UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0515

September Term, 2015

TIMOTHY CROCKETT

v.

STATE OF MARYLAND

Meredith,
Reed,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: March 17, 2016

The appellant, Timothy Crockett, was convicted in the Circuit Court for Baltimore City in a jury trial, presided over by Judge Lawrence P. Fletcher-Hill, of two counts of conspiracy to commit murder in the first-degree. By way of a belated appeal granted in a post-conviction proceeding, the appellant raises a single contention:

> that the evidence was not legally sufficient to support a conclusion that a conspiracy existed between the appellant and his alleged co-conspirator.

The Factual Background

On the evening of June 11, 2008, a group of young people congregated in the 2100 block of Herbert Street in Baltimore City. The group included Darius Harrison and Djuan Anderson, both of whom were murder victims before the evening was over. Other members of the group were Davon Madison, ultimately a co-defendant of the appellant on the murder and conspiracy charges; Davon's twin brother, Tavon Madison; and Tavon's girlfriend, Kadasha Braswell.

A potential for trouble inhered in the fact that represented in the group were members of two rival street gangs, the Bloods and the Crips. Although he himself denies it, the evidence showed that Davon Madison was a member of the Bloods. The tattoos on his neck and on his hands were tell-tale signs of membership in the Bloods, as he acknowledged in his testimony. Both Davon Madison and Kadasha Braswell testified that Darius Harrison, on the other hand, was a member of the rival Crips gang. Harrison was prominently wearing Crips colors that night. It was further established that the neighborhood where the gathering

was taking place was designated as Bloods territory. The gathering on Herbert Street imbibed alcohol and marijuana as the evening progressed.

At some time thereafter the appellant arrived to join the festivities. The appellant, then 23 years of age, had just been released from federal prison two weeks earlier, after serving time on a weapons charge. The appellant testified in his own defense. He admitted on cross-examination that while in prison he was affiliated with the "Bounty Hunter" set of the Bloods; although he disclaimed any activity with the Bounty Hunters since his release.

As the evening wore on, the appellant and Davon Madison, his fellow Blood, along with the Crip, Darius Harrison, and Djuan Anderson left the larger group and went to a bar on West North Avenue and North Smallwood Street. At closing time, the foursome left the bar and walked in the direction of Easterwood Park. According to the testimony of Davon Madison, their ostensible purpose was to retrieve a car so that the appellant and Madison could give Harrison and Anderson a ride home.

At the entrance of the park, the appellant directed Madison to wait there at the entrance, while he and the other two went into the park to retrieve the car. A few minutes later, Madison heard three or four gunshots from the direction of the park. The appellant came trotting out of the park alone, with a silver handgun in his right hand. He told Madison, "I don't want to hear any more about it."

The next morning, the police found the dead bodies of Harrison and Anderson, sitting on the concrete bleachers at one of the playing fields. Each had suffered two gunshots to the head, all fired from the same gun.

A Non-Particularized Motion

At the end of the State's case, the appellant made a blandly generic motion for a judgment of acquittal. When Judge Fletcher-Hill directed counsel to "make any motions that you may have," defense counsel said simply, "Oh yes. I'll make a motion for judgment of acquittal as to each and every charge." The court denied the motion. At the end of the entire case, the court inquired, "Are there any motions?" Defense counsel simply responded, "I'll renew my motions and submit on the evidence at this time." The motion was again denied "based on the same reasoning [given] after the State's case in chief."

Maryland Rule 4-324(a), of course, requires counsel to "state with particularity all reasons why the motion should be granted." In his brief, the appellant acknowledges, "[t]rial counsel did not advance any specific arguments or cite to any evidence. Indeed, she only generally asked the court to enter judgment 'as to each and every charge.'" The appellant acknowledged that at the end of the entire case, "she made no specific argument in support of the motion." In arguing for a "plain error" exemption from the preservation requirement, the appellant concedes:

> "As the State is sure to point out, trial counsel made no specific arguments in support of her motion for judgment of acquittal. In so doing, she ran afoul of Rule 4-324(a), which requires counsel to 'state with particularity all reasons

> why the motion should be granted.' Md. Rule 4-324(a). Failing to abide by those plain terms can have harsh consequences[.]"

(Emphasis supplied).

At trial, when the motion for a judgment of acquittal was made, the charges in this case that everyone was focusing on were those of first-degree murder. Conspiracy was an afterthought that was not even mentioned. In his brief, the appellant now acknowledges this, "The fact of the matter is that the conspiracy charge in this case was just an afterthought for the State." It equally appears clear that it was also an afterthought for the defense.

The appellant now argues about a lack of evidence as to a meeting of the minds between himself and Davon Madison. He argues that a finding of conspiracy cannot be predicated on gang membership alone. As an alternative, he argues that gang membership is not admissible even to corroborate a conspiracy otherwise inferable from the behavior of the participants. None of this, however, was remotely argued before the trial court. None of this, moreover, was even on the minds of anyone during the trial, as full attention was focused on the murder charges.

What followed must have been an unusual jury deliberation, although we are not provided with any of the tantalizing detail. The appellant tells us:

> "The jury room was marked by turmoil through out the trial. Ultimately, the Court had to excuse three jurors. Two of the ten remaining jurors had difficulty staying awake during the proceedings."

After deliberating for approximately ten hours, the jury informed the court that it could not reach a verdict on the first-degree or second-degree murder charges or on any of the other substantive counts. It could reach verdicts only on the two conspiracy counts.

Discretionary Notice of Plain Error

The bottom line is that the appellant's sole contention about evidentiary insufficiency was not preserved for appellate review. Acknowledging the failure to preserve the issue, the appellant invokes Maryland Rule 8-131(a) and asks us, in our discretion, to notice plain error. Although it appears to us, by way of cursory glance, that no error occurred, it is not necessary that we undertake a searching examination of what could be a very convoluted question. Even if, purely arguendo, it were clear that the evidence was not sufficient to support the conspiracy convictions, that still would not necessarily be a persuasive reason for us to overlook the preservation requirement.

Even in asking us to do so, the appellant is swimming upstream against a very strong current. As this Court pointed out in Williams v. State, 131 Md. App. 1, 7, 748 A.2d 1 (2000):

> "[T]here is no instance of a Maryland appellate court's ever applying the 'plain error' exception so as to entertain a non-preserved challenge to the legal sufficiency of the State's evidence."

The appellant, as is a disturbingly common practice among defense attorneys, makes the naive assumption that if an unpreserved objection would have had sufficient merit to prevail on appeal if it had been preserved, that in and of itself is good reason for noticing it

under the plain error exception to the preservation requirement. Error, even error that is unquestionably prejudicial, is not, however, dispositive on this discretionary question. It is merely the threshold for even considering the question. As we explained in Morris v. State, 153 Md. App. 480, 511-12, 837 A.2d 248 (2003):

> "The mere existence of error, in and of itself, has very little to do with the distinct question of why the appellate court, in its discretion, would wish to take official notice of the error, even assuming it to have occurred. If every material (prejudicial) error were ipso facto entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless. In all of the numerous instances where a Maryland appellate court has declined to notice plain error, it was, at the very least, assumed that some plain and material error has occurred."

(Emphasis supplied).

We spoke to the same effect in Perry v. State, 150 Md. App. 403, 436, 822 A.2d 434 (2002):

> "There is a naive assumption that if a contention would prevail on its merits that it should be noticed under the 'plain error' exemption, even if not preserved. Reversible error, however, is assumed, as a given, before the purely discretionary decision of whether to notice it even comes into play."

(Emphasis supplied).

On the subject of plain error, defense counsel typically go to great lengths to tell us that we are entitled to overlook the preservation requirement and to notice plain error. And they stop there. But we are already well aware of that fact. What we seldom hear are any of the half dozen or so reasons that might actually persuade us, in the exercise of our discretion, to overlook the preservation requirement even when we are not required to do so. In Austin

v. State, 90 Md. App. 254, 267-72, 600 A.2d 1142 (1992), we went to great length to set out some of those more prominent reasons. The issue is not whether we can overlook the preservation requirement. Of course we can. The issue is why we would wish to. Does this case deal with a subject on which we have been waiting impatiently for a chance to expound? Is this a case of truly outraged innocence? What, in short, would persuade us to overlook the otherwise very salutary preservation requirement? The appellant has not persuaded us of any reason why we would wish to overlook non-preservation in this case. We, therefore, shall not overlook it. The discretion to notice plain error is ipso facto the discretion not to notice plain error.

Plain Error Plus a Lot More

The appellant asks us to take an additional step beyond noticing plain error. His argument is that if this Court declines to consider and to decide the legal sufficiency issue because counsel failed to preserve it, that very failure to preserve the issue ipso facto demonstrates counsel's Sixth Amendment incompetence. The paradox is that the appellant's argument would require us to consider the very thing that non-preservation relieves us of any obligation to consider.

The argument is that the merits of the legal insufficiency claim are so transparently clear that defense counsel's failure to preserve the issue constitutes in and of itself an indisputable failure to satisfy both the performance prong and the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The merits of the unpreserved legal sufficiency issue, however, are not so transparently clear that they speak for themselves without any necessary in-depth consideration. A plausible argument could well be made that a meeting of the minds between the appellant and Davon Madison could permissibly be inferred from their behavior alone, without any mention of gang affiliation. For its proposition that "evidence of gang membership is insufficient to prove the existence of a conspiracy among gang members," the appellant's otherwise thorough appellate brief cites not a single Maryland case but only out-of-state authority. The proposition does not speak for itself but would seem to be one of first impression. Even if that proposition should ultimately prevail, it is by no means self-evident.

Even if, moreover, it should be established that gang membership is not, standing alone, sufficient evidence of a conspiracy, that would not necessarily mean that gang membership might not be a corroborative factor along with other direct or inferential evidence of concerted behavior to prove conspiracy, even if the direct or inferential evidence based on concerted behavior might not be sufficient to do so standing alone.

No answer as to the hypothetical merits, as the appellant seems to suggest, blithely leaps off the page. We do not know what our answer to the legal sufficiency issue would have been if that issue had been actually before us for in-depth analysis. Because it has not been preserved, we do not consider it. The appellant, however, would have us consider the very thing which we have opted not to consider. Without knowing what our hypothetical

answer to the sufficiency issue would have been, we cannot say that the prejudice prong of Strickland v. Washington would necessarily have been satisfied by the failure to preserve it for appellate review. If the hypothetical answer, moreover, is not transparently clear to us, we cannot say that it should have been so transparently clear to counsel that his failure to preserve the issue, particularly when it dealt only with a secondary issue in a then much more important case of two potential first-degree murders, was ipso facto, a failure to satisfy the performance prong of Strickland v. Washington.

On the issue of the allegedly self-evident inadequacy of counsel, we cannot follow the appellant's syllogistic route without considering the very question, to wit, the sufficiency of the evidence to support a conviction for conspiracy, that the appellant's failure to preserve it relieves us of all necessity of considering. This, in short, is not one of those very rare cases wherein the Sixth Amendment issue of the adequacy of counsel can be resolved on the trial record rather than be more accurately and efficiently assessed in a Post-Conviction Procedure hearing. See Smith v. State, 394 Md. 184, 199, 905 A.2d 315 (2000) ("We have repeatedly held that a claim of ineffective assistance of counsel generally should be reviewed in a post-conviction proceeding.").

JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.