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Neal v. State*, 191 Md. App. 297, 314 (2010) (citations and quotations omitted).

A conspiracy occurs when two or more persons combine or agree "to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Savage v. State*, 226 Md. App. 166, 174 (2015). "When the object of the conspiracy is the commission of another crime, … the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed." *Mitchell v. State*, 363 Md. 130, 146 (2001). The essence of a criminal conspiracy is the unlawful agreement, and the crime "is complete when the agreement to undertake the illegal act is formed." *Savage*, 226 Md. App. at 174. "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Townes v. State*, 314 Md.

71, 75 (1988). "A conspiracy may be shown through circumstantial evidence, from which a common scheme may be inferred." *Hall v. State*, 233 Md. App. 118, 138 (2017).

Mr. Seck was charged with conspiracy to commit a specific crime, namely, first-degree assault of the attempted battery variety. To prove that Mr. Seck committed that specific crime, the State needed to show that Mr. Seck "actually tried to cause physical harm to the victim, [that he] intended to bring about physical harm to the victim, and [that] the victim did not consent to the conduct." *Snyder v. State*, 210 Md. App. 370, 385 (2013). In addition, the State needed to show that Mr. Seck "committed the assault with a firearm or with the intent to cause serious physical injury." *Id.* at 386. Again, the State did not need to prove that Mr. Seck committed first-degree assault to convict him of conspiracy to commit first-degree assault; the State only needed to prove that Mr. Seck agreed to commit that crime. *See Savage*, 226 Md. App. at 174 ("The crime of conspiracy is complete when the agreement to undertake the illegal act is formed. The crime is unaffected by the performance of the act.") (internal citation omitted).

Here, the evidence adduced at trial established that, just prior to the shooting, Mr. Cowart, Ms. Smith, Mr. Nichols, and Mr. Hall were all at 613 Light Street and that all four individuals were aware that Ms. Cavoli was planning on coming to the residence to obtain $30 from Ms. Smith as part of a drug deal. The evidence also showed that, prior to Ms. Cavoli's arrival, all four individuals were involved in a conversation regarding whether Ms. Smith should pay Ms. Cavoli the $30. Although there was no evidence that Mr. Seck was part of that conversation, Ms. Smith testified that Mr. Seck arrived at the

residence around the time the plan was being hatched, and Mr. Nichols testified that, after Mr. Seck arrived, the "group" had a least one conversation to which Mr. Nichols was not privy.

Shortly thereafter, Ms. Cavoli and Mr. Dornon arrived at the residence, at which point Ms. Smith, Mr. Nichols, Mr. Hall, and Mr. Seck all grabbed guns, and at least two of them concealed their faces. All four of them then went outside, and approached Mr. Dornon and Ms. Cavoli, who were seated in Mr. Dornon's vehicle. Upon approaching the vehicle, several of the group members, Mr. Seck included, simultaneously opened fire at Mr. Dornon's vehicle. Following the shooting, the group immediately returned to the residence, and Mr. Seck exclaimed: "I hit that bitch."

Viewing that evidence in a light most favorable to the State, a reasonable inference could be made that Mr. Seck and at least one other group member conspired to shoot Ms. Cavoli and/or Mr. Dornon. Although there was no direct evidence of a formal agreement between Mr. Seck and the other group members to shoot Ms. Cavoli and/or Mr. Dornon, sufficient evidence was presented from which a common scheme could have been inferred. A reasonable inference can be drawn that Mr. Seck and at least one other group member was involved in a conversation minutes before Mr. Dornon and Ms. Cavoli's arrival. Following that conversation, and immediately upon being alerted to Mr. Dornon and Ms. Cavoli's arrival, Mr. Seck and the other group members engaged in nearly identical behavior, *i.e.*, grabbing a gun, going outside, shooting at Mr. Dornon and Ms. Cavoli, and returning to the residence. Those actions were done in apparent concert and

reflected a unity of purpose and design. *See Jones v. State*, 132 Md. App. 657, 660 (2000) ("If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may … infer a prior agreement by them to act in such a way."). The evidence was therefore sufficient to sustain Mr. Seck's convictions for conspiracy to commit first-degree assault.

**III. The Convictions for Conspiracy to Commit First-Degree Assault**

Mr. Seck next claims that, even if the evidence was sufficient to sustain his conspiracy convictions, one of those convictions must be vacated because the State only proved one conspiracy. The State concedes, and we agree, that one of the convictions should be vacated.[3]

In Maryland, when multiple conspiracies are charged, "the unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). "The conviction of a defendant for more than one conspiracy turns, therefore, on whether there exists more than one unlawful agreement." *Molina v. State*, 244 Md. App. 67, 169 (2019) (citations and quotations omitted). "Where the State fails to establish a second conspiracy, there is merely one continuous conspiratorial relationship … that is evidenced by the multiple acts or agreements done in furtherance of it." *Id.* (citations and quotations omitted). "To avoid double jeopardy violations, Maryland's appellate courts have vacated any unproven conspiracy convictions." *Id.* The

[3] In making its concession, the State erroneously contends that Mr. Seck "was convicted of, *and sentenced for*, two conspiracy charges." Mr. Seck was sentenced on only one of the convictions.

result is the same even where a trial court merges, for sentencing purposes, one or more of the conspiracy convictions. *Id.* at 171.

Here, while Mr. Seck was charged with committing two conspiracies, each with its own criminal objective, the State presented evidence of only one agreement, and the jury was not instructed that it had to find the existence of multiple agreements in order to convict Mr. Seck of multiple conspiracies. The State concedes that one of Mr. Seck's conspiracy convictions should be vacated. Accordingly, we will remand with instructions to vacate Mr. Seck's conviction on Count 23, the count on which he did not receive a separate sentence. *See Wilson v. State*, 148 Md. App. 601, 641 (2002) ("In accord with the principles of *Henry v. State*, 324 Md. 204 [] (1991), the most severe sentence imposed for the crimes of conspiracy should remain . . . [thus,] the other sentences imposed on the conspiracy counts are vacated").

## IV. The Trial Court's Conspiracy Instruction

Mr. Seck's final claim is that the trial court erred in instructing the jury on the charge of conspiracy. He claims that the court's instruction was deficient and misleading because the court referred to the objective of the conspiracy only as a "crime" and not as "first-degree assault." Mr. Seck argues that the court's instruction deviated from the pattern jury instruction on conspiracy, which directs the court to inform the jury of the specific crime that is the objective of the conspiracy. He then claims that the court's error was prejudicial because the jury could have found him guilty of conspiracy based on a belief that he conspired to commit a crime other than first-degree assault. Mr. Seck also

notes that, while the jury convicted him of possessing a shotgun, the jury acquitted him of the charges that required the State to prove that he intended to shoot Mr. Dornon and/or Ms. Cavoli. Mr. Seck maintains that the jury's verdict makes sense only if the jury thought that the specific intent to commit first-degree assault was not an element of conspiracy. Recognizing that he failed to object to the court's instruction, Mr. Seck asks that we exercise our discretion and review the issue for plain error.

The State argues that plain error review is inappropriate here, and that we should decline to address Mr. Seck's claim of error. The State contends that the trial court's "error" was not clear or obvious but was, rather, merely a slight deviation from the language of the pattern instruction. The State also contends that the court's instruction did not affect the outcome of the case because the evidence and arguments presented at trial clearly showed that the objective of the conspiracy was the assault. Finally, the State notes that defense counsel expressly stated that he did not have any objections to the court's instructions.

Generally, "plain error review is inappropriate 'as a matter of course' or when the error is 'purely technical, the product of conscious design or trial tactics or the result of bald inattention.'" *Campbell v. State*, 243 Md. App. 507, 538 (2019) (citing *State v. Brady*, 393 Md. 502, 507 (2006)), *cert. denied* 467 Md. 695. Even if we undertake plain error review, "we reserve plain error relief 'for errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Pietruszewski v. State*, 245 Md. App. 292, 323 (2020) (citing *Yates v. State*, 429 Md. 112, 130-31 (2012)), *cert.*

*denied* 471 Md. 127. "Even if an appellant is able to satisfy the threshold burden of proving a plain and material error, the Court need not recognize the error." *Steward v. State*, 218 Md. App. 550, 566 (2014). And we will grant plain error relief "only when the error was so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Newton v. State*, 455 Md. 341, 364 (2017) (citations and quotations omitted).

In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals adopted the Supreme Court's formulation of plain error review:

> First, there must be an error or defect – some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [court] proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

*Id.* at 578 (quoting *Puckett v. U.S.*, 556 U.S. 129, 135 (2009)) (internal citations and quotations omitted); *accord Malaska v. State*, 216 Md. App. 492, 525 (2014) (noting the adoption).

Even assuming that plain error review is appropriate here, we would decline Mr. Seck's request for plain error relief for several reasons. First, the conspiracy instruction given by the trial court was the exact same instruction, verbatim, that the parties had submitted to the court as part of their proposed jury instructions. It is entirely possible that the court gave that instruction because the court assumed that Mr. Seck wanted the

instruction worded in that manner. That scenario is made even more plausible by the fact that, after the court read the instruction, defense counsel affirmatively stated that he had no objections to the instructions as given. Those circumstances suggest potential trial tactics on the part of defense counsel. *See Givens v. State*, 449 Md. 433, 481 (2016) ("[P]lain error review is unavailable where a defendant fails to object as a matter of trial tactics.").

We are also not persuaded that any error the trial court may have made in giving the instruction was plain and material to Mr. Seck's rights. To be sure, the instruction given by the trial court differed from the pattern jury instruction, which directs the court to inform the jury of the specific crime to which the defendant is alleged to have conspired to commit. MPJI-Cr 4:08. Nevertheless, we cannot say that the trial court's omission of the specific crime of first-degree assault infringed upon Mr. Seck's substantial rights or affected the outcome of the proceedings. Mr. Seck faced three counts of conspiracy to commit first-degree assault. No other conspiracy charges were submitted to the jury. The verdict sheet provided to the jury expressly listed the three conspiracy charges as "Conspiracy Assault in the First Degree," and, again, no other conspiracy charges were included. At no point during deliberations did any of the jurors express confusion as to the substantive crime that was the object of the conspiracy. Later, when the verdict was announced and then hearkened in open court, the clerk described the conspiracy charges as "conspiracy assault in the first degree." Once again, none of the jurors expressed any concerns regarding the nature of those charges. Given these

circumstances, we find it improbable that the jury convicted Mr. Seck of conspiracy to commit a crime other than first-degree assault.

Last, because the jury was instructed on all the elements of first-degree assault, the court's instructions set forth all the elements of the conspiracy charge. That is, when the jury decided that Mr. Seck was guilty of two of the charges of conspiracy to commit first-degree assault, it had before it all the necessary elements on those charges. *See General v. State*, 367 Md. 475, 487 (2002) ("In reviewing the adequacy of jury instructions, we review the instructions as a whole."). That Mr. Seck was acquitted of the substantive charges of first-degree assault is immaterial and entirely consistent with his convictions for conspiracy to commit that crime. *See Savage*, 226 Md. App. at 174 (noting that "the essence of a criminal conspiracy is an unlawful agreement" and that "a conspiracy to commit a crime is entirely separate from the substantive crime"). We conclude that plain error relief is unwarranted.

**JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY REMANDED IN PART WITH INSTRUCTIONS TO VACATE APPELLANT'S CONVICTION ON COUNT 23 (CONSPIRACY TO COMMIT FIRST-DEGREE ASSAULT ON RANDALL DORNON); JUDGMENTS OTHERWISE AFFIRMED; COSTS TO BE PAID AS FOLLOWS: THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY WICOMICO COUNTY.**