Circuit Court for Washington County
Case No. C-21-CR-18-000056

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2358

September Term, 2018

ASHTON LEE FRISBY

v.

STATE OF MARYLAND

Arthur,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 5, 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.

Ashton Lee Frisby, appellant, was convicted by a jury in the Circuit Court for Washington County of conspiracy to distribute cocaine, distribution of cocaine, possession of cocaine, and possession of drug paraphernalia. On appeal, Mr. Frisby challenges the sufficiency of the evidence to support his convictions. We shall affirm.

BACKGROUND

At trial, the State presented evidence that, on December 11, 2017, the Narcotics Task Force for Washington County, with the assistance of a confidential informant, carried out a controlled drug purchase from Theodore Crew, a suspected cocaine dealer. The informant had made a previous controlled purchase of cocaine from Mr. Crew, at which time Mr. Crew told the informant that he would be "dealing with Mr. Frisby from here on out."

On the date in question, the informant made telephone contact with Mr. Crew to "set [Mr. Crew] up for drug dealing[,]" and arrangements were made to meet on the 100 block of High Street in Hagerstown. The informant was outfitted with covert audiovisual recording equipment that allowed the police to audibly monitor interaction between the informant and anyone he came in contact with.

The informant drove his personal vehicle to the meeting location, parked on the street, called Mr. Crew, and engaged in a "three-way conversation" in which the informant "tried to direct [Mr. Crew] or Mr. Frisby to [his] car." The informant explained that they "eventually got everything straight." Mr. Frisby then emerged from an alley, got into the vehicle, produced a plastic bag, containing what was later determined to be cocaine, and handed it to the informant. The informant gave Mr. Frisby two hundred dollars.

The audiovisual recording of the interaction between the informant and Mr. Frisby was played for the jury and was transcribed as follows:

> [INFORMANT]: All right. Is this the same shit as before?
>
> [MR. FRISBY]: Don't give me mine [sic]. It's some - - it's good though. I don't know what you had last time. Um.
>
> [INFORMANT]: Yeah, it's hard, ain't it?
>
> [MR. FRISBY]: Yeah.
>
> [INFORMANT]: Two hundred?
>
> [MR. FRISBY]: Yeah.
>
> [INFORMANT]: Okay. It looks pretty good.
>
> [MR. FRISBY]: Thank you.
>
> [INFORMANT]: Thank you.

Shortly after the informant said the "code" words, "it looks [ ] good[,]" police arrived and arrested Mr. Frisby.

DISCUSSION

"The test of appellate review of evidentiary sufficiency is 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citation and some internal quotation marks omitted). "[T]he test 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.'" *Anderson v. State*, 227 Md. App. 329, 346 (2016) (quoting *Painter v. State*, 157

Md. App. 1, 11 (2004)) (emphasis in *Painter*). In reviewing the sufficiency of the evidence, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citation omitted).

Mr. Frisby first contends that the evidence was insufficient to support his conviction for conspiracy to distribute cocaine because the State failed to prove that he had an agreement with another person to distribute cocaine. The State responds that the jury could infer the existence of a conspiracy to distribute cocaine based on the "concurrence of actions" between Mr. Crew and Mr. Frisby in delivering the cocaine to the informant. We agree with the State.

"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) (internal quotations marks and citation omitted). A conspiracy may be shown through circumstantial evidence, from which a prior agreement can be inferred, as we have previously explained:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Darling v. State, 232 Md. App. 430, 466-67 (citation omitted), *cert. denied*, 454 Md. 655 (2017). *See also Carroll v. State*, 202 Md. App. 487, 505 (2011) ("[T]he State [is] only

required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement.") (citation omitted), *aff'd*, 428 Md. 679 (2012). Here, we conclude that, from the "concerted nature of the action[s]" of Mr. Crew and Mr. Frisby, which culminated in the distribution of cocaine to the informant, the jury could reasonably infer that Mr. Frisby was engaged in a conspiracy with Mr. Crew to distribute cocaine.

Mr. Frisby next contends that the evidence was insufficient to support his convictions for conspiracy to distribute cocaine, distribution of cocaine, and possession of cocaine because those offenses require that the accused have knowledge of the presence and illicit nature of the substance, and there was no evidence that Mr. Frisby "knew that the substance he handed to [the informant] was an illegal substance and, specifically, cocaine." As Mr. Frisby recognizes, knowledge of the general character or illicit nature of a substance "may be proven by circumstantial evidence and by inferences drawn therefrom." *Dawkins v. State*, 313 Md. 638, 651 (1988). Here, the evidence was sufficient to support a reasonable inference that Mr. Frisby knew that the substance in the plastic bag he handed to the informant was cocaine.

Finally, Mr. Frisby contends that the evidence was insufficient to sustain his conviction for possession of drug paraphernalia, in this case, the plastic bag that contained the cocaine, because the State "failed to provide any expert testimony on what constitutes paraphernalia." Mr. Frisby cites no authority requiring expert testimony to establish that plastic "baggies" are used as drug paraphernalia, and we are aware of none. Here, the court instructed the jury on that count that, "for the Defendant to be found guilty of [possession of drug paraphernalia], the State must prove beyond a reasonable doubt that the Defendant

knowingly used . . . plastic baggies . . . as drug paraphernalia[,]" which the court defined as materials that are used for "possession . . . packaging, re-packaging, storing, [or] containing . . . a controlled dangerous substance." *See also* Md. Code (2002, 2012 Repl. Vol), Criminal Law Article, § 5-101(p)(2)(ix) and (x) ("'Drug paraphernalia' includes: . . . (ix) a capsule, balloon, envelope, or other container used . . . in packaging small quantities of a controlled dangerous substance; (x) a container or other object used . . . in storing . . . a controlled dangerous substance[.]") Based on the evidence and the court's instructions, the jury could reasonably conclude that the plastic bag containing cocaine that Mr. Frisby gave to the informant constituted drug paraphernalia.[1]

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

[1] We decline to address Mr. Frisby's claim, which he asserts for the first time in this appeal, that, under *Dickerson v. State*, 324 Md. 163, 174 (1991), he could not be convicted of possession of paraphernalia because the only paraphernalia involved was the one plastic bag in which the cocaine was stored. *See Redkovsky v. State*, 240 Md. App. 252, 261 (2019) ("Pursuant to Maryland Rule 4-324(a), a criminal defendant who moves for judgment of acquittal must 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal.") (citation and some internal quotation marks omitted).