Circuit Court for Prince George's County
Case No. CT091040A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2675

September Term, 2016

RASHADD ALEXIS

v.

STATE OF MARYLAND

Wright,
Beachley,
Zarnoch, Robert S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 4, 2018

This appeal arises from the Circuit Court of Prince George's County. By indictment, appellant, Rashadd Alexis, was charged with the first-degree murder of Bobby Ennels, first-degree murder of Anthony Cash, attempted first-degree murder of Frances Lammons, first-degree assault of Frances Lammons. He was also charged with three counts of the use of a handgun in the commission of a felony, conspiracy to murder Bobby Ennels, harming Bobby Ennels with the intent to prevent him from testifying in circuit court, and harming Bobby Ennels in retaliation for giving testimony in an official proceeding.

After a trial that commenced on January 5, 2012, and concluded on February 7, 2012, a jury found appellant guilty of conspiracy to murder Bobby Ennels, harming Bobby Ennels with the intent to prevent him from testifying in circuit court, and harming Bobby Ennels in retaliation for giving testimony in an official proceeding. It acquitted him of the murder and attempted murder charges of Cash and Lammons.

On April 27, 2012, appellant was sentenced to life imprisonment for conspiracy to commit murder, 20 consecutive years for harming Bobby Ennels with the intent to prevent him from testifying, and 20 years for harming Bobby Ennels in retaliation for giving testimony in an official proceeding. Appellant timely appealed. In an unreported opinion issued on December 27, 2013, this Court reversed the judgment of the circuit court and remanded the case to the circuit court for further proceedings. *Alexis v. State*, 0510, September Term 2012, filed December 27, 2013.

After a trial that commenced on September 21, 2016, and concluded on October 6, 2016, a jury found appellant guilty of conspiracy to commit murder. Appellant was sentenced to life imprisonment and granted credit for time served. This appeal followed.

Appellant asks this Court two questions which we have reworded:[1]

> 1. Whether the trial court properly found a witness unavailable and admitted the witness's prior testimony into evidence?
>
> 2. Was the evidence sufficient to sustain the conviction for conspiracy to commit murder?

For the reasons below, we answer both questions in the affirmative and affirm the judgment of the circuit court.

BACKGROUND

The facts, in this case, traverse twelve years as well as multiple trials and appeals.

1. The October 13, 2006 Murder of Raymond Brown

In the early morning hours on October 13, 2006, Jamaal Alexis ("Jamaal"), appellant's brother, Bobby Ennels, and Neiman Marcus Edmonds colluded to steal a black Chrysler parked on Stillwell Place, in Largo, Maryland. Jamaal acquired a tow truck and Ennels was in a car that was being used as a look out vehicle. Jamaal hitched

[1] The original questions presented were:

1. Did the trial court err in finding Amadu Jalloh unavailable, and allowing the State to read his prior testimony into evidence?
2. Was the evidence sufficient to sustain the conviction for conspiracy to commit murder?

the Chrysler to the tow truck and set off the car's alarm. The sound awakened Raymond Brown, the owner of the car, and his wife. Thinking the car was being towed, the Browns got into Mrs. Brown's car and drove to the entrance of their subdivision, where there was a sign bearing the name of the towing company for the residential community.

Mrs. Brown saw a man, later identified as Edmonds, trying to disable the car's alarm. Mr. Brown got out of his wife's car and walked towards Edmonds, who then ran away. Suddenly, the person, who was sitting in the driver's seat of the vehicle, shot through the window of the tow truck, killing Mr. Brown with a fatal gunshot to the chest.

After the shooting, Edmonds, Ennels, and Jamaal regrouped and removed the tires from the car so they could sell the rims. Both the car and the tow truck were later found without tires. Jamaal told Edmonds and Ennels that he had shot Mr. Brown but was unsure if he killed him. Ennels panicked, worrying that he would be caught and sent to prison. Mrs. Brown identified Edmonds from the photogenic array but could not identify the person who shot and killed Mr. Brown, because she could not see the driver, who was inside the tow truck.

A few weeks after Mr. Brown's murder, Jamaal approached Edmonds and said, "I think [Ennels's] going to tell." Jamaal hatched a plan to kill Ennels. Jamaal told Edmonds to "take [Ennels] to the go-go, get him drunk, drive, go to the stoplight," and that he would "handle the rest." Edmond refused to go along with the plan, but did not warn Ennels that Jamaal wanted to kill him.

On April 11, 2007, after Edmond's fingerprints were recovered from the hood of Mr. Brown's car, he was arrested and charged with Mr. Brown's murder. He gave a statement to the police identifying Jamaal as the person who shot Mr. Brown and Ennels as the third man involved in the theft of the car. Edmonds also told police that Jamaal asked him to kill Ennels. In May 2007, Edmonds entered into a plea agreement that called for his cooperation with the State. Soon thereafter, Jamaal and Ennels were arrested and charged with the murder of Mr. Brown and related offenses. Like Edmond, Ennels entered into a plea agreement to cooperate with the State. That left Jamaal, the shooter, as the remaining targeted defendant. On March 6, 2008, Ennels appeared before the grand jury and testified against Jamaal. Ennels was a key witness for the State in the trial against Jamaal for the murder of Mr. Brown, scheduled for November 2008.

2. The Ennels and Cash Murders and the Attempted Murder of Lammons

Edmonds, Ennels, Jamaal, Anthony Cash, and appellant grew up in the same neighborhood. On the night of October 7, 2008, Ennels, Cash, and a 16-year-old girl, Frances Lammons, drove to the intersection of Nalley Road and Twining Court in Landover, Maryland. Ennels was driving, Cash was sitting in the front passenger seat, and Lammons was sitting in the rear passenger seat. Ennels was talking on his cell phone while driving. When they got to Nalley Road, Ennels stopped the car and Lammons heard him say into his cell phone, "[y]ou all can come down. I'm here."

According to Lammons, she, Ennels, and Cash sat in the car. A few minutes later, two men walked up to the passenger side of the car, looked inside, and then walked

around the front of the car to the driver's side door. The driver's side window was rolled down. Lammons heard Ennels tell the men, "[y]ou all don't have to worry about nothing. I'm not going to say anything." A few seconds later, the men drew guns and shot through the open window, hitting Ennels in the chest. Ennels stepped on the gas, but the car lurched backward, hitting a tree. Cash got out of the car and tried to escape on foot. Lammons climbed over the front seat and exited the car through the front passenger door, because the rear portion of the car was damaged when it hit the tree. As Lammons was running, one of the shooters chased her until she got to a 7-Eleven. She sustained a gunshot wound to her right elbow and was hospitalized for two weeks. At trial, Lammons identified appellant as the person who chased and shot her.

Some residents of the houses on Nalley Road heard Ennels's car hit the tree and called the police to report the accident; others called because they heard the gunshots. Officer Donovan Dearing[2] responded to the scene on Nalley Road and saw the car backed into some trees across the street from Twining Court. He found Ennels in the driver's seat, "unresponsive and not breathing." Ennels was transported to a nearby hospital where he was pronounced dead.

While on the scene, Officer Dearing heard someone farther down Nalley Road yelling for help. He found Cash laying in the driveway of 406 Nalley Road suffering from a gunshot wound. Cash was barely alive and was only able to tell Officer Dearing

[2] All the police officers and detectives mentioned in this opinion were at the relevant time employed by the Prince George's County Police Department.

that he was shot by a black man. Cash was transported to a hospital, where he died because of multiple gunshot wounds.

In response to the calls reporting shots coming from Nalley Road, Officer Juan Nolasco drove to the scene. As he was driving he "observed two vehicles coming from Nalley Road at a high rate of speed." He turned his car around and followed the vehicles, and as he approached them they went in different directions. Officer Nolasco decided to follow one of the cars, which he thought was green, and activated his emergency equipment to make a traffic stop. He approached the car on the driver's side and asked the driver for his license and registration. Officer Nolasco noticed that the driver, later identified as appellant, was "extremely nervous" and had what looked like blood on his white t-shirt near his left arm and abdomen.

Officer Nolasco ordered appellant to exit the vehicle, placed him in handcuffs, patted him down, and found a small bag of marijuana on his person. He placed appellant in the back seat of his cruiser and searched appellant's car, which did not turn up any evidence. Backup officers arrived, appellant was moved to the cruiser assigned to Detective Patrick Turri, and Officer Nolasco left the area. According to Detective Turri, the car that appellant was driving was black, not green. Homicide officers on Nalley Road told Detective Turri to release the appellant, and he was released.

During the time in question, Joan Wood was living on 404 Nalley Road. At about 12:30 a.m. on October 7, 2008, she heard what sounded like several gunshots. She went to her window and "saw a young lady running down the opposite side of the street from

[her] house, ..." She did not notice anyone in her backyard. The next morning, she opened her door to take her dog outside in her backyard and "saw all of this blood and gun shell casings on the patio." After returning the dog to his crate, she flagged down a police officer. The police secured evidence from Woody's backyard, including eight bullet casings, a metal spring, a piece of a gun magazine, and a black skullcap. Police found blood stains which were swabbed and submitted for analysis.

On June 30, 2009, appellant was arrested for the murder of Ennels and Cash and the related crimes. Between the commission of the crimes and the arrest, police conducted investigations into cell phone locations, firearms evidence, and DNA evidence. They also executed a search warrant for the appellant's house and interviewed appellant.

3. Jamaal's Conviction

After Ennels was murdered, the trial date in the Brown murder was postponed from November 2008, and Jamaal was separately charged with solicitation to commit the murder of Ennels to prevent him from testifying in the Brown murder case, solicitation to commit the murder of Ennels in retaliation for his testifying before the grand jury, and other offenses.

The two cases were consolidated and were tried before a jury from October 4, 2010, to October 29, 2010. In the first case, Jamaal was convicted of second-degree murder and robbery with a deadly weapon of Mr. Brown and related offenses. He was acquitted of first-degree murder of Mr. Brown, first-degree felony murder of Mr. Brown,

armed carjacking, and carjacking. In the second case, Jamaal was convicted of solicitation to commit the murder of Ennels to prevent him from testifying, and solicitation to commit the murder of Ennels in retaliation for testifying before the grand jury. The jury acquitted Jamaal of conspiracy to murder Ennels, obstruction of justice by preventing the testimony of Ennels, and obstructing justice by retaliating against Ennels.

Jamaal was sentenced to a total of 140 years of incarceration. This Court affirmed his convictions in a reported opinion filed on February 27, 2013. *Alexis v. State*, 209 Md. App. 630 (2013). On June 20, 2013, the Court of Appeals granted a petition for writ of *certiorari* to review two issues in that case, neither of which is related to any issue in this appeal.[3]

4. Subsequent investigation and Jamaal's efforts to have Ennels killed

Police lifted Edmonds's fingerprint from the hood of the Chrysler. They arrested Edmonds in April of 2007, and he told them about a conversation he had with Jamaal the day of the murder, in which Jamaal told Edmonds that he had shot Brown. Jamaal told Edmonds a couple of days later that he was worried Ennels was going to tell the authorities about the murder, and so Jamaal wanted to "get rid of" Ennels and wanted Edmonds to "set him up."

Police also ultimately were able to get Ennels's cooperation, and he and Edmonds agreed to cooperate with the State. They both entered into a plea agreement in exchange

[3] The judgment of this Court was affirmed in *Alexis v. State*, 437 Md. 457 (2013).

for testifying against Jamaal about Brown's murder. Ennels testified at a grand jury proceeding in March of 2008.

On August 6, 2008, when Edmonds was restricted to house arrest, he saw someone pull up in front of his house, remain for about five minutes, then leave. Convinced that the car's occupants were coming to "shoot [his] house up" for testifying against Jamaal, Edmonds fled the home (ultimately getting caught and receiving an increase in his sentence as punishment for the escape attempt).

As part of their investigation, police recorded Jamaal's conversations when he was detained at the Prince George's County Detention Center ("PGCDC"). On October 3, 2008, Jamaal spoke with Rashadd and Jamaal's close friend, Deandre Shropshire. The meaning of the call was disputed at Rashadd's later trial. Shropshire claimed that in the call, Jamaal asked him, "What is going on with my *Imp*?" (Emphasis added). According to Shropshire, Jamaal was asking about the status of an Impala he owned and wanted Shropshire to sell, in order to get money for his legal fees. According to the State, the three suddenly dropped into coded conversation and Jamaal asked, "What is going on with my *M*?" (Emphasis added). Again according to the State, "M" referred to "murder," and the point of Jamaal's question was to ask whether Ennels had been eliminated.

Amad Jalloh was housed at the PGCDC at the same time as Jamaal. Jalloh refused to testify at Rashadd's second trial, so that trial court found him "unavailable" and permitted the State to present at Rashadd's second trial Jalloh's testimony from

Rashadd's first trial. Jalloh testified there that when the two were in jail together, he was part of a conversation in which a third inmate, Donnell Hunter, told Jamaal that if he wanted to get out of jail, he would need to get rid of any witnesses to Brown's murder. On a subsequent occasion, Jamaal told Jalloh that "he was going home for sure," because his brother – i.e., Rashaad – had gotten rid of the key witness. Jamaal gave Jalloh the further detail that "a girl [was] in the car with two people and he got shot."

5. Appellant's 2012 Trial and 2013 Reversal of his Convictions

Appellant was charged with the murder of Ennels and Cash, attempted murder of Lammons, and the conspiracy to murder Ennels. He was also charged with two obstruction of justice charges related to the efforts to prevent Ennels from testifying, and retaliation against Ennels once he testified.

The jury acquitted appellant of the murder charges, convicting him only of conspiracy and the related obstruction charges. On appeal, this Court reversed appellant's conviction, remanded the case for a new trial, but deemed the evidence presented at trial legally sufficient to support his conviction. This Court also ruled admissible the jail call recording in which, according to the State, Jamaal said "[w]hat's going on with my M?"

5. Appellant's 2016 Trial

Appellant's second trial commenced on September 21, 2016, and concluded on October 6, 2016. Because the trial court dismissed the obstruction charges just before appellant's trial, the State could prosecute only one count: conspiracy to murder Ennels.

At trial, again, the State argued that appellant shot and killed Ennels to silence him, which the Alexis brothers believed would end the State's efforts to prosecute Jamaal for Mr. Brown's murder two years earlier. Appellant's defense was that Ennels was murdered in a drug deal gone awry. The appellant claims he never spoke with Jamaal about the murder nor that he had anything to do with the murder.

On September 27, 2016, during appellant's second trial, Amadu Jalloh, a witness from appellant's first trial, appeared in court and informed the court that he did not want to testify. At that time, the court informed Jalloh that he was not charged with any offenses and had no Fifth Amendment rights.

On September 29, 2016, when the court reconvened after the lunch recess, the State explained that Jalloh was "not in the building," but that he was speaking with Jason Ricki, an Assistant Public Defender, apparently by phone. The parties discussed what to do next and Rickie appeared before the court and there was the following colloquy:

> [PROSECUTOR]: I'd like to deal [with the question of Jalloh's testimony] right now based on what the circumstances are, my understanding is from Mr. Jalloh is that he's asserting the Fifth Amendment.
>
> COURT: I need to hear that directly from him.
>
> [PROSECUTOR]: Or his attorney or somebody representing him.
>
> THE COURT: I'll take that; I just need something more.
>
> [PROSECUTOR]: I understand.
>
> ***

[DEFENSE COUNSEL]: If he wants to take the Fifth, I think the court needs to determine whether or not he can properly take the Fifth. Whereas Mr. Jamaal Alexis, he invoked the Fifth in his case, rightfully so, because he had a pending habeas. This gentleman, although he may think he's entitled to take the Fifth, he may not be able to because he's not one of the pending parties.

THE COURT: Can refuse to testify for any reason.

[DEFENSE COUNSEL]: He can, and then because he's under the subpoena, the court can decide what, if anything, is appropriate.

THE COURT: Sanction.

[DEFENSE COUNSEL]: Sanction or punishment may be pursued on him. And based on whatever the court decides appropriate that may affect, actually, him to testify.

THE COURT: He gets to talk to his lawyer. He's even told to talk to his attorney. And see where we go from there.

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[PROSECUTOR]: Judge, I don't have-if we have to go through that entire process, if the witness is unavailable, as the court is aware, he has former testimony that could be read into the record. He was subject to cross-examination.

THE COURT: Well, let's get him. I mean, I understand what you're saying. I think I'd like to have him here.

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THE COURT: All right. And you talked with Mr. Jalloh; is that right.

MR. RICKIE: I have. And the State wants to have him as a witness, and I'm not sure what to do next. Mr. Jalloh has indicated he assert[s] his Fifth amendment privilege.

THE COURT: Does he have a Fifth Amendment privilege?

MR. RICKIE: I can't speak to that, Your Honor.

THE COURT: Okay. Tell me how I get past that. Can't ask him what he did that causes him to assert his Fifth Amendment without violating the Fifth Amendment.

MR. RICKIE: Correct.

THE COURT: So that is a circular route. What are you getting ready to say?

[DEFENSE COUNSEL]: I looked at the rules, unfortunately. And says Rule 5-804(a)(2), unavailability of witness includes situations where the declarant refuses to testify concerning the subject matter despite an order of court to do so.

So I think if he wants not to testify, I think that's one point. The second is why is he not testifying.

THE COURT: Can we bring him and have him do that? Is it possible?

[SECOND PROSECUTOR]: Your Honor, he's told our office and the friend of the Court, defense counsel . . . prior to leaving to go pick up his kids that he was going to assert his Fifth Amendment privilege.

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[PROSECUTOR]: So, Judge, we're moving for 5-804 not 802, 5-804, the rule where the defendant is unavailable because they assert a privilege. And then we're going down to subsection (b)(1), which says former testimony. [Counsel quotes Rule 5-804(b)(1).]

We've been back and forth with this witness for three days. He's been served well in advance. He comes and saying he's going to assert the Fifth. He believes he has a Fifth Amendment right. He was waiting on his counsel, so his counsel didn't show up. He had a Public Defender step in to assist him we asked for.

[DEFENSE COUNSEL]: I again I just-first-and I appreciate the stating under 5-804(b) the following are not excluded by the hearsay rule if declarant is unavailable. Well, is he unavailable? We have to go to the definition of unavailable and that he refuses to testify despite an order of the court to do so. So the problem is-I understand he's refusing to testify. The question is does he have a privilege or not. Anyone can come in and take the Fifth. The question is can you rightfully do that. And I think when he gets here he has a right to do that. Can't presume whether he's unavailable or not.

THE COURT: I need him here. I want to make this as convenient as I can for everybody. I want him here, and I want him to say he's going to take the Fifth, and I'm asking him as delicately as I can if it has to do with anything that's covered by the Fifth Amendment, or he just doesn't want to do it. So, as soon as you find him, we'll do that.

I don't think it's up to you to find.

MR. RICKIE: I believe that the information that the—

THE COURT: Tuesday morning, can you get him here? [Will] you try to do that?

[PROSECUTOR]: Okay.

On October 4, 2016, Jalloh did not show up for court, and the State requested that the court admit his testimony from appellant's first trial because Jalloh had refused to testify after being properly served. When it came time for the State to offer the testimony of Jalloh, the bailiff called for Jalloh, and received no response.

At that time, the appellant objected to reading into evidence the testimony of Jalloh from the previous trial. Appellant argued that Jalloh had previously been in court, and that the court should issue a body attachment for Jalloh. Appellant further argued

that the defense was in a different position in the second trial in terms of cross-examining Jalloh because he was in prison during the first trial.

The court found that the witness was unavailable and allowed the State to read the testimony from the first trial to the jury. A witness then read the transcript of Jalloh's testimony from the first trial into the record. The testimony established that Jamaal discussed his murder trial with Jalloh, and that Jamaal told Jalloh that he was going to go home because his brother "got rid of the witness."

After all the evidence was presented at trial, the jury convicted appellant of conspiracy to commit the murder of Ennels.

STANDARD OF REVIEW

In reviewing decisions by trial courts to admit or exclude evidence, three different standards of review apply, depending on the nature of the ruling. "The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence." *Brooks v. State*, 439 Md. 698, 708 (2014). Many evidentiary rulings involve the exercise of discretion, which "will ordinarily not be disturbed on appeal." *State v. Walker*, 345 Md. 293, 324 (1997).

DISCUSSION

I.

First, we shall address the issue of the unavailability of Jalloh. We review witness unavailability determinations for an abuse of discretion. *Cross v. State*, 144 Md. App. 77,

88 (2002). There is an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,' or where the ruling is 'clearly against the logic and effect of facts and inferences before the court.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

Appellant argues that the circuit court erred and abused its discretion when it declared that Jalloh was unavailable after it was discovered that he did not show up for the trial. Additionally, appellant contends that Jalloh was not unavailable, but he was absent, and the court abused its discretion in failing to do more before it found that he was unavailable and permitting the State to read his testimony into the trial.

The State responds that the circuit court did not abuse its discretion because the State made reasonable efforts to produce Jalloh before requesting that the court find that Jalloh was unavailable. In its brief, the State outlines the challenges they faced attempting to secure Jalloh's testimony for the second trial. On September 27, 2016, Jalloh appeared and explained that he did not want to testify, was on medication, and told the State "there is nothing I can do for you." On September 29, 2016, Jalloh was again unavailable. The State and appellant believed that Jalloh intended to assert that he had a Fifth Amendment right not to testify.[4] At that point, the court requested that either Jalloh

[4] The Fifth Amendment, among other things, protects individuals from being compelled to be witnesses against themselves in criminal cases and allows witnesses to decline to answer questions where the answers might incriminate them. Nothing in the record suggests that Jalloh was in any legal jeopardy.

or his counsel appear before the court so he could assert his Fifth Amendment right or simply refuse to testify. Relying on Md. Rule 5-804 (b)(1), the State moved to have the court declare that the defendant was unavailable because he was asserting a privilege.[5]

On October 4, 2016, the day the State was concluding its case, Mr. Jalloh still had not appeared to testify at the trial although he was requested to do so. The State argued that he should be declared unavailable because, "[h]e's been back and forth numerous times. He's refused to testify. Sometimes he's responded to phone calls, sometimes he's not. He has been properly served. And, every time he's been here, he's refused to testify for one reason or another, and now he's not shown up." Appellant contended that the circuit court should issue a body attachment before Jalloh could be deemed unavailable. The court disagreed and found that Jalloh was not available for trial. Because "he had testified earlier at another time and place," the court permitted the State to read Jalloh's testimony from the first trial into the record.

[5] Md. Rule 5-804(b)(1) states:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The Court of Appeals has held that the former testimony exception applies to a criminal trial only when (1) the witness has given testimony under oath; (2) the witness who gave the prior testimony is unavailable to testify; and (3) the accused has the opportunity to cross-examine the witness at the prior trial or hearing where the testimony was elicited. *Huffington v. State*, 304 Md. 559, 566 (1985). The first prong was satisfied. The State admitted testimony that Jalloh gave under oath at a previous trial and during the first trial. As to the third prong, appellant had the opportunity to cross examine Jalloh.

The main issue before us is the second prong whether the circuit court abused its discretion in declaring Jalloh unavailable. We have guarded against trial courts cavalierly declaring witnesses unavailable. *See Mullaney v. Aude*, 126 Md. App. 639, 659-61 (1999) (where we held it was erroneous to introduce an expert witnesses' affidavit at a sanction hearing because the witness was not unavailable according to the Md. Rule 5-804(b)(1) as she did not refuse to testify under a court order).

Here, the circuit court did not abuse its discretion in declaring that Jalloh was unavailable and allowing the State to read his testimony into the record. The State correctly notes that the standard we should apply is not that the State has taken all measures to obtain the witness's testimony, but that it has made a diligent, good faith effort. *Coleman v. State*, 49 Md. App. 210, 226-27 (1981).

Based on our review of the record, the State made a good faith effort to secure Jalloh's testimony. The State properly served Jalloh with a subpoena to testify and

attempted to secure him legal counsel from the Public Defender's Office. The State made every reasonable effort to secure Jalloh's appearance, which was successful at one point during the ongoing trial. Jalloh told the State he did not want to testify. He further asserted a Fifth Amendment right not to testify. Finally, the State indicated that it had been in contact with Jalloh numerous times, and he provided many excuses as to why he could not testify. The State had no reason to believe that Jalloh would testify on the date he was assigned to appear.

The circuit court could rightfully rely upon the protestations of Jolloh and the acknowledgement of counsel that there would be a refusal to testify.[6] *Commercial Union*

[6] As previously discussed, Jalloh also refused to testify at the trial of the appellant's brother, Jamaal. *See Alexis v. State*, 209 Md. App. 630, 647 (2013). It should be noted that the trial judge at appellant's trial was the same as that at Jamaal's trial. *Id*. at 635. On appeal, this Court determined that "the circuit court properly concluded that Jalloh was 'unavailable' for purposes of Md. Rule 5-804(b)(1)." *Id*. at 668. We stated the following:

> In this case, Jalloh advised many times that he refused to testify. Outside the presence of the jury, the State asked Jalloh, "If the Court were to order you to answer questions, would you comply with that order and answer questions?" Jalloh replied, "No." The State asked Jalloh, "[I]f you're held in contempt, will that affect your decision as to whether to testify or not?" Jalloh answered, "No." The State asked Jalloh if the court holds him in contempt for a week or two weeks, would that change his decision to testify, and Jalloh answered, "It doesn't change anything." The circuit court asked Jalloh, "If I ask you those same questions, your answer would be the same?" Jalloh replied, "Yes, Your Honor." The court made a finding that Jalloh was in contempt of court for refusing to testify. Next, in the presence of the jury, the State asked Jalloh substantially similar questions, to which his responses were the same, and then the circuit court

Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 652 (1997) (Lawyers, as officers of the court, occupy a position of trust and our legal system relies on that trust. If counsel makes a representation, "counsel's word is counsel's bond unless there is something to the contrary that the opponent can bring in."). We agree with the State that the law does not require the court to follow specific steps that must end with a contempt finding. Md. Rule 5-804(a)(5) only requires the use of "process or other reasonable means."

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made a finding that Jalloh "ha[d] refused to testify" and that he was "in fact in contempt of court."

Although the circuit court did not specifically order Jalloh to testify, the circuit court made clear that Jalloh was being held in contempt for refusing to testify. The circuit court made two findings as to Jalloh's contempt, one outside of the presence of the jury and one before the jury. By finding Jalloh in contempt twice, the circuit court found that Jalloh could be penalized.

In *Gaskins v. State*, 10 Md. App. 666, 677 (1971), *cert. denied*, 404 U.S. 1040 (1972), this Court stated, "We think a witness who steadfastly refuses to testify under the penalty of contempt is, in effect, 'unavailable' as a witness." Although, in *Gaskins*, the trial court did not advise the witness of the maximum penalty of contempt or appoint him a lawyer, we upheld the finding of unavailability. *Id*. at 678 n. 5. Here, Jalloh steadfastly refused to testify, under the penalty of contempt. Jalloh faced "all appropriate judicial pressures" and still refused to testify. *Tyler v. State*, 342 Md. 776, 778 (1996). We concluded that, because Jalloh was subject to contempt, the circuit court did not err in finding, under Rule 5-804(a)(2) that Jalloh was unavailable.

Id. at 668-69. Importantly, there is nothing in this opinion that requires a contempt finding before a witness can be found to be unavailable. In addition, it is at least curious that the trial judge for both brothers was the same.

The final bridge that could have been traversed was the issuance of a body attachment and the hauling of Jolloh before the tribunal. Md. Rule 4-266(d).[7] That step, considering the circumstances of this case, was not necessary or requested, as the State acted with due diligence to have the witness appear in court when his testimony would be required. The court did not abuse its discretion in making the finding that Jalloh was "unavailable."

As to the third prong, Jalloh makes a secondary argument that the defense did not have an "opportunity" and similar notice to develop the testimony of the witness at the first trial. Md. Rule 5-804(b)(1); *Williams v. State*, 416 Md. 670, 646 (2010). The requirement is that the motive must be "sufficiently similar," where the party has been "given a full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination." *Williams*, 416 Md. at 696 (alterations in original).

As explained in *Williams:*

> The way to determine whether or not motives are similar is to look at the issues and the context in which the opportunity for examination previously arose, and compare that to the issues and context in which the testimony is

[7] Md. Rule 4-266(d) states:

> (d) **Attachment**. A witness personally served with a subpoena under this Rule is liable to a body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

> currently proffered. The similar motive inquiry is essentially a hypothetical one: is the motive to develop the testimony at the proper time similar to the motive that would exist if the declarant were produced (which of course he is not) at the current trial or hearing?

Id. at 697 (citation and internal quotations omitted).

In *Williams*, the Court held that the defendant's motive on cross-examination was different in the first trial than it would be at a retrial, because he did not know at the first trial that an eyewitness who later became unavailable was legally blind. The Court could not, therefore, say that counsel could have questioned her perception of events in the same way when he was ignorant of that key fact. *Id*. at 697-98.

In the instant case, the only difference between the first and second trial was that Jolloh was no longer incarcerated and had fulfilled the terms of his plea agreement. However, appellant failed to adequately brief this argument but simply makes a statement of a difference without further elaboration or supporting case law. Thus, we decline to address this issue on appeal. *See Barksdale v. Wilkowsky*, 192 Md. App. 366, 389 (2010) (declining to address argument where appellant makes no argument in support of claim, other than statement that testimony was inadmissible under Md. Rule 5-403), *rev'd on other grounds*, 419 Md. 649 (2011); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) (declining to address argument where party failed adequately to brief it). Further, it is not this Court's responsibility to attempt to fashion legal theories to support appellant's sweeping claims. *Elecs. Store, Inc. v. Cello P'shp*, 127 Md. App. 385, 405 (1999).

II.

Moving to the next question, appellant argues that the evidence from trial was insufficient to sustain his conviction for conspiracy to commit murder. We disagree.

This Court, in reviewing a challenge to the sufficiency of the evidence, applies the standard of "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (citing *Moye v. State*, 369 Md. 2, 12-13 (2002)). We give "due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Harrison v. State*, 382 Md. 477, 487-88 (2004) (citations omitted). In performing its function, "the jury [is] free to accept the evidence it believes and reject that which it does not." *Muir v. State*, 64 Md. App. 648, 654 (1985), *cert. granted*, 305 Md. 244 (1986), *aff'd*, 308 Md. 208 (1986). Accordingly, "[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.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (emphasis in original) (citations omitted).

Appellant contends that the evidence was insufficient to support a conviction for conspiracy to commit murder because the State only proved that: (1) appellant visited his brother in prison, (2) Bobby Ennels was killed after appellant said that his brother did not have to worry about Ennels because he would not say anything; and (3) that appellant

was in the area where the crime was committed, not that appellant conspired to murder Ennels.

The State argues that the law of the case doctrine precludes this Court's consideration of the appellant's sufficiency challenge. The law of the case doctrine provides that, "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling[.]" *Scott v. State*, 379 Md. 170, 183 (2004). The doctrine applies to a second appeal in the same case: "[d]ecisions rendered by a prior appellate panel will generally govern the second appeal at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice." *Id*. at 184 (internal quotations omitted).

The State correctly notes that Maryland appellate courts have not applied the law of the case doctrine to bar a sufficiency challenge. This Court has applied the doctrine in the context of a criminal proceeding where it considered the trial court's denial of a motion to suppress. In *Icgoren v. State*, 103 Md. App. 407, 441 (1995), we reversed the defendant's conviction, in an unreported opinion, but affirmed the trial court's denial of a motion to suppress. In a retrial, Icgoren's counsel "merely renewed the same motions [to suppress] and offered no additional arguments and *no additional evidence or factual support*." *Id*. at 439 (emphasis in original). This Court held that the law of the case doctrine barred its consideration of the legal grounds for the motion to suppress once again, where the motion "was, by its terms, limited to the same reasons as the originally

unsuccessful motion." *Id*. at 441; *cf. Tu v. State*, 97 Md. App. 486, 494-95 (1993) (declining to apply the doctrine to a ruling on a suppression motion, where the record on appeal of the second trial was "quite different" than it had been on the first appeal).

The State has cited cases from sister jurisdictions that have applied a similar rationale to prevent a defendant from relitigating a sufficiency challenge a second time. *See United States v. Garcia-Ortiz*, 792 F.3d 184, 191 (1st Cir. 2015) (applying the doctrine in the face of a sufficiency challenge, where the defendant presented no new evidence at a second trial, and noting the general proposition that "[t]he law of the case doctrine dictates that all litigations must sometime come to an end" (internal quotations omitted)); *Bennett v. State*, 825 S.W.2d 560, 562 (Ark. 1992) (applying the law of the case doctrine to preclude a sufficiency challenge to evidence presented at retrial, where evidence was "essentially the same"); *People v. Wilson*, 628 N.E.2d 472, 494 (Ill. 1993) (holding that evidence in the second trial was substantially the same as that in the first trial, thus allowing application of the doctrine); *Dixon v. Com.*, 505 S.W.2d 771, 772 (Ky. App. 1974) (applying the law of the case doctrine to preclude a sufficiency challenge on second appeal, and noting that "the evidence on the second trial was not substantially different from that on the first trial," because even though there were inconsistences in victim's testimony from one trial to the next, they were "of minor significance"). One other state has also ruled that where the evidence at the second trial was not materially different from that at the first trial, the doctrine of law of the case is applicable. *Henderson v. State*, 684 S.W.2d 231, 233 (Ark. 1985).

There is contrary authority on this issue. The Texas Criminal Appellate Court in *Alexander v. State of Texas*, 866 S.W.2d 1, 3 (Tex. Crim. App. 1993), has held the application of the law of the case doctrine is never appropriate when sufficiency of the evidence is challenged after a retrial. The Court opined that this position is less an exception to the law of the case doctrine than an application of its requirements. Re-prosecution may be upon a different theory than relied upon in the original trial. Less or different evidence may have been used in the second trial. In either case, the question presented by the challenge to the reconviction may not be the same as that presented in the first appeal. Further, the need to respect the presumption of innocence to which the accused is entitled in the retrial constitutes a sufficient compelling circumstance to render application of the doctrine inappropriate in these situations. *Id.*

As to the law of the case doctrine itself, there are three independent "exceptional circumstances" that can impair the law of the case doctrine: "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision on the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Baltimore Cty. v. Baltimore Cty. Fraternal Order of Police, Lodge No. 4*, 220 Md. App. 596, 659 (2014) (citations omitted), *aff'd*, 449 Md. 713 (2016).

The only "exceptional circumstance" that could apply here is the notion that the evidence in this second trial was "substantially different," but as a practical matter, that was not so. There was no less evidence presented-and indeed, when it came to Jalloh (the

"key witness," according to Rashadd), that testimony actually came from the first trial. Moreover, in talking about other witnesses at the retrial, defense counsel mentioned that, when he conferred with the prosecutor about who would be testifying, both acknowledged that the case involved "basically, as the same witnesses."

In this appeal, we need not resolve the issue of the applicability of the law of the case doctrine because, on its merits, the appellant's argument of the insufficiency of the evidence fails.

The State is correct that this Court addressed the issue of sufficiency of the evidence in *Alexis v. State*, 0510, September Term 2012, filed December 27, 2013. In the opinion, this Court stated:

> Although the conspiracy case against the appellant was not strong, the evidence was legally sufficient, that is, there was sufficient evidence to support a reasonable finding of an agreement between the appellant and Jamaal to have Ennels murdered, so as to allow the crime to go to the jury for decision. The testimony by Edmonds and Jalloh was key to proving a conspiracy. According to Edmonds, [appellant] solicited him to kill Ennels shortly after the Brown murder, but he refused. According to Jalloh, Jamaal talked about needing to have the witness against him killed, so he would not be convicted in the Brown murder trial, and later bragged that he would be going home because his brother-the appellant-had got rid of the witness against him. From this evidence, reasonable jurors could find beyond a reasonable doubt that the idea of killing Ennels originated with Jamal and that the appellant was involved in putting that idea into action; and from those findings the jurors could draw a rational inference that Jamaal and appellant, who were in frequent contact, in some fashion conferred and agreed to having Ennels killed.

(Emphasis added). This Court's ruling on sufficiency in the first case was based on the appellant's 2012 trial, and conviction, which this Court overturned in 2013. During the

2013 trial, Jalloh provided testimony which we held was crucial to prove that there was sufficient evidence to support a conviction for conspiracy to commit murder. In the 2016 trial, Jalloh's testimony at the first trial was introduced. As such, we must conduct a new inquiry into whether the evidence presented during the 2016 trial was sufficient to support a conviction, which leads us to the State's second argument. The State argues that the evidence presented during the 2016 trial was legally sufficient to support the conviction for conspiracy to commit murder. We agree.

In our review of the legal sufficiency of a conviction we restrain ourselves from "undertak[ing] a review of that record that would amount to a retrial of the case." *State v. Pagotto*, 361 Md. 528, 533 (2000). The sufficiency standard is the same whether the case relies on direct or circumstantial evidence. *State v. Smith*, 374 Md. 527, 534 (2003). To support a conviction for common law conspiracy, the evidence introduced by the State must show "the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement." *Mitchell v. State*, 363 Md. 130, 145 (2001). The Court in *Mitchell* explained that "[t]he agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Id*. To meet its burden of proof, "'the State [is] only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement.'" *Darling v. State*, 232 Md. App. 430, 467 (2017) (citation omitted)).

To sustain a conspiracy conviction, there must be some evidence from which the jury can reasonably infer that the defendant knew what the conspiracy was about and acted knowingly in helping to bring it about. *Mitchell*, 363 Md. 145-56. For someone to be a party to a conspiracy, "one must have some stake in the conspiracy, but that each party need not have the same stake; merely acting for the venture's success is sufficient." *Perry v. State*, 344 Md. 204, 234-35 (1996) (emphasis added) (internal quotations omitted).

There was abundant evidence from which the jury could infer a conspiracy between appellant and Jamaal, or between appellant and a third person, to kill Ennels. Although appellant claims that the State merely presented evidence about the completion of the crime, that claim ignores the evidence from which the jury could infer a pre-existing conspiracy-appellant's agreement to participate in Ennels's murder. It also fails to consider an additional theory under which the jury could have convicted appellant (and which the State also presented): that regardless of whether he and Jamaal agreed ahead of time, appellant conspired, on the night of Ennels's murder with someone else who was not Jamaal, to carry out the murder.

In its brief, the State gives a summary of the evidence from which the jury could infer that appellant and Jamaal had a "meeting of the minds" prior to the night of Ennels's murder (regardless of whether appellant was one of the people who actually killed Ennels), with the end goal of eliminating Ennels so he could not testify against Jamaal:

> -Jamaal had expressed concern (in the end, a legitimate one), to Edmonds that Ennels was going to give evidence to the State. He told Edmonds that Ennels was going to "snitch" on him, and Jamaal wanted to "set up" Ennels.
>
> -While Edmonds was on house arrest, he thought he saw someone stop in front of his house who came by to "shoot [his] house up" in retaliation for testifying against Jamaal.
>
> -Jalloh was present when Hunter advised Jamaal to get rid of any witnesses to Brown's murder if he wished to go free, and later Jamaal told Jalloh that "he was going home for sure" because his brother had eliminated the key witness. For good measure, Jamaal even told Jalloh that a girl (*i.e.*, Lammons) was with two other people (*i.e.*, Ennels and Cash) at the time.
>
> -The jury heard the conversation between appellant, Jamaal, and Shropshire four days before Ennels was murdered, in which the State argued that Jamaal asked about the status of Ennels's murder.
>
> -Appellant suggested to Corporal Webb that the investigation would go nowhere, explaining that "they" (*i.e.*, the police) could not possibly know all the details because if they did, he "would be going in." He also asked, rhetorically, "why they let me go, that's what happened to my brother. He came here and never came out."

In addition, the State introduced evidence from which the jury could infer that appellant either had a "meeting of the minds" ahead of Ennels's murder with Jamaal and went on to commit it, or had a "meeting of the minds" with another, unidentified person who acted with him on the night of Ennels's murder:

> -Lammons heard Ennels tell one of the men who approached his car that they did not have to worry about anything and he "wouldn't say nothing."
>
> -When gunmen first fired at the group, gunfire was directed at Ennels alone, suggesting that he was singled out for the murder and that this was not just a drug deal gone awry.
>
> -Lammons identified appellant at trial as one of the men who was there.

> -A black skullcap was found near Woody's house that included DNA from appellant.
>
> -Officer Nolasco saw appellant speeding from the direction of the murder scene. Appellant was extremely nervous when Nolasco approached the car, and he was covered in splotches of blood.
>
> -Cell phone evidence put a second phone that had made contact almost exclusively with Ennels's phone in the area of the shooting just before Ennels was killed. The phone was purchased from a store near where Rashadd lived.
>
> -Appellant appeared to express bravado to Detective Turner about the fact that the State had no evidence against him to prove Ennels's murder, and was surprised when the detective produced the murder weapon.

The skullcap alone was direct evidence that established appellant's participation in the murder, and the prosecutor argued that the skullcap established that appellant cornered Cash in the backyard where Cash sought shelter after fleeing the scene of Ennels's shooting. According to the prosecutor, Cash and appellant fought in the backyard, appellant got Cash's blood on him, and his skullcap fell off in the chaos. The presence of the skullcap, in combination with the abundant circumstantial evidence, required only that the jury connect the evidence between Ennels's death and appellant's involvement in it.

The evidence presented at trial established that appellant and Jamaal agreed that appellant would kill Ennels to keep him from testifying at Jamaal's trial. Appellant was at the scene of Ennels's murder with a second person. The jury was, therefore, provided

with sufficient evidence to convict appellant of conspiracy to murder Ennels.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.