UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1925

SEPTEMBER TERM, 2014

DANYAE ROBINSON

v.

STATE OF MARYLAND

No. 2131

SEPTEMBER TERM, 2014

DERRICK BROWN

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Graeff,
Hotten,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: November 12, 2015

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Brothers Danyae Robinson and Derrick Brown, the appellants, were tried together before a jury in the Circuit Court for Baltimore City. Robinson was convicted of first degree murder, three counts of conspiracy to commit murder, three counts of attempted murder, four counts of use of a firearm in the commission of a felony, and possession of a regulated firearm after a disqualifying offense. He was sentenced to an aggregate term of life imprisonment plus 110 years, the first 5 years without parole. Brown was convicted of first degree murder, three counts of conspiracy to commit murder, three counts of attempted murder, and four counts of use of a firearm in the commission of a felony. He was sentenced to an aggregate term of life imprisonment plus 105 years, the first 5 years without parole.

The appellants raise several issues on appeal. We first shall address Brown's separate issue, which we have rephrased as follows:

I. Did the trial court err by admitting into evidence Brown's statement to the police?

We then shall address the issues raised by both appellants, which we have rephrased as follows:

II. Did the trial court abuse its discretion by declining to propound a requested *voir dire* question?

III. Did the trial court err by sentencing the appellants for multiple conspiracy convictions?[1]

[1] Robinson alone raises the alternative question whether the evidence was sufficient to support the multiple conspiracy convictions. As we shall explain, we do not reach that issue.

IV. Do the appellants' commitment records accurately reflect the sentences imposed by the trial court?

For the reasons to follow, we answer "no" to the first, second, and fourth questions, and "yes" to the third question. We shall reverse two judgments for conspiracy to commit murder as to both Robinson and Brown; remand the cases for correction of the commitment records and to give Robinson and Brown 914 days of credit each for pretrial incarceration; and otherwise affirm the judgments.

FACTS AND PROCEEDINGS

This case stems from an act of gang violence that claimed the life of 12-year-old Sean Johnson on May 24, 2011, in the Montebello-Homestead neighborhood of Baltimore City. The following evidence was adduced at trial through witnesses called by the State and evidence admitted in the State's case. (The appellants rested at the close of the State's case.)

On the day in question, Eric Avens was shot and wounded during an altercation in an alley near Aisquith and Montpelier Streets in Baltimore City. Avens is a leader in the Black Guerilla Family gang ("BGF"). Robinson and Brown, also members of the BGF, arrived to help Avens. They were accompanied by Antwaan Mosley. Mosley has no affiliation with the BGF. Avens told Robinson the shooter was a man known as "Critic"[2] and that he belonged to a rival gang, the Off Top Boys. Robinson and Brown were not

[2] Critic's legal name is not in the record.

familiar with Critic, but Mosley said he knew Critic by sight. Avens went to The Johns Hopkins Hospital that evening for treatment. His cellular phone records showed he received calls from Brown throughout the night.

Avens testified that BGF members take an initiation oath in which they swear that, if a fellow member is harmed, they will "respond 10 times worse." Although Avens did not give Robinson and Brown a direct order, he "had a feeling they were going to retaliate."

Mosley testified that later that evening he met Robinson and Brown at the Harbor Institute on Harford Road. Robinson and Brown were armed with handguns. The three men walked on Harford Road to Cliftview Avenue in search of Critic. Their walk took them past a house on Cliftview Avenue in which Michael McDaniel lived.

McDaniel was home with friends Calvin Atkins and Brian Jackson. They had just walked to McDaniel's house after watching Johnson (the eventual murder victim) play football on 25th Street with a group of neighborhood boys. McDaniel went inside to get Atkins a glass of ice and Atkins and Jackson stayed on the front porch. They noticed three men, unknown to them, walking down Cliftview Avenue. McDaniel came out on the front porch after the men had walked past the house.

Robinson, Brown, and Mosley continued walking on Cliftview Avenue and turned onto Normal Avenue. They proceeded through a Checkpoint Check Cashing store parking lot and walked along 25th Street. Video surveillance footage introduced at trial showed the three men walking through the lot. They did not locate Critic.

On 25th Street, Mosley recognized an acquaintance, Ayanna Stevenson. He stopped to speak with her. Stevenson testified that Robinson and Brown did not stop; instead, they kept walking toward Cliftview Avenue.

At around 9:30 p.m., Johnson finished playing football and walked to McDaniel's house. Johnson was on the sidewalk when McDaniel, still on the porch with Jackson and Atkins, told him to go home because he had a 10:00 p.m. curfew. At that point, Jackson noticed two people hiding behind a church between 25th Street and Cliftview Avenue, about 100 feet away. A silver Chrysler passed by and seconds later two men approached. McDaniel heard what he thought were fireworks in the street. He watched as Johnson raised his hands in defense and was shot multiple times. McDaniel ran to Johnson's aid, noticed a second shooter, and took cover behind a parked car. Atkins recognized the shooters as two of the men he had seen earlier. He took cover in the house. Jackson escaped onto an adjacent porch and then ran to an alley toward his house.

That same evening, Jerod Robinson ("Jerod"), Johnson's cousin, was sitting on the porch of his house on 25th Street. He noticed three men he did not recognize walking around. They gave off a "suspicious aura" because "[r]andom people just don't walk through that block." Soon after, he heard gunshots and saw Jackson running up the street. Jerod learned that Johnson had been shot and immediately called Johnson's mother. Eleven months later Jerod was shown a photo array and positively identified Robinson and Mosley as two of the men he had seen walking around on the night in question.

Mosley testified he heard the shots and saw Robinson and Brown run from Cliftview Avenue toward the school where they originally met up. Mosley ran behind them and he, Robinson, and Brown slowed when they reached the school. Robinson hid the two handguns in a bush. They walked to Lake Clifton High School. Robinson called his other brother, Barry Robinson ("Barry"), to pick them up. Barry arrived ten minutes later in an old Cadillac and drove them home. Robinson and Brown talked about the shooting during the drive.[3]

Johnson was rushed to The Johns Hopkins Hospital where he remained in critical condition. He died two days later. At trial, Dr. Victor Weedn, a forensic pathologist, opined that Johnson died from a gunshot wound to the right side of his head.

McDaniel, Atkins, and Jackson were transported to nearby hospitals. McDaniel was treated for nine bullet wounds in his calf, leg, hip, and thigh. Atkins was treated for a bullet wound in his lower back. Jackson was treated for bullet wounds that fractured his toe and pierced his abdomen. Jackson's liver and intestines were severely damaged; the injuries required multiple surgeries.

Avens remained in the hospital recovering that evening. He noticed police officers in the hall and saw them bring in several shooting victims. He overheard discussion on the officers' radios about a shooting on Harford Road and Cliftview Avenue. He knew this was retaliation on his behalf because Critic lived in that area. He

[3] Barry testified that he owned a Cadillac but it was not operational and he did not recall picking up the appellants or Mosley that evening.

was released the next morning and spoke to Robinson that afternoon. Robinson confirmed his participation and that the shooting was retaliation for the attack on Avens. A few days later, Avens sold some Percocet tablets to Brown. Brown asked for a discount for what he and Robinson had done for Avens.

Detective John Jendrek testified as an expert in cellular site mapping, record analysis, and call detail interpretation. He reviewed cell phone records for Robinson, Brown, Mosley, Barry, and Avens from the night of the shooting. He mapped the cell tower locations and corroborated the testimony by Mosley and Avens linking Robinson and Brown to the shooting.

Robinson and Brown were arrested on April 17, 2012. Brown gave the police a statement, which we shall discuss in depth *infra*, in which he said he was in the Montebello-Homestead neighborhood on May 24, 2011. He admitted to having a handgun, but said he purchased it for the sole purpose of selling it for a profit. He claimed that on the evening in question he had been with an ex-girlfriend, and, after he left her house, a person he did not know fired shots at him. He returned fire in self-defense. Brown's statement was recorded and was admitted at trial.

Officer Richard Robbins, Crime Lab Technician Nancy Morse, Firearms Examiner Daniel Lamont, and Detective Luis Delgado also testified on behalf of the State.

As noted, Robinson and Brown did not put on any evidence. They were convicted and sentenced, and noted timely appeals. The appeals were consolidated by order of this Court.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

I.

The police arrested Brown for Johnson's murder, and transported him to the station house. Brown completed an information sheet in which he stated that he had smoked marijuana about 10 hours before he was arrested. Detective Delgado gave Brown an advice of rights form that set forth his *Miranda*[4] rights. Brown initialed the form next to each right and signed the bottom. He then spoke with Detectives Delgado and Eric Ragland for about one hour. Brown agreed to give a recorded statement.

The recording begins with Detective Delgado reviewing the advice of rights form Brown had initialed and signed before speaking with the detectives. During this review, the following colloquy took place:

> [DETECTIVE] DELGADO: Can you read the uh, bold letters please?
>
> BROWN: I have been advised of any of and understanding my rights. I freely and voluntarily waive my rights and agree to talk with the police without having an attorney present, present.
>
> [DETECTIVE] DELGADO: Alright, and on the uh, signature uh, line, did you put your signature there?

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

BROWN: Yeah.

[DETECTIVE] DELGADO: And what is your signature?

BROWN: Derrick Brown.

[DETECTIVE] DELGADO: Ok.

BROWN: ***So I could of waited and talked to a attorney?***

[DETECTIVE] DELGADO: ***Yes, but you, you chose to uh, to speak with us, is that correct?***

BROWN: ***Yeah, Yeah.***

(Emphasis added.) At the very end of the recording, after Brown finished making his statement, he said that in addition to smoking marijuana, he had ingested an unknown quantity of Percocet tablets earlier that evening.

Brown did not file a motion to suppress, but the prosecutor anticipated that he would challenge the statement's admissibility. At a hearing the day before the trial was set to begin, the prosecutor raised the issue with the court:

> Mr. Brown, after he was, the State would submit, advised of his *Miranda* rights, gave a statement at the time of his arrest. I understand, or I would expect that the defense would object to the admission of that, so we are prepared to litigate that matter today, as well.

The court held an impromptu suppression hearing. Detective Delgado testified that he had asked Brown to initial the advice of rights form to make clear that Brown understood his rights. Brown understood the conversation and his physical appearance was normal. The prosecutor then asked Detective Delgado about Brown's remark about speaking to an attorney:

[PROSECUTOR]: Detective Delgado, can you tell us a little bit more about the context in which Mr. Brown referring to an attorney came up?

[DETECTIVE DELGADO]: When he read the bold letters on the waiver of rights.

[PROSECUTOR]: And was that a question that he had, or was it a statement?

[DETECTIVE DELGADO]: No, I believe that was a -- I guess a statement. He was wondering, he could have talked to an attorney.

[PROSECUTOR]: And what, if anything, did you reply to him?

[DETECTIVE DELGADO]: Yes.

[PROSECUTOR]: And --

[DETECTIVE DELGADO]: But he chose to talk to us.

[PROSECUTOR]: Okay. And how do you know that he chose to talk to you?

[DETECTIVE DELGADO]: Because we -- he talked to us. We had an hour worth of an interview with him.

[PROSECUTOR]: And you had previously gone over his rights where you had told him he didn't have to talk with you if he didn't want to?

[DETECTIVE DELGADO]: Correct.

[PROSECUTOR]: And you had previously gone over the information sheet and notice to prompt presentment?

[DETECTIVE DELGADO]: 1:51 a.m.

[PROSECUTOR]: Did anything change when Mr. Brown made that statement to you? Did you tell him that he, in fact, had to talk with you?

[DETECTIVE DELGADO]: He didn't have to talk to me. He could have had a counsel.

[PROSECUTOR]: And is that what you told him?

[DETECTIVE DELGADO]: That's what's on the paper, waiver of rights.

Brown did not testify at the hearing.

Brown argued that his statement should be suppressed because: (1) due to his intoxication he did not knowingly and intelligently waive his *Miranda* rights; and (2) he invoked his Sixth Amendment right to counsel by stating, "So I could of waited and talked to a attorney?" The court disagreed:

> I am satisfied that under the totality of the circumstances, the statement that was given was free and voluntary. I am also satisfied that under all of the testimony and arguments, that the Defendant was properly advised pursuant to *Miranda* [*v.*] *Arizona*. One of the things that he was advised was that he could stop the statement at any time and request the presence of a lawyer. The only question that is raised here is what is the significance of his statement later on to the effect of, "Oh, I could have had a lawyer." Number one, it is reference to the fact that he knows he could have a lawyer, and number two, it is an inadequate assertion of a Sixth Amendment right. Because had he asserted that, the process would be over and done with, but he must assert it. He cannot question about it, he cannot inquire about it. He has to assert it at that point. Had he asked that question while he was being advised of his *Miranda* rights, it would have had a significant impact on the question of his understanding. . . .
>
> * * *
>
> Level of intoxication is a factor in this, but that's only a factor, and the evidence that has been presented is that he gave no impression of any level of intoxication. . . . I'm going to rely on the intoxication question on the experience of an officer with 19 years of police experience having come into contact with many sober people and many people less than sober and his assessment that the Defendant was not intoxicated at the time he made this statement. Once again, saying -- to reiterate, like I said, taking all of the circumstances under consideration, I find the statement to be freely and voluntarily given and that the *Miranda* warnings were properly -- the Defendant was properly advised of his *Miranda* warnings, so the statement is admissible.

A.

"In reviewing a trial court's decision to grant or deny a motion to suppress evidence, an appellate court ordinarily limits its review to the record of the motions hearing." *Sinclair v. State*, 444 Md. 16, 27 (2015). We view the evidence in the light most favorable to the prevailing party, here, the State. *Norwood v. State*, 222 Md. App. 620, 633 (2015); *see also Gonzalez v. State*, 429 Md. 632, 647–48 (2012) ("The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court."). Deference is given to the trial court's findings of fact unless clearly erroneous. *E.g. Briscoe v. State*, 422 Md. 384, 396 (2011). Furthermore, a trial court makes its determination based on the totality of the circumstances. *Underwood v. State*, 219 Md. App. 565, 569 (2014).

B.

Quoting *Lee v. State*, 418 Md. 136, 157 (2011), Brown contends his statement should have been suppressed because Detective Delgado's response to his question ("Yes, but you, you chose to uh, to speak with us, is that correct?") directly contradicted Detective Delgado's prior *Miranda* warning about the right to an attorney and thereby "rendered [Brown's] prior *Miranda* waiver ineffective for all purposes." The State counters that Brown did not raise this issue below, and therefore it is not preserved for review on appeal. On the merits, the State asserts that, considering the totality of the

circumstances, Detective Delgado's response was not inconsistent with the *Miranda* advisements.

A defendant in a criminal case is "foreclosed from raising [grounds for suppression not made before the circuit court] for the first time on appeal." *Washington v. State*, 191 Md. App. 48, 91 (2010); *see also Evans v. State*, 174 Md. App. 549, 557, (2007), *cert. denied*, 400 Md. 648 (2007) ("We have specifically held that the failure to argue a specific theory in support of a motion to suppress evidence constitutes waiver of that argument on appeal."). In this case, Brown asked the circuit court to suppress his statement on two very specific grounds, as we have explained. He does not advance either ground on appeal. Rather, he now argues that Detective Delgado's post-warning answer to his question incorrectly stated the law, rendering the prior *Miranda* warnings ineffective. Brown did not make this argument below, and therefore it is not preserved for review.

Even if the issue were preserved for review, we would not find merit in it. In *Lee*, *supra*, and *State v. Luckett*, 413 Md. 360 (2010), the Court of Appeals examined the totality of the *Miranda* warnings given to the defendants and held that statements made by a police officer post-waiver rendered the *Miranda* warnings "constitutionally defective." *Id.* at 380. In *Lee*, after the police officer properly gave the defendant his *Miranda* warnings, the defendant asked whether the conversation was being recorded. The officer responded, "This is between you and me, bud." *Lee*, 418 Md. at 144. The Court of Appeals held that this answer contradicted the earlier warning that anything the

defendant said "can and will be used against him." *Id.* at 156. The officer's statement "eviscerate[d] the [previous] *Miranda* warnings" and rendered the defendant's statement inadmissible. *Id.* at 154 (citations omitted).

In *Luckett*, a police officer advised the defendant of his *Miranda* rights, including that he had a right to an attorney. Later, the officer told the defendant that he *did not* need counsel for anything he and the officer discussed outside of the investigation. When the defendant asked him to clarify, the officer responded that the defendant did "not need a lawyer." *Luckett*, 413 Md. at 371. The Court held that, as a matter of law, the "'clarifications' and 'explanations' of the rights" were improper and "nullified what otherwise were proper warnings." *Id.* at 381.

The circumstances in the case at bar are unlike those in *Lee* and *Luckett*. Brown's question—"So I could of waited and talked to a attorney?"—was posed after he had been interviewed for an hour and when he was reviewing the advice of rights form he had signed before the interview. The question, framed in the past tense, was whether he could have waited to talk to an attorney before the interview. Detective Delgado correctly answered yes, but pointed out that, instead of doing that, Brown had opted to be interviewed. Brown agreed that that is what he had done. He then proceeded to give his recorded statement.

Detective Delgado's answer did not say or imply that Brown had forfeited his right to ask for an attorney. Nor was it misleading, legally incorrect, or confusing. Rather, it reaffirmed that Brown had the right to speak to an attorney.

The totality of the warnings shows that Brown understood his rights before he gave a formal recorded statement, and that Detective Delgado did not say anything that nullified the prior *Miranda* warnings. Accordingly, the court did not err in admitting Brown's recorded statement.

II.

The appellants contend the trial court abused its discretion by refusing to propound a *voir dire* question asking prospective jurors whether they could apply the presumption of innocence. (Specifically, whether they would presume the appellants were guilty merely because they had been charged with a crime.) They argue that the question was required because it would identify potential bias; and they were prejudiced by the court's failure to pose the question because that deprived them of the opportunity to eliminate prospective jurors who would answer the question affirmatively, and therefore of their right to a fair and impartial jury.

The State counters, as a threshold matter, that the issue is preserved only as to Brown. On the merits, the State maintains that the question was not required and the court did not abuse its discretion in declining to ask it.

Before jury selection, the following discussion took place:

> [BROWN'S COUNSEL]: There is one question about the *voir dire* that I wanted to ask as soon as [Robinson's counsel] returns.
>
> (Pause.)
>
> [BROWN'S COUNSEL]: Your Honor, and I guess on behalf of [Robinson's counsel], as well, and I know the Court said with respect to the nature of the charge, I also generally request and this will be one -- one

> special request for me. The mere fact that the Defendants are charged or accused, would that --
>
> THE COURT: I do not ask that question. Believe me, I make that very clear to them from the very beginning and will make it clear to them multiple times during the course of the trial.
>
> [ROBINSON'S COUNSEL]: Okay.
>
> THE COURT: And we expect the jurors are going to follow my instruction?
>
> [ROBINSON'S COUNSEL]: We hope.

A.

We first address whether the issue is preserved as to Robinson. Rule 4-323(c) governs objections to rulings or orders beyond those concerning evidence:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.

Generally, "in cases involving multiple defendants each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected." *Williams v. State*, 216 Md. App. 235, 254 (2014).

Brown requested the *voir dire* question at issue, so whether the trial court erred or abused its discretion by declining to give it is preserved as to him. The State maintains that Brown's *voir dire* question was specific to him alone and therefore did not preserve the issue as to Robinson.

Robinson relies on *Bundy v. State*, 334 Md. 131 (1994), for the proposition that an exception to the co-defendant preservation rule exists when only one defendant objects to a ruling that categorically applies to both. In *Bundy*, before jury selection, the court ruled that each co-defendant had four peremptory challenges, and the State had eight. Bundy argued, pursuant to Md. Code (1974, 1989 Repl.), section 8-301(d) of the Courts and Judicial Proceedings Article, that the State was limited to four challenges. The court disagreed and permitted the State to exercise eight. During *voir dire*, when the State used a fifth challenge, Bundy's co-defendant objected. Bundy remained silent. The court immediately stated, "*You each* get four. The State gets eight[,]" and proceeded with jury selection. *Bundy*, 334 Md. at 146 (emphasis in original).

The Court of Appeals held that the co-defendant "made known his 'objection to the action of the court,' which is all that Rule 4-323(c) requires" and "immediately after the codefendant's objection, the trial court ruled on the objection." *Bundy*, 334 Md. at 147. The Court stated: "The manner of that ruling obviated Bundy's need to join in the objection because the judge acknowledged that the objection inured to Bundy's benefit by expressly directing his ruling . . . to both defendants" and thus the issue "was sufficiently preserved[.]" *Id.*

We reach a similar conclusion here. To be sure, Brown's counsel prefaced his request by saying "this will be one – one special request for me." The requested *voir dire* question covered both defendants, however: "The mere fact that the ***Defendants*** are charged or accused. . . ." (Emphasis added.) Accordingly, the question was not specific

to Brown. Had the trial court agreed to propound Brown's question, it would have been posed generally, as to both defendants, not as to Brown alone. Moreover, the court's ruling shows that it would have been futile for Robinson's counsel to have said anything. Before Brown's counsel finished his sentence, the court silenced him, stating, "I do not ask that question." Obviously, the ruling would not have differed had Robinson's counsel joined in. Under the circumstances, the issue adequately was preserved as to both the appellants.

B.

On the merits, we assess whether the trial court abused its discretion by refusing to propound a "presumption of innocence" *voir dire* question. "*Voir dire* is critical to assure that the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantees to a fair and impartial jury will be honored." *Washington v. State*, 425 Md. 306, 312 (2012); *Stewart v. State*, 399 Md. 146, 158 (2007); *Curtin v. State*, 393 Md. 593, 600 (2006); *White v. State,* 374 Md. 232, 240 (2003); *Dingle v. State,* 361 Md. 1, 9 (2000). "[T]he only purpose of *voir dire* in Maryland is to illuminate to the trial court any cause for juror disqualification." *Wright v. State*, 411 Md. 503, 508 (2009).

"Maryland has adopted, and continues to adhere to, limited *voir dire*." *Washington*, 425 Md. at 313; *Dingle*, 361 Md. at 13. To be sure, "[w]e afford the trial court 'broad discretion in running *voir dire*[.]'" *Wagner v. State*, 213 Md. App. 419, 450 (2013) (quoting *State v. Shim*, 418 Md. 37, 44 (2011)); *see also Washington*, 425 Md. at

313 ("The scope of *voir dire* and the form of questions propounded rest firmly within the discretion of the trial judge."). Except as expressly provided by case law, "[t]hat discretion extends to both the form and the substance of questions posed to the venire." *Wright*, 411 Md. at 508. "An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014).

In *Twining v. State*, 234 Md. 97 (1964), the defendant sought to have the court ask the venire whether they "would give the accused the benefit of the presumption of innocence and the burden of proof." *Id.* at 100. The court declined, and the Court of Appeals found no abuse of discretion. It stated:

> The rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law. See 50 C.J.S. *Juries* § 275(2). This would seem to be particularly true in Maryland, where the courts' instructions are only advisory.

Id. *See also Marquardt v. State*, 164 Md. App. 95, 144 (2005), ("[*v*]*oir dire* need not include matters that will be dealt with in the jury instructions"); *Baker v. State,* 157 Md. App. 600, 616–17 (2004); *Wilson v. State,* 148 Md. App. 601, 656–67 (2002); *Carter v. State,* 66 Md. App. 567, 576–77 (1986).

The appellants argue that *Twining* is inconsistent with more recent Court of Appeals decisions holding that ascertaining a venire person's state of mind can uncover prejudicial bias. They further argue that, after *Unger v. State*, 427 Md. 383 (2012), the

holding in *Twining* rests on a rejected premise – that the court's instructions to the jury on the law are "advisory only."

As to the first argument, only the Court of Appeals can decide to overrule its decision in *Twining*. *See Baker*, 157 Md. App. at 618 ("[I]t is up to the Court of Appeals, not this Court, to decide . . . that the reasoning of *Twining* is 'now outmoded.'"). We note, moreover, that much more recently than in *Twining*, the Court of Appeals has held that matters of law are not subject to *voir dire* questioning. *See Stewart*, 399 Md. at 165 (questions addressing the "presumption of innocence" are "matters of law, and as such, were not the proper subject of *voir dire*."[5]).

As to the appellants' second argument, the *Unger* decision really is of no moment. To the extent that the *Twining* Court tacked on its "particularly true" observation about jury instructions being advisory in Maryland, the observation was short-lived. In 1980, the Court held in *Stevenson v. State*, 289 Md. 167 (1980), that jury instructions on the law are not advisory, except in limited circumstances when the instructions concern disputes

[5] The *voir dire* questions the trial court declined to ask in *Stewart* are precisely the types of questions the appellants requested. They were as follows:

> Does any member of the jury panel draw any inferences of guilt from the mere fact that a person has been indicted for a crime?
>
> Does any member of the jury panel have any quarrel with the principle of American Justice that declares all persons to be presumed innocent until proven guilty beyond a reasonable doubt?

about the substantive law of the crime. *Id.* at 180. *Unger* concerned convictions rendered before *Stevenson*. The *Twining* case has been the prevailing law for the 35 years since *Stevenson* was decided.

Moreover, in the instant case the trial court not only instructed the jurors about the presumption of innocence after the close of the evidence, it also explained the principle throughout all the stages of jury selection. Immediately after bringing the venire into the courtroom and taking roll, the trial court stated:

> Ladies and gentlemen, the next stages of this process is called *voir dire*. That means I'm going to ask you questions about areas that the parties think are important so that we can pick a fair and impartial jury. I'm going to use that term dozens of times before the trial's over. Probably half a dozen times before the day is finished here with our visit.
>
> To be fair and impartial, you must begin with an open mind about how this case should turn out. *You start with the presumption that the Defendants are innocent*. You understand that the burden of convicting beyond a reasonable doubt falls upon the State and you must commit to basing your conclusion in this case on evidence that you learned in this courtroom and the law as I explain it to you.

(Emphasis added.)

The court asked the venire general questions about bias, including racial bias and bias towards law enforcement. Jurors answering affirmatively stood, their numbers were recorded, and they later were brought to the bench for a private, individual inquiry by the court and counsel. Before conducting individual inquiries, the court addressed the venire as follows:

> Now ladies and gentlemen, I've asked about a dozen questions that come at you from all sorts of different angels that were areas of concern for the parties. My last question to you is, is there anyone sitting there who thinks for some other reason -- something that you did not stand up about,

> something that we have no idea is involved in your situation. Is there anyone sitting there who thinks for some other reason you could not be fair and impartial? *Remembering, I'm talking about starting with an open mind, presuming the Defendants to be not guilty, placing the burden of conviction on the State to prove their case beyond a reasonable doubt, and then deciding the case on the evidence learned in this room and the law as I explained it.* Is anyone sitting there who thinks that for some other reason, something that we have not mentioned, you would be unable to be fair?

(Emphasis added.)

During individual questioning the court routinely asked, "Can you follow the law and *begin with the presumption of innocence* and then base your conclusion on the evidence that you learn in this courtroom and the law the way I explain it?" (Emphasis added.) Potential jurors were removed for cause if they answered in the negative. There is no abuse of discretion when the substance of a party's request is fairly covered by other questions asked of the prospective jurors by the trial court. *Carter*, 66 Md. App. at 577.

The trial court did not abuse its discretion in refusing to propound the appellants' requested *voir dire* question, which was not a required question and the substance of which was clearly communicated to the venire in the court's *voir dire* process in any event.

III.

Robinson and Brown each were charged with five conspiracy to murder counts: one each for Critic, Johnson, McDaniel, Atkins, and Jackson. In opening statement, the prosecutor explained that the State's theory of the case was that, when Robinson and Brown did not find Critic, "they decided to send a message" and "walked up to the first house with people outside, and decided there, upon four boys, to deliver their message."

The State attempted to prove this theory through the testimony of Mosley and Jackson. Mosley had accompanied Robinson and Brown to point out Critic, so they could retaliate for the assault on Avens. He understood that nothing would happen if they did not find Critic. After the three men walked along Cliftview Avenue to 25th Street, Mosley broke off from Robinson and Brown to speak to Ayanna Stevenson. Robinson and Brown walked toward Cliftview Avenue. Jackson, still on McDaniel's porch, saw two people behind the church between 25th Street and Cliftview Avenue. They peered out from behind the church, hid when the Chrysler passed, and waited for it to drive down the street before they emerged, shooting.

In closing argument, the prosecutor urged the jurors to find two conspiracies. In the first conspiracy, the appellants, with the knowledge of Mosley, entered into an agreement to kill Critic. When that did not pan out, the appellants, without Mosley's knowledge, entered into the second conspiracy, to murder the four people they had passed on Cliftview Avenue.

With regard to the multiple conspiracy charges, the trial court instructed the jury as follows:

> Now, let's talk about the charges that the Defendants are facing. Each Defendant is facing the charge of conspiracy, with another person, to murder the person known to us as "Critic." That's the first count to consider.
>
> Second, you'll be asked to consider whether each of the defendants conspired with one -- at least one other person to murder Sean Johnson.
>
> Third, you'll be asked to consider whether each Defendant conspired with at least one other person to murder Calvin Atkins. Then you'll be asked to decide whether each Defendant conspired with another person to murder Brian Jackson.

Then you'll be asked to consider whether each defendant conspired with another person to murder Michael McDaniel. All of those first charges that you'll be considering will be based on the theory of conspiracy, and I'll explain that to you in a moment.

* * *

That's what the charges are, and I'm going to try and explain them all to you in a minute. But before I do, there are three separate concepts, here, at play, three legal concepts, conspiracy and attempt and participation in the crime, either as a principal, the person primarily doing it, or aiding and abetting the other person.

Let me explain to you what they mean and then try and give you an example to see how they could relate to one another. All right. First of all, conspiracy. In order to prove conspiracy, the State has to prove that there was an agreement between, at least two people, to commit a crime.

In order to convict the Defendant of Conspiracy, the State must prove that the Defendants entered into an agreement with at least one other person, and that the Defendant entered into the agreement, with the intent that the crime would be committed.

* * *

All right. Before I give you the specifics of the crimes involved, let me give you an example about how all these three concepts could fit together.

Now, not that going to New York is a crime, but suppose that is the crime we're talking about. If you enter into an agreement with another person to go to New York, you are conspiring to go to New York, whether or not you ever go or not.

The crime is committed in the agreement.

* * *

Now, let's talk about how those concepts come to pass. We have, first, the charge of conspiracy to commit the murder of "Critic" or the person we know as "Critic." In order to prove that, the State must prove that a conspiracy existed. And a conspiracy is an agreement between two or more persons to commit a crime.

In order to convict the Defendants of conspiracy, the State must prove that each Defendant entered into an agreement with at least one other person to commit the crime and that each Defendant entered into the

> agreement with the intent that the crime, the murder of "Critic," actually be committed.
>
> Now, as to the substantive crimes . . .

The jurors convicted Robinson and Brown of conspiracy to murder Critic, conspiracy to murder Atkins, and conspiracy to murder Jackson. They acquitted them of conspiracy to murder Johnson and conspiracy to murder McDaniel. The judge sentenced Robinson and Brown to ten-year sentences on each of their three conspiracy convictions, each term to run consecutively.

Robinson and Brown contend that, as a matter of law, the State proved but one conspiracy, and therefore the court erred by imposing three sentences for one crime.

The State concedes that there can be only one conviction for conspiracy to murder Atkins and Jackson. It maintains, however, that a separate conspiracy to murder Critic was proven. It asks that the case be remanded for the appellants to be resentenced for two (not three) conspiracy convictions.

In Maryland, "[a] court may correct an illegal sentence at any time." Md. Rule 4-345(a). So, even if the issue of an illegal sentence was not raised below, it may be decided on appeal. *Chaney v. State*, 397 Md. 460, 466 (2007). A sentence is illegal when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Id.*

Maryland adheres to the common law definition of conspiracy, *i.e.* "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." *Mason v. State*, 302 Md. 434, 444 (1985). "The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). "If the state seeks to establish multiple conspiracies, it has the burden of proving a separate agreement for each conspiracy." 5 Joseph Latronica, *Maryland Law Encyclopedia* § 17 (Oct. 2015).

Here, "[t]he [appellants'] argument, in substance, is a double jeopardy challenge to the prosecutor's decision to charge [them] with" multiple counts of conspiracy from a "purportedly single event." *Purnell v. State*, 375 Md. 678, 686 (2003); *see also Savage v. State*, 212 Md. App. 1, 15 (2013) ("When a defendant 'contends that only one conspiracy exists, while the [prosecution] insists there are at least two,' he 'challenges [his] conviction[s] on the ground of double jeopardy[.]'") (quoting *United States v. Abbamonte*, 759 F.2d 1065, 1068 (2d Cir. 1985)). The appellants argue that the facts only could support a finding of one conspiracy, so only one sentence could be imposed, not three.

In *Savage*, 212 Md. App. 1, the defendant was convicted of two counts of conspiracy to commit first-degree burglary. He was sentenced to two consecutive eight-year terms, one for each conviction. On appeal, he argued that the sentence was illegal because the State only proved one conspiracy. In addressing that issue, we considered whether the jury was instructed that it must find each conspiracy existed separately

beyond a reasonable doubt; whether the State advanced a multiple conspiracy theory; and whether the evidence supported the State's multiple conspiracy theory. *Id.* at 31.

In the case at bar, the prosecutor argued that there were multiple conspiracies. Yet, the jury was not instructed that it was required to find, beyond a reasonable doubt, that the appellants entered into separate agreements, each being its own conspiracy. In *Savage*, we explained:

> Without an instruction that the jury could not find appellant "guilty of more than one count of conspiracy unless [it] was convinced beyond a reasonable doubt that he entered into two *separate* agreements to violate the law," *United States v. Frierson,* 698 F.3d 1267, 1270 (10th Cir. 2012) (emphasis added); *see also United States v. Swingler,* 758 F.2d 477, 492 (10th Cir. 1985) (similar instruction to *Frierson*), the State was not put to the test of proving separate conspiracies, and therefore it cannot be "allowed to obtain a sentencing advantage from having failed at trial to" do so. *United States v. Cerro,* 775 F.2d 908, 913 (7th Cir. 1985). *Without a proper instruction, "[t]he jury may very well have been left with the impression that one agreement could support more than one conspiracy count*." *Turnley,* 725 N.E.2d 87 at 90 n. 2. We recognize that the jury was also instructed that it "must consider [each charge] individually and separately," but that general instruction was insufficient to "alert" the jury that it "needed to find that the two conspiracy involved distinct agreements." *Frierson,* 698 F.3d. at 1270.

212 Md. App. at 27 (emphasis added).

Here, the trial court gave a general instruction about the burden of proof and listed the multiple conspiracy counts. It did not give any instruction informing the jurors that they were required to find two (or more) separate conspiracies beyond a reasonable doubt. (The State concedes this point in its brief.) In the absence of such an instruction, "there is no way to be certain that one or more jurors voting guilty did not see the . . .

agreement as one overall conspiracy[.]" *Id.* Therefore, only one conspiracy conviction can stand. Accordingly, we must reverse two of the three conspiracy convictions.

IV.

Finally, the appellants contend the court erred by: (1) not accurately entering their sentences on their respective commitment records; and (2) giving them 882, rather than 917, days of pretrial incarceration credit. The State concedes the commitment record is incorrect and that additional credits are warranted. However, it maintains that the appellants are entitled to 914 days credit, not 917.

Sentencing took place on October 17, 2014. The court pronounced its sentence, by count, as to each defendant. Brown's sentence totaled life plus 105 years. Robinson's sentence totaled life plus 110 years. The court then summarized each of the defendants' sentences, but mistakenly gave an aggregate sentence for each that included 10 additional years (life plus 115 years for Brown and life plus 120 years for Robinson).

Having already sentenced each defendant by count, the court could not increase the sentences by ten years. And it does not appear that the court intended to do so; rather, it made a math error in computing the aggregate sentences. The correct sentences are as originally pronounced by the court, by count, and the commitment records must be corrected to reflect that, in accordance with Rule 4-351. The commitment records, as corrected, also should reflect that two of the three conspiracy convictions have been reversed (for each appellant). Thus, the aggregate sentence for Brown is life plus 85 years (which includes one ten-year sentence for a single conviction of conspiracy to

commit murder) and the aggregate sentence for Robinson is life plus 90 years (which includes one ten-year sentence for a single conviction of conspiracy to commit murder).

Robinson and Brown both were arrested on April 17, 2012, and were incarcerated prior to trial, up to the October 17, 2014 date of sentencing. We agree that the 882 days credit for pretrial incarceration they received was incorrect. The State's calculation of 914 days credit for pre-trial incarceration is correct.

JUDGMENTS OF ROBINSON AND BROWN FOR CONSPIRACY TO MURDER ATKINS AND CONSPIRACY TO MURDER JACKSON REVERSED. CASES REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO GIVE EACH ROBINSON AND BROWN 914 DAYS CREDIT FOR PRETRIAL INCARCERATION, AND CORRECT BOTH ROBINSON'S AND BROWN'S COMMITMENT RECORDS, PURSUANT TO RULE 4-351. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE MAYOR AND CITY COUNCIL OF BALTIMORE; ONE-QUARTER BY ROBINSON; AND ONE-QUARTER BY BROWN.