Circuit Court for Baltimore County

Case No. 03-K-18-003684

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2481

September Term, 2019

ROBERT LEWIS

V.

STATE OF MARYLAND

Beachley,
Ripken,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: July 7, 2021

The appellant, Robert Lewis, was convicted in the Circuit Court for Baltimore County by Judge Nancy M. Purpura, sitting without a jury, of 1) participating in a criminal gang, 2) of conspiracy to distribute a controlled dangerous substance, and 3) of a firearms offense. Judge Purpura imposed a sentence of 15 years imprisonment for the participation in a criminal gang. The other sentences were concurrent. On this appeal, the appellant raises, by way of questions, two contentions:

1. **WAS THE EVIDENCE SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR PARTICIPATION IN A CRIMINAL GANG WHEN THERE WAS NO EVIDENCE THAT APPELLANT'S DRUG CRIMES WERE COMMITTED FOR THE BENEFIT OF A CRIMINAL GANG?**

2. **MUST THE COMMITMENT RECORD BE REVISED TO REFLECT TIME IN CUSTODY SINCE APRIL 20, 2018?**

The Maryland gang statute in effect at the time of the events charged in this case was Maryland Code, Criminal Law Article, Sect. 9-804(a), which then provided:[1]

> A person may not: (1) participate in a criminal gang knowing that the members of the criminal gang engage in a pattern of organized crime activity; and (2) knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal gang.

(Emphasis supplied.) *See* Madrid v. State, 247 Md. App. 693, 735-41, 239 A.3d 770 (2020); Baires v. State, 249 Md. App. 62, 78-89, 245 A.3d 37 (2021).

Legal Sufficiency Of The Evidence

[1] The amendment to the statute took effect on October 1, 2020, well after the trial of this case. Other than to substitute the phrase "criminal organization" for the word "gang," any difference between the former version and the present version would have had no effect on this case. *See* Baires v. State, 249 Md. App. 62, 78 n.1, 245 A.3d 37 (2021).

The criminal gang in which the appellant allegedly participated was known as the "500" or "500 L." It was said to be active in the 500 block of Rose Street in Baltimore City. When the appellant was indicted, twelve other persons were indicted with him. Two of those twelve, Keith Worthington and Harvey Turner, were tried along with the appellant. They were both also found guilty of participation in a criminal gang. Neither of them has appealed his conviction.

As the appellant poses this central question in his appellant brief, "The main point of contention at trial [and on this appeal] was whether 500 L was a criminal gang or just a bunch of guys that sold weed and molly." We are satisfied that the trial evidence supported the judge's conclusion that 500 L was, indeed, a criminal gang.

As we prepare to review the legal sufficiency of the evidence to convict, it behooves us to remind ourselves of just how limited our reviewing function is. In State v. Albrecht, 336 Md. 475, 478-79, 649 A.2d 336 (1994), Judge Raker articulately pointed out that the burden of production is by no means a burden of ultimate persuasion:

> Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.
>
> In other words, when a sufficiency challenge is made, the reviewing court is not to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt; rather, the duty of the appellate court is only to determine 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.

(Emphasis supplied.)

In Travis v. State, 218 Md. App. 410, 422-23, 98 A.3d 281 (2014), this Court spoke emphatically to the same effect:

> Virtually every crime testified to by multiple witnesses could give rise to half a dozen conceivable scenarios or different stories. That is why we have factfinders. We, on the other hand, are not concerned with those other possible stories, because we are not factfinders. The factfinding job has already been done by someone else. All that matters at this juncture is that the factfinding judge believed the victim's story. Unless clearly erroneous (a rare phenomenon, indeed), Judge Groton's findings of fact are the only facts in the case as far as we are concerned. There are no other stories. No other facts or factual scenarios even exist and it is pointless, therefore, to bring them up. In assessing legal sufficiency, we are required to take that version of the evidence most favorable to the prevailing party. What then is the appellant seeking to do by beguiling us with different stories which are immaterial to the only legal issue before us? An appraisal of legal sufficiency is not a proper venue for jury argument. Appellate concern is not with what should be believed, but only with what could be believed.

(Emphasis supplied.) *See also* Goff v. State, 387 Md. 327, 338, 875 A.2d 132 (2005); Middleton v. State, 238 Md. App. 295, 304, 192 A.3d 777 (2018).

Our concern is not with what a factfinding judge **SHOULD** have found, but only with what a factfinding judge **COULD** have found. Chisum v. State, 227 Md. App. 118, 127, 132 A.3d 882 (2016) ("The issue of legal sufficiency is precisely the same under either trial modality. In a court trial just as in a jury trial, the issue is the satisfaction of the burden of production."). On the burden of production, the inferential long shot is just as satisfying as is the inferential favorite.

The appellant is a paraplegic and is confined to a wheelchair. It was nonetheless the State's case that he was not simply a participant in the activities of the 500 L gang but was, along with Gregory Randall, one of the two actual leaders of the gang.

In terms of the legal sufficiency of the evidence, the appellant in his brief makes several major concessions:

> It appears that the State proved that the 500 or 500 L committed two or more underlying crimes, due to the several incidents of distribution of marijuana and fake molly. Conspiracy to distribute CDS and distribution of CDS, as well as distribution of a counterfeit substance, are underlying crimes as defined in CR 9-801(f). It also appears that the State proved beyond a reasonable doubt that the object of 500 was to "get money" through drug distribution and that 500 had something of a command structure. Lewis does not concede that the State proved that he was a leader, but Lewis will concede that the cooperator, Randall, was shown to be in charge.

(Emphasis supplied.)

The appellant also concedes that "Lewis's conspiracy and counterfeit drug convictions satisfy" the requirement that he knowingly and willfully directed or participated in an underlying crime. His insufficiency claim is exceedingly narrow:

> [T]here was insufficient evidence of (4) [evidence that he took part in the gang knowing that gang members had committed two or more underlying crimes] in that the State failed to show that Lewis knew that the others in the 500 gang had committed two or more underlying crimes.

The evidence, however, abundantly demonstrated that the appellant was fully aware of every aspect of the gang's activities. One key witness was Timothy Zeller, the appellant's driver, who testified that the appellant, along with Gregory Randall, was one of the two leaders of the 500 L gang. Zeller testified that he drove the appellant to the gang's corner to sell drugs on a daily basis and that he personally observed the appellant selling

drugs with other members of the 500 L gang. Zeller also testified that he observed the appellant interact with various juveniles as part of the drug transactions and specifically that he observed the appellant and Malik Mungo, a juvenile member of the 500 L gang, sell marijuana together.

Two other key witnesses were Lionell Young and Vernon Miller, both of whom were members of the 500 L gang. Each of them testified that the appellant was one of the founders and leaders of the 500 gang. Each of them testified that it was the appellant and Randall who controlled who would be allowed to sell drugs in the gang's area.

Another key witness was Joseph Flowers, the appellant's cousin. He was not himself a member of the 500 L gang, but he was allowed by the appellant to sell drugs with them. Flowers testified that the appellant and Randall were the leaders of the gang and that he had observed each of them directing various members of the gang to conduct sales of marijuana and molly. Flowers also testified that he had observed the appellant enlisting juveniles to work for him, including some who would sit on the steps of Flowers's house to sell marijuana and molly. Flowers testified that he had seen gang members give money from those drug sales to the appellant and Randall. According to Flowers, the appellant and Randall got a cut of the money made from the sales of those other gang members.

Another entire category of witnesses against the appellant were undercover police officers who had made purchases of drugs from the appellant. Detective Shivdayl Bawa was videotaped purchasing drugs from the appellant and one of his co-defendants, Harvey Turner. As Turner told the undercover officer that they had molly for sale, the tape showed

that the appellant broke off a portion of drugs from a bigger rock. Detective Bawa handed over the purchase money to the appellant.

Detective Stephon White made an undercover purchase of drugs from the appellant. On the videotape of that purchase, the appellant could be heard yelling to someone to get the drugs.

The State also called Detective Gregory Price, who had investigated various social media posts implicating the involvement of the appellant with other gang members. A Facebook message between the appellant and another co-defendant, Keith Worthington, showed the two of them discussing drugs and using emojis that indicated that they were setting up CDS transactions. Another Facebook message between the two gang leaders, the appellant and Gregory Randall, showed them discussing the selling of molly. Yet another text message between the appellant and another co-defendant, Duwarn Holt, revealed the two of them discussing a CDS exchange.

A final key State's witness was Sergeant Joseph Landsman, an expert witness on criminal gang activity. On the basis of the evidence in this case, he testified that in his opinion, the appellant and Gregory Randall were the two highest ranking members of the 500 L gang and that the main goal of the gang was to make money from the sale of contraband drugs. Sgt. Landsman offered his opinion that the gang had been set up in the first place for the purpose of making money from the sale of drugs. Under the gang's hierarchy, lower members of the gang would report back to the appellant and Randall on

how many drugs had been sold and how much money had been made. The appellant and Randall, moreover, would share in the proceeds of the sales made by other gang members.

The appellant nonetheless stubbornly, although admittedly participating in drug sales himself, disclaims all knowledge of what the other gang members were doing or why they were doing it. He blithely ignores the uncontradicted evidence that he was a founder of the 500 L gang and one of its two leaders who gave the orders and directions as to who would do what and where and when. Appellant produced no evidence to diminish his role in the hierarchy. The unrefuted command structure cannot be ignored.

Putting aside for the moment all other required characteristics, the awareness component is quite simple. As Madrid v. State explained, 247 Md. App. at 740:

> § 9-804(a) prohibits a person from participating in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity. This indicates that the person must have knowledge of the pattern of criminality of members of the gang. In In re Kevin T., 222 Md. App. 671, 114 A.3d 297 (2015), we said: "The statute requires the State to prove not only that appellant was a member of a criminal gang, but that the gang, in this instance MS-13, engaged in a pattern of criminal behavior, *i.e.*, committed, attempted to commit, or conspired to commit two or more of the specific underlying crimes listed in § 9-801(f).

(Emphasis supplied.)

At the O.K. Corral, for instance, Ike Clanton self-evidently enjoyed a depth of inculpatory awareness and responsibility that lesser members of his family did not necessarily share. Nor could Wyatt Earp have cogently disclaimed any awareness of what his brothers Morgan and Virgil were doing as they, with him, approached the corral that afternoon. This is simply the essential nature of a chain of command.

At the end of this tsunami of incriminating evidence, we have no hesitation in holding that the appellant, as a founder and as a co-leader of the 500 L gang, was intimately familiar with every aspect of the gang's criminal activities. The evidence was legally sufficient to support the conclusion that he, like Wyatt Earp and Ike Clanton before him, was a knowing participant in the respective group activity of himself and his colleagues.

Credit For Time Served And Plain Error

The appellant's second contention is that with respect to his ultimate sentence, he is entitled to time served in pre-trial detention. It appears that he may well have a solid argument in that regard pursuant to Maryland Rule of Procedure 4-351. There are, however, some details to be considered in implementing that argument that were never considered by Judge Purpura nor ruled on by her. This was for the obvious reason that that issue of credit for time served was never raised by the appellant at the sentencing hearing. There is some question of precisely the proper starting date for the counting of pre-trial detention credit. There is the issue of the qualification of home detention as an aspect of pre-trial detention.

These are not questions for this Court to consider in the first instance but for the trial court to deal with. As the appellant acknowledges in his appellate brief:

> This issue should be addressed on appeal, even though no objection was raised below. The issue of credit for time served was never discussed at sentencing…On this record, the failure to award proper credit for time in custody, including time in home detention, is plain error.

(Emphasis supplied.)

In Bratt v. State, 468 Md. 481, 506, 227 A.3d 621 (2020), Judge Hotten pointed out for the Court of Appeals why Rule 4-351 is the appropriate vehicle for raising and for deciding this issue:

> Maryland Rule 4-351 is the appropriate vehicle for achieving a correction of the commitment record. Rule 4-351 dictates that the commitment record contain the sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law. Failure to include this information in the commitment record only warrants correction to the commitment record, not the pronounced sentence. The plain language of Rule 4-351(b) confirms as much, providing that 'the effect of an error or omission in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.' In other words, this type of commitment record error or omission does not nullify the sentence or term of imprisonment imposed, which would ordinarily require resentencing or a hearing. Instead, the commitment record error or omission is addressed through a motion to amend the commitment record to reflect credit for time served.

(Emphasis supplied.) *See also* State v. Bratt, 241 Md. App. 183, 196, 209 A.3d 209 (2019) ("As the State points out, commitment records may be corrected pursuant to Rule 4-351 without a resentencing or a hearing.").

We decline to assume such a *nisi prius* role ourselves pursuant to some misbegotten notion of noticing plain error.

JUDGEMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.