

Circuit Court for Montgomery County  
Case No. 131575C

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2307

September Term, 2017

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TIMARIO GREGG

v.

STATE OF MARYLAND

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Meredith,  
Shaw Geter,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: July 3, 2019

\*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.

Appellant Timario Gregg was convicted by a jury in the Circuit Court for Montgomery County of five counts of armed robbery, five counts of conspiracy to commit armed robbery, one count of use of a firearm in the commission of a crime of violence, and one count of possession of a firearm after a disqualifying crime. The court sentenced him to a term of incarceration of thirty years: five years for each of the armed robbery counts; five years, concurrent, for each of the conspiracy counts; five years, consecutive, for the use of a firearm count. On appeal, he presents the following questions for our review, which we rephrase:

1. Was the evidence insufficient to sustain convictions for robbery with a deadly weapon, conspiracy to commit robbery, and the use of a firearm in the commission of a crime of violence?
2. Did the trial court err in admitting a handgun found in appellant's possession shortly before his arrest?<sup>1</sup>
3. Did the trial court err in admitting written evidence of rap music lyrics written by Shiloh Young and performed by him in the presence of appellant?
3. Is appellant's sentence illegal?

We agree with appellant that his sentencing for multiple conspiracies was error and shall vacate all but one conspiracy conviction. We shall affirm the remaining judgments of conviction.

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<sup>1</sup> Appellant did not include this question but argued the issue in his brief.

I.

On March 1, 2017, appellant and Shiloh Young robbed five students from Watkins Mill High School in Gaithersburg, Maryland. The five victims were R.C., C.L., E.M., F.C., and J.T. At the time of the robbery, at least four of the victims were high on marijuana they smoked during their lunch break. As the victims returned from lunch, the two men approached them. The victims' descriptions of their assailants differed as to some features, but they agreed that one robber was thin, light-skinned and mixed-race, and wore a black jacket and a mask. He was armed with a black semiautomatic handgun, and one victim noticed that he wore blue and white basketball shoes. The victims agreed generally that the second robber had dark skin and wore a green jacket and a hoodie sweatshirt cinched tight over most of his face. One testified that the second robber had a tattoo on his hand, and another testified that appellant and Young had skin tones that matched the skin tones of the robbers.

The robber with the gun asked for the victims' money and drugs, and he ejected the magazine from his handgun to show them that it was loaded. The second robber collected the victims' possessions, including two Apple iPhones. After the robbers left, the victims contacted the police. Police officers tracked the location of R.C.'s cell phone using the "Find My iPhone" app. A few hours after the robbery, an officer drove to the cell phone's location and took pictures of Young wearing a black jacket and blue and white basketball shoes, holding what the officer believed was a cell phone.

Two days after the robbery, Officer Timothy Hollis, using the “Find My iPhone” app, tracked R.C.’s cell phone to a green Ford Mustang. Other officers stopped the vehicle. At the time of the stop, appellant was in the passenger-side rear seat and Young was in the driver-side rear seat. Corporal Ray Bennett testified that he noticed the front seat passenger handing F.C.’s cell phone to Young at the time of the stop and that he confiscated it; his body camera footage showed him seizing the phone. Sergeant Robert Perkins testified that he used the “Find My iPhone” app to set off an alarm on R.C.’s cell phone. Sergeant Perkins testified that he discovered the cell phone inside or underneath a green jacket on the middle seat between appellant and Young.<sup>2</sup> On the night of the arrest, the officers observed appellant wearing the green jacket.

The officers searched the vehicle and found a black 9mm Hi-Point semiautomatic handgun in appellant’s jacket and a black 9mm Smith and Wesson semiautomatic handgun in the glove compartment. Both handguns matched the vague descriptions provided by the victims. The 9mm Hi-Point was linked to Young at trial through a chat message he sent which read “It’s a hi point 9.” The State also introduced two photos Young had sent from the victim’s phone that depicted him holding two handguns.

Sergeant Michael Yu, a police expert in the forensic analysis of cell phones, removed the data from one of the victims’ cell phones, which contained information linking

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<sup>2</sup> It is unclear from the trial transcripts and the parties’ briefs whose phone Corporal Ray Bennett seized before removing appellant and his co-defendant Shiloh Young from the Ford Mustang.

it to Young and appellant.<sup>3</sup> Sergeant Yu noted that someone attempted to reset the phone’s password an hour and a half after the robbery. He found on the phone a video of Young rapping, which he testified was created on March 1, 2017 at 9:55 p.m. He testified that it was “highly likely . . . that it was created on [the victim’s] phone” because it was created on the same iPhone model with the same version of the iPhone operating system and in a chronological series of other media files. Appellant appeared in the background of that video.

Between the time of the robbery and appellant’s arrest, someone used the phone to access an account with the username “Simba” (Young’s nickname), to send a message which read “This [is] Simba,” and to access shilohv21@gmail.com and onllysimbabookings@gmail.com. Someone also logged into the Twitter account “only\_simba” at 7:07 p.m. on March 1. This caused the Twitter app on the cell phone to synchronize the user’s previous messages, which included a message sent before the robbery explaining that the user did not have a cell phone but was “about to.”

Appellant and Young were tried together. The State played for the jury the video of Young rapping, muting the audio and thus limiting the jury’s exposure to the profane and largely irrelevant lyrics. The court admitted the silent video, two still photographs

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<sup>3</sup> The trial transcripts and the parties’ briefs refer to both R.C.’s and F.C.’s cell phones as “State’s Exhibit 7.” The exhibit was a single iPhone. R.C. identified State’s Exhibit 7 as his cell phone. Sergeant Michael Yu testified that he examined State’s Exhibit 7 and copied the data at issue. Detective Marisol Orlina contradicted Sergeant Yu and testified that R.C.’s iPhone contained no data and that the information recovered by Sergeant Yu came from F.C.’s phone.

from the video, and the text of two inculpatory lyrics: “Had to rob a few n—s ain’t have no patience,” and “Where is my semi[automatic handgun] it’s right on my hip.”

As noted, the jury convicted appellant of robbery, conspiracy to rob, use of a firearm in a crime of violence, and possession of a firearm after a disqualifying crime. The court sentenced appellant, and this timely appeal followed. Appellant’s and Young’s appeals before this Court were consolidated for argument.

## II.

Before this Court, appellant argues that the evidence was insufficient to support the judgments of conviction of armed robbery, conspiracy to commit armed robbery, and use of a firearm in a crime of violence. He maintains that the State presented no evidence placing him at the scene of the robbery and that inconsistent victim descriptions, the presence of firearms and one of the stolen cell phones in a car with three other people, and his presence in a rap video on the stolen cell phone could not establish his guilt beyond a reasonable doubt. He emphasizes the inconsistencies in the victims’ descriptions and notes that the police did not show the robbers’ clothing to all the victims, show his or Young’s photograph to the victims, or present fingerprint evidence tying him to the physical evidence.

Within his sufficiency of the evidence argument, and not included in the questions he presented to this Court, appellant claims that the trial court erred in admitting the

handgun into evidence.<sup>4</sup> He argues that the gun was irrelevant because there was no evidence that the gun was the one used in the robbery. He argues in the alternative that its probative value was substantially outweighed by the danger of unfair prejudice. Because the handgun was one of “thousands of similar looking guns,” he argues, its probative value was substantially outweighed by the danger of the jury concluding that he had a general propensity to commit crimes.

Appellant argues that the written lyrics<sup>5</sup> from Young’s rap video were irrelevant because, lacking sufficient detail, they were artistic expressions and not statements of fact. He argues also that the lyrics were unfairly prejudicial, as they tended to prove that he was a “violent thug” with a propensity to commit crime.

Finally, appellant argues that his sentence is illegal because only one conviction and sentence may be imposed for a single common law conspiracy. Hence, all but one of his conspiracy convictions must be vacated.

The State concedes that the circuit court erred in convicting and sentencing appellant multiple times for the same conspiracy. The proper remedy, the State suggests, is to vacate all but one conspiracy conviction and all but one sentence. The State maintains, though, that the evidence was sufficient to support the other convictions and that there was no error in admitting the handgun or the rap lyrics.

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<sup>4</sup> He appears to adopt this argument in its entirety from Young’s brief.

<sup>5</sup> Though his question raises the issue of “video evidence of rap music lyrics,” he appeals the admission of the written lyrics, not the silent video played for the jury.

As a threshold issue, the State argues that most of appellant’s sufficiency of the evidence arguments are not preserved for our review because he did not make below the arguments that he now makes before this Court. In his motion for judgment of acquittal, he argued only that “none of the cell phone information had any applicability to [him],” and that there was “contradictory identification” evidence which undermined the credibility of the witnesses. The State argues that the rest of his claims are not preserved for our review.<sup>6</sup>

On the merits, the State argues that the evidence was sufficient to support appellant’s convictions. The State points out that appellant’s co-defendant Young, “clearly committed an armed robbery with someone else.” Victims described the second robber as wearing a green jacket and bearing a tattoo on his hand. Appellant matched the physical description agreed upon by the victims, had a tattoo on the back of his hand, and was wearing a green jacket two days later upon his arrest. Further, appellant was arrested with Young, in joint possession of the stolen cell phone and a handgun, and he was connected to Young by the rap video (recorded on a stolen cell phone the day of the robbery).

The State argues that the handgun’s admissibility is not preserved for our review. Appellant’s codefendant objected to the admissibility of the handgun at trial, but appellant

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<sup>6</sup> The State argues that the following arguments are not preserved for our review: that “mere presence at the scene of a crime is not sufficient to establish guilt”; that appellant’s presence on the cell phone video and his presence two days later in a car with other suspects was the only evidence to support the conviction; that the victims gave inconsistent descriptions; that the gun was not probative; that the police did not show the defendants’ clothing to all of the victims; that the police did not show photo arrays to the victims; and that the police did not try to lift fingerprints from the physical evidence.

did not object. He did not argue the handgun issue at his motion for judgment of acquittal. Turning to the merits, the State argues that the circuit court did not abuse its discretion in admitting the handgun. The gun was relevant, the State argues, because two victims examined the gun at trial and testified that it resembled the one that was used in the robbery. The police found the gun in the back seat of the car in between appellant and Young. The State argues that the probative evidence was relevant and not unfairly prejudicial.

The State argues that the trial court did not err or abuse its discretion in admitting the rap lyrics printed in Sergeant Yu’s report. The State argues that the words of the “robbery” lyric go to identification of the robbers and motivation for committing the robbery. Young apparently wrote the lyrics shortly after the robbery, and some of the words arguably refer to Young’s desire to get a cell phone—Young’s earlier phone chat message stated that he was “about to” have a cell phone. As to the “Where is my semi its right on my hip” lyric, the State argues that the words referred to Young’s possession of and familiarity with a semiautomatic handgun, the type of weapon used in the robbery. Because Young and appellant were together on the day of the robbery and matched the descriptions of the robbers, the State argues, evidence that incriminated Young (such as rap lyrics written on a stolen cell phone) was relevant also to the charges against appellant. Alternatively, assuming error *arguendo*, the State argues harmless error because the robbery lyric was relatively unimportant in the State’s case and the handgun lyric was cumulative of other evidence that appellant possessed a handgun.

III.

When reviewing a conviction for sufficiency of the evidence, we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Manion*, 442 Md. 419, 430–31 (2015). We view the evidence in the light most favorable to the State and defer to the jury’s ability to choose among differing inferences to reach its verdict. *Jackson*, 443 U.S. at 319; *Manion*, 442 Md. at 431.

Addressing the State’s preservation argument first, we hold that appellant preserved for our review all his arguments related to the identification of appellant as the robber. He did not say specifically that mere presence at the scene of a crime is insufficient to support a finding of guilt or that photos or clothing were not shown to all the victims. Nonetheless, it was clear to the trial court that appellant was contesting identification of him as the robber. *See Conyers v. State*, 354 Md. 132, 148–49 (1999) (holding that the purpose of the preservation rule is “to bring the position of [the complaining party] to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.”).

Robbery is the felonious taking and carrying away of personal property from another through violence or putting in fear. *Fetrow v. State*, 156 Md. App. 675, 687 (2004). Armed robbery is robbery aggravated by the use of a dangerous or deadly weapon. *Id.* 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.” *Mason v. State*, 302 Md. 434, 444 (1985). A person may not use a firearm in the commission of a crime of violence (such as robbery). Md. Code, Crim. Law Art., § 4-204(b); Md. Code, Pub. Safety Art., § 5-101(c)(13) (defining robbery as a crime of violence). In the case at bar, appellant does not contest the wealth of evidence that *someone* committed those crimes against the five victims. Rather, he argues that the evidence at trial was insufficient for a rational jury to find that *he* participated in the armed robbery.

We hold that the evidence was sufficient to support the judgment of conviction. The victims’ descriptions, although not identical, were sufficiently consistent and accurate in describing appellant and Young. A majority of the victims testified that the robber with the gun was thin, appeared to be of mixed race, wore a black jacket and a mask, and used a black semiautomatic handgun in the robbery. A majority of the victims testified that the second robber had dark skin, was larger than the other robber, and wore a hoodie sweatshirt cinched over his face. R.C. and E.M. noted that the second robber wore a green jacket, and one victim saw a tattoo on his hand. Appellant was wearing a green jacket when he was arrested, and he had a tattoo on the back of his hand. He was in the company of Young at the time of the arrest, and the two were in joint possession of a pistol and the victim’s cell phone, which fell out of appellant’s jacket when a police officer moved the jacket. R.C. testified that Young and appellant matched the skin tones of the first and second robbers, respectively.

Appellant’s argument that “none of the cell phone information” applied to him is meritless. The rap video showed appellant participating in Young’s rap recording several

hours after the robbery. It was filmed on a cell phone stolen from one of the victims. The video was relevant in that it tied appellant to Young on the day of the robbery, contributing to a factual inference that appellant was *also* with Young when he robbed the victims several hours earlier. The remainder of the cell phone evidence showed primarily that Young committed the robbery. Because appellant was accused of conspiring with Young, evidence that Young committed the robbery was relevant and admissible against appellant.

It was the jury's responsibility to weigh the conflicting victim testimony and decide how much weight to accord the evidence. From the evidence admitted, a rational trier of fact could have inferred that appellant was the second robber and convicted him. Deferring to that inference of identity, we hold that the State presented evidence sufficient for a rational jury to convict appellant of armed robbery, conspiracy to commit armed robbery, and use of a handgun in a crime of violence.

We address next the admissibility of the handgun. We agree with the State and hold that this issue is not preserved for our review. Appellant did not object below. Ordinarily, we do not decide an issue unless it “plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131(a). This Court held in *Williams v. State*, 216 Md. App. 235 (2014), as follows:

“Under Maryland law, in cases involving multiple defendants each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected. One defendant, of course, may expressly join in an objection made by a co-defendant but he must expressly do so. It is not implicit.”

*Id.* at 254. Young objected to the admission of the handgun on chain of custody and relevance grounds. Appellant did not object. The issue is not preserved for our review.

We turn next to the rap lyrics. Appellant argues only against the admission of the written lyrics, not the plainly relevant silent video evidence. We review the trial court’s decision to admit the evidence by determining first whether the evidence is legally relevant, a conclusion of law which we review *de novo*. *Smith v. State*, 218 Md. App. 689, 704 (2014). To qualify as relevant, evidence must tend to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 5-401. “Evidence that is relevant is admissible, but the trial court does [not have] discretion to admit evidence that is not relevant.” *Smith*, 218 Md. App. at 704; Rule 5-402.

If relevant, we then determine whether the court abused its discretion in admitting relevant evidence which was unfairly prejudicial and therefore should have been excluded. *Smith*, 218 Md. App. at 704–05. “Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.” *Hannah v. State*, 420 Md. 339, 347 (2011). Under Rule 5-403, the trial court should exclude relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Carter v. State*, 374 Md. 693, 705 (2003).

In *Hannah*, the Court of Appeals reviewed the admissibility of a defendant’s self-written rap lyrics. The defendant was accused of crimes that stemmed from a drive-by shooting. *Id.* at 340–42. To disprove his testimony that he had no interest in guns, the

prosecutor offered and the trial court admitted the State’s evidence of rap lyrics the defendant wrote. *Id.* The lyrics included “I ain’t got guns, got a d[ozen] under the seat,” “Ya see da tinted [window] cum down n out come da [G]lock,” “Ya just got jacked, we leave da scene in da lime green [car],” and others consistent with a drive-by shooting. *Id.* at 345–46.

Surveying case law and academic writing on the issue of self-written rap lyrics, the Court drew a distinction between two types of lyrics. The first, lyrics that refer generally to criminal acts, tend to be “inadmissible works of fiction” “probative of no issue other than the issue of whether [the defendant] has a propensity for violence.” *Id.* at 348, 355. The Court cited with approval a law review article that cautioned against the admission of “abstract representations of events or ubiquitous storylines frequently employed in rap music.” Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1 (2007). The Court noted that this first category of statements may nevertheless be admissible to prove identity or knowledge. *Hannah*, 420 Md. at 351–52. The second category, “statements of historical fact,” may be admissible as direct evidence of a defendant’s guilt. *Id.* at 348. The Court of Appeals reversed the trial court, holding that there was “no evidence that [defendant]’s lyrics are autobiographical statements of historical fact” and that they were “probative of no issue other than the issue of whether he has a propensity for violence.” *Id.* at 349, 355.

In the instant case, the trial court did not err or abuse its discretion in admitting the lyric “had to rob a few n—s, ain’t have no patience” as a “statement of autobiographical

fact.” Though the lyric was less specific than the lyrics at issue in *Hannah*, the circuit court admitted evidence that tied the lyric to the robbery at issue. Unlike the undated lyrics in *Hannah*, the State produced evidence that Young wrote the lyric just hours after the robbery on a phone stolen from one of the victims. The lyric speaks in past tense about robbing multiple people out of impatience. The State produced a message, sent by Young shortly before the robbery, which proclaimed that he was “about to” have a cell phone. Because it appears that the lyric was a literal statement of fact, it was admissible as evidence of Young’s identity as the robber and his motive for the robbery. Because appellant was accused of conspiring with Young, evidence that Young committed the robbery was relevant and admissible against appellant.

The admissibility of the lyric referencing the gun is a closer question. Arguably, it was an irrelevant lyric written about handgun possession, a common theme in rap music. On the other hand, arguably it was relevant to show that one of the co-defendants possessed a handgun, the instrument used in the robbery. We need not decide whether the lyric’s admission was error in the first instance because we shall assume error and find that any error was harmless beyond a reasonable doubt.

When the trial court errs, we must reverse unless the State can “demonstrate, beyond a reasonable doubt, that the error did not contribute to the conviction.” *Dorsey v. State*, 276 Md. 638, 658–59 (1976). In that analysis, we consider whether the evidence at issue was cumulative evidence which tended “to prove the same point as other evidence presented during the trial.” *Dove v. State*, 415 Md. 727, 743–44 (2010).

Appellant presents no argument on the issue of harmless error. The State argues that the admission of the lyric was harmless because the State presented other evidence that appellant and Young possessed one or more semiautomatic handguns—the court admitted a handgun found inside appellant’s jacket and photographs of his co-defendant Young holding a pair of semiautomatic handguns. We agree with the State that the admission of the handgun lyric was cumulative of the other evidence admitted and hold that any error was therefore harmless.

Finally, as to appellant’s convictions and sentences for multiple conspiracy charges, the State concedes, and we agree, that only one conviction and sentence may be imposed for a common law conspiracy. *Jordan v. State*, 323 Md. 151, 161 (1991). We shall vacate four of the five convictions and sentences for conspiracy to rob.

**JUDGMENTS AND SENTENCES FOR  
COUNTS SIX THROUGH NINE, FOR  
CONSPIRACY TO COMMIT ARMED  
ROBBERY, VACATED. ALL REMAINING  
JUDGMENTS OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED. COSTS TO BE PAID HALF  
BY APPELLANT, HALF BY  
MONTGOMERY COUNTY.**