Circuit Court for Charles County
Case No. 08-K-16-000495

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 188

September Term, 2017

AKEEM HARRINGTON

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Davis, J.

Filed: May 15, 2018

* 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.

Appellant, Akeem Harrington, was tried and convicted of eleven counts of reckless endangerment, conspiracy to commit first degree assault, two counts of illegal possession of a regulated firearm, wearing, carrying or transporting a regulated firearm, wearing, carrying or transporting a handgun in a vehicle, possession with intent to distribute over ten grams of marijuana, possession with intent to distribute marijuana and possession of production equipment by a jury in the Circuit for Charles County (West, J., presiding) Appellant was sentenced on March 2, 2017.[1]

Appellant received credit for 290 days and was recommended to Patuxent Youth Institution. Appellant is also required to undergo a five-year supervised probationary period upon his release. In this appeal, Appellant posits the following questions for our review:

1. Is a charge that Appellant conspired to assault an unidentified victim a cognizable offense?

2. Did the trial court err in prohibiting Appellant from cross-examining Dion McBeth

[1] Appellant was sentenced as follows: Count 70, Possession of production equipment, 3 years; Count 69, Possession with intent to distribute, 3 years, consecutive; Count 73, Possession of a regulated firearm, 2 years, consecutive; Count 66, Possession of a regulated firearm, 2 years, concurrent with Count 73; Count 24, Reckless endangerment of a minor, 3 years, consecutive; Count 40, Reckless endangerment of a minor, 3 years, consecutive; Count 44, Reckless endangerment of a minor, 3 years, consecutive; Count 60, Reckless endangerment of a minor, 3 years, consecutive; Count 8, Reckless endangerment, 1 year, consecutive; Count 16, Reckless endangerment, 1 year, consecutive; Count 20, Reckless endangerment, 1 year, consecutive; Count 32, Reckless endangerment, 1 year, consecutive; Count 48, Reckless endangerment, 1 year, consecutive; Count 52, Reckless endangerment, 1 year, consecutive; Count 56, Reckless endangerment, 1 year, consecutive; Count 65, Conspiracy to commit 1st-degree assault, 20 years, suspended, consecutive.

about the act of cutting off his ankle monitor while on probation?

3. Did the trial court commit error by not instructing the jury to disregard improper comments made by the State's expert witness?

4. Did the trial court err in propounding a jury instruction on "accomplice" liability?

5. Is the evidence insufficient to sustain Appellant's conviction for conspiracy to commit assault in the fire degree?

FACTS AND LEGAL PROCEEDINGS

On May 15, 2016, Frank and Candie Simpson,[2] of 3574 Threshfield Street, White Plains, Maryland, were having a graduation party. Because of the party, a large number of cars were parked on both sides of the street in the neighborhood. Around 9:00 p.m., as the party was ending, Candie walked one of the guests to his vehicle and was then given a ride back to the front of her house. While Candie was sitting in the car, two girls and two boys in a white Toyota pulled up along the driver's side. A female passenger inside the Toyota told the driver of the vehicle to move. Candie's cousin told the girl that there was plenty of room for her to drive the Toyota through. Words were exchanged and the situation became verbally aggressive. Candie ran into the house and screamed for her husband because she did not have her phone.

Frank Simpson had been in the back yard of his house straightening up when he heard the commotion out front. Frank walked to the front of his house and saw a male standing on the driver's side of a car grab one of the people who had been at the party and

[2] Where there are two witnesses with the same last name, this Court will use the witness' first names to differentiate.

a fight broke out between three or four people. The combatants on both sides threw punches and the fight lasted a few minutes. The man who had been standing on the driver's side of the car said, "I'll be back." The group of people eventually got back into the Toyota and drove off.

Candie had run inside of the house and called the police. She saw people outside fighting and the people who had arrived in the Toyota re-enter their vehicle and drive away. When the police arrived, Candie and Frank reported what had occurred and gave the police the license plate number of the white Toyota. Because one of the passengers in the Toyota had made a threat about returning to the house, Candie and Frank requested that the police stay; however, the police were not able to remain at the Simpson residence and instructed them to call the police if they saw the car again.

Frank sat at the window watching out for the vehicle if it returned. Approximately thirty minutes after the police left, he saw the same white Toyota driving along a nearby street. Frank told his wife to call the police and then went outside where he told his brother, Kevin Hollins, and two other people from the party that they should come inside. Hollins did not come inside immediately because he was smoking a cigarette. The next time that Frank saw the car, it was speeding through the street from a direction that Frank did not anticipate. Shortly after the white car sped by, Frank heard two shots fired. Hollins ran inside of the house and slammed the door closed. Frank heard another shot, which shattered the window glass. Frank heard someone kick the front door in, whereupon he took cover, heading to the basement. However, there were approximately 13 children in the basement

watching a movie and Frank did not want the gunman to follow him there, so he went back upstairs. When Frank reached the top of the basement stairs, he saw that the front door of his house was still open, a gunshot in his floor and a hole in his wall through which a bullet had come from the outside.

After Frank had told her to call the police, Candie had gone to the laundry room to make the phone call. While in the laundry room, Candie heard two or three gunshots and got down on the floor. She then heard a couple more shots after the initial round. When Candie heard her husband and Hollins talking, she exited the laundry room and went to check on the children, whom she found shaken and visible upset.

Hollins testified that, on May 15, 2016, he spent the whole day cooking at his brother's house in White Plains. Hollins went to the store to get more cooking supplies and, when he returned, he stood on the porch smoking a cigarette. Frank told Hollins to be on the look-out for a white car, but Hollins did not pay much attention to what Frank said as he was on the porch with two other men, Greg Irving and another man. Irving and the other man went inside of the house and Hollins remained outside. Hollins saw a white car around the corner and then the same white car came back around and shots were fired from the vehicle. Hollins heard someone say, "What's that shit you talking?" The person then started shooting at Hollins, who was not able to see the individual. Hollins backed into the door pane, heard a second shot, hurried through the front door of the house and then heard a third shot. The front door was kicked down and another shot was fired, whereupon Hollins and Frank dropped to the ground as the assailant fired again. One of the shots

grazed Hollins on the right arm. The only description of the shooter that Hollins was able to provide to the police, was that the assailant wore a dark hood and a gray ball cap.

Crystal Davis testified that, on May 15, 2016, she went to a graduation party with her three children at the Simpson residence. According to Davis, around 9:00 p.m., there was an altercation outside. Davis saw four or five people outside of a car arguing about moving a car which resulted in a fight because no one would move the vehicle. Davis took a photograph of the license plate of the car that was involved in the altercation. One of the individuals in the white car was badly beaten during the fight and Davis heard one of the combatants say that they would be back. After the affray ended, she went back inside of the house to gather her children because she was ready to leave. As Davis sat on the couch with her two younger children, she saw Hollins come inside the house and she heard gunshots. The front door of the house was kicked in and she heard three more gunshots. Davis grabbed her one-year-old son and threw him on the floor.

Thomas Brockenberry testified that he lived in the Greenhaven Run neighborhood on May 15, 2016. Between 9:00 and 10:00 p.m., he was sitting on his couch when he heard "multiple pop sounds" that seemed like gunshots. Brockenberry stepped out on his front porch and saw a white Toyota drive down the street. Brockenberry thought that he saw three heads in the car and that the driver was an African-American male.

Michael Owens testified that he lived in the Greenhaven Run neighborhood and, on May 15, 2016, there was a party and he saw "a bunch of people" standing out in the road. There was a lot of screaming and people were running all over the place. A few hours later,

Owens saw a white Toyota drive past his house a couple of times. The third time it passed his house, the white Toyota pulled up and parked in front of his mailbox. The car drove off and Owens next saw a young man who walked up to a house and started shooting. Owens heard three or four shots fired and called the police.

Corinna Wilcox testified that she lived in the Greenhaven Run neighborhood and, on May 15, 2016, she was outside with her boyfriend when they saw a fight break out in the middle of the road that involved at least ten people. After the fight, some of the people left in their white Toyota. Later, when both Wilcox and her boyfriend were inside their home, Wilcox's boyfriend notified her that the white car was back out front. Wilcox looked out of the bedroom window and saw that the white car had pulled in between her house and the neighbor's house. Wilcox saw a black male wearing a hoodie get out of the car and run across the yard of the house across the street, where he started shooting. Wilcox called the police.

Detective John Elliott testified that, on May 15, 2016, he observed three bullet holes on the outside of the house on Threshfield Street and what appeared to be a bullet hole in the back of the house. A projectile fragment was recovered from the wall inside of the house and five casings were recovered in the grass in the front yard.

Later that day, Detective Elliott assisted with the execution of a search warrant at 328 Trefoil Place. At that residence, Tyrae Harrington directed him to a location outside of the house. Behind the house there was a cardboard box. Inside of the box was a white shopping bag that was tied in a knot. Once the plastic bag was untied, Detective Elliott saw

a white t-shirt and inside of the t-shirt was a semiautomatic handgun.

Katherine Busch, a forensic scientist with the Maryland State Police Crime Lab, was admitted as an expert in DNA analysis and forensic serology. Busch received swabs from the magazine of a Colt firearm, swabs from the slide and barrel, swabs from the grip area, swabs from the trigger area, and the oral standards of Appellant, Dion McBeth, Tyrae Harrington and Dana McBeth. Busch compared the known standards and the DNA profiles generated from the evidence. In the grip area of the firearm, there were more than two contributors in the DNA profile. In the mixture, there was one male and one female. Appellant was included as one of the potential contributors to the mixture. The other three individuals were excluded. On the swabs from the slide and barrel of the firearm, there was a mixture of more than two contributors. A significant contributor was developed and Appellant could not be excluded.

Torin Suber, the supervisor of the Firearm and Toolmark Unit with the Maryland State Police, was admitted as an expert in firearm and toolmark examination. Suber received a firearm related to this case and determined that the firearm was operable. The firearm was a Colt .38 Super semiautomatic handgun. Suber also received five cartridge cases and determined that all five of the cartridge cases were fired from the same firearm. Suber then compared two of the test shots that he had done with the Colt to the five cartridge cases. Suber concluded that the five shell casings were fired from the Colt that he tested.

Dion McBeth testified that he had entered into a plea agreement to plead guilty to

first-degree assault and first-degree burglary in this case. Pursuant to the plea agreement, Dion could be sentenced to as much as eight years' incarceration. At the time that Dion was testifying, he had not been sentenced.

According to Dion, on May 15, 2016, he was a passenger in the car that his twin sister, Dana McBeth, was driving, along with friends "Maddie" and "Moose," who were riding in the back of the car. Dana was driving down a road that was blocked and the people were asked to move the car. According to Dion, the people outside of the car got "an attitude" with them. Dion and his sister decided to exchange places in the car in order that Dion could drive through the tight spot in the road. According to Dion, the people outside of the car mistook him exiting the vehicle to switch places with his sister the wrong way. Dion testified that a "gay man" hit Dana and a fight broke out. Dion tried to persuade everyone to get back in the car. Moose was injured badly during the fight. Once they were in the car, Dion backed up and was able to drive out of the neighborhood.

Dion dropped Moose and Maddie off at their home and drove to Appellant's townhouse. Dion told Appellant what had happened and Appellant said, "We about to go pull back up on them." Appellant got dressed and they went back to the neighborhood in Dana's white Toyota Camry. Dion had intended to go back to the house to engage in a fight and Appellant was there to make sure it was fair. Appellant drove the car, Dion sat in the front passenger seat and Dana sat in the rear of the car. Dana told them that they were "being dumb" and she hopped out of the car. Dion got out of the car to talk to Dana and Appellant drove off. Dion heard four or five shots and he then saw Appellant come

speeding by in the car. Dion and Dana got back in the car and they all went back to Appellant's house. While at Appellant's house, they smoked marijuana. Appellant told Dion that he thought he had seen someone with a gun and he "shot up" the house. Dion had seen Appellant with a gun a few times previously and had been with Appellant in prior altercations. According to Dion, each time he was involved in a fight, he would call Appellant and Appellant would watch while he fought. Dion had held Appellant's gun twice before. Dion took photographs of himself holding the gun and pointing the gun at the camera.

Dion was arrested in the early morning of May 17, 2016. At the time that he was arrested, Dion was wearing the same hoodie as he was wearing in the photos where he was holding Appellant's gun.

Dana McBeth testified that she had pled guilty to conspiracy to commit a first-degree assault. Dana had not been sentenced at the time of Appellant's trial. In exchange for her plea of guilty, Dana would not serve jail time, but would be required to continue her attendance at the University of Maryland, Eastern Shore. Dana was being monitored with an ankle monitor.

Dana testified that, on May 15, 2016, she was driving her white Toyota Camry to a friend's house with her brother and friends, Moose and Maddie. When Dana drove down a street in the Greenhaven Run neighborhood, a car was parked on the side of the road blocking her passage. Dana and her friends asked them to move their car, but the people did not. Dana and her brother decided to switch positions in the car so that her brother

could drive past. More people came out of the nearby house and, according to Dana, the people were drunk and rude. Dana was offended by what the people were saying to her and she became belligerent. She stated that people got in her face and in Dion's face. A man kicked her and everyone started fighting. Dana and her friends lost the fight, but were finally able to re-enter in the car and Dion sped away. They dropped Moose and Maddie off at their home and Dion, Moose and Maddie smoked marijuana.

From there, Dana and her brother went to Appellant's house. Once at Appellant's house, Dana pet the dogs while Dion went to talk to Appellant. After approximately ten minutes she, Dion and Appellant got back in her car. Dion wanted to return to the community to fight. Dana had initially wanted to go back to fight; however, when they arrived at the neighborhood, Dana asked to get out of the car because she became unsure. While Dana and Dion argued outside of the vehicle, Appellant drove off towards the house. Dana testified that she never saw a gun that night. She called her friends to come pick her up and, while she was walking by herself, she heard gunshots. A short time later, Dana saw her friends across the street at the same time that Appellant pulled up in her car. Dana and her brother got into the car with Appellant and drove back to Appellant's house. Dana asked Appellant what happened, but Appellant would only tell her that there was a shootout. As soon as they arrived at Appellant's house, Dana drove away. Dana was later arrested by the police and was not initially truthful with them.

Detective Gilroy was involved in the execution of a search warrant at 372 Trefoil Place on May 16, 2016. Detective Gilroy went into the back yard and saw Appellant on the

ground below a window. There was also a bag of suspected marijuana on the ground next to Appellant's leg.

Corporal Davidson, with the Narcotics Enforcement Section, prepared a search and seizure warrant for 382 Trefoil Place in Waldorf. When they arrived at the townhouse, they were notified that someone had jumped out of a window towards the back of the house. A bag of suspected marijuana was found in the backyard. They also recovered a smaller bag of suspected marijuana inside of the residence, in the living room, by the couch. Also recovered in the living was a bag containing tobacco leaves and a black digital scale. Located in an upstairs bedroom with an open window was a box of unused sandwich baggies and a metal grinder. Male and female clothing were found in the bedroom along with $300.

Sashi Kambapati, with the Maryland State Police Forensic Sciences Division, was admitted as an expert in the field of forensic chemistry. Kambapati found that the net weight of the first bag was 90.47 grams of marijuana and the net weight of the second bag was 19.39 grams of marijuana.

Detective Sergeant John Burroughs, with the Charles County Sheriff's Office, was admitted as an expert in the field of identification, packaging, distribution, evaluation, and use of CDS, specifically marijuana. Detective Sergeant Burroughs testified that the bag of marijuana that was located next to Appellant, which contained 90.47 grams of marijuana, had an approximate street value of $1,800. The other bag of marijuana, which contained 19 grams, was worth approximately $200. The evidence in this case, the quantity of

marijuana, the location of sandwich bags in a bedroom, the presence of a digital scale, the presence of $300 in cash, and the presence of a firearm, indicated to Detective Sergeant Burroughs that this was a possession with intent to distribute case.

After hearing this, and other evidence, the jury convicted Appellant of multiple counts of reckless endangerment, conspiracy to commit first-degree assault, illegal possession of a regulated firearm on May 15, 2016, wearing, carrying, or transporting a handgun in a vehicle, illegal possession of a regulated firearm on May 16, 2016, possession of over ten grams of marijuana, possession with the intent to distribute marijuana, and possession of production equipment.

Appellant was sentenced, on March 2, 2017, to 28 years of incarceration with 20 years suspended.

DISCUSSION

I.

Appellant first contends that his charge for conspiracy to commit first-degree assault, when a victim was not specified on the indictment, is not a cognizable offense. Specifically, Appellant argues that, "[i]n failing to identify a victim of the alleged crime, the charging document [] utterly failed to provide the accused with a sufficient description of the crime alleged to have been committed." Appellant further notes that Maryland statutes and case law require that the victim of an assaultive crime be stated in the charging document. According to Appellant, "[t]he constitutional requirement that the accused be entitled to a description of the particular act alleged to have been committed is not a mere

technicality" and that "[t]he charge against [him] is insufficient to 'protect the accused from a future prosecution for the same offense.'"

The State responds that, although the indictment did not identify the victim of the crime, it did charge the offense of conspiracy to commit first-degree assault sufficiently "to endow the circuit court with subject-matter jurisdiction" which, according to the State, is "the only claim properly before the Court[.]" The State maintains that Appellant's argument "weaves due-process and jurisdictional principles together even though there was no pretrial motion to dismiss the conspiracy count for a defect of due-process notice, as required by Maryland Rule 4–252(a)(2)." The State argues that the identity of the victim of a conspiracy's object-crime is not a jurisdictional element necessary in the charging document. The State also notes that, although the statutory short form of an indictment for first-degree assault requires identification of a victim, the charging for a criminal *conspiracy* differs from charging for the object crime of a criminal conspiracy. Citing *Denicolis v. State*, 378 Md. 646. 662 n.4 (2003), the State maintains that there is no requirement to "'name known victims of a conspiracy in an indictment' and that 'identification of the victim can hardly be regarded as jurisdictional.'" The State reasons that, at the time of formulating the conspiracy, specific victims may be unknown, but the crime of conspiracy nonetheless stands. Finally, the State argues that "[t]he conspiracy charge in this case identifies the conspiratorial agreement by date, place and participants," thus, prohibiting any future prosecution of Appellant for the same criminal conspiracy to commit first-degree assault upon subsequently identified victims and, thereby, upholding

Appellant's constitutional right against double jeopardy.

> A primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him. More particularly, the purposes served by the constitutional requirement include (1) putting the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (2) protecting the accused from a future prosecution for the same offense; (3) enabling the accused to prepare for his trial; (4) providing a basis for the court to consider the legal sufficiency of the charging document; and (5) informing the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Williams v. State, 302 Md. 787, 790–91 (1985) (citations omitted).

The Court of Appeals has

> repeatedly emphasized that every criminal charge must, first, characterize the crime; and, second, it must provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the accusation and avoid a second prosecution for the same criminal offense.

Id. at 791 (citations omitted).

> It is fundamental that a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction prescribed by common law or by statute. Manifestly, where no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction, *i.e.*, it is powerless in such circumstances to inquire into the facts, to apply the law, and to declare the punishment for an offense.

Id. at 791–92 (citations omitted).

The crime of conspiracy is defined in Maryland as:

> [T]he combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. [Furthermore], the crime is complete when the unlawful

> agreement is reached, and no overt act in furtherance of the agreement need be shown.

Campbell v. State, 325 Md. 488, 495–96 (1992) (citations omitted).

Md. Code Ann., Crim. Law ("C.L.") § 1–203 governs the charging documents for criminal conspiracies and provides the following:

> An indictment or warrant for conspiracy is sufficient if it substantially states: "(name of defendant) and (name of co-conspirator) on (date) in (county) unlawfully conspired together to murder (name of victim) (*or other object of conspiracy*), against the peace, government, and dignity of the State.".

(Emphasis supplied).

Therefore, "in a prosecution for conspiracy, it is essential only that the indictment state that there was a conspiracy and what *the object of the conspiracy was*." *Manuel v. State*, 85 Md. App. 1, 20 (1990) (emphasis supplied) (citing *Winters v. State*, 301 Md. 214, 234 (1984)).

For example, the *Williams* Court held that, "[t]he charge, conspiracy 'to violate the controlled dangerous substances law of the State of Maryland,' sufficiently characterizes the crime of conspiracy so as to invest the circuit court with jurisdiction. *Campbell*, 325 Md. at 501(citing *Williams*, 302 Md. at 793).

Furthermore, in a footnote in *Denicolis*, a case concerning solicitation, the Court of Appeals made the following analogy to the crime of conspiracy:

> The statutory form indictment for conspiracy, a crime that has a close affinity to solicitation, *provides for naming the victim where the conspiracy is to murder but not otherwise*. If the name or identity of the victim of other conspiracies directed against a person is not required, identification of the victim can hardly be regarded as jurisdictional. In *Pearlman v. State*, 232 Md. 251, 260 (1963), we held that the

State was not required to name known victims of a conspiracy in an indictment. *Denicolis*, 378 Md. at 662 n.4 (emphasis supplied).

Maryland Rule 4–252(a)(2), governing mandatory motions, requires that, an allegation of a defect in a charging document for any reason other than failure to illustrate the court has jurisdiction or that a crime has not been charged, must be "raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise[.]"

In the instant case, the State alleges that the only claim before this Court is jurisdictional. Appellant argues that "[w]here no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment and impose a sentence," citing *Pully v. State*, 287 Md. 406, 415–16 (1980). We agree with the State that Appellant's argument "weaves due-process and jurisdictional principles together" and Appellant made no pretrial motion, as required under Md. Rule 4–252(a)(2), to dismiss the conspiracy count for a defect of due-process notice. Accordingly, we limit our review of Appellant's claim in terms of subject-matter jurisdiction.

We are persuaded that, in a non-murder criminal conspiracy charge, the identity of the victim was not required for the indictment to charge a cognizable offense. C.L. § 1–203; *Denicolis, supra*. In the case *sub judice*, the charging document stated that there was a conspiracy and that the object of the conspiracy was first-degree assault. Per *Manuel, supra*, this was sufficient for prosecution and the establishment of a cognizable offense, thereby conferring upon the circuit court the requisite subject-matter jurisdiction.

We also note Appellant's double jeopardy concerns are alleviated by the particularity by which the indictment states the location, date and participants regarding the charge for criminal conspiracy in the first-degree. The charging document sufficiently identified the locus from which the conspiracy arose. As "[t]he 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives[,]'" *Savage v. State*, 212 Md. App. 1, 13 (2013), subsequently identified victims from the same location, date and involving the same participants could not change the "unit of prosecution" in the instant case, which is the unlawful agreement. Accordingly, we hold that the charging document charged a cognizable offense, *i.e.*, conspiracy to commit first-degree assault, and, thereby, conferred subject-matter jurisdiction to the circuit court.

II.

Appellant's next contention is that the trial court erred in prohibiting him from cross-examining Dion McBeth concerning Dion's alleged act of cutting off his ankle monitor while on probation. Appellant reasons that the act of cutting off an ankle monitor illustrates that Dion was dishonest and was "probative of a character trait of untruthfulness." Appellant argues that all four parts of the test devised in *Ogburn v. State*, 71 Md. App. 496, 503 (1987) were met. Furthermore, Appellant asserts that it was not harmless error for the court to refuse Appellant's cross-examination of Dion, "[c]onsidering the centrality of [his] testimony[.]"

The State responds that the trial court properly regulated the scope of Appellant's cross-examination of a State's witness. The State notes that, during the hearing on the

motion in limine, Appellant's trial counsel proffered only belief, not factual evidence, that Dion cut off his ankle monitor. According to the State, the trial court correctly assessed that including cross-examination of this kind "was a step too far," considering that there was already cross-examination concerning Dion's plea deal with the State on two counts to resolve "seventy-something counts" in the case at issue and to terminate probation in a separate juvenile manner. The State argues that, "the preclusion of inquiry on the ankle bracelet could not have led to a significantly different appraisal of [Dion's] credibility."

Md. Rule 5–608(b) governs impeachment by examination regarding a witness's own prior conduct that did not result in conviction, and provides that

> the court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

"This Court has recognized as a general rule that a witness may be cross-examined 'on such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or cause, his bias, or the like.'" *State v. Cox*, 298 Md. 173, 178 (1983) (quoting *Kantor v. Ash*, 215 Md. 285, 290 (1958)).

> [T]he trial judge plays a significant role; for he must balance the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion.

Id.

"To assist the trial judge, our courts have recognized and enforced certain

principles." *Id.* "We have [] permitted a witness to be cross-examined about prior bad acts which are relevant to an assessment of the witness' credibility." *Id.* at 179.

> We have also been steadfast in holding that mere accusations of crime or misconduct may not be used to impeach. The rationale for this viewpoint is obvious. First of all, accusations of misconduct are still clothed with the presumption of innocence and receiving mere accusations for this purpose would be tantamount to accepting someone else's assertion of the witness' guilt and pure hearsay.

Id. at 179–80 (citations omitted).

However, the Court of Appeals has "allowed, given a proper showing, cross-examination of a witness regarding 'prior bad acts which are relevant to an assessment of the witness' credibility.'" *Fields v. State*, 432 Md. 650, 673 (2013) (quoting *Cox*, 298 Md. at 179). "To be sure, 'if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination.'" *Id.* (quoting *Robinson v. State*, 298 Md. 193, 200 (1983)). "[W]hen impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, *but whether the witness actually committed the prior bad act*. A hearsay accusation of guilt has little logical relevance to the witness' credibility.'" *Id.* at 674 (emphasis supplied) (quoting *Cox*, 298 Md. at 181).

In the instant case, neither party disputes that the basis for Dion's alleged prior bad act was the belief of Appellant's trial counsel that it had occurred.[3] As *Fields, supra*,

[3] Appellant's brief states: "Defense counsel proffered to the court that the defense had reason to believe Mr. McBeth had cut off the ankle monitor." The State, in its brief, asserts, "[A]ll that defense counsel proffered was that she 'believe[ed] that [McBeth] cut off his ankle monitoring[.]" Both parties cite the transcript dated December 7, 2016 at page 21.

restates, as it concerns impeachment, the inquiry is not whether the witness is *accused* of misconduct, but rather, whether the witness *actually* committed the prior bad act. Mere accusations cannot be used for impeachment. *Cox, supra*. An accusation is still "clothed in the presumption of innocence" and quantifies little more than hearsay. *Cox, supra.* Therefore, the trial court did not err by prohibiting Appellant from cross-examining Dion concerning the mere accusation, based on counsel's belief that he had cut off his ankle monitor.

III.

Appellant next contends that the trial court erred by not instructing the jury to disregard improper comments made by the State's expert witness, Katherine Busch. Specifically, Appellant asserts that "[t]he trial court should have recognized the prejudicial impact of having an expert witness repeatedly refer to what defense counsel was attempting to do as unethical and should have given a curative instruction." Appellant notes that "[c]omments denigrating opposing counsel are such as to 'unfairly prejudice the jury against the defendant,' and are thus improper." According to Appellant, the error was not harmless and reversal is required.

The State responds that the trial court properly exercised its discretion by not providing a curative instruction to the jury regarding "ambiguous" testimony from the State's expert witness. The State maintains that its expert witness was referencing her own ethical duty and not impugning the ethical character of Appellant's trial counsel. The State further asserts that the court provided counsel the opportunity to cross-examine the witness

regarding "what she was talking about," but that defense counsel declined.

> [T]he mere occurrence of improper remarks does not by itself constitute reversible error. There must be an additional element for this conclusion to be reached. If we cannot say that the assailed argument constituted a material factor in the conviction, must have resulted in substantial prejudice to the accused or that the verdict would have been different had the improper closing argument not been made, then we must necessarily conclude that no prejudicial error resulted from the argument.

Wilhelm v. State, 272 Md. 404, 431 (1974), *abrogated on other grounds by Simpson v. State*, 442 Md. 446 (2015) (citations omitted).

In the instant case, we have a situation where an expert witness is accused of making improper remarks directed, not at the defendant, but rather at defense counsel. Before we can determine if a curative instruction to the jury was warranted, we must first determine if improper remarks were made.

During cross-examination, State's witness, Katherine Busch stated the following: "That is unethical to do in my business"; "I don't do that"; "So, to go back after the fact and say, 'Somebody must be there, because this number or that number is there,' that is unethical for me to do"; "I have an ethical duty *** to make sure that the jury doesn't misunderstand what is in this report"; "And you are trying to mislead them into believing something—".

After the jury was excused, the following colloquy occurred:

> [DEFENSE COUNSEL]: Again, not only would I like you to order her to answer the questions, I would like a curative instruction. Because what she has done is just called me unethical in front of the jury, and the jury is hearing that, and they may feel the same way. And I just think, you know, I think that needs . . . I need a curative instruction.

[COURT]: So, you want me to say to them . . . [] what do you want me to say?

[DEFENSE COUNSEL]: Well, the—

[PROSECUTOR]: No way.

[COURT]: That the witness just called you unethical, disregard it?

[DEFENSE COUNSEL]: Yeah, the attorney is just doing her job, or something to that effect.

***

[COURT]: Well, I can't . . . that's a step too far.

***

[PROSECUTOR]: Right, in all fairness, I think that's what she was saying. I don't think she said . . . I don't think she said [defense counsel] is unethical.

[COURT]: Yeah.

[PROSECUTOR]: I mean, we can listen to it, but—

[COURT]: It could have easily been interpreted that way.

[DEFENSE COUNSEL]: Exactly.

[COURT]: I think . . . and it could have easily been interpreted that way. I think what she was talking about was her own professional ethics. But certainly, [defense counsel] is there in front of the jury. I don't know what any of them took.

My only question is, should . . . do you want me to revisit that, [defense counsel]?

[DEFENSE COUNSEL]: Um . . . Your Honor—

[2ND DEFENSE COUNSEL]: Yes.

[DEFENSE COUNSEL]: Yes, you know, I think certain allegations were made, and I'm just trying to do my job. It's as simple as that.

[WITNESS]: And I'm trying to do mine.

[COURT]: I understand.

[WITNESS]: And I would be happy to make a statement to the jury—

[COURT]: It's okay, it's okay.

[WITNESS]: —that it's my professional ethics.

***

[COURT]: Honestly, I do think we just have to keep going.

[DEFENSE COUNSEL]: Well—

[COURT]: Because here is what I can't do, I can't say, [defense counsel] is just doing her job, or [the prosecutor] is doing his job. *** So . . . but the witness gave her response several questions ago, and to sort of go back now, I'm not sure that it's appropriate. *** And I'm not sure what even the instruction seeks to do. If you want to ask her, when she made a statement about unethical, what she was talking about, or if you want to ask her, that's fine.

[DEFENSE COUNSEL]: No, Your Honor, I do not want to do that.

Patently, the witness referenced her own ethical duty. On one occasion, the witness did state that defense counsel was attempting to "mislead" the jury. The trial judge indicated that there was some confusion as to what the witness may have been talking about and stated that her remarks could have been interpreted by the jury to reflect upon defense counsel. Defense counsel requested the trial court provide a curative instruction that she was doing her job and to disregard the witness' reference to ethics, or lack thereof. The trial judge felt this was a "step too far" and declined to give a curative instruction. However, the trial judge did state that defense counsel could cross-examine the witness regarding her

statements and clarify that she was referencing her own ethical duty and not impugning the ethical character of the defense counsel. Counsel declined to do so. It is the trial judge's duty to review the remarks and determine whether they are so prejudicial to the defendant that they require intervention in the form of curative instruction. Here, the trial judge determined that was unnecessary. Moreover, the judge questioned whether revisiting remarks made "several questions ago" was even appropriate. Indeed, the Court of Appeals has stated that, on occasion, a curative instruction may "highlight[] the inadmissible evidence rather than curing it." *Simmons v. State*, 436 Md. 202, 218–19 (2013) (quoting *Carter v. State*, 366 Md. 574, 592 (2001)).

In sum, Appellant does not argue that the remarks, which were directed at his counsel rather than himself, substantially prejudiced him and constituted a material factor in the conviction; rather, Appellant alleges that the witness' remarks "depict[ed] defense counsel as an individual willing to sink to any ethical depths in the search for an unmerited acquittal." We are unpersuaded that the trial court erred by not providing curative instruction to the jury to disregard the State's witness' remarks. Moreover, the trial court did offer a cure; defense counsel was provided the opportunity to cross-examine the witness to clarify that the remarks were in reference to the witness' duty, not to defense counsel's ethical character. Defense counsel declined. Accordingly, we uphold the lower court's ruling.

IV.

Appellant's next contention is that the trial court erred in propounding a jury

instruction on "accomplice" liability. According to Appellant, "[t]he instruction was problematic because it permitted the State to proceed on a theory of criminal liability that was inconsistent with the theory the State pursued throughout the trial." Appellant alleges that he "was prejudiced by the State's eleventh hour insertion of a new theory of culpability" because he was unable, at that point in the trial, to "focus[] cross-examination on establishing reasonable doubt that Appellant in no way aided or encouraged the shooter." Accordingly, Appellant asserts that his due process rights were violated.

The State responds that the trial court properly exercised its discretion to give a jury instruction on accomplice liability. The State maintains that Appellant introduced the need for the State "to pursue two avenues of culpability." In addition to the primary avenue that Appellant was the gunman, the State needed to pursue a secondary avenue of culpability for Appellant as an accomplice, because Appellant repeatedly raised the defense that the McBeth twins were responsible for the shooting. According to the State, the accomplice-liability instruction should not have been a surprise to Appellant.

"The court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" MD. RULE 4–325(c). "Whether a particular instruction must be given depends upon whether there is any evidence in the case that supports the instruction; if the requested instruction has not been generated by the evidence, the trial court is not required to give it." *Fleming v. State*, 373 Md. 426, 432 (2003) (citations omitted).

In the case, *sub judice*, Appellant does not argue that the accomplice-liability jury instruction was an incorrect statement of the law or not generated by the evidence

presented. Rather, Appellant restricts his argument to the claim that the accomplice-liability jury instruction was inconsistent with the State's main theory of criminal liability, *i.e.*, that Appellant was the gunman. Therefore, Appellant asserts that the issuance of the instruction deprived him of his due process rights.

Regarding inconsistencies in separate trials involving multiple defendants, the Court of Appeals has held that "a due process violation will only be found when the demonstrated inconsistency exists at the *core* of the State's case." *Sifrit v. State*, 383 Md. 77, 106 (2004) (emphasis supplied).

> As a general rule, when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom.

Diggs & Allen v. State, 213 Md. App. 28, 85 (2013) (quoting *Sheppard v. State*, 312 Md. 118, 121–22 (1988)).

"A Principal in the first degree is one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *State v. Ward*, 284 Md. 189, 197 (1978), *overruled on other grounds by Lewis v. State*, 285 Md. 705 (1979).

> An accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another. This responsibility, known as accomplice liability, takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense.

Diggs & Allen, 213 Md. App. at 85 (quoting *Sheppard*, 312 Md. at 122).

Appellant argues that a jury instruction for accomplice-liability is inconsistent with the State's main theory of criminal liability, *i.e.*, that Appellant was the gunman. However,

as *Diggs & Allen, supra*, illustrates, "when two or more persons participate in a criminal offense, *each is responsible for the commission of the offense*." (Emphasis supplied). At trial, Appellant conceded that he agreed to return to the Simpson residence with the McBeth twins and that he later leapt from a window with a stash of marijuana. Appellant also asserted at trial several times that the McBeth twins had the motive to return to the Simpson residence and to engage in a shootout. Specifically, Appellant alleged that Dion used the gun. Indeed, during cross-examination of expert witness Busch, Appellant continued to question the witness concerning Dion's DNA, *vel non*, on the firearm.[4] Understanding that Maryland law provides that both principals and accomplices are legally responsible for the commission of an offense, Appellant cannot argue, on appeal, that his due process rights were violated by the State pursuing an accomplice-liability theory of criminal responsible, when Appellant raised the defense, at trial, that the McBeth twins were criminally responsible. Therefore, we hold that the trial court properly exercised its discretion in giving accomplice-liability instruction to the jury.

V.

Appellant's final contention is that the evidence presented was insufficient to sustain his conviction for conspiracy to commit assault in the first degree. Specifically, Appellant alleges that the evidence presented only supports that the McBeth twins returned to the Simpson residence to fight and that there was no agreement to use a firearm or that the

[4] *See, supra,* Section III.

twins even "had seen a handgun[.]" Furthermore, Appellant asserts that "the evidence did not show a meeting of the minds regarding the crime of assault in the first degree[.]"

The State's response is that the evidence presented was legally sufficient to convict Appellant of conspiracy to commit first-degree assault. The State asserts that, due to Dion's past altercations with Appellant, knowledge that Appellant owned and carried a handgun and that Dana pled guilty to conspiracy to commit first-degree assault, "a rational juror could infer beyond a reasonable doubt that the McBeth twins conspired with Harrington to return to the scene with the added leverage of a handgun."

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is 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." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)).

> It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to the jury's inferences and determine whether they are supported by the evidence.

Id. at 185 (citations omitted).

"That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Id.* (citation omitted).

> Even in a case resting solely on circumstantial evidence, and resting moreover on a single strand of circumstantial evidence, if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence.

Ross v. State, 232 Md. App. 72, 98 (2017).

"[C]onspiracy is a combination by two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." *Jones v. State*, 8 Md. App. 370, 375 (1969).

In the instant case, we are persuaded that the evidence presented was sufficient to support Appellant's conviction for conspiracy to commit first-degree assault. Dion McBeth testified that he recruited Appellant to return with him and his sister to the Simpson residence to get revenge for the fight earlier that evening. Dion further testified that, on several prior occasions, Appellant had assisted him in physical altercations. There was evidence that Dion knew Appellant carried a gun. In fact, Dion posed with Appellant's gun in photographs. Dana McBeth pled guilty to conspiracy to commit first-degree assault. Accordingly, it is plausible that a rational jury could make the inference, beyond a reasonable doubt, that a meeting of the minds had taken place between Appellant and the McBeth twins to return to the Simpson residence seeking revenge, but this time with the added benefit of Appellant and the handgun he was known to carry. Therefore, we hold that Appellant's conviction is sufficiently supported by the evidence presented.

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