Circuit Court for Baltimore City
Case No. C617226016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 176

September Term, 2018

IN RE: J. K.

Wright,
Graeff,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: February 26, 2019

This is an appeal from the Circuit Court for Baltimore City, sitting as a juvenile court. The appellant in this case, J.K., is a delinquent child who challenges the court's findings that he was involved in the crimes of conspiracy to commit robbery and attempted robbery. In this appeal, J.K. presents four questions for our review:

1. Did the circuit court err in finding J.K. involved in the uncharged lesser included offense of attempted robbery without giving him the opportunity to present arguments regarding that offense?

2. Did the circuit court violate the rule of consistency by finding J.K. involved in conspiracy to commit robbery when his co-respondent, [J.T.], was found not involved in conspiracy after their joint trial?

3. Did the circuit court err in sustaining the State's exceptions without giving appropriate deference to the magistrate's finding that J.K. "could not have been there" when the incident occurred?

4. Did the circuit court err in sustaining the State's exceptions on the basis that the magistrate erroneously limited the cross-examination of J.K.'s alibi witness?

For reasons to follow, we hold the court erred by finding J.K. involved in the uncharged lesser included offense of attempted robbery without giving him the opportunity to present arguments on that offense. We also hold the court erred by finding J.K. involved in conspiracy to commit robbery.

BACKGROUND

On August 11, 2017, at approximately 11:00 p.m., Anna Turgeman, an employee of Papa John's Pizza, was robbed as she delivered a pizza order to an address on Kenwood Avenue in Baltimore City. Turgeman identified J.K. and his co-respondent, J.T., as the culprits of the robbery. Turgeman recalled that after responding to the pizza delivery order, she parked her vehicle and walked towards the front door of the residence. She then

proceeded to knock on the door of the residence, but there was no response. She stated that it was "dark" and "raining really hard" and the house appeared vacant. She returned to her vehicle and sent a text message to the phone number associated with the order on the receipt. After some time passed, a person responded, "I'm coming."

Turgeman then "saw . . . five boys running from . . . the next block over" in her direction. She stated that the boys opened the door of the residence, one of which she was "pretty sure" was J.T., and motioned for her to enter. She refused and went back into her car with the pizza. While she was placing the pizza bag in the front passenger seat, she saw the five boys leave the house and come towards her. Once the boys approached her vehicle, J.T. began to hit her twice with a broomstick, bruising her head. While this was occurring, J.K. was standing behind J.T. Turgeman testified:

> He was just standing there, he was standing behind [J.T.], he was the taller one behind him and when [J.T.] was fighting at me, I was able to look beyond him I wasn't paying that much attention to the tall guy, I was just noticing that I was being hit and why I was being hit and why was he standing there watching.

Turgeman acknowledged in her testimony that J.K. was "doing nothing" during the incident and that he was not carrying a stick. She stated that one of the boys tried to take her phone and the pizza store's money from her pocket, however he was unsuccessful. In addition, she testified that one of the boys, other than J.T. or J.K., took the pizzas from the passenger side of the vehicle. The group of boys then ran off together into an alley. When Turgeman returned to Papa John's, the police were called. She provided the responding

officer with J.T.'s name and Facebook profile picture, however she could not name any of the other boys, nor could she describe what they were wearing.

The following evening, at approximately 7:00 p.m. or 8:00 p.m., while working her shift at Papa John's, Turgeman received a pizza delivery order from the same address as the previous evening, but from a different phone number. She informed her supervisor, who then contacted the police. The police responded to the address and found J.T. and J.K., one holding a tree branch and the other holding a broomstick. Turgeman was taken to the location and identified J.T. and J.K. as two of the five boys who robbed her the night before. In addition, she stated that she recognized the broomstick handle shown to her by police.

J.K. was arrested and charged with robbery, second-degree assault, theft under $100, and conspiracy to commit robbery. Following the State's presentation of evidence, J.K.'s motion for judgment of acquittal was denied. J.K. then called his sister, Tiffany Watson, to testify on his behalf as an alibi witness. She testified that she lived with J.K. at the time of the incident. She further stated that on the date of the incident, J.K. left the house between 12:00 p.m. and 1:00 p.m. and that she next saw him later that evening. Watson also testified that J.K.'s curfew time was 8:00 p.m., and that they had to attend a family reunion the next day. She stated that she and J.K.'s mother picked him up from his aunt's house at approximately 10:15 p.m. and afterwards they all returned home. Watson testified that she did not know where J.K. had been before he was picked up and he did not leave the house once they returned home.

On cross examination, the State asked Watson several questions challenging the credibility of her claim to have picked up J.K. and the magistrate sustained several of the respondent's objections. Following closing argument, the magistrate determined that the State did not prove J.K.'s involvement, stating "the testimony of Ms. Watson was uncontradicted, that he could not have been there on the night of August 11th." She did not determine J.T.'s involvement during this hearing. During the next hearing, the magistrate recommended that J.T. be found involved in robbery and assault, but not involved in conspiracy to commit robbery.

The State filed the following exceptions in J.K.'s case: (1) the "trial court erred as a matter of law and fact in sustaining multiple objections on cross during the State's cross-examination of . . . Ms. Watson . . . preventing the State a full opportunity to cross-examine for inconsistencies and to fully challenge credibility . . . negatively impact[ing] the State's case, prevent[ing] the State from having a fair hearing and result[ing] in the Respondent being found facts-not-sustained;" and (2) the "trial court erred as a matter of fact and law in finding the Respondent facts-not-sustained of all counts based on the evidence presented and the applicable law."

At the exceptions hearing, the circuit court stated that after watching the proceedings before the magistrate, the court made the following findings:

> The [c]ourt finds as a matter of law that she will sustain the exceptions as to those parts illustrated by the State which are whether the trial court erred as a matter of law and fact in sustaining multiple Respondent's objections on cross during the State's cross-examination of the Defense alibi witness, Ms. Watson, who is respondent's sister.

> This [c]ourt found that the trial court erred as a matter of law by not allowing the State to ask questions that would have either corroborated the alibi witness'[] statements or prove them to be untrue. Also illustrated in the State's exception is whether the trial court erred as a matter of fact and law in finding the Respondent facts not sustained of all counts based on the evidence presented and the applicable law. This [c]ourt . . . sustains the exceptions as to that part and finds that the trial court erred as a matter of law by finding the Respondent facts not sustained of all counts based on the evidence presented and the applicable law.
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> The [c]ourt found that the testimony by the victim supported the State's case beyond a reasonable doubt. The record supports a finding of facts sustained as to count four, conspiracy to commit robbery, and count six, attempted robbery. And this [c]ourt overrules as to counts one, two, three, and five, which are robbery, second-degree assault, theft under $100, and robbery with a dangerous weapon.

Following a disposition hearing held on March 16, 2018, J.K. was committed to the custody of the Department of Juvenile Services for placement in a secure facility. This timely appeal followed.

DISCUSSION

I. The circuit court erred in finding J.K. involved in the uncharged lesser included offense of attempted robbery without allowing him the opportunity to present arguments regarding that offense.

Appellant argues the trial court erred in finding J.K. involved in the uncharged lesser included offense of attempted robbery without giving him the opportunity to present arguments on that offense. Conversely, the State asserts the juvenile court properly exercised its discretion in finding J.K. involved in attempted robbery, and that J.K. had an opportunity to present argument on that offense. We disagree with the State.

It is well established that a judge may convict a defendant on an uncharged lesser included offense. *Smith v. State*, 412 Md. 150, 170 (2009). However, a "trial judge may

not convict a defendant of an uncharged lesser included offense *unless the parties are given an opportunity to present arguments on that offense before the trial court*." *Id.* at 175. (emphasis added). In *Smith*, the defendant was convicted in a bench trial of armed robbery and use of a handgun in the commission of a felony, but acquitted of several other charges, including first-degree assault. *Id.* at 154. Defendant appealed. *Id.* This Court reversed for inconsistency because he had been acquitted of first-degree assault and remanded the case to the trial court with instructions to enter a guilty verdict for misdemeanor theft, an offense that was neither explicitly charged nor pursued at trial. *Id.* The Court of Appeals reversed, holding that the guilty verdict could not be remanded back to the judge because the parties were not given the opportunity to present arguments on the uncharged lesser included offense before the trial court. *Smith v. State*, 412 Md. 150, 169 (2009). The Court explained:

> a trial judge may not convict a defendant of an uncharged lesser included offense unless the parties are given an opportunity to present arguments on that offense before the trial court. Once the court has given the parties that opportunity, the trial court may convict the defendant of the uncharged lesser included offense regardless of whether either party requests or agrees that the court should consider that offense.

Id. at 175.

In the present case, the State concedes, "attempted robbery was not charged in the State's original petition or amended petition" and further, that there was no "oral argument *per se* about a 'charge' of attempted robbery." Nevertheless, the State argues that facts relevant to an attempted robbery the day after the alleged offense were argued by both the State and defense. However, during trial the State did not present arguments regarding

attempted robbery. Instead, the State presented evidence regarding J.K.'s involvement in an attempted robbery on August 12th to show his involvement in the robbery and assault that occurred on August 11th. Moreover, the State did not mention attempted robbery in its closing argument, rather the State focused on charges that were a direct result of events that occurred on August 11th. In its closing argument, the Prosecutor stated:

> Your Honor, it is clear, based on all of the evidence presented, that these young men should be found facts sustained of the armed robbery of Ms. Turgeman, of conspiring to commit armed robbery against Ms. Turgeman. I believe robbery would be a lesser included, second-degree assault, the theft of the pizzas, and the conspiracy to commit robbery also I believe would be a lesser included to the conspiracy to commit the armed robbery. The armed robbery – the dangerous weapon being the stick with which the victim was beaten with in order to take her belongings.

In response, J.K.'s counsel emphasized to the court that it needed "to keep the incident of August 11th separate from what happened on August 12th." Further, counsel focused on the inconsistencies in Turgeman's testimony, highlighting her inability to conclusively identify J.K. as one of the boys involved in the events that occurred on August 11th.

In addition, the magistrate did not reference a charge of attempted robbery in making her findings. The magistrate only considered the charges as to the events that occurred on August 11th when she made her findings, stating "so as to [J.K.,] the facts are not sustained . . . he could not have been there on the night of August 11th." Thus, we find J.K. was not given an opportunity to present arguments on the uncharged lesser included offense of attempted robbery.

Second, the State argues that J.K. "had notice that attempted robbery was a charge considered by the magistrate and therefore it would be considered by the juvenile court"

because the magistrate's December 14, 2017 order "recommended a finding of facts not sustained as to all counts, including 'Cnt. 6 Attempted Robbery.'" However, attempted robbery was not listed as a charge in the State's original or amended petition nor did the court inform the parties prior to rendering its verdict that J.K. could be charged with attempted robbery. We therefore hold that J.K. did not have adequate notice that the charge would be considered by the magistrate or the juvenile court.

II. The circuit court violated the rule of consistency by finding J.K. involved in conspiracy to commit robbery when his co-respondent was found not involved in conspiracy.

Appellant contends the circuit court violated the rule of consistency by finding J.K. involved in conspiracy to commit robbery when his co-respondent, J.T., was found not involved in conspiracy after their joint trial. The State argues the rule of consistency does not apply. We disagree. Conspiracy is defined as "the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose." *State v. Johnson*, 367 Md. 418, 424 (2002). It is well settled that the crime of conspiracy requires the participation of at least two people. *Id.* at 425. However, the rule of consistency provides that "where the participation of only one person is established, the crime of conspiracy cannot exist and a conviction thereunder is void." *Id.*

In *Gardner v. State*, the Court of Appeals clarified that the rule of consistency is only applicable in joint trials and does not apply when co-conspirators are tried separately. 286 Md. 520 (1979). In *Gardner*, the defendant was convicted of conspiracy to commit murder of two individuals and other related offenses. *Id.* at 522. Several months later,

defendant's co-conspirator, was tried in a separate trial before a jury. *Id.* at 523. The trial judge granted the co-conspirator's motion for acquittal as to one count of conspiracy to commit murder. *Id.* Following trial, the jury found him not guilty by reason of insanity on the remaining count of conspiracy to commit murder and other related offenses. *Id.* The Court of Appeals granted certiorari to review defendant's contention that the subsequent acquittal of his alleged co-conspirator violated the rule of consistency, and thus required reversal of his conviction. *Gardner v. State*, 286 Md. 520, 523 (1979). In addressing this issue, the Court of Appeals stated:

> it is settled that the crime of conspiracy necessarily requires the participation of at least two people. Where the participation of only one is shown the crime is incomplete and a conviction as to him is void. This proposition is recognized in the law as the rule of consistency: that "[a]s one person alone cannot be guilty of conspiracy, when all but one conspirator are acquitted, conviction of the remaining conspirator cannot stand." *Hurwitz v. State*, 200 Md. 578, 92 A.2d 575, 581 (1952). The rule developed many years ago when the practice was to try all persons charged with the crime of conspiracy together. Under such circumstances, common sense dictated that verdicts based on the same evidence and circumstances should be consistent. Accordingly the rule has developed primarily regarding joint trials.
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> However, while the evidence at the trial of a conspirator must show that he and at least another are guilty of forming an illegal scheme, it is not necessary that more than one person be convicted. Thus, the quantum of proof is sufficient at the trial of A when the evidence convinces the trier of fact beyond a reasonable doubt that A and B agreed with one another to accomplish some criminal purpose or to accomplish some purpose, not in itself criminal, by criminal or unlawful means. The rule of consistency has been held not to apply when A has been convicted of conspiracy and B has been granted immunity, or when B is dead, unknown, untried, unapprehended, or unindicted. In these and other situations in which there has been no judicial determination of the guilt or innocence of the alleged co-conspirators, i.e., no adjudication on the merits, there is nothing incongruous or inconsistent about convicting a sole defendant if there is sufficient evidence of the conspiracy.

Id. at 524–23 (internal citations omitted). The Court held that "the rule of consistency does not apply to separate trials but that each trial must be sufficient unto itself to support its verdict." *Id.* at 528.

In the present case, J.T. and J.K. were tried jointly as co-conspirators. The State's juvenile petition charged that J.K. "conspire[d] with [J.T.] to rob Anna Turgeman, and violently steal from said person, to wit: pizza, in violation of Criminal Law Article, Section 3-402 and Common Law." Following their joint trial, the magistrate concluded the State did not prove J.K.'s involvement. However, the magistrate found J.T. involved in robbery and assault, but *not involved in conspiracy to rob*. (Emphasis added). The State filed exceptions as to the magistrate's findings regarding J.K., however the State did not file exceptions regarding J.T. Following a hearing, the circuit court found J.K. involved in conspiracy to commit robbery.

We hold that the circuit court's finding violates the rule of consistency because one conspirator's conviction cannot stand when his sole co-conspirator is acquitted in a joint trial. Unlike in *Gardner*, J.K. and J.T. were not tried in separate trials. To convict J.K., but not J.T., based on the same evidence would be incongruous. See *Gardner v. State*, Md. 520, 527 (1979) (quoting *Platt v. State*, 143 Neb. 131, 8 N.W.2d 849 (1943)) ("when tried together, failure of proof as to one [co-conspirator] would amount to failure of proof as to both because the evidence was the same.").

Nevertheless, the State asserts "the evidence was sufficient to prove that J.K. conspired to commit robbery with other boys involved in the incident, even if J.T. was

found to be not involved." The State avers "that [because] the other boys were not named or identified in the juvenile petition . . . does not change this result." We disagree. The fact that the State chose to name a sole co-conspirator is dispositive as illustrated in *McMillian v. State*, 325 Md. 272 (1992).

In *McMillian*, the defendant was charged with conspiring with Carter, Jackson, and "with certain other persons whose names are to the Jurors aforesaid unknown" to distribute cocaine. *Id.* at 280. Following a jury trial, both Jackson and Carter were acquitted of all charges. *Id.* Defendant was convicted of conspiracy to distribute cocaine. *Id.* Defendant argued that his conviction must be reversed because of the acquittals of his co-conspirators. *Id.* at 290. The Court of Appeals emphasized that "[h]ad McMillian been charged with conspiring only with Jackson and Carter, then, under the rule of consistency his conviction could not stand." However, because the indictment alleged that he not only conspired with Carter and Jackson, but with certain other unknown persons, his conviction was upheld. *Id.* at 292.

In the present case, unlike *McMillian* the State charged J.K. with conspiring with J.T. and failed to include any other known or unknown conspirators. We therefore reverse the decision of the circuit court regarding the conspiracy charge.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE VACATED; COSTS TO BE PAID BY APPELLEE.