Circuit Court for Prince George's County
Case No. CT180531A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1535

September Term, 2019

IN SUNG KIM

v.

STATE OF MARYLAND

Kehoe,
Gould,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: August 31, 2020

Appellant In Sung Kim was convicted by a jury sitting in the Circuit Court for Prince George's County of conspiracy to commit theft over $100,000 and theft between $10,000 and $100,000. The court imposed concurrent suspended sentences of 364 days of imprisonment and five years of probation for each conviction. Appellant was also ordered to pay $197,668.68 in restitution. Appellant raises two questions on appeal, which we have slightly rephrased for clarity:

I. Did the trial court err in denying appellant's motion for judgment of acquittal on the conspiracy charge because there was insufficient evidence of an agreement with his alleged co-conspirator?

II. Did the trial court err in ordering $197,668.68 in restitution because the amount does not represent damages for which appellant was directly responsible?

For the following reasons, we answer both questions in the negative and affirm the judgments.

FACTS AND BACKGROUND PROCEEDINGS

The State's theory of prosecution was that between September 2013 and November 2014, appellant stole money, separately and in collaboration with Jang Wook Kim,[1] from a restaurant where they both worked as managers. The State's testimonial evidence came primarily from Chan Hee Bae, the owner of the restaurant. The State also introduced receipts of the restaurant's sales and data from its point of service ("POS") computer system. The defense denied any wrongdoing by appellant and suggested that Ms. Bae stole from her own restaurant to reduce her tax liability. Appellant presented no witnesses.

[1] Appellant and Jang Wook Kim are not related even though they share the same last name. We shall refer to Jang Wook Kim as "Jang" to avoid confusion.

The evidence, viewed in the light most favorable to the State, established that Ms. Bae was the owner and president of Kobe Japanese Steak House, a hibachi-style, 18-table restaurant, located in the Capital Centre in Largo, Maryland. Appellant worked at the restaurant as a server and was promoted to manager in 2009. Ms. Bae described the duties and responsibilities of a manager to include opening and closing the restaurant, ordering supplies, managing employees, and closing out the days' sales receipts at the end of the night on a written worksheet. She testified that appellant and Jang worked individually, alternating Monday through Thursday, but they worked together on Friday, Saturday, and Sunday. She testified that she only stopped by the restaurant a few times a week.

Ms. Bae testified that the restaurant managed its operation through a POS computer system. She explained that a server would take a customer's order and enter the order into the POS system. Once the customer paid the bill, the server would take the bill and signed credit card receipt or cash to the manager, who would then close out the order in the POS system. She testified that only a manager could close out an order. At the end of the night, the manager would total the day's sales from the cash and credit card payments to match against the day's sales in the POS system.

In November 2014, Ms. Bae received a tip that money was being stolen from the restaurant. Although what was sold and paid for in the POS system matched, she looked further and found discrepancies between customers' receipts and the POS data. According to Ms. Bae, if a customer came in and ordered a drink, an appetizer, and an entrée, the items would be entered in the POS system. When the customer finished her meal, the customer would pay, whether by credit card or cash, for all three items. The manager

would close out the drink and appetizer in the POS system, but the entrée would be "transferred" to a virtual table in the computer system. As subsequent customers purchased the same entrée, the customers would pay for the entrée, but each time, it would be transferred back to the virtual table and not closed out on the POS system until the end of the night. Although the restaurant would have sold several of the same type of entrées throughout the evening, the POS data would show only one entrée sold. According to the State, the managers pocketed (from the restaurant's cash sales) the difference between what the customers paid and what was reflected in the POS system when they closed the receipts for the night.

Ms. Bae testified that on the days between September 2013 and November 2014, when appellant was the sole manager, the difference between what customers paid and what was entered into the POS system was $31,276.04. When appellant and Jang worked together, the difference was $166,392.64. She testified that she once questioned appellant about the restaurant's lack of profits, and he explained that it was due to a rise in inventory costs and a downturn in the number of customers. She trusted him and did not inquire further. Once she discovered the theft, she confronted appellant, who denied any wrongdoing, but did not show up for work the next day or ever since.

DISCUSSION

I.

Appellant argues that we must reverse his conviction for conspiracy to commit theft because the State failed to prove that he and Jang entered into an agreement. Appellant

argues that, at most, the State's evidence demonstrated "a one-person operation[.]" The State disagrees, as do we.

The standard for 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." State v. Thomas, 464 Md. 133, 152 (2019) (citation omitted). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." Smith v. State, 415 Md. 174, 185 (2010). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." State v. Suddith, 379 Md. 425, 447 (2004) (cleaned up). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." In re Heather B., 369 Md. 257, 270 (2002) (quotation omitted). Thus, "the 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." Allen v. State, 158 Md. App. 194, 249 (2004) (cleaned up), aff'd, 387 Md. 389 (2005).

Appellant was charged and convicted of conspiracy to commit theft over $100,000. Conspiracy, a common law crime, is defined as the "combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful

means. The essence of a criminal conspiracy is an unlawful agreement." Mitchell v. State, 363 Md. 130, 145 (2001) (quotation omitted). "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." Khalifa v. State, 382 Md. 400, 436 (2004) (quotation omitted). We have stated:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Jones v. State, 132 Md. App. 657, 660 (2000).

Having reviewed the evidence presented by the State, we are persuaded that there was sufficient evidence from which a rational juror could find beyond a reasonable doubt that appellant was guilty of conspiracy. Appellant focuses on the mechanism by which money was stolen and characterizes it as "a single individual [] understat[ing] the amount realized from a customer and pocket[ing] the difference." The lens though which appellant views his actions is too narrow. Because both appellant and Jang used the exact same scheme, at the same time, to steal from their common employer, a rational juror could infer a conspiratorial agreement between them.

The restaurant was small—not a large-scale operation by any stretch. As managers, only they had the ability to create virtual tables and alter the POS data so it did not accurately reflect a day's sales. On the evenings they worked together, they submitted a single, handwritten worksheet on which they underrepresented the amount of money

earned by the restaurant. Under the circumstances, we are persuaded that a rational juror could infer that on the nights appellant and Jang worked together, each agreed to associate, cooperate, and contribute to the success of the conspiracy to steal from the restaurant. Accordingly, the trial court did not err in denying appellant's motion for judgment of acquittal on conspiracy to commit theft over $100,000.

II.

Appellant argues that the court erred when it ordered him to pay $197,668.68 in restitution, which he asserts represented losses on the nights he was the sole manager, nights when he and Jang worked as co-managers, and nights when Jang was the sole manager. Appellant urges us to vacate the restitution award and remand to reduce the restitution figure by the loss attributable to Jang when they worked together and the loss attributable to Jang when he worked alone, arguing that in both of those situations, he was not directly responsible for the losses. Again, the State disagrees, as do we.

We review a trial court's restitution order for an abuse of discretion, Silver v. State, 420 Md. 415, 427 (2011) (citation omitted), even if not objected to at the trial level, because an illegal sentence may be corrected at any time. Hughes v. State, 243 Md. App. 187, 2013 (2019).

In criminal cases, restitution may be ordered as part of a sentence, see Md. Code Ann., Criminal Procedure § 11-603(a) (2001, 2018 Repl. Vol.), or as a condition of probation. See also Pete v. State, 384 Md. 47, 55 (2004). Whether ordered as a sentence or a condition of probation, restitution may be ordered "only where the injury results from the actions that made the defendant's conduct criminal." State v. Stachowski, 440 Md.

504, 513 (2014). In other words, the harm must be a "direct result" of the criminal conduct. Id. There is, however, a narrow exception to this direct result requirement—when the defendant expressly agrees to pay restitution as part of a plea bargain. Id. at 513-16 (discussing Lee v. State, 307 Md. 74 (1986) and Silver, 420 Md. 415).

Here, the restitution amount was part of a joint sentencing recommendation. Appellant agreed to the restitution amount in exchange for leniency as to the duration of his sentence and probation. By agreeing to the sentencing recommendation, appellant entirely avoided incarceration and his probation was limited to five years. We need not determine whether appellant's sentencing agreement is the equivalent of a plea agreement to meet the narrow "direct cause" exception, because the restitution order here reflects the direct consequences of appellant's conduct.

First, contrary to appellant's assertion, the $197,668.68 restitution award does not represent any losses that occurred when Jang worked alone. Rather, the award represents the combined money stolen on days that appellant worked alone, $31,276.04, and days he and Jang worked together, $166,392.64.

Second, contrary to appellant's argument, he is liable for the acts of his co-conspirator Jang. See Mackey v. Compass Mktg., Inc., 391 Md. 117, 128 (2006) ("It is well established in Maryland law that a conspirator can be liable for the conduct of a co-conspirator."). The punishment for conspiracy to commit a crime may be the same as the underlying crime. See Md. Code Ann., Criminal Law § 1-202 (2002, 2012 Repl. Vol.) ("The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit."). Moreover,

Maryland's theft statute specifically provides for restitution. See id. § 7-104(g)(1)(iii)(2) ("A person convicted of theft of property or services with a value of . . . $100,000 or more . . . shall . . . pay the owner the value of the property[.]"). Accordingly, the sentencing court did not err in ordering appellant to pay restitution in the amount of $197,668.68. See U. S. v. Brewer, 983 F.2d 181, 184 (10th Cir.) ("When a defendant is convicted of conspiracy, a . . . restitution award may encompass all losses resulting from the conspiracy."); Moore v. State, 673 A.2d 171, 172 (Del. 1996) ("A defendant may be ordered to make restitution on the basis of acts of a co-conspirator[.]"); Com. v. Mathis, 464 A.2d 362, 374 (Pa. Super. Ct. 1983) ("we hold that restitution may be imposed upon a conspirator for the acts of his fellow conspirators done within the course of the conspiracy").

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.