Circuit Court for Montgomery County
Case No. 130704

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1328

September Term, 2017

RONNIE STEVEN LAND

v.

STATE OF MARYLAND

Wright,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 7, 2018

Ronnie Land was convicted in the Circuit Court for Montgomery County of conspiracy to commit burglary. He presents the following questions for our review:

> "1. Whether the trial court erred by admitting hearsay statements under Rule 5-803's co-conspirator exception when insufficient independent evidence of the conspiracy existed.
>
> 2. Whether the trial court erred by allowing unfairly prejudicial testimony from appellant's probation officer that indicated appellant's criminal history for the minimally probative purpose of establishing appellant's unemployment.
>
> 3. Whether the State violated appellant's due process rights by falsely telling the jury that it could find appellant in possession of stolen checks because of his proximity to someone who possessed them.
>
> 4. Whether, under the cumulative error doctrine, the foregoing errors collectively amount to reversible error.
>
> 5. Whether insufficient evidence existed to convict appellant of conspiracy to commit burglary, where the only evidence against him was his association with the alleged co-conspirator and an ambiguous hearsay statement from the co-conspirator."

We shall hold that the trial court did not err and affirm its judgment.

I.

The Grand Jury for Montgomery County indicted appellant with burglary in the second degree, conspiracy to commit burglary, theft, and conspiracy to commit theft related to a robbery of Twinbrook Swimming Pool in September 2016. In a jury trial, the court granted a judgment of acquittal on the theft charges, and the jury acquitted appellant of burglary and convicted him of conspiracy to commit burglary. The court sentenced appellant to a term of incarceration of fifteen years, all but five years suspended.

The following evidence was presented at trial: one or more people broke into Twinbrook Swimming Pool after Labor Day and stole cash and checks. On September 25, 2016, Dana Watkins and a friend drove into an Exxon station, where Denzel Parker approached her car and asked her to help him cash some checks made out to other people (hereinafter "the check-cashing question"), which she refused to do. He also said "We just hit up Twinbrook Pool" (hereinafter "the 'hit-up' statement"). Parker had a "large wad" of cash and more checks than he could hold in one hand in his book bag. Ms. Watkins identified appellant as standing at the gas station with Parker holding a significant amount of cash, and at one point appellant put his shirt in Parker's bag. Ms. Watkins called the police later to report the conversation, and testified at trial.

On February 10, 2017, the court held a hearing on a defense motion to sever parties (to sever appellant's trial from Parker's) and a motion to suppress evidence (specifically Ms. Watkins's identification of appellant).[1] While the court considered the severance motion, it examined whether the "hit-up" statement would be admissible hearsay, and ruled as follows:

> "It's a statement uttered by one conspirator that implicates the other. And, it's not *Bruton* [*v. U.S.*, 391 U.S. 123 (1968)]. So, if what you're saying is true, we could never have an example of a statement made in furtherance of the conspiracy admitted unless the person who uttered it was available to be cross-examined. So, that's not the issue here. The issue is, is this a custodial statement made by the defendant in violation of *Bruton*, or is it a conspiracy? And based on what I've heard, it's a classic conspiracy, it seems to me.

[1] The court found the motion to suppress evidence moot because the State agreed not to use Ms. Watkins's identification. The court granted the motion to sever because Parker would be unavailable for an undetermined period of time.

> It's happening in the middle of it, they've got the fruits of what they sought. And, now they need to convert it into cash. And they're asking Ms. Watkins how to do that in effect. And, if that's the case, it's made in the furtherance of a conspiracy. The only question is, who is the co-conspirator? And, there's evidence that each one of you can point to, to suggest that it's [appellant] or it's not [appellant]. So, I don't, I'm not going to detain you further on that issue. I'm going to rule that, that statement is an exception. It is a statement made by a co-conspirator, and it's admissible."

Appellant did not object to the court's conspiracy finding in determining that the statement fit the conspiracy exception.

On February 21, 2017, the first day of trial, appellant made a motion in limine to exclude Parker's hearsay statements, renewing his arguments that they violated the Sixth Amendment to the United States Constitution (the confrontation clause). The court heard arguments and ruled as follows:

> "[DEFENSE COUNSEL]: We have a statement that [is] a statement of past facts. Me and my man or we and my friend broke into the pool. This statement is, my argument to the Court, is not in furtherance of a conspiracy as if a conspiracy ever occurred, it happened in the past and is now over.
>
> The second statement, however, I believe is in furtherance of the conspiracy, and I'm not asking the Court to suppress the second portion of the statement, which has to deal with the checks. You know, here are the checks. You know, well, do you know anybody who would be willing to cash them? Because I do believe at this point that the statement allegedly made by Mr. Parker will be in furtherance of trying to continue to achieve the reason why those checks were obtained, by having someone cash the checks. And I think this distinction is important because I think it tells the Court as an example to what in furtherance of a conspiracy actually means. We have two different statements, one being clearly reflective but addresses the past, that is therefore not in furtherance of the conspiracy and therefore hearsay and should be excluded. And then on the other hand, we have the statement that is made for

> the purpose of continuing and furthering the conspiracy, and as I said, I'm not objecting to that portion coming in through the testimony from Ms. Watkins.
>
> ***
>
> THE COURT: As to the [other] issue of a co-conspirator, I will hear the objection at the appropriate time. You can just make it when the witnesses testify."

During the trial, Ms. Watkins testified to Parker's statements as follows:

> "[THE STATE]: Okay. And [Parker], what, if anything, did he say to you?
>
> [MS. WATKINS]: He said that—
>
> [DEFENSE COUNSEL]: Objection.
>
> [MS. WATKINS]: —he was looking for—
>
> THE COURT: One moment, ma'am. I'm sorry. Basis?
>
> [DEFENSE COUNSEL]: The grounds we discussed previously Your Honor. Hearsay.
>
> THE COURT: Overruled. You may answer.
>
> [MS. WATKINS]: He told me that he was looking for a broad or a crackhead to cash these checks and he wanted to know how can I help him cash the checks?
>
> ***
>
> [THE STATE]: What else did he say to you?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. You may answer.
>
> [MS. WATKINS]: He say we just hit up Twinbrook Pool.
>
> [DEFENSE COUNSEL]: Objection.

THE COURT: Overruled."

Also on the first day of the trial, appellant moved in limine to suppress the testimony of his probation agent Mazen Eraifeg. Mr. Eraifeg would testify that appellant did not have a job in the six months prior to the robbery, rebutting an alternative explanation for appellant's possession of a large wad of cash at the gas station. The court ruled as follows:

> "[DEFENSE COUNSEL]: I can tell the Court that I had a very similar fact pattern where the State's attorney in a different case called a probation officer to establish whether or not someone was reporting and instead of using the word reporting, they used the word, they were seeing each other, they had interactions and obviously the person in the trial did not identify themselves to the probation officer, either. I can tell the Court after that, I had the opportunity to talk to the jury. They knew right away that the person who came in was a probation officer or parole agent, and I think this is exactly the same type of conclusion they are going to draw here.
>
> I don't think that it is fair for [appellant]. I think it is extremely prejudicial for them to hear from someone that, oh, I have known [appellant] for six months. I've been seeing him frequently. He didn't have a job at the time. I don't think that it is proper testimony. Frankly, I don't think that it is relevant for the issue in the case that the State is trying to establish. I think a number of people can have cash for a number of reasons, and I just don't think that the testimony from the officer is required in this case.
>
> ***
>
> THE COURT: As to the issue of the probation officer's testimony concerning the fact that [appellant] had no job counsel is going to be free to argue as to the ultimate weight to be given that testimony. There will be no testimony that [appellant] was on probation or that it was a probationer and very little information about what a potential juror in another case may or may not have said I don't have any authority that anyone has cited to excluding that particular piece of evidentiary evidence, whatever the weight of it will be.

> It is simply one aspect of the State's effort to make their arguments concerning the fact that he was or was not unemployed. So I will permit that testimony."

During trial, after overruling a renewed continuing objection to Mr. Eraifeg's testimony, the court allowed Mr. Eraifeg to testify as follows:

> "[THE STATE]: Have you been helping [appellant] find a job?
>
> [MR. ERAIFEG]: I've been trying. Yes.
>
> [THE STATE]: Okay. And when did you begin helping [appellant] find work?
>
> [MR. ERAIFEG]: In June. June of 2016.
>
> [THE STATE]: And as part of your assistance with him is he to tell you if he gets a job?
>
> [MR. ERAIFEG]: That's correct.
>
> [THE STATE]: And as of September 25th of 2016, to your knowledge have a job?
>
> [MR. ERAIFEG]: He did not verify any employment with me. No.
>
> ***
>
> [DEFENSE COUNSEL]: So you—obviously you know [appellant]. Correct?
>
> [MR. ERAIFEG]: Yes.
>
> [DEFENSE COUNSEL]: And you also know that over the summer and in September of 2016 [appellant] was residing and living with his mom and dad. Correct?
>
> [MR. ERAIFEG]: That's correct.
>
> [DEFENSE COUNSEL]: And you also know that [appellant] according to you did not have employment. However you

> guided and counseled him for him to look for employment. Correct?
>
> [MR. ERAIFEG]: Absolutely. Yes.
>
> [DEFENSE COUNSEL]: And to your knowledge, [appellant] was actually looking for employment even though he couldn't, according to you, he didn't successfully obtain employment?
>
> [MR. ERAIFEG]: I couldn't really verify if he was actually looking but we were in the process of helping him find employment.
>
> [DEFENSE COUNSEL]: And [appellant] is twenty-three years old. Correct? If you know?
> [MR. ERAIFEG]: I'm not sure. I don't have my notes in front of me.
>
> [DEFENSE COUNSEL]: Early twenties?
>
> [MR. ERAIFEG]: Yes."

At the trial's conclusion, the State's closing argument included the following:

> "Again, there has been no explanation whatsoever as to why [appellant] has the property of Twinbrook Pool, has the wad of cash, has checks. And in fact you can find that legally he has the checks because he is with Mr. Parker. He has possession and control with Mr. Parker. He may have had some of Denzel's and so on and so forth."

After the jury found appellant guilty of conspiracy to commit burglary, the court sentenced him to a term of incarceration of fifteen years, all but five years suspended. This timely appeal followed.

II.

Before this Court, appellant argues first that the trial court did not establish a conspiracy by a preponderance of the evidence in order to admit Parker's hearsay statements in Ms. Watkins's testimony. He argues that the judge's findings included potential errors, such as the time of the gas station encounter and how much money appellant held. He points to case law that establishes that mere association with conspirators or conduct that is equally consistent with acting independently is insufficient to establish a preponderance of the evidence. The issue is preserved, appellant contends, because the trial court decided pre-trial and contemporaneous hearsay questions, including the conspiracy, and Maryland Rule 8-131(a) preserves "an issue raised in or decided by the trial court." Appellant says this error is not harmless error because Parker's statements are the primary evidence tying him to the burglary.

Appellant claims also that the probation officer's testimony constituted "prior bad acts" evidence which the court admitted improperly. Such evidence requires both special relevance and a showing that probative value outweighs any unfair prejudice. Appellant argues that Mr. Eraifeg's testimony indicated a supervisory role over appellant's job search, which implies prior criminal activity based upon parole or probation status.

Next, appellant argues that the State's multiple comments in its closing argument that Parker's possession of the cash and checks equaled appellant's possession were improper and prejudicial. He maintains that case law defines possession as dominion over or control of an item, which is not established by someone nearby exercising the dominion or control. As to preservation of the issue, he argues that although defense counsel did not

object at the moment of these statements, his general objection made soon afterwards, overruled by the court without explanation or discussion, preserves the issue for appeal. Appellant argues that even if each of the above issues constitutes harmless error alone, cumulatively, they constitute reversible error.

Finally, appellant claims there was insufficient evidence to prove conspiracy to commit burglary. He maintains that the State presented no direct evidence of a common plan to commit burglary, which is a necessary element of the conspiracy charge.

Before this Court, the State argues that the co-conspirator exception to the admission of the hearsay statements was not preserved because appellant objected at trial on the basis of the Sixth Amendment right to confront witnesses, which he does not argue on appeal. In fact, appellant waived the claim by admitting on the record that the conspiracy was established in order to admit one of the challenged statements. Even if preserved, the State argues that the evidence, although circumstantial, was sufficient to support a factual finding of conspiracy.

The State argues that Mr. Eraifeg's testimony did not indicate appellant's parole status, as the jury never heard Mr. Eraifeg's title or role. Many non-criminal programs assist with job searches and have assorted reporting requirements.

The State contends that its statements about the co-conspirators' possession of the cash and checks in its closing argument were not error because the prosecutor was not laying out a legal rule, but explaining the inferences that the jury could make from the evidence presented. If it was error, the State claims that it was not preserved as appellant did not make a contemporaneous objection.

Finally, the State argues that appellant and Parker's joint appearance bearing the fruits of their crime and Parker's reference to a joint undertaking allow a reasonable inference of a conspiracy between the men.

III.

We review the trial court's decision whether to admit relevant evidence, such as Ms. Watkins's testimony about Parker's statements, under an abuse of discretion standard. *Taneja v. State*, 231 Md. App. 1, 11 (2016). A trial judge abuses her discretion by "exercis[ing] discretion in an arbitrary or capricious manner or . . . act[ing] beyond the letter or reason of the law." *Cooley v. State*, 385 Md. 165, 175 (2005) (quoting *Jenkins v. State*, 375 Md. 284, 295–96 (2003)). To apply this standard, we will not second-guess any reasonable ruling on the admission of evidence, even if it could have gone the other way. *Peterson v. State*, 196 Md. App. 563, 585 (2010).

No one disputed that Ms. Watkins's testimony constituted hearsay. The judge ruled, however, that it fit into the exception of Rule 5-803(a)(5), which reads as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (a) **Statement by Party-Opponent**. A statement that is offered against a party and is: . . . or
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy."

We address first the State's preservation argument on the issue of the co-conspirator exception. Appellant's pre-trial motion and motion in limine presented Sixth Amendment Confrontation clause arguments. He did not object to the judge's finding in the pre-trial

hearing that "based on what I've heard, it's a classic conspiracy, it seems to me." In fact, appellant's counsel said during the hearing on his motion in limine, "[the check-cashing question], however, I believe is in furtherance of the conspiracy, and I'm not asking the Court to suppress [it]." He proceeded to challenge the "hit-up" statement on the basis that it was made after the conspiracy had concluded. Appellant accepted the finding of conspiracy during the hearing.

At trial, appellant objected to the introduction of both statements in slightly different ways. When the court asked for the basis for appellant's objection to the check-cashing question, he offered "[t]he grounds we discussed previously Your Honor. Hearsay." He did not offer a basis for his objection to the "hit-up" statement and the court did not request his grounds. If a trial court requests specific grounds, the objector's appeal is limited to the grounds she offers at trial. *Boyd v. State*, 399 Md. 457, 476 (2007). Contemporaneous *general* objections to evidence preserve all possible grounds for inadmissibility. *Id.*

Appellant did not preserve the co-conspirator issue for the check-cashing question, but he did for the "hit-up" statement. Appellant's reference to prior hearsay discussions for the check-cashing question incorporate his admission that the question was in furtherance of a conspiracy, and he cannot challenge that ground for the first time before this Court.[2] His objection to the "hit-up" statement, however, did not offer a specific basis, and preserved all possible grounds, including the co-conspirator issue.

[2] If appellant did preserve this issue, we would affirm based on the analysis *infra*.

To admit hearsay under the co-conspirator exception, a judge must "determine, preliminarily, whether a conspiracy had been established by a preponderance of the evidence." *Ezenwa v. State*, 82 Md. App. 489, 513 (1990).[3] At the hearing and at trial, the judge had evidence that supported an inference of a conspiracy. Both men carried large amounts of cash. Appellant put his shirt in the bag in which Parker carried the checks, suggesting they were there together and Parker did not conceal or keep the checks from appellant. Parker's "hit-up" statement began with "We," and no evidence tied anyone else at the station to him. There was no evidence appellant was not with Parker. Appellant offers suggestions, pure argument, about how he could have obtained the cash, but no evidence in favor of those alternative theories. The evidence supported the finding of a conspiracy by a preponderance of the evidence to allow the "hit-up" statement.

The trial court did not abuse its discretion in admitting Ms. Watkins's testimony about Parker's check-cashing question and "hit-up" statement.

IV.

The admission of Mr. Eraifeg's testimony is reviewed for abuse of discretion. Mr. Eraifeg never indicated his job or appellant's probationary status. Assistance in finding a job could come from any number of private and public sources that require reporting, notwithstanding appellant's counsel's single anecdote. In fact, Mr. Eraifeg indicated that

[3] Appellant points to one case, *Acquah v. State*, 113 Md. App. 29 (1996), to show that "mere association with conspirators" is insufficient to find a conspiracy. *Id.* at 51. *Acquah* considered the sufficiency of evidence for a *conviction* of conspiracy, which requires a higher "beyond a reasonable doubt" burden of proof.

he could not verify that appellant actually looked for a job, implying a non-supervisory relationship. Because it did not imply past criminal activity, Mr. Eraifeg's testimony did not constitute bad acts evidence and was admissible.

Appellant points to *Arca v. State*, 71 Md. App. 102 (1987), in which this Court reversed the admission of sanitized mug shots on the grounds that the "sanitizing" was insufficient to cure the evidence, to show that the court cannot admit sanitized bad acts evidence. There are two key differences in this case. First, the *Arca* photos had been only partially sanitized. While the nameplate was covered up, the photographs still showed the classic front and profile perspectives of mug shots, and testimony established that the police showed a witness these photos in a photo array, suggesting police had processed the defendant at some prior time. *Id.* at 106. While appellant argues that Mr. Eraifeg's testimony contains clues about appellant's record, it does not so strongly infer appellant's criminal past as the *Arca* photos. Second, the *Arca* defendant had admitted that he committed the act, completely eliminating the State's need to prove the issue of identity in the case. *Id.* Because the police did not need the eyewitness's identification or the photo that produced it, the photos had no probative value. Here, Mr. Eraifeg's testimony that appellant did not have a job eliminates one alternative to the State's theory that appellant got his cash from robbing the pool. That elimination is probative enough to admit evidence that does not reveal prior bad acts, and the judge acted within her discretion in admitting the evidence here.

V.

Rulings on the propriety of closing arguments are reviewed under the same abuse of discretion standard as admission of evidence. *Ingram v. State*, 427 Md. 717, 726 (2012). Multiple reasonable grounds existed to allow the statement "in fact you can find that legally [appellant] has the checks because he is with Mr. Parker." Appellant's counsel made a general objection later in the argument that might have applied to this claim, but did not offer specific grounds and was overruled by the court without counsel having been asked to offer any explanation. The preservation issue is ambiguous. Hence, we shall address the issue as though it is preserved.

Assuming *arguendo* that appellant did preserve it, the State's closing argument was not improper. The prosecutor may have been making the point that if the jury finds appellant is associating with or conspiring with Parker, it can infer that he possesses the contraband with Parker. The judge did not abuse her discretion in allowing the statement.[4]

VI.

We hold that the evidence was sufficient to support the judgments of conviction beyond a reasonable doubt. As to sufficiency of the evidence, "it is not the function of the appellate court to undertake a review of the record that would amount to a retrial of the case. Rather, we must view the evidence in the light most favorable to the prosecution, and the judgment can be reversed only if we find that no rational trier of fact could have

[4] Finding no error, we decline to address appellant's question about the cumulative error doctrine.

found the essential elements of the crime." *State v. Pagotto*, 361 Md. 528, 533 (2000) (internal citations omitted).

To support a conspiracy conviction, "[t]he State was not required to show a formal agreement . . . . In fact, the State was only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." *Acquah v. State*, 113 Md. App. 29, 50 (1996). The State can show this by "circumstantial evidence from which an inference of common design may be drawn." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (internal citations omitted).

As reviewed *supra*, appellant came to the gas station with Parker. Appellant held a stack of cash and used the book bag where Parker kept his cash and checks. Ms. Watkins testified that Parker said "[w]e" robbed the pool. The totality of the circumstantial evidence sufficiently supports a rational finding beyond a reasonable doubt that appellant and Parker conspired to commit the crime.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.