UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2778

September Term, 2014

SIERRA McCOY

v.

STATE OF MARYLAND

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 25, 2016

Appellant, Sierra McCoy, was convicted by a jury, in the Circuit Court for Baltimore County, of first degree burglary, robbery, conspiracy to commit first degree burglary, and conspiracy to commit robbery. The court sentenced appellant to ten years on the conviction for first degree burglary, fifteen years, consecutive, on the conviction for robbery, and twenty years, concurrent, on the conviction for conspiracy to commit first degree burglary.[1]

On appeal, appellant presents the following questions for our review:

1. Did the circuit court err in denying the motion to suppress after concluding that appellant's confession was involuntary?

2. Did the circuit court err in merging the conviction for conspiracy to commit robbery, instead of vacating the conviction for that offense?

For the following reasons, we shall vacate appellant's conviction for conspiracy to commit robbery, and otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Because the issues on appeal address only the denial of a motion to suppress and a sentencing issue, we give only a brief background of the nature of the case. At approximately 3:54 a.m. on August 10, 2012, the elderly victim in this case, Geraldine Ecker, deceased at the time of trial, was in bed at her residence in Baltimore County, Maryland, when the basement door was kicked in. The assailants ransacked Ms. Ecker's home, left it disheveled throughout, and stole her television and a large container of coins. Phones were missing from the bedroom, and all the phone lines in the

[1] The court merged the count for conspiracy to commit robbery into the count charging conspiracy to commit first degree burglary.

upstairs living area were ripped out of the walls. Sharon Ecker Gard, Ms. Ecker's daughter, testified that Ms. Ecker sustained injuries to her wrists during the home invasion when the assailants tied her up with phone cords.

There had been a rash of similar crimes in the area. Baltimore City Police Detective Dale Wood testified that a related police investigation, which started in late July 2012, involved more than fifteen different incidents.

On August 18, 2012, at approximately 10:30 a.m., Detective Wood received a report from a concerned citizen about a telephone scam. The Baltimore City Police, tracked the telephone that made the call to a house on Cole Street in Baltimore City. At approximately 4:00 p.m., Detective Wood encountered appellant inside the residence, along with several other people. These individuals were then transported to separate holding cells at Baltimore police headquarters.

During one of appellant's interviews, appellant told Detective Wood that three men, Jimmy Pasko, Chris Pasko, and Mike Fields, were "[k]icking in doors, beating up elderly people,[and] tying them up" in an ongoing scheme that lasted six or seven months. As part of the criminal enterprise, appellant and her associates placed phone calls to elderly individuals, "[t]rying to get money from them." Using a false name, appellant would tell the potential victims that they owed on an outstanding bill to Baltimore Gas & Electric ("BGE"), usually in the amount of $800 to $900. Appellant explained that she learned this scheme from her mother, who had been stealing from the elderly for years before she died.

The reason appellant and her cohorts preyed on the elderly was because "they could be scared the most. You talk about turning off their lights or something I guess."

Appellant stated that, after contact with a potential victim was confirmed, appellant would then contact Jimmy Pasko, tell him "[i]t's a pick up," and provide him with an address. Mr. Pasko and his associates would break into the victim's home, sometimes "kicking in backdoors and stuff like that," assault the victim, rip the phone cords out of the wall, and then tie up the victim as he and his companions robbed the victim's home. Appellant did not receive any money in exchange for her role, but she did receive clothes and jewelry as proceeds. Appellant claimed that she did not know that Mr. Pasko was beating his victims during the home invasions she helped organize. She knew, however, of Mr. Pasko's violent nature and that Mr. Pasko "like to beat on people. Period. He get a kick out of it."

At the motions hearing, the parties litigated whether appellant's statements to the police were voluntary. Detective Wood testified that he first interviewed appellant at approximately 10:00 p.m. At 10:06 p.m., Detective Wood read appellant her *Miranda* rights.[2] Appellant waived her rights and agreed to speak with the detective. Detective Wood testified that appellant was not under arrest at the time, and although she initially was handcuffed at her residence, she was not handcuffed in the interview room at the police station. She was not, however, free to leave during the interview.

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

After appellant was informed that the purpose of the interview was to discuss robberies in her neighborhood, she provided names of three other people that Detective Wood decided would need to be interviewed. This interview concluded at approximately 11:15 p.m. Appellant agreed that the police treated her "kindly," did not force her to answer any questions, did not make her any promises, and gave her water when requested.

After this interview ended, four separate search warrants were prepared. Police also interviewed several other individuals.

Appellant remained in a holding cell during the night, where she slept. She was given the opportunity to use a bathroom and get a drink of water. Detective Wood testified that he ordered and paid for pizza.

After executing the search warrants, Detective Wood returned to police headquarters at approximately 8:45 a.m. the next morning. Appellant asked to be re-interviewed. Appellant again waived her *Miranda* rights. She agreed that she was not forced to make another statement, and she was initiating the further communication with the police.

During this second interview, appellant provided the names of other individuals, including Christopher Pasko, James Pasko, and Michael Fields. These individuals were included on a search warrant that was prepared in connection with this case.

Several hours later, at approximately 12:30 p.m., Detective Wood asked appellant to waive her right to prompt presentment to a commissioner. He stated that he did so

because "[s]he provided additional information that we had to follow up on." Detective Wood and Detective Samuel Bowden informed appellant of her "right to go quickly before, or promptly before the District Court Commissioner." Detective Wood said to appellant:

> We brought you back in here because, as we spoke before, we want you to sign a notice of waiver of right to promptly present, which means (inaudible) you would have twenty-four hours (inaudible) the time someone is picked up, be presented before the Court Commissioner (inaudible), okay? All right. Due to additional investigations we're conducting, okay, we were wondering if you would waive that and allow us the additional time to complete a thorough investigation, okay? All right. Are you willing to do that?

Appellant indicated that she "wish[ed] to waive [her] right to prompt presentment." The waiver was signed by appellant within 24 hours of the time she was taken into police custody.[3]

When Detective Wood was asked the purpose of holding appellant from 4:00 p.m. on August 18 to 12:30 p.m. on August 19, he replied: "To conduct a thorough investigation . . . we just had the cell phone and the house and wanted to know where it came from and who it was, using the phone, who was related to the crime." Detective Wood clarified that his purpose was to "[t]horoughly investigate" this case.

Detective Wood testified that appellant was considered "a person of interest" at approximately 4:00 p.m., but she was not considered a "suspect" until after she was

[3] Appellant was taken into custody at approximately 4:00 p.m. on August 18, 2012, and the form was signed approximately 20½ hours later, at approximately 12:27 p.m. on August 19, 2012.

interviewed the second time.[4] She was not taken to the Commissioner because "she provided us additional information we had to investigate, in reference to other suspects," and "[b]ecause we were still conducting a thorough investigation." He explained:

> We didn't know, the way, the way the investigation took place was we kept receiving additional information from everybody, herself and the other suspects, in reference to different types of crimes that were being committed, different, additional people that needed to be looked into. So as the course of the investigation went on, new evidence was presented and we had to investigate it.

Detective Wood agreed that, normally, an individual is taken to a commissioner when they are charged. In this case, however, he did not know whether appellant was going to be charged in connection with this case.

Appellant then testified at the motions hearing. She stated that the police arrived at her residence at 1:30 p.m. on a Saturday, asking questions about individuals and phone numbers. Appellant and other occupants of the home subsequently were transported to the police station.

Appellant was taken to a small interview room, and she was not handcuffed. She testified that she was not given food until the next day, Sunday, at approximately 4:00 p.m. more than twenty-four hours after she arrived. She denied that she was given pizza.

[4] After the detective testified that appellant became a suspect after "she was interviewed the second time," defense counsel asked if the second interview concluded at 11:00 p.m. Saturday night, and Detective Wood replied: "Correct." The circuit court found, however, that the "first" interview with appellant began that night at approximately 10:06 p.m., and both the State and appellant, in their opening briefs, referred to this interview as the first interview, making the second interview the next morning.

Appellant testified that she did not know that she could see a Court Commissioner until she was given the waiver of prompt presentment form. She did not see a commissioner until approximately 2:00-3:00 a.m. on Monday morning. She subsequently was charged in Baltimore County.

On cross-examination, appellant agreed that her first name was "Sierra," but she initially told police her name was "Tierra." She agreed that was a lie. Appellant confirmed that she made phone calls to elderly people, and she pretended to be a representative from BGE, telling these elderly people that they owed money on their bills and she would send someone to shut down their electricity. Appellant admitted that this also was a lie.

Appellant agreed that she had been convicted of theft over $500 in 2010 and theft under $500 in 2006. She agreed that she was not forced or threatened to make statements to Detective Wood, and she asked to speak to Detective Wood again before she made her second statement.

Detective Bowden was present for some interviews with appellant. He testified that he never threatened her, promised her anything, or used physical force to get her to talk to the police.

At the conclusion of this evidence, appellant argued that her statements were not voluntary because she was not promptly presented to a District Court Commissioner. The motions court denied the motion to suppress, stating, in pertinent part, as follows:

> First of all, with that, as to the testimony of Detective Wood, I . . . find that his testimony was credible, that the whole focus of this case was an investigation that was being conducted by the Baltimore City Police, that was handled by or run by Detective Wood, as to a number of, of crimes that were

> being committed and it's been described in this hearing as essentially phone scams involving individuals being contacted, elderly individuals, and . . . representations made as to whether someone works for BGE or related type of crimes and there was an investigation going on because there were at least nine incidents that were being investigated at the time so there were a number of individuals with, I guess, a lead that was given to the police which led them to the Defendant in this case on the date in question when she was detained for questioning and she was in custody of the detectives during this time period.
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> ***
>
> They were conducting an investigation and they needed information to see where the investigation would go. The Defendant has been described as a person of interest that led to a first interview and she provided further information which caused the detectives to conduct further investigation as to what information was given at that time. That led to a second interview, which was initiated by the Defendant in this case. I find that she initiated that second interview and then purportedly gave additional information, which led to additional investigation by the detectives and the police as to this, I would describe, as a large investigation as it has been described, at least, to me.

The court found that appellant validly waived her *Miranda* rights and agreed to speak to police. She was not forced to give a statement, or promised anything in return. The court disagreed that appellant was under any express or implied duress due to the delay. Noting that appellant knew the reason she was being interviewed, the court stated:

> Now, I also would say that, again, with respect to the investigation that was an ongoing investigation that was large in scope, that there had to be a time that was necessary to determine whether there would be eventual charges against [appellant] . . . and in fact, led eventually to sixteen counts against her. I don't know what was presented before the Commissioner in that regard but I can say the Court file reflects that she is, she had sixteen counts against her.

The court concluded its findings as follows:

> And this also goes to voluntariness as to whether food was brought to her or water was brought to her. I think that there, the, the video record is clear as to the fact that she was given water when requested and I find credible the detective's testimony that food was ordered by him and was given to the Defendant and I saw no evidence from the video record that was made that there was any fatigue issues that were involved in the taking of those statements as to sleep or food issues or water issues or whether she was allowed or not allowed to use a restroom when requested. So I find that the State has met its burden by a preponderance of the evidence in this case and looking at the facts and the totality of the circumstances, that does not support the suppression of the statements that were given and I deny the Motion to Suppress of the Defendant as to both statements.

DISCUSSION

I.

Appellant contends that the suppression court erred in denying her motion to suppress her statements. Specifically, she asserts that, "[u]nder the totality of the circumstances, especially in light of the violation of the right to prompt presentment, the statements were involuntary as a matter of law."

The State disagrees. It contends that the motions court correctly concluded that appellant's statements were voluntary.

In reviewing the motions court's decision on a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party on the motion, *Robinson v. State*, 419 Md. 602, 611-12 (2011). *Accord Gonzalez v. State*, 429 Md. 632, 647 (2012). We review the motions court's factual findings for clear error, but we make our own independent constitutional appraisal, "reviewing the relevant law and applying it to the

facts and circumstances of this case." *State v. Luckett*, 413 Md. 360, 375 n.3 (2010). *Accord Moore v. State*, 422 Md. 516, 528 (2011). The issue whether a confession is voluntary presents a mixed question of law and fact, subject to *de novo* review, with deference given to the suppression court's factual findings. *Winder v. State*, 362 Md. 275, 310-11 (2001).

In Maryland, a confession may be admitted against an accused only when it has been "determined that the confession was '(1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of *Miranda*.'" *Ball v. State*, 347 Md. 156, 174-75 (1997) (quoting *Hof v. State*, 337 Md. 581, 597 (1995)), *cert. denied*, 522 U.S. 1082 (1998). *Accord Knight v. State*, 381 Md. 517, 531-32 (2004); *Smith v. State*, 220 Md. App. 256, 273 (2014), *cert. denied*, 442 Md. 196 (2015). "[T]he burden of proving the admissibility of a challenged confession is always on the State." *Smith v. State*, 186 Md. App. 498, 519 (2009), *aff'd*, 414 Md. 357 (2010).

Here, there is no dispute that appellant's statement was obtained in compliance with *Miranda*. The only issue is voluntariness. In assessing voluntariness, the Court considers the totality of the circumstances, which includes the following relevant factors:

> "[W]here the interrogation was conducted; its length; who was present; how it was conducted; whether the defendant was given *Miranda* warnings; the mental and physical condition of the defendant; the age, background, experience, education, character, and intelligence of the defendant; when the defendant was taken before a court Commissioner following arrest[;] and

> whether the defendant was physically mistreated, physically intimidated or psychologically pressured."

Perez v. State, 168 Md. App. 248, 268 (2006) (quoting *Hof*, 337 Md. at 596-97).

Appellant's primary argument involves the delay before she was taken before a Court Commissioner. Maryland Rule 4-212(f) provides, in pertinent part, that, "[w]hen a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest." There is no dispute that this did not occur in this case.

That does not, however, automatically render her confession involuntary. Maryland Code (2006 Repl. Vol.) § 10-912 of the Courts and Judicial Proceedings Article provides that a violation of Maryland Rule 4-212(f) shall be only "one factor" and not the sole basis for excluding a confession:

> (a) A confession may not be excluded from evidence solely because the defendant was not taken before a judicial officer after arrest within any time period specified by Title 4 of the Maryland Rules.
>
> (b) Failure to strictly comply with the provisions of Title 4 of the Maryland Rules pertaining to taking a defendant before a judicial officer after arrest is only one factor, among others, to be considered by the court in deciding the voluntariness and admissibility of a confession.

Accord Williams v. State, 375 Md. 404, 415 (2003) (rejecting the argument that any unnecessary delay in presentment required suppression per se, noting that "[t]he test under the statute, and under the Constitution, remains voluntariness"). The Court of Appeals has made clear, however, that if the purpose of any unnecessary delay in presentment is to obtain incriminating statements, that circumstance is to be given "very heavy weight" when "determining the overall voluntariness of the confession. Obviously, the longer any

unlawful delay, the greater is the weight that must be given to the prospect of coercion." *Williams*, 375 Md. at 433.

This Court has made clear that not all delay is prohibited. Some delays are necessary, such as delays for purposes of "reasonable routine administrative procedures," determining whether a charging document should issue, verifying the commission of the crime itself, obtaining information in order to avert harm to persons and loss of property, and discovering the identity or location of other persons involved, or in preventing loss or destruction of evidence. *Odum v. State*, 156 Md. App. 184, 202 (2004). These violations do not violate Rule 4-212 or weigh against voluntariness. *Id.*

With respect to delays that are unnecessary, the weight to be given to the delay varies. "Class I" delays, those "not for the sole purpose of custodial interrogation," are not weighed heavily in the overall analysis. *Id.* at 203. "Class II" delays, those occasioned "deliberately for the sole purpose of custodial interrogation," should be weighed "very heavily" against voluntariness. *Id.*

Appellant asserts that her right to prompt presentment "was violated once the police had a basis for charging [her], which occurred no later than 10 hours after she was detained." She argues that this delay should be weighed heavily because it was "the functional equivalent of being deliberate" and was "designed for the sole purpose of soliciting a confession."

The State contends that the "circuit court correctly concluded the [appellant's] statements were voluntary based on the totality of the circumstances including the delay in

presentment." It asserts that the relevant period of delay was that between the first and second interviews (from 11:15 p.m. on August 18 to 8:45 a.m. on August 19), and the circuit court found as a fact that the delay was necessary "to determine whether there would be eventual charges against" appellant.

In assessing this delay in presentment to the Commissioner, we consider the time from when appellant alleges the unnecessary delay began, at 11:15 p.m. on August 18 after her first statement, until 9:30 a.m. on August 19, when she concluded her second statement.[5] *See Odum*, 156 Md. App. at 208 (concluding that any delay after criminal defendant gave written statement is not considered because the "statement must *result* from the delay"). Accordingly, the period of delay at issue was approximately nine hours and forty-five minutes.

As the State notes, the circuit court found that the delay was necessary due to the nature of the ongoing investigation of these crimes. This finding was not clearly erroneous. Detective Wood testified that the information that appellant gave during her two statements was used to develop further leads, identify additional suspects, and form the basis for additional search warrants. Given the nature of the underlying crime, *i.e.*, a telephone scam of seniors accompanied by threats, home invasion, assault, and robbery, it was not unreasonable for the police to try to obtain further information from appellant, to determine what charges to file against appellant and to obtain information regarding other persons

[5] According to the timestamp on the video recording of the second interview, appellant concluded her statement at approximately 9:28 a.m.

involved in the offense. As indicated, a necessary delay does not weigh against a finding of voluntariness.

With respect to appellant's contention that she received "physically coercive mistreatment," the circuit court rejected this argument.[6] The court made factual findings that appellant "was given water when requested," that appellant was given food,[7] that no evidence was presented "that there was any fatigue issues that were involved in the taking of those statements as to sleep or food issues or water issues or whether she was allowed or not allowed to use a restroom when requested."

It is well established that "[m]aking factual determinations, *i.e.* resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder." *Longshore v. State*, 399 Md. 486, 499 (2007). A motions court is entitled to "expressly credit[] the testimony of the detectives as to what transpired during the interrogation." *Whittington v. State*, 147 Md. App. 496, 525 (2002), *cert. denied*, 373 Md. 408, *cert. denied*, 540 U.S. 851 (2003). Moreover, in reviewing a suppression ruling, this Court

> will accept that version of the evidence most favorable to the prevailing party. It will fully credit the prevailing party's witnesses and discredit the losing party's witnesses. It will give maximum weight to the prevailing party's evidence and little or no weight to the losing party's evidence. It will

[6] In support, appellant states that she had to sleep on the floor in a six foot by eight foot room, where she was cold, and she was not fed until 26 hours after she was arrested.

[7] In assessing the inconsistency between the testimony by appellant and Detective Wood regarding whether she was given food, the court found that Detective Wood's testimony, as opposed to appellant's, was credible that "food was ordered by him and was given to" appellant.

> resolve ambiguities and draw inferences in favor of the prevailing party and against the losing party. It will perform the familiar function of deciding whether, as a matter of law, a *prima facie* case was established that could have supported the ruling.

Morris v. State, 153 Md. App. 480, 490 (2003), *cert. denied*, 380 Md. 618 (2004).

Given this standard of review, and the evidence presented, we are persuaded that the circuit court properly concluded that appellant's statements were voluntary. Accordingly, the court properly denied appellant's motion to suppress.

II.

Appellant next asserts that the circuit court erred by merging the conviction for conspiracy to commit robbery into the conviction for conspiracy to commit first degree burglary, instead of vacating the conviction. The State agrees that there was only one conspiracy, and the conviction for conspiracy to commit robbery should be vacated. We also agree.

"A criminal conspiracy is 'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444 (1985)). In *Jordan v. State*, 323 Md. 151 (1991), the Court of Appeals held that Jordan could not be sentenced for both conspiracy to murder and conspiracy to commit robbery because there was only a single agreement to commit murder and robbery. *Id.* at 161-62. "'The unit of prosecution is the agreement or combination rather than each of its criminal objectives.'" *Id.* at 161 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). The key is whether there was one, or more than one, agreement. *See Manuel v. State*, 85

Md. App. 1, 11-12 (1990) (conspiracy to distribute cocaine will not merge with the conspiracy to distribute heroin when the conspiracy emanated from a separate, distinct agreement), *cert. denied*, 322 Md. 131 (1991).

Here, at disposition, the court stated that, with respect to the convictions for conspiracy to commit a robbery and conspiracy to commit burglary "there is really only one conspiracy, they are not separate." Based on our review of the record in this case, we agree with the circuit court that appellant was involved in only one conspiracy. Therefore, we shall vacate the conviction for conspiracy to commit robbery. *See Savage*, 212 Md. App. at 26 (vacating one of two conspiracy convictions to avoid a double jeopardy violation).

CONVICTION FOR CONSPIRACY TO COMMIT ROBBERY VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY BALTIMORE COUNTY.