Circuit Court for Baltimore County
Case No. 03-K-18-005374

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1519

September Term, 2019

EARL MORRIS

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: February 18, 2021

*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.

A jury sitting in the Circuit Court for Baltimore County convicted the appellant, Earl Morris, of two counts of armed robbery and several related offenses in connection with the theft of dozens of cell phones, an iPad, and cash from an AT&T store in Baltimore County. As relevant to this appeal, in addition to sentences imposed for armed robbery and use of a firearm in connection with the crime, the trial court sentenced Mr. Morris to concurrent sentences of 20 years' imprisonment for conspiracy to commit armed robbery and 15 years' imprisonment for conspiracy to commit robbery.

Mr. Morris asks us to consider whether the trial court: (1) committed plain error in an instruction given in response to a jury note; (2) erred in permitting the State to introduce into evidence clothing seized from Mr. Morris's co-defendant; and (3) erred in sentencing Mr. Morris separately on each of the two conspiracy convictions. The State concedes, and we agree, that the trial court erred in not vacating one of Mr. Morris's conspiracy convictions. Accordingly, we will vacate the conviction and sentence for conspiracy to commit robbery. We will otherwise affirm the trial court's judgments.

BACKGROUND

At approximately 7:45 p.m. on November 17, 2018, Keonna Moore,[1] a sales associate at the AT&T store on Harford Road in Parkville, was in the store's break room when two men—one "big" and one "short and skinny"—entered the store with their faces covered. The bigger man, later identified as Mr. Morris, directed Ms. Moore at gunpoint to the "safe room," where the store's inventory was secured. He ordered Ms. Moore to

[1] The transcript spells Ms. Moore's first name "Keyona." The briefs and other court documents spell her name as "Keonna," which we assume to be the correct spelling.

open the safe and prompted her and Keisha Webster, the other sales associate working that night, to load phones from the safe into black trash bags that the men provided.[2] Along with the phones, Ms. Moore surreptitiously placed a tracking device into one of the bags.

The men then ordered Ms. Moore onto the ground and took Ms. Webster to the front of the store to open the register, from which they grabbed approximately $250 in cash. After the men left, Ms. Webster pressed a panic alarm. The police arrived minutes later.

Officer Melvin Koramah responded to the robbery call and was tasked with locating the vehicle containing the tracking device, assisted by real-time updates of the device's location. Officer Koramah pursued the vehicle into Baltimore City, where he discovered that the getaway car had crashed and that Baltimore City Police officers had already detained Mr. Morris. Police also had detained Kelly Davis, another occupant in the car who had fled on foot after the crash and was apprehended near the crash scene. In a search conducted pursuant to a warrant, police later recovered black plastic bags from the vehicle containing the stolen cell phones, cash, latex gloves, masks, and a handgun loaded with blanks.

Dazha Adams,[3] Mr. Davis's girlfriend, testified that Mr. Davis had told her that he and his friend, Mr. Morris, had come up with a way to obtain some money to wipe out their

[2] Ms. Moore and Ms. Webster gave the police a list of the stolen phones' serial numbers. Detective Larry Rogers later determined that the stolen items, including the phones, an iPad, and chargers, had a value of almost $48,000.

[3] Ms. Adams, who had pleaded guilty to armed robbery and was awaiting sentencing at the time of Mr. Morris's trial, testified in exchange for the prosecutor's recommendation that she receive no more than 18 months of executed local prison time. Mr. Davis pleaded

debt. Ms. Adams explained how she and Mr. Davis had picked up Mr. Morris, who brought the trash bags, and she drove them to the AT&T store. She waited in the car while the two men entered the store and later returned with the trash bags in their hands.[4] The trio had planned to return to Ms. Adams's house to count and divvy up the proceeds from the robbery, but that plan was thwarted when the police located them almost immediately after they left the store. Ms. Adams said that at some point shortly into the police chase, Mr. Morris jumped out of the car. When she saw the police, Ms. Adams panicked, ran a red light, and was hit by an oncoming vehicle. After the crash, Mr. Davis exited the car and fled the scene, leaving the stolen phones, but Ms. Adams remained and was arrested.

Following his conviction, Mr. Morris filed this timely appeal.

DISCUSSION

I. WE DECLINE TO EXERCISE PLAIN ERROR REVIEW OF MR. MORRIS'S UNPRESERVED JURY INSTRUCTION CONTENTION.

Mr. Morris argues that the trial court committed plain error in an instruction it gave in response to a jury note provided during the jury's deliberations. He argues that the court's instruction "failed to convey the importance of individual judgment" and coercively "highlighted the court's 'preference' for the jury to 'come up with a unanimous verdict'"

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guilty to charges of armed robbery and the use of a handgun in the commission of a crime of violence.

[4] From still photos taken from the store's security video at the time of the robbery, Ms. Adams identified Mr. Morris as the larger man wearing all black clothing and carrying a gun and Mr. Davis as the smaller man wearing a gray jacket, camouflage pants, and blue shoes.

on all the charges. Acknowledging that he failed to object to the court's instruction at trial, Mr. Morris urges us to exercise our discretion to review the issue for plain error.

Rule 4-325 governs instructions to the jury and states. It states in pertinent part:

> (e) **Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Rule 4-325(e) makes clear that the absence of an objection to the giving or the failure to give a jury instruction at trial ordinarily constitutes a waiver of a claim that the instructions were erroneous. *See Morris v. State*, 153 Md. App. 480, 509 (2003). "Only if a party takes exception to an error in the jury instruction does the court have the opportunity to correct it." *McMillan v. State*, 181 Md. App. 298, 359 (2008), *rev'd on other grounds*, 428 Md. 333 (2012).

Rule 4-325(e) grants us "plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court." *Id.* (quoting *Danna v. State*, 91 Md. App. 443, 450 (1992)). But plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court that "vitally affect[ ] a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)).

In the context of erroneous jury instructions, the plain error doctrine has been applied sparingly. *Conyers v. State*, 354 Md. 132, 171 (1999). The plain error hurdle, "high in all events, nowhere looms larger than in the context of alleged instructional errors." *Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Peterson v. State*, 196 Md. App. 563, 589 (2010)). To recognize error in a trial court's instructions absent an objection, "the error must be plain, and material to the rights of the accused, and, even then, the exercise of [appellate] discretion to correct it should be limited to those cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice." *Campbell v. State*, 243 Md. App. 507, 538 (2019) (quoting *Brown v. State*, 14 Md. App. 415, 422 (1972)), *cert. denied*, 467 Md. 695 (2020), & *cert. denied*, ___ S. Ct. ___, 2021 WL 78082 (2021). Moreover, where, as here, a party "affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the instructions as actually given[,]" we are "especially disinclined to take the extraordinary step of noticing plain error[.]" *Choate v. State*, 214 Md. App. 118, 130 (2013).

In *State v. Rich*, the Court of Appeals adopted a four-prong test regarding plain error review of a trial court's jury instructions:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

415 Md. 567, 578-79 (2010) (internal quotation marks, citations, and alterations omitted) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Here, less than an hour-and-a-half after the jury began its deliberations on the second day of trial, the jury sent the court a note asking: (1) "If one person votes not guilty on one count does that equal not guilty?" and (2) "If one charge is not guilty does it throw the rest of the rest of the guilty charges out?" The trial court summoned counsel to discuss the jury's questions, during which the court stated that "we're nowhere near an *Allen* charge territory."[5] The transcript reflects that counsel for Mr. Morris and the State both "[i]ndicat[ed] in the affirmative" in response. The court then brought the jury back into the courtroom and instructed them as follows:

> THE COURT: Please be seated. Ladies and gentlemen of the jury, you have given us two questions. The first question is, If one person votes not guilty on one count, does that equal not guilty? The instructions were or are still that we're looking for a unanimous verdict. So, for someone to be not guilty, all twelve of you would have to say not guilty. Conversely, if someone is guilty, all twelve of you would have to say guilty.
>
> Now, it is certainly possible that you could not come up with a determination if you were eleven to one or one to eleven or any of the various numbers in between there on one of the counts and you would not have a verdict on that count.
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> The other question is, If one charge is not guilty, does it throw the rest of the guilty charges out? I'm not exactly sure what this question means, but

[5] The term "Allen charge" derives from a jury instruction, approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492, 501 (1896), to be given to a deadlocked jury in a criminal case. The Court of Appeals has disapproved the use of the traditional Allen charge in Maryland courts, but has endorsed a "modified Allen charge," which is considered less coercive than a traditional Allen charge and encourages all of the jurors to deliberate and reconsider their respective positions while not surrendering individual honest convictions. *See Armacost v. Davis*, 462 Md. 504, 521 n.9 (2019).

I'll try to answer it for you as best I can. With regard to this second question, there are eleven charges that have been given to you. You could find Mr. Morris not guilty on all eleven charges. You could find him guilty on eleven charges. Could you find him guilty on nine charges and not guilty on two charges. We can go through that two and nine, seven and four. You'r[e] smart people. You can do the rest of the math.

Each one of those charges has to be considered by itself. So, for instance on Count 1, if you found found [sic] him not guilty, that doesn't mean that you couldn't find him guilty on Count 2 and vice versa.

So, lastly, and I'm not encouraging you to not to come up with a verdict, but if you can decide nine of the instances and not three, the other three would be called hung. You would be hung on those three counts, meaning that you didn't come up with a determination on those three counts.

It would be my preference and the preference of the system and the counsel here that you come up with a unanimous verdict on all twelve charges, but maybe you can't. We're not there yet.

So, it is 4:30. But the alternative to not going back to the jury room now is we come back tomorrow and do this all over again. I'm seeing a lot of shaking heads. I'm assuming that you folks would rather go back and try to work this thing out. Is that correct?

A JUROR: Yes.

THE COURT: So, here is what I'm going to do. Counsel, any comments?

[PROSECUTOR]: No, sir.

THE COURT: I'm going to ask you to go back to the jury room and try to find unanimity on all twelve charges. Guilty or not guilty, that is your call to make. You're the judges of fact here. And if you can only decide ten of the charges and you can't decide the other two and you're hopelessly deadlocked, that is your statement to make, but we're not there yet.

So, I would appreciate it if you would go back and see what you can get done. Okay? Thank you.

After the jury left, the court asked if either counsel had any "commentary," and both responded that they did not. About ten minutes later, the jury returned with a verdict of guilty on all counts.

Under the circumstances, we cannot say that the trial court's supplemental instruction was erroneous or that, even if erroneous, the exercise of plain error review would be appropriate. The alleged legal error is neither clear nor obvious. Mr. Morris claims that the trial court employed unduly coercive instructions to sway each juror's verdict into acquiescence with a majority, thereby violating the rule requiring individual jurors to decide freely and voluntarily. *See Hall v. State*, 214 Md. App. 208, 219 (2013). But the jurors had neither informed the court that they were deadlocked nor suggested that any juror felt pressured by the others. Instead, their note raised procedural questions about the necessity of unanimity and effect of a lack of unanimity in rendering a guilty verdict on each charge, and whether a not guilty verdict on any one charge would have implications for the other charges. The court answered their questions, and in so doing, encouraged but did not require the jury to reach a verdict on all charges. And, in light of the jury's apparent desire, the court sent it back to continue deliberating, instead of "com[ing] back tomorrow and do[ing] this all over again."[6]

The court's response merely expanded in a neutral manner upon its initial instruction that any verdict must be unanimous, but it made no suggestion of a particular

[6] Mr. Morris seems to interpret the court's reference to jurors shaking their heads in response to being presented with the option of returning the following day as indicative of possible coercion. The court interpreted it as an expression of their choice to continue deliberating that evening. We have no reason to doubt the trial court's interpretation.

verdict that would be acceptable, and it expressly informed the jurors that it was possible for the jury to render no verdict on some counts. We perceive no coercion in the trial court's supplemental instruction nor any undermining of the requirement that each juror render a voluntary, individual verdict. *See Caldwell v. State*, 164 Md. App. 612, 635 (2005) (stating that unanimity, a "fundamental aspect" of a jury trial, "embraces not only numerical completeness but also completeness of assent, *i.e.*, each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influences"). We therefore decline to exercise plain error review.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE CLOTHING SEIZED FROM MR. DAVIS.

Mr. Morris next contends that the trial court erred when it permitted the State to introduce into evidence clothing the police had seized from Mr. Davis when he was arrested for his part in the robbery. In Mr. Morris's view, the clothing was not relevant and was "highly prejudicial," because it served to bolster the State's theory that he participated in the robbery with Mr. Davis and Ms. Adams.

Detective Rogers testified that he had collected the "unique" clothing, including camouflage pants and blue shoes, worn by Mr. Davis at the time of his arrest. The prosecutor asserted that the clothes were similar to those worn by the smaller robber, as seen on the AT&T store's video recording of the robbery, and offered them into evidence after a still photograph from the video had already been admitted.

Generally, all relevant evidence is admissible. Md. Rule 5-402. "Evidence is relevant if it tends 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.'" *Walter v. State*, 239 Md. App. 168, 198 (2018) (quoting Md. Rule 5-401). "Having 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (quoting *State v. Simms*, 420 Md. 705, 727 (2011)).

Still, a trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or a similar countervailing concern. Md. Rule 5-403; *Decker v. State*, 408 Md. 631, 640 (2009). In balancing probative value against unfair prejudice, prejudicial evidence is not excluded under Rule 5-403 merely because it hurts one party's case. *Burris v. State*, 435 Md. 370, 392 (2013) (citing *Odum v. State*, 412 Md. 593, 615 (2010)). Instead, probative value is substantially outweighed by unfair prejudice only when the evidence "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *State v. Heath*, 464 Md. 445, 464 (2019) (quoting *Hannah v. State*, 420 Md. 339, 347 (2011)). And even then, the admission of evidence is "committed to the considerable and sound discretion of the trial court." *Copsey v. Park*, 453 Md. 141, 157 (2017) (quoting *Merzbacher v. State*, 346 Md. 391, 404 (1997)).

We review "the probative value of the evidence against the danger of unfair prejudice . . . for abuse of discretion." *Payne v. State*, 243 Md. App. 465, 481 (2019) (quoting *State v. Faulkner*, 314 Md. 630, 641 (1989)). We review a court's determination of the relevance of evidence without deference. *See Simms*, 420 Md. at 724-25.

Here, the identities of the perpetrators was a critical fact. The jurors were presented with a video recording (and still photos taken therefrom) of the robbery and were able to see the two robbers, one of whom was wearing distinctive camouflage pants and blue shoes. That Mr. Davis was apprehended a short time after the robbery wearing what appeared to be those same clothes, after being seen jumping out of the car containing the stolen items, had the tendency of proving that he was one of the individuals in the security video. The clothing was therefore relevant to the jury's determination of his participation in the robbery. And because Mr. Morris had been tied to Mr. Davis through Ms. Adams's testimony and faced charges of conspiracy to commit the same crime, the identity of Mr. Davis as one of the robbers made it more likely that Mr. Morris was the other robber caught on the security video. The trial court thus did not err in determining that the clothing was relevant evidence.

We further perceive no abuse of discretion by the trial court in not excluding the clothing as unfairly prejudicial. "Evidence may be unfairly prejudicial 'if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Odum*, 412 Md. at 615 (quoting Lynn McLain, *Maryland Evidence* § 403:1(b) (2d ed. 2001)). The "[p]robative value is outweighed by the danger of '*unfair'* prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum*, 412 Md. at 615 (quoting Joseph F. Murphy, Jr., *Maryland Criminal Evidence Handbook* § 506(B) (3d ed. 1993 & Supp. 2007)).

The items of clothing recovered from Mr. Davis were not the kind of evidence likely to evoke an emotional response that would have posed a danger that the jury would disregard the other evidence in the case. The jurors were able to decide for themselves if the clothing taken from Mr. Davis upon his arrest matched the clothing worn by the smaller robber seen in the security video without the clothing inflaming their passions. Indeed, Mr. Morris has not presented any basis to conclude that the introduction of the clothing was unfairly prejudicial, much less to an extent that would outweigh its probative value. We are satisfied that the trial court did not abuse its discretion in admitting the clothing into evidence.

III. MR. MORRIS'S CONVICTION FOR CONSPIRACY TO COMMIT ROBBERY MUST BE VACATED.

Mr. Morris contends that the trial court erred in imposing separate sentences for the convictions of conspiracy to commit robbery and conspiracy to commit armed robbery. The State concedes that both the conviction and sentence imposed for the charge of conspiracy to commit robbery were erroneous and should be vacated. We agree with the State.[7]

"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) (quoting *Mason v.*

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[7] As a threshold matter, we note that it does not appear that Mr. Morris raised this argument before the trial court. However, because a defendant may challenge an illegal sentence at any time, the omission presents no hurdle to our review of this claim even on direct appeal. *See Jordan v. State*, 323 Md. 151, 160-61 (1991).

State, 302 Md. 434, 444 (1985)). "The 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives.'" *Savage*, 212 Md. App. at 13 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). Accordingly, "[a] single agreement . . . constitutes one conspiracy[.]" *Savage*, 212 Md. App. at 13 (quoting *United States v. Broce*, 488 U.S. 563, 570-71 (1989)).

The State bears the burden of proving the agreement or agreements underlying the conspiracy. *Savage*, 212 Md. App. at 14. Therefore, "[i]f the prosecution fails to present proof sufficient to establish a second conspiracy, it follows that there [is] merely one continuous conspiratorial relationship, or one ongoing criminal enterprise, that is evidenced by the multiple acts or agreements done in furtherance of it." *Id* . at 17. "If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id.* at 26.

The State rightly concedes that it did not establish two distinct conspiracies. The evidence presented at trial was that Messrs. Morris and Davis participated in a single armed robbery of the AT&T store. The State presented no evidence to establish that the men entered into multiple agreements, nor did the State advance such an argument during its opening statement or closing argument. Moreover, the trial court did not instruct the jury that it could find Mr. Morris guilty of two conspiracies only if it found that he entered into two separate agreements to break the law. Because the State proved the existence of only a single conspiracy, only one conspiracy conviction may stand. *See, e.g.*, *Jordan*, 323 Md. at 161-62 (concluding that the evidence did not support the determination that two separate conspiracies existed and remanding for the court to vacate the judgment of conviction for

conspiracy to commit robbery); *Martin v. State*, 165 Md. App. 189, 210 (2005) (vacating the "conviction and sentence for conspiracy to commit robbery" because the record showed a single conspiracy to commit murder and robbery). Accordingly, because we typically vacate the conviction carrying the less serious penalty, *see, e.g.*, *Jordan*, 323 Md. at 162, we will vacate Mr. Morris's conviction and sentence for conspiracy to commit robbery.

CONVICTION AND SENTENCE FOR CONSPIRACY TO COMMIT ROBBERY VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED; COSTS ASSESSED 2/3 TO APPELLANT AND 1/3 TO BALTIMORE COUNTY.