UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0954

September Term, 2015

KAMISHA J. LOFTIN

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 20, 2016

Appellant, Kamisha Loftin ("Loftin"), was convicted by a jury in the Circuit Court for Montgomery County, Maryland, of robbery and conspiracy to commit robbery. After she was sentenced to eight years for robbery, Loftin timely appealed. In her appeal, Loftin presents the following question for our review:[1]

> Whether the circuit court erred in denying Loftin's motion for judgment of acquittal for insufficient evidence.

For the reasons set forth herein, we shall affirm the judgment of the Circuit Court for Montgomery County.[2]

FACTS AND PROCEEDINGS

On August 12, 2014, at around 8:00 p.m., seventy-nine-year old Rawatmal Surana ("Mr. Surana") and his wife of fifty-two years, Kusum Surana ("Mrs. Surana"), arrived at the Maryland Live Casino to eat dinner and then gamble on slot machines. After sitting down near a machine and playing for a few minutes, an African-American female in a long, red dress sat down next to Mr. Surana. Mr. Surana testified at trial that he would not be able to recognize that woman again if he saw her.

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[1]The issue, as presented by Loftin, is:

> Was the evidence legally insufficient to support Appellant's convictions?

[2] The court merged the sentence for the conspiracy conviction with the sentence for the robbery, notwithstanding that conspiracy and the underlying crime ordinarily are treated as separate crimes. *See*, *e.g.*, *Carroll v. State*, 428 Md. 679, 694, 700 (2012) (recognizing that conspiracy does not merge into the underlying offense under required evidence or rule of lenity, and that merger is not required under fundamental fairness).

The woman played on an adjacent machine, then started a conversation with Mr. Surana. At one point, Mr. Surana opened his wallet and the woman commented that he had "a lot of money" in his wallet, and she asked if he had won a jackpot. Mr. Surana replied that he was "still losing," and continued to play. Soon, the woman stopped playing and informed Mr. Surana that she "ran out of . . . money," and was waiting for more to arrive. The woman then got up, and began talking with an African-American gentleman sitting behind Mrs. Surana in a different row of slot machines. Those two individuals stayed in the general area while the Suranas continued to play over the course of the next two or three hours. Mr. Surana testified that he did not see them play any slot machines during this time.

At around 10:30 or 11:30 p.m., Mr. Surana helped his wife use her walker to leave the casino. They returned to the parking garage, got into their Mercedes, and drove to their single family home on Stonecrest Drive in Silver Spring, Montgomery County, Maryland. As he was arriving in their residential neighborhood at around midnight, Mr. Surana noticed that a car was behind him. That car turned off its lights and parked. There were no other vehicles around at the time.

After Mr. Surana parked his Mercedes in his garage, he got out and started to retrieve his wife's walker from the trunk. At that point, an African-American man wearing dark clothing jumped out, pushed Mr. Surana down to the ground, and demanded his wallet. The assailant said "give me money, give me money," and then ripped Mr. Surana's wallet out of

his left pants pocket, tearing the pocket in the process. Mr. Surana testified that his wallet contained his driver's license, insurance information, $460.00 in currency, and two credit cards, one of which was an American Express card in his wife's name, and the other, a U.S. Bank FlexPerks card in his name. After taking the wallet, the man fled towards a waiting vehicle. That vehicle subsequently left the area, driving away with his headlights off. According to the 911 call that was played for the jury, Mr. Surana reported the robbery to police at approximately 12:33 a.m. on August 13, 2014.

Detective Ryan Biedlingmaier ("Detective Biedlingmaier"), of the Montgomery County Police Department, was the lead investigator in this case. After contacting Tom Coppinger ("Coppinger"), Vice President of Risk Management, Compliance and Surveillance at Maryland Live Casino in Hanover, Maryland, Detective Biedlingmaier obtained surveillance video recordings from the casino and associated parking garage. Those recordings were viewed by the jury and admitted into evidence during Loftin's trial. Based on those recordings, Detective Biedlingmaier created a timeline of events in this case.

Loftin and her companion, Antonio Applewhite ("Applewhite"), entered the casino parking garage, in a rented red Ford Fusion with North Carolina license plates, at around 7:36 p.m. on the night in question. This was determined by using license plate recognition systems that recorded tag numbers of vehicles entering or exiting the casino parking garage, as well as an identification card scanner at the casino entrances to record the driver's license

information for anyone appearing to be under the age of 35. The vehicle parked in the garage at around 7:41 p.m.[3]

At around 7:56 p.m., Mr. and Mrs. Surana, entered the casino from a nearby restaurant. Loftin and Applewhite first encountered the Suranas approximately an hour later, between 9:12 and 9:18 p.m. As seen on the surveillance videos played in court, Loftin was attired in a long dress, either coral or red in color, and Applewhite wore jeans, a black t-shirt, and a baseball cap.

According to Coppinger, who also testified at trial, the surveillance recordings revealed that Loftin and Applewhite "were constantly back and forth in the area where the Suranas were playing, gaming, and then appeared to follow them out of the casino." Detective Biedlingmaier concurred with Coppinger, testifying that, in the one and a half hours between 9:12 and 10:41 p.m., Loftin sat next to Mr. Surana while he was playing slots, and Applewhite was "lingering in the background" near other machines. At times, Loftin and Applewhite met and interacted in "close proximity," while the Suranas continued gaming. Indeed, Applewhite followed Mrs. Surana to the restroom area at around 10:43 p.m. Applewhite did not play any of the slots, and Loftin only played some when she made her initial contact with Mr. Surana.

[3] The red car was rented from Avis Budget Group by Applewhite.

At around 11:48 p.m., and shortly before the Suranas left the casino, video surveillance showed Loftin leaving the casino and walking by herself to the red Ford Fusion in the parking lot. At around the same time, Applewhite was seen riding in the same elevator with the Suranas as they left the casino. The Suranas then got into their Mercedes and left the parking garage at around 12:02 a.m., followed by the red Ford. Although he agreed that he could not specifically identify the driver of the Ford from video surveillance, Detective Biedlingmaier opined that the driver was wearing a dress that was similar in color to the one worn by Loftin earlier that same evening. The detective further testified that the red Ford was six cars behind the Surana's Mercedes when it left the garage.

Additional video-recorded evidence was admitted concerning the events that took place after Mr. Surana was robbed in his driveway. The jury saw footage from an Exxon Mobil gas station, located in Washington, D.C., approximately four-tenths of a mile from Loftin's home address. Video surveillance from this location was pertinent because there was evidence that, at around 1:13 a.m., and within mere minutes of the robbery, the Surana's American Express credit card was declined at this station.

At around 1:10 a.m., according to the video surveillance from the gas station, Loftin and Applewhite arrived in the same red Ford seen leaving the casino earlier that evening. After the Ford parked at the pumps near an unidentified SUV, Loftin got out of the driver's side of the Ford, walked over to a trash can, then returned to the driver's seat. Meanwhile,

Loftin's companion, Applewhite, spoke to the driver of the nearby SUV, and momentarily went inside the convenience store to speak to the cashier. Shortly after 1:18 a.m., Applewhite got back into the Ford, and both the Ford and the unidentified SUV simultaneously left the gas station.

DISCUSSION

Loftin contends that the evidence was legally insufficient to sustain her convictions for robbery and conspiracy to commit robbery. Loftin specifically argues that there was no evidence of an agreement to support a criminal conspiracy, and that there was insufficient evidence tending to show that she was an accomplice in the robbery. The State responds that the evidence in this case, both direct and circumstantial, was sufficient to sustain Loftin's convictions. We agree with the State.[4]

In reviewing the sufficiency of the evidence, we must decide "'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 (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S.

[4] At the end of the State's case-in-chief, Loftin only argued that the evidence was insufficient to convict her of robbery. Thereafter, at the close of all the evidence, Loftin offered only general argument of insufficiency, asserting that "[b]eing present is not sufficient to prove anything." Although it is arguable that Loftin's argument was not particularized as to the conspiracy charge, *see Montgomery v. State*, 206 Md. App. 357, 385-86, *cert. denied*, 429 Md. 83 (2012), because preservation is unchallenged by the State, we shall address the sufficiency of both Loftin's convictions.

307, 319 (1979), *cert. denied*, 443 Md. 736 (2015)). In applying this standard, 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.'" *Id.* (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). Furthermore,

> "The Court's concern is not whether the verdict is in accord with what appears 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 offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence."

DeGrange v. State, 221 Md. App. 415, 420-21 (2015) (alterations in original) (quoting *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014)); *see also Fraidin v. State*, 85 Md. App. 231, 241-42 ("The limited question before us, therefore, 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." (emphases in original)), *cert. denied*, 322 Md. 614 (1991). Moreover, courts in Maryland have long held that there is no difference between direct and circumstantial evidence:

> "'[C]ircumstantial evidence need not be such that no possible theory other than guilt can stand . . . . It is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors. The rule does not require that the jury be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt.' 3 *Wharton's Criminal Evidence* (12th Ed.1955) § 980, p. 477. While it must afford the basis for an inference of guilt beyond a reasonable doubt, it is not necessary that each circumstance, standing alone, be sufficient to establish guilt, but the circumstances are to be considered collectively. 1 *Underhill's Criminal Evidence* (5th Ed.1956) § 17, p. 23 and p. 25."

Hebron v. State, 331 Md. 219, 226-27 (1993) (quoting *Gilmore v. State*, 263 Md. 268, 292-293 (1971) (quoting *Nichols v. State*, 5 Md. App. 340, 350 (1968)), *vacated in part, Gilmore v. Maryland*, 408 U.S. 940 (1972)); *see also Hall v. State*, 225 Md. App. 72, 81 (2015) ("That all the evidence against him was circumstantial is irrelevant.").

We begin by addressing the underlying premise of Loftin's argument on appeal. Loftin asserts that "[t]he number of assumptions that the jury necessarily had to make in order to convict firmly establishes that Loftin's convictions were based, impermissibly, on pure speculation." Although this Court has recognized that mere speculation is not permitted, *see Dukes v. State*, 178 Md. App. 38, 47-48 ("Maryland courts have long drawn a distinction between rational inference from evidence, which is legitimate, and mere speculation, which is not."), *cert. denied*, 405 Md. 64 (2008), inferences are permitted from the evidence properly admitted. This is so because there are few facts, including even

ultimate facts, that cannot be established by rational inference. As we observed in *Evans v. State*, 28 Md. App. 640, 702-03 (1975), *aff'd*, 278 Md. 197 (1976):

> In a real sense, the whole decision-making process is the process of drawing inferences. From fact A, we infer fact B. From a confession, we infer guilt. From the pulling of a trigger, we infer an intent to harm. From the possession of recently stolen goods, we infer the theft. From the motive, we infer the criminal agency. From the presence of the sperm, we infer the penetration. From the muddy footprints on the living room rug, we infer the unlawful entry. The whole phenomenon of circumstantial evidence is the phenomenon of inferring facts in issue from facts established.

Id.

Moreover, on appeal, our standard of review of evidentiary sufficiency following a jury trial is only concerned with the burden of production, not the burden of persuasion:

> Once the trial moves on, moreover, from the threshold of evidentiary admissibility to testing the satisfaction of the burden of production, an inferred fact is simply a fact like any other fact. In testing the legal sufficiency of the evidence in a criminal case, we take that version of the evidence most favorable to the State and assume for all of its constituent elements, regardless of their evidentiary origins, maximum credibility and maximum weight. *As a matter of persuasion, factfinders may assign different pieces of evidence different weights*, *but a reviewing court does not do so when assessing the burden of production, as a matter of law*. At the end of the case and with respect to the burden of production, the exculpatory inferences do not exist. They are not a part of that version of the evidence most favorable to the State's case.

Cerrato-Molina v. State, 223 Md. App. 329, 350-51 (emphasis added) (footnote omitted), *cert. denied*, 445 Md. 5 (2015).

Turning to the specific facts in this case, the primary charge levied against Loftin was robbery. The Court of Appeals recently stated that "[r]obbery in Maryland is governed by a common law standard." *Spencer v. State*, 422 Md. 422, 428 (2011). Robbery retains its judicially determined meaning, *i.e.*, "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear." *Coles v. State*, 374 Md. 114, 123 (2003) (quotation omitted). There is little dispute that the actions of Mr. Surana's assailant qualified as robbery. Mr. Surana's wallet was ripped from his pants, violently, and then carried away to a waiting vehicle parked nearby. Considering the burden of production and the rule that, on appellate review, we assess disputed facts in the light most favorable to the prosecution, there was also sufficient evidence supporting a rational inference that Applewhite was the principal in the first degree in that robbery. *See Owens v. State*, 161 Md. App. 91, 99 (2005) ("A first degree principal is the actual perpetrator of the crime."). The question, then, is whether the evidence was also sufficient to show that Loftin was an accomplice in that robbery.[5]

"'[T]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must

[5] The jury was instructed on the legal concept of accomplice liability.

in some way advocate or encourage the commission of the crime.'" *Silva v. State*, 422 Md. 17, 28 (2011) (quoting *State v. Raines*, 326 Md. 582, 597 (1992)). "'[T]he mere fact that a person witnesses a crime and makes no objection to its commission, and does not notify the police, does not make him a participant in the crime.'" *Id.* (alteration in original) (quoting *State v. Foster*, 263 Md. 388, 394 (1971)). "Instead, the person must actually participate by 'assist[ing], support[ing] or supplement[ing] the efforts of another,' or, if not actively participating, then the person must be present and 'advise or encourage the commission of a crime' to be considered an accomplice." *Id.* (alterations in original) (quoting *Foster*, *supra*, 263 Md. at 393). "The test commonly used to determine whether a witness was an accomplice is 'whether the witness could be indicted and/or punished for the crime charged against the defendant.'" *Id.* (quoting *Foster*, *supra*, 263 Md. at 393). Indeed, "'[a]s a general rule, when two or more persons participate in a criminal offense, each is ordinarily responsible for the acts of the other done in furtherance of the commission of the offense and the escape therefrom. . . .'" *Owens*, *supra*, 161 Md. App. at 105-106 (quoting *Sheppard v. State*, 312 Md. 118, 121-22 (1988)).

Of course, mere presence at the scene of a crime is insufficient to sustain a guilty finding. *Warfield v. State*, 315 Md. 474, 491 (1989) ("'[P]resence, alone, at the place where a crime has been committed is not sufficient to establish participation in the perpetration of the crime.'" (quoting *Johnson v. State*, 227 Md. 159, 175 (1961))); *see also Fleming v. State*,

373 Md. 426, 433 (2003) (recognizing that mere presence is nevertheless an "important element" in determining participation). Presence coupled with aiding and abetting by direct assistance in the commission of the crime, however, establishes a defendant's accountability as a principal in the second degree. *Todd & Merryman v. State*, 26 Md. App. 583, 585 ("When, however, as here, the accused's presence at the scene of a crime is coupled with his, in some degree, aiding and abetting by direct assistance or encouragement the commission of the crime, the accused is accountable as a principal in the second degree."), *cert. denied*, 275 Md. 753 (1975); *see also Chavis v. State*, 3 Md. App. 179, 182 (1968) ("[T]he trier of facts must take into consideration all the attendant circumstances surrounding the presence of the accused at the scene in making the determination of guilt or innocence.").

In this case, and recognizing that most, if not all, of the evidence was circumstantial, there was sufficient evidence for the fact finders, *i.e.*, the jury, to rationally conclude that Loftin aided, encouraged, and participated in the robbery of Mr. Surana. That evidence included Loftin's and Applewhite's own "surveillance" of the victims at the Maryland Live Casino. Just as a bank robber may gather critical information about a bank prior to a heist, Loftin and Applewhite gathered information about their potential victims in this case, including noticing, and commenting on, the contents of Mr. Surana's wallet, as well as lingering nearby while the Suranas enjoyed an otherwise pleasant evening of gaming. When the Suranas were finished, the evidence presented a reasonable inference that Loftin

and Applewhite followed the Suranas from the casino to their secluded, residential home in Silver Spring. There, the robber, *i.e.*, the principal in the first degree, appeared, demanded money, and then forcibly grabbed Mr. Surana's wallets from his person. Loftin's complicity in that crime was supported by evidence suggesting she was the driver of the red Ford that followed the Surana's Mercedes, and by the fact that, shortly after the robbery, a vehicle surreptitiously left the scene of the crime. From these facts, the jury could rationally infer that Loftin was waiting nearby as a lookout or a getaway driver in order to aid the primary assailant. *See*, *e.g.*, *Farmer v. State*, 5 Md. App. 546, 553 (1968) ("A person who serves as lookout is as guilty as a person who does the actual robbing."); *Thomas v. State*, 2 Md. App. 502, 507 (1967) ("One who keeps watch or guard at such convenient distance as to afford aid or encouragement to the actual perpetrator of a robbery is clearly a principal.").

Moreover, there was clear and direct evidence that Loftin drove the red Ford seen in surveillance video, both at the casino and at the Exxon Mobil gas station. Indeed, Loftin was seen getting out of the Ford at the gas station. Notably, that gas station was the same location where, at around the same exact time, someone attempted to use Mr. Surana's stolen American Express card. A rational inference from this evidence is that Loftin, either as a principal or an accomplice, was in recent possession of stolen property, namely, Mr. Surana's stolen credit card. That suggested Loftin's criminal agency:

> The permitted inference, of course, is that the unexplained possessor of the recently stolen goods was the actual original

> thief, who picked up the stolen goods and carried them away in the first instance. If the evidence, moreover, establishes that the theft was inextricably part and parcel of a burglary or a robbery (or, for that matter, a murder or a rape or an arson), the indivisibility of the total criminal package establishes the criminal agency of the possessor for whatever role he played in the criminal episode.

Molter v. State, 201 Md. App. 155, 168 (2011).

Considered under the proper standard of review, the evidence was sufficient to support Loftin's conviction for robbery. As for the Loftin's conspiracy conviction, it is well established that "[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. State*, 302 Md. 434, 444 (1985)). Further, "[t]he agreement at the heart of a conspiracy need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy." *Carroll v. State*, 428 Md. 679, 696-97 (2012) (internal citations and quotation marks omitted). Such an agreement need not be explicit, rather:

> It is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose. In fact, the State [is] only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement. The concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy.

Acquah v. State, 113 Md. App. 29, 50 (1996) (internal citations omitted); *see also In re Lavar D.*, 189 Md. App. 526, 591 (2009) (internal quotation omitted) ("[R]ather, a conspiracy can be inferred from the actions of the accused."), *cert. denied*, 414 Md. 331 (2010).

The same acts that formed the basis of establishing Loftin's accomplice liability in the robbery of Mr. Surana were also sufficient to show concerted action between Loftin and Applewhite. From the concerted action, the jury could infer the requisite meeting of the minds. Accordingly, the evidence was also sufficient to sustain Loftin's conviction for conspiracy. We, therefore, hold that the circuit court did not err in denying Loftin's motion for judgment of acquittal.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.