UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 521

September Term, 2016

---

PAUL DARNELL JENKINS

v.

STATE OF MARYLAND

---

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Eyler, Deborah S., J.

---

Filed: May 5, 2017

A jury in the Circuit Court for Wicomico County convicted Paul Darnell Jenkins, the appellant, of possession of heroin, second-degree assault, and two counts of failing to stop at the scene of an accident. The court sentenced him to four years in prison for possession of heroin, a consecutive six years for assault, and concurrent sentences of sixty days for each traffic offense.

The appellant presents two questions for review, which we have rephrased:

I. Did the trial court err by admitting the drug evidence without a showing of a proper chain of custody?

II. Was the evidence legally sufficient to support the second degree assault conviction?

For the reasons discussed below, we shall affirm the judgments.

## FACTS AND PROCEEDINGS

On October 19, 2015, Maryland State Police ("MSP") Corporal Brooks Phillips was working undercover with the Worcester County Narcotics Task Force. That day another officer with the task force called and gave him a physical description of a suspected heroin dealer driving a 2002 gold Ford Taurus with Delaware plates. The officer also gave Corporal Phillips a cell phone number for the suspect. Corporal Phillips called the cell phone number and, over the course of several calls and text messages, arranged to purchase four "logs," or 520 bags, of heroin from him.[1] Corporal Phillips arranged to meet the suspect at the parking lot of the Buffalo Wild Wings restaurant, in Salisbury. Corporal

[1] According to MSP Lieutenant Michael Daugherty, who testified for the State as an expert in narcotics, a "log" consists of ten bundles, and bundles are thirteen bags. Accordingly, four "logs" amounts to 520 bags.

Phillips arranged for a "gang unit" to perform surveillance and carry out an arrest. The "gang unit" consisted of MSP Senior Trooper Mike Porta, driving an unmarked Ford Explorer, with Salisbury Police Department ("SPD") Officer John Oliver in the passenger seat; and MSP Corporal Richard Lee Hagel, Jr., driving an unmarked Honda Pilot, with SPD Officer Jesse Kissinger and MSP Senior Trooper Moore as passengers. The gang unit officers all were wearing black vests with "Police" emblazoned on them, and their badges were visible.

Around 4:00 p.m., Corporal Phillips observed a 2002 gold Ford Taurus with Delaware plates pull into the parking lot of the Buffalo Wild Wings restaurant in Salisbury. The driver later was identified as the appellant. Corporal Phillips called the same cell phone number and changed the location of the meeting to the other side of the building. While he was making that call, he could see that the appellant was talking on his phone too. The appellant drove his vehicle to the other side of the Buffalo Wild Wings restaurant. Corporal Phillips called him again, changing the location of the meeting to the nearby Sam's Club parking lot. As the appellant was driving his car into the Sam's Club parking lot, Corporal Phillips told him (by phone) that he was in a parked green Chevrolet truck. In fact, he was not, but he had spotted an unoccupied green Chevrolet truck parked at the far side of the lot. The appellant parked next to the green Chevrolet truck and paused briefly. The gang unit immediately moved in to make an arrest. The appellant proceeded to drive forward.

With lights activated and a short siren blast, Trooper Porta pulled in front of the appellant, while Corporal Hagel blocked the appellant's car from behind. The officers

exited their vehicles with guns drawn and pointed at the appellant. They identified themselves as police officers and directed the appellant to stop and put his hands out of the window. Instead, he put his car in reverse, striking Corporal Hagel's vehicle and causing Officer Kissinger and Trooper Moore to have to dive out of the way. The force of the collision pushed Corporal Hagel's vehicle into Trooper Moore. The appellant then drove forward, nearly striking Trooper Porta and Officer Oliver, and jumped a concrete "island" before exiting the parking lot onto U.S. Highway 13. As the appellant passed, Trooper Porta used his baton to smash the driver's side window of the appellant's car.

The officers pursued the appellant in a high speed chase north on U.S. 13. In addition to speeding, the appellant ran a red light and struck a vehicle in an intersection. The pursuit continued, and the appellant crossed the state line into Delaware. Shortly thereafter he lost control of his car and spun into the opposite lane of traffic. As his car was coming to a stop, officers saw him throw a white plastic bag out of the passenger-side window of his car toward the trees on the side of the road. Officers moved in and arrested him.

Officer Kissinger retrieved the white plastic bag that the appellant had thrown out the car window. It was tied in a knot at the top. He untied the bag, saw "numerous" packages of what he suspected to be heroin wrapped in wax paper, and retied the bag. Following a discussion at the scene, the officers turned the bag over to Delaware State Police Trooper First Class William Wallace. That was at 4:20 p.m. At 6:00 p.m., TFC Wallace returned the bag to the Maryland State Police. Detective Kissinger was not there at the time. Later, Jessica Taylor, a chemist with the Maryland Crime Laboratory, tested

five of the recovered packages and determined that they contained heroin. At trial, Ms. Taylor testified as an expert in forensic chemistry, opining that the net weight of the recovered contraband was 96.68 grams. Lt. Michael Daugherty with the Maryland State Police, supervisor for the criminal and drug units in Dorchester, Somerset, Wicomico, and Worcester Counties, testified as an expert in narcotics and controlled dangerous substances. He opined that the contraband was packaged in a manner "consistent with street level distribution of heroin."

The appellant testified in his defense. He admitted that he was driving the gold Ford Taurus the officers observed. He stated, however, that he was taking marijuana to someone, not carrying heroin. According to the appellant, when the vehicles moved in on him at the Sam's Club parking lot, their lights and/or sirens were not activated. The appellant claimed to have thought that the vehicle that pulled in front of him was a lost motorist who was going the wrong way. He claimed he was listening to loud music and could not have heard anything. He also claimed that he was scared when he saw people with guns pointed at him and that he never saw Corporal Hagel's vehicle. When Trooper Porta broke his window, he thought someone was shooting at him. The appellant testified that he finally noticed that his pursuers were police officers near Delmar and the state line; but he continued driving because he needed to call his father for advice. He denied throwing a white plastic bag from his car.

The appellant was convicted by a jury of possession of heroin, second-degree assault of Trooper Porta, and two counts of failing to stop at the scene of an accident.

## DISCUSSION

### I. Chain of Custody

When Officer Kissinger first recovered the heroin evidence in this case, it was inside a white plastic bag. Officer Kissinger described the bag as "like a grocery bag like a Wal-Mart bag you would buy."

Trooper Wallace testified that he arrived at the scene of the appellant's arrest after Officer Kissinger retrieved the bag containing the heroin. At that time, it was thought that the appellant would be charged in Delaware, where the heroin was recovered, so Trooper Wallace was tasked with taking the heroin to a Delaware police barracks. His memory was that the heroin either was in a white plastic bag or a brown "evidence bag." At the barracks, he placed the bag in the evidence room, where it was unsecured; he did not recall seeing any other officers in the area at the time, however. He spoke with a supervisor about whether the case would remain in Delaware. He may have been out of the room when that conversation took place. The decision was made that the case would be pursued in Maryland, not Delaware. Trooper Wallace photographed the evidence and then drove to a gas station just shy of the Maryland state line and returned it to Corporal Hagel.

Corporal Hagel testified that the packages were still in a white plastic bag when he received them from Trooper Wallace. At the Maryland police barracks, Corporal Hagel took the evidence out of the white plastic bag, removed the rubber bands securing the packages, and counted 520 individual bags of suspected heroin. Corporal Hagel then secured all the individual bags in an evidence bag, sealed it, and sent it to the Maryland Crime Laboratory for testing. Corporal Hagel could not recall what happened to the white

plastic bag, but he testified that State's Exhibit 1—the individual bags of heroin—was the "contents of the [white plastic] bag[.]"

On appeal, the appellant contends the trial court erred in admitting the contraband in evidence. Specifically, he argues that the State failed to show an adequate chain of custody, mainly due to the absence of the white plastic bag. Furthermore, he maintains that Officer Kissinger, Corporal Hagel, and Trooper Wallace testified that the evidence was not as it was at the time it was recovered by the side of the road.

The State counters that this issue is not preserved for review because the defense did not object to the admission of the contraband; the issue has no merit in any event; and, even if there was error, the admission of the contraband was harmless beyond a reasonable doubt.

We disagree with the State that the chain of custody issue is not preserved for review. The defense objected to the State's chemist testifying at all, based on inadequate chain of custody evidence. The court overruled the objection. Twice during the chemist's testimony when she was about to express an opinion about the contents of the baggies the defense objected, again based on chain of custody. When the second objection was overruled defense counsel requested a continuing objection, which the court granted. The State argues that the chain of custody objection later was waived because, when the prosecutor moved to admit State's Exhibit 1, the contraband and the accompanying chemist's report, defense counsel objected on another ground, thereby failing to object to the actual contraband based on chain of custody and waiving the previous chain of custody objection.

Defense counsel made ample objections to the contraband evidence, including the chemist's testimony and the drugs themselves, based on chain of custody. After three objections, all at appropriate times, the court granted him a continuing objection. That objection applied to chain of custody generally and was not waived by counsel's adding a second basis for objection to the contraband evidence.

We do not find merit in the appellant's chain of custody argument, however. With respect to real evidence, proof of chain of custody is an aspect of authentication that "'assure[s] that the particular item is in substantially the same condition as it was when it was seized.'" *Bey v. State*, 228 Md. App. 521, 535–36 (2016) (quoting *Wagner v. State*, 160 Md. App. 531, 552 (2005)), *aff'd*, __ Md. __, No. 49, Sept. Term 2016 (filed Mar. 27, 2017). Chain of custody is sufficient if, viewed in a light most favorable to the proponent of the evidence, it shows a reasonable probability that the evidence that was analyzed is the same as the evidence that was seized, *i.e.*, that there was "'no tampering.'" *Cooper v. State*, 434 Md. 209, 227 (2013) (quoting *Breeding v. State*, 220 Md. 193, 199 (1959)). Arguments as to "[t]he existence of gaps or weaknesses in the chain of custody[,]" such as the appellant's, "generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Easter v. State*, 223 Md. App. 65, 75 (2015), *cert. denied*, 445 Md. 488 (2015). The standard of review of a trial court's ruling on whether evidence satisfies the chain of custody requirement is abuse of discretion. *Id.* at 74–75.

The trial court did not abuse its discretion. As the State asserts, there was "ample evidence to establish a reasonable probability that the drug evidence analyzed by the chemist was the same as the drug evidence that [the appellant] threw out his car window

on October 19, 2015." The supposedly missing white bag went to the weight of that evidence, not to its sufficiency to prove chain of custody.

**II. Sufficiency of the Evidence of Second-Degree Assault on Trooper Porta**

The appellant was charged with second-degree assault of Officer Kissinger, Trooper Moore, Corporal Hagel, Officer Oliver, and Trooper Porta. The only conviction was as to Trooper Porta. All the officers testified except Trooper Moore. In moving for judgment of acquittal, defense counsel argued that because Trooper Moore did not testify, there was no evidence that Trooper Moore was in fear of being hit, and therefore the evidence was legally insufficient to show second-degree assault of Trooper Moore. Defense counsel stated that he was making the same argument as to all the officers, even though they did testify. The motion was denied.

On appeal, the appellant advances a different argument. He contends the evidence was legally insufficient to support his conviction for second-degree assault of Trooper Porta because the jury acquitted him of the assault charges as to the other officers, and Trooper Porta's testimony was similar to the testimony of the other officers. Therefore, the evidence "did not support a second degree assault of any of the officers."

The State counters that this issue is not preserved for review and that, on the merits, it is not a sufficiency argument but an inconsistent verdict argument. The State maintains that the jury's acquittal on the assault charges pertaining to the other officers is immaterial to whether the evidence was sufficient to support the second-degree assault conviction as to Trooper Porta. Should we address the sufficiency of the evidence, the State argues that there was sufficient evidence to sustain the appellant's conviction.

We agree with the State that this issue is not preserved for review because the argument the appellant advanced below is not the one he makes now, and the one he makes now was not advanced below. *See* Md. Rule 4-324(a) (defendant must state with particularity the reasons why his motion for judgment of acquittal should be granted), and Rule 8-131(a) ("T]he 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[.]"). In any event, his argument lacks merit. We agree with the State that the appellant's argument on appeal concerns the consistency of the verdicts, not the sufficiency of the evidence. Factually inconsistent verdicts are permissible. *See McNeal v. State*, 426 Md. 455 (2012) (holding that factually inconsistent verdicts are permissible, while legally inconsistent verdicts are not); *see also Teixeira v. State*, 213 Md. App. 664, 683 (2013) (remarking that when faced with a factually inconsistent verdict, "[t]he jury's choices . . . while a source of wonder, are beyond appellate scrutiny"). And the evidence concerning Trooper Porta was sufficient to prove that the appellant committed second-degree assault of the attempted battery type by trying to drive into him in the Sam's Club parking lot.

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