UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0174

September Term, 2015

STATE OF MARYLAND

v.

JAMES ANTHONY McDONALD

Woodward,
Alpert, Paul E.
(Retired, Specially Assigned),
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 7, 2016

*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.

James Anthony McDonald was convicted by a jury sitting in the Circuit Court for Montgomery County of distribution of heroin, conspiracy to distribute heroin, and obstruction of justice. Because McDonald was a subsequent offender, the State filed a timely notice of intent to seek mandatory minimum ten year terms of imprisonment on McDonald's distribution and conspiracy convictions. The court declined to impose those sentences, however, and instead sentenced McDonald to two, concurrent ten year terms of imprisonment, five years suspended, for distribution and conspiracy; a concurrent three-year sentence for obstructing justice; and three years of probation upon his release from prison.

The State argues on appeal that the court erred when it declined to impose the mandatory minimum sentences. McDonald cross-appeals pro se raising 14 arguments. After reviewing the relevant facts and law, we shall vacate McDonald's sentences on distribution and conspiracy to distribute, and remand for a new sentencing hearing consistent with this opinion. We shall affirm the judgment in all other respects.

FACTS

The State's argument relates to sentencing, while McDonald's arguments relate to his trial during which the State presented evidence that on the evening of August 5, 2013, McDonald conspired with Joseph Harem Allen, Jr., to sell drugs. Allen and several police officers testified for the State; McDonald presented no witnesses. We shall provide a summary of what occurred at trial and at sentencing to place in context the arguments raised.

In April 2013, a few months after being released from ten years of incarceration on firearm and drug charges, Allen met McDonald at a family funeral. Allen shared the difficulties of earning a living with a criminal record, and McDonald told him to call, if he needed help. On August 5, McDonald called Allen and asked him to meet him at a 7-11 gas station in Silver Spring later that evening. Allen agreed to do so.

Allen arrived at the 7-11, waited a few minutes, and then saw McDonald arrive in a Range Rover. Allen entered McDonald's car, and McDonald drove away. Unbeknownst to either of them, plain-clothed police officers were surveilling the area and followed McDonald's car, which drove a mile or so in "a roundabout" manner to another gas station. Allen testified that while in the car, McDonald gave him a bag of heroin and told him to go to a certain intersection and wait for a phone call. McDonald instructed Allen to tell the unnamed caller to meet him at the intersection where they would exchange the heroin for money. Allen was then to meet McDonald and give him the money, less $200, which Allen was to keep.

McDonald filled his car with gas and then drove back to the 7-11 gas station by a direct route. McDonald dropped off Allen and drove away. Police officers followed McDonald's car and performed a traffic stop while other officers approached Allen at the 7-11. Allen consented to a search of his person, and the police recovered heroin from Allen's pants pocket. Allen told the police that the man who had just dropped him off had given him the heroin. Allen was placed under arrest, and McDonald was subsequently arrested. Allen

was taken to a police station where he waived his *Miranda* rights[1] and gave a taped statement relating the above.

Following their arrest, the State charged Allen and McDonald with felony drug charges. Allen testified that several weeks after their arrest McDonald came to his place of employment. McDonald told Allen that he had just learned of Allen's taped statement to the police in which Allen had implicated him. During their conversation, McDonald twice told Allen, "I know you'll do the right thing." Allen believed that McDonald was threatening him, that "without me, there's no case." The conversation was related to the State prosecutor, who then filed an obstruction of justice charge against McDonald and dropped the charges against Allen.

On February 20, 2014, the jury convicted McDonald of distribution of heroin, conspiracy to distribute heroin, and obstruction of justice. Less than a month later, the State filed a notice to seek mandatory minimum ten year terms of imprisonment on McDonald's distribution and conspiracy convictions. In response, McDonald filed a motion to strike the notice, arguing that his due process rights were violated because the State's notice to seek mandatory minimum sentences came after trial. The State opposed McDonald's motion, responding that its notice was timely filed under Md. Rule 4-245(c).

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On February 24, 2015, McDonald was sentenced. The court declined to impose the statutorily required penalty. The court stated:

> [I]t strikes the Court that it is a matter of fundamental fairness that somebody should know before they're going to trial that the State is going to elect to seek a minimum mandatory sentence[.] . . . I know that's what the mandatory minimums are, but I think the more enlightened for you is that notice is a matter of due process and fundamental fairness if an equal protection should be afforded to a person prior to going to trial so they really know what they're facing, instead of wondering what's going to happen in sentencing[.]

The court then sentenced McDonald to concurrent ten year terms of imprisonment, five years suspended, for his distribution and conspiracy convictions, and a concurrent three-year sentence for obstructing justice. He was to be placed on three years of probation upon his release from prison.

DISCUSSION

I.

The State argues that the sentencing court erred in not imposing mandatory minimum sentences of ten years without parole on McDonald's distribution of heroin and conspiracy to distribute heroin convictions as a second-time offender. McDonald adopts the reasoning of the sentencing court, arguing that the notice requirement was unconstitutional because it informed a defendant of the State's intent to seek a mandatory sentence after trial, rather than before trial. We agree with the State.

McDonald was convicted of violating § 5-602, Md. Code Ann., Criminal Law (Crim. Law), which makes it a crime for a person to distribute a controlled dangerous substance. He was also convicted of conspiracy to commit that crime, a common law offense. *See Bordley v. State*, 205 Md. App. 692, 717 (2012)("Conspiracy to distribute CDS is a common law crime.")(citation omitted).

The penalty provisions for violating §5-602 and conspiracy to violate § 5-602, provide:

> (a) *In general*. – Except as otherwise provided in this section, a person who violates a provision of §§ 5-602 through 5-606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding $25,000 or both.
>
> (b) *Second time offender*. – (1) Except as provided in § 5-609.1 of this subtitle, a person who is convicted under subsection (a) of this section or of conspiracy to commit a crime included in subsection (a) of this section shall be sentenced to imprisonment for not less than 10 years and is subject to a fine not exceeding $100,000 if the person previously has been convicted once: . . .
>
> (iii) of a crime under the laws of another state or the United States that would be a crime included in subsection (a) of this section or § 5-609 of this subtitle if committed in this State.
>
> (2) The court may not suspend the mandatory minimum sentence to less than 10 years.
>
> (3) Except as provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

Crim. Law § 5-608. *See also* Crim. Law § 1–202 ("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."). McDonald has a previous federal 2005 conviction for possession of heroin with intent to distribute. No one disputes that his federal crime is a felony in Maryland. *See* Crim. Law § 5-602. Accordingly, under § 5-608(b), McDonald should have been sentenced to imprisonment for not less than 10 years on each of his distribution of heroin and conspiracy convictions.

Md. Rule 4-245 governs subsequent offenders and provides:

> (c) **Required notice of mandatory penalties**. When the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days <u>before sentencing in circuit court</u> or five days before sentencing in District Court. If the State's Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

The Court of Appeals has stated that the purpose of Rule 4-245(c):

> is to facilitate the imposition of mandatory sentences prescribed by the Legislature. That is accomplished, not by giving the defendant a vested interest in avoiding mandatory sentences, but rather by permitting the mandatory sentence to occur, but only after ensuring that the defendant has received the requisite notice, thus, allowing him or her to challenge the assertion that he or she is a subsequent offender.

State v. Montgomery, 334 Md. 20, 29 (1994)(footnote omitted). If the State complies with the 15-day notice requirement in Rule 4-245(c), a sentencing court has no discretion but to impose the mandatory minimum sentence. *See Beverly v. State*, 349 Md. 106, 124 (1998)

("Whenever the statutory requirements are met and the requisite notice given, a trial court must impose the sentence prescribed in the mandatory sentencing statute; it has no discretion to do otherwise.")(quotation marks and citation omitted). It is undisputed that the State filed its intent to seek mandatory minimum sentences within the time prescribed in Rule 4-245(c). Accordingly, the court's sentence was erroneous and must be vacated.

The sentencing court's reasoning, that McDonald was denied due process because he was not given notice of the mandatory minimum sentence prior to trial, was rejected in *Loveday v. State*, 296 Md. 226, 237-38 (1983) and *Horsman v. State*, 82 Md. App. 99, 105-06, *cert. denied*, 321 Md. 225 (1990). *See also Lee v. State*, 332 Md. 654, 659 (1993) (holding that the requirements of Rule 4-245(b) satisfy due process requirements of notice and opportunity to be heard before being sentenced as a recidivist). Nothing in the trial court's reasoning or McDonald's arguments persuade us to overrule established precedence. Because the trial court was required to impose the second time offender sentences mandated by §5-608(b), we shall vacate McDonald's sentence and remand for re-sentencing consistent with this opinion.

II.

We now turn to McDonald's cross-appeal in which he raises 14 arguments for our review. Specifically, McDonald argues:

1. Whether the Framers left the 5th and 6th Amendment Right clause vague by not explaining that jurors can be private citizens and not bar members.

2. Whether the trial judge had impermissibly delegate[d] his power to non-judicial officers, in violation of the Article III Clause and separation of power doctrine?

3. Whether jurors usurpation of authority infringed upon the President's appointment of power, pursuant to the Article II Clause?

4. Whether the prosecutor approved jurors to engaged in a crime of False Impersonator in the courtroom?

5. Whether trial counsel had forfeit to raise a claim of selective prosecution claim, in violation of the appellant 6th Amendment Right?

6. Whether the verdict sustain insufficient evidence to obtain a conviction for conspiracy to distribute heroin, possession of heroin and obstruction of justice?

7. Whether trial counsel was ineffective in his duty to raise a [*Bruton v. U.S.*, 391 U.S. 123 (1968)] violation claim, to prevent the codefendant from testifying at the trial?

8 Whether the trial judge lacked standing to allow the prosecutor to pursued this case in the capacity of a third party without an injury in fact?

9. Whether the appellant was exposed to a double jeopardy claim, in which makes his court order to be void?

10. Whether the prosecutor's misconduct resulted to an official bribery charge in the courtroom?

11. Whether trial counsel neglected his lawful duty, by not calling the prosecutor and Mr. Allen's parole officer as a witness, to prove that Mr. Allen receive a gift and benefit from his dismissed charge?

12. Whether the appellant was deprived of an effective counsel, in violation of his 6th Amendment Right, when the judge appointed an incompetent lawyer?

13. Whether court officials had war against the Constitution and committed an "ACT OF TREASON" in the courtroom?

14. Whether the Chief Judge had obstructed the appellant's appeal process?

We have long held that pro se appellants are held to the same standards that represented defendants are held. *Grandison v. State*, 341 Md. 175, 195 (1995), *cert. denied*, 519 U.S. 1027 (1996)(citation omitted). To the extent that we can discern McDonald's arguments, we are persuaded that they are either not preserved for our review; are more appropriate in a post-conviction motion because they are fact-specific; or are meritless because they lack factual or legal support.

Unpreserved arguments

When an unobjected error is claimed, we look to Md. Rule 8-131(a). That Rule provides:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

We have said:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). Nonetheless, an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992)(quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). We have said: "[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court." *Nelson v. State*, 137 Md. App. 402, 424 n.5 (2001).

McDonald has failed to preserve the following arguments for our review because he failed to raise them below: his first four arguments about whether the trial court erred in allowing "private citizens," who are not "bar member[s]" and are "unskilled in the law," to sit as jurors on his trial; to the extent that he argues that the trial court erred by allowing his co-defendant Allen[2] to testify against him in violation of *Bruton v. United States*, 391 U.S. 123 (1988)(addressing the admissibility of a co-defendant's confession that implicates a defendant at a joint trial); and to the extent that he argues that Allen's testimony should not have been admitted because it was inadmissible hearsay. Under the circumstances, we

[2] We note that McDonald is factually incorrect – Allen was McDonald's co-conspirator, not McDonald's co-defendant.

decline to overlook the lack of preservation and exercise whatever discretion given to us under Md. Rule 8-131. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003)(the five words, "We decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.")(emphasis and footnote omitted), *cert. denied*, 380 Md. 618 (2004).

Ineffective assistance of counsel claims

"'We have consistently held that the desirable procedure for determining claims of inadequate assistance of counsel, when the issue was not presented to the trial court, is by way of the Post Conviction Procedure Act.'" *Walker v. State*, 338 Md. 253, 262 (quoting *Stewart v. State*, 319 Md. 81, 92 (1990)), *cert. denied*, 516 U.S. 898 (1995). This is because a trial setting provides the opportunity to develop a full record concerning the relevant factual issues that are challenged. *Id.* This is particularly true where the claim does not involve a legal question but centers more on resolving factual questions, *i.e.*, why did defense counsel act in a certain matter. *See Mosley v. State*, 378 Md. 548, 560-62 (2003).

We decline to address McDonald's ineffective assistance of trial counsel arguments because they are fact specific and best addressed in a post-conviction filing. These arguments include that his trial counsel failed to: raise a claim of selective prosecution because the State declined to prosecute Allen; pursue a *Bruton* violation; bring a lack of jurisdiction claim because the obstruction of justice charge occurred in Prince George's County, not Montgomery County where he was tried; pursue a double jeopardy violation

claim on grounds that he was punished both criminally and civilly in the same criminal prosecution; raise a bribery claim against the State prosecutor who gave Allen a "gift" in exchange for his testimony; call the State prosecutor and Allen's parole officer to show that they had illegally terminated Allen's parole in exchange for his testimony against McDonald; and file a written motion for judgment of acquittal. McDonald also claims that his counsel was ineffective when he "aided the prosecutor in a miscarriage of justice"; extorted legal fees from McDonald's wife knowing that he was going "to demonstrate poor representation"; and withheld "Jencks materials[,]" audio sound tapes, and "other emails" to him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

McDonald's sixth argument, that the evidence was insufficient to sustain his convictions for conspiracy to distribute heroin and obstruction of justice, is preserved for our review but meritless. To support his argument, McDonald claims that there was no evidence of a completed drug deal, no evidence of a buy/sell relationship between himself and Allen, and no evidence that he possessed any drugs. McDonald adds that Allen's testimony was not credible because he lied to the police officers, and he made inconsistent statements. McDonald argues that his obstruction of justice charge cannot be sustained because his statement was not a threat to physically harm Allen.

When reviewing the sufficiency of the evidence, our task is to determine "'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.'"

Taylor v. State, 346 Md. 452, 457 (1997)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(emphasis in original). "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)(citation omitted). 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." *Fraidin v. State*, 85 Md. App. 231, 241, *cert. denied*, 322 Md. 614 (1991)(emphasis in original). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998)(citing *Binnie v. State*, 321 Md. 572, 580 (1991)).

McDonald's evidentiary insufficiency claim is refuted by the record. Notwithstanding McDonald's arguments to the contrary, the evidence elicited at trial was sufficient for a juror to believe that McDonald conspired with Allen to distribute heroin and obstructed justice. *See Townes v. State*, 314 Md. 71, 75 (1988)(setting forth the elements of conspiracy); Crim. Law §§ 5-602 (distribution of CDS) and 9-306 (obstruction of justice).

McDonald's eighth argument, that the trial court erred in allowing the State to pursue charges against him even though Maryland is not a person to whom he could have caused any harm or injury, is likewise meritless. Although subject matter jurisdiction cannot be waived, *see State v. Walls*, 90 Md. App. 300, 305 (1992), the circuit court was properly vested with jurisdiction. *See* Cts. & Jud. Proc., § 1-501.

Lastly, McDonald argues that Chief Judge Krauser of the Court of Special Appeals "obstructed the due administration of justice and acted bias with a deep-seated favor[i]tism" by striking McDonald's pro se motion, not granting McDonald's request for a 60-day extension to file his motions, and ignoring McDonald's motion to clarify the record. We have reviewed the record and find no merit to those arguments.[3]

SENTENCES FOR DISTRIBUTION OF HEROIN AND CONSPIRACY TO DISTRIBUTE HEROIN VACATED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID BY APPELLEE/CROSS-APPELLANT.

[3] McDonald's 14th argument, "[w]hether court officials had war against the Constitution and committed an 'ACT OF TREASON' in the courtroom?" is not preserved for our review because he does not raise it in the argument portion of his brief. *See* Md. Rule 8-504(a)(6)(the contents of an appellate brief shall include "[a]rgument in support of the party's position on each issue.") and *DiPino v. Davis*, 354 Md. 18, 56 (1999)("if a point germane to the appeal is not adequately raised in a party's brief, the [appellate] court may, and ordinarily should, decline to address it.")(citation omitted).