Circuit Court for Prince George's County
Case No. JA-17-0537

UNREPORTED*

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 189

September Term, 2018

IN RE: E.J.

Leahy,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: July 9, 2019

In 1952, Chief Judge Marbury, writing for the Court of Appeals, observed:

> No matter how sordid the case and how suspicious the circumstances, we cannot permit a person charged with crime to be convicted without evidence. The conjectures of the trial judge might be entirely correct, and the evidence produced before him might be false in important particulars. Nevertheless, a conviction without proof cannot be sustained under the laws of this State. A man is innocent until he is proved guilty, and there must be evidence which leads to such a result.

Estep v. State, 199 Md. 308, 314 (1952). This principle is put to the test in the present case.

E.J., a juvenile in 2017, was found involved in connection with an armed robbery. The evidence against him was his presence in the getaway vehicle and his proximity to a gun and stolen cell phone found in the car. The State argued, and the circuit court agreed, that this was enough to find him involved on theories of accomplice and co-conspirator liability and constructive possession of a firearm.

The circuit court certainly had reason to be suspicious given the circumstances of the case. But its finding of E.J.'s involvement in the crimes could not have been reached without resorting to speculation. Without evidence actually linking E.J. to the crimes, we must reverse.

BACKGROUND

On the night of July 11, 2017, E.J. was sitting in the backseat of a car when the police pulled it over and ordered its occupants to exit. Earlier that night, two of the other occupants (the "**perpetrators**") had robbed several individuals with a handgun at an apartment complex in Prince George's County, making off with cash, cell phones, and wallets. While the perpetrators fled the scene, a neighbor dialed 911 to report the crime.

Several police officers responded to the call, including two who were half a mile away. These two officers witnessed a black sedan speeding away from the scene of the crime with its headlights turned off. When the officers tried to initiate a traffic stop, the car slowed down, and then rapidly accelerated before finally pulling over and stopping. The officers ordered the occupants to exit the car and searched it, finding a gun in the center console and a cell phone in the back-right seat of the car where E.J. had been sitting.

The victims of the robberies were then brought to the site of the stop, where they positively identified the perpetrators as their assailants. They did not identify E.J. A witness later identified the gun found in the car as looking "exactly like" the one involved in the crime.

Prosecutors charged E.J. with numerous counts related to the armed robbery, including counts stemming from his involvement as an accomplice, conspiracy, and various gun charges. To prove that E.J. was involved as an accomplice, the State needed to show that he had assisted, supported, or encouraged the perpetrators in their crimes. See Silva v. State, 422 Md. 17, 28 (2011). Similarly, to prove that E.J. was involved in a conspiracy, the State needed to show that he had an agreement with the perpetrators to commit the robbery. Mitchell v. State, 363 Md. 130, 145-46 (2001). Finally, to prove the gun charges, the State needed to show that E.J. had joint constructive possession of the gun that had been found in the center console. See Cerrato-Molina v. State, 223 Md. App. 329, 335 (2015).

At trial, the State put on five witnesses: the two police officers who had pulled over the car, the two detectives who conducted the show-up identifications of the perpetrators, and the detective involved in retrieving the gun and stolen property from the car. Neither the perpetrators of the robbery, nor E.J. himself, testified. None of the witnesses testified that they saw E.J. participating in the crimes. Nor was there any testimony about the relationship among the two perpetrators and E.J. or how and why it came to be that E.J. was riding in the car after the robbery. And finally, no one testified about who owned the weapon or vehicle used in the crimes.

Not surprisingly, the defense argued that there was insufficient evidence to tie E.J. to the robbery or the gun found in the car. The prosecution countered that the fact that a phone was found on the seat in which E.J. was sitting, in addition to his presence in the car—with the perpetrators and the gun, shortly after the robbery—was sufficient to show that E.J. aided the robbery by acting as a look-out, thereby rendering him an accomplice. The State also argued that E.J. had constructive possession of the gun because it was located within his reach in the center console.

The circuit court, sitting as a juvenile court, found E.J. involved as to all counts, relying primarily on the fact that the cell phone was found in E.J.'s seat:

> THE COURT: Okay, having considered the testimony in this case and the evidence presented, there's no doubt that the State's civilian witnesses were robbed. Were robbed by a deadly weapon. The question in this case is what, if any, type of culpability does the respondent have. Much, not all, but much of the testimony evidence is not really in dispute.
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> Testimony later was that the civilians did a show up and they did not identify the Respondent but identified two others in this case. So the question is what if any type of conduct does the Court find beyond a reasonable doubt that the Respondent was involved in? I have said that that was my concern through much of the case, even with regard to the firearm being found in the center console. However, I disagree with the defense. I think that the objects in the car, as well as most notably the phone in the backseat, does convince me that the Respondent is involved by way of accomplice liability.
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> Accomplice, I'll paraphrase that the jury instruction, is that one who either assists or is ready, willing, and able to assist and I find that I think is a logical, that by, again by the evidence in this case, and what was very important, that one of the phones in the backseat was where the Respondent was actually sitting.

DISCUSSION

Our review of the circuit court's decision "is limited to determining whether there is a sufficient evidentiary basis for the court's underlying factual findings." In re Anthony W., 388 Md. 251, 261 (2005) (quotation omitted). We do not independently determine if we would have reached the same conclusion as the trial court; we are instead constrained to determine "whether after reviewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime[s] beyond a reasonable doubt."[1] Id. (emphasis added). When the record contains no evidence or proper inferences from which the circuit court could have found the juvenile

[1] The State points out that a trial court stands in a superior position to assess witnesses' credibility and determine what weight to attach to conflicting pieces of evidence. However, this is not a case in which the fact-finder needed to make credibility determinations and resolve conflicts in the evidence. Here, as the circuit court pointed out, the facts are largely undisputed. Instead, the crux of the issue for our review is whether the circuit court drew appropriate and acceptable inferences from the facts, or instead resorted to impermissible speculation.

involved in the crimes alleged, we must hold that its decision was clearly erroneous. See Estep, 199 Md. at 310-311. This is one such case.

I. THERE IS INSUFFICIENT EVIDENCE TO FIND THAT E.J. WAS AN ACCOMPLICE TO THE ROBBERY, ASSAULT AND THEFT COUNTS

The State argues that E.J. was an accomplice to the crimes, and therefore just as involved in (and culpable for) them as the actual perpetrators. To be considered an accomplice to a crime, an individual must "actually participate" in the crime "by assisting, supporting or supplementing the efforts of another, or, if not actively participating, then the person must be present and advise or encourage" the crime's commission. Silva, 422 Md. at 28 (citations omitted) (cleaned up).

The State argues that several distinct facts, taken together, permitted the inference that E.J. was an accomplice to the crimes. Taken in the light most favorable to the State, the facts show that E.J. was an occupant, along with the actual perpetrators, in a car speeding away from the scene of the crime with its lights off, shortly after the crimes were committed, within reach of the gun used in the crimes, and in a seat in which a stolen cell phone was later found. Under the State's theory, these facts prove beyond a reasonable doubt that E.J. served as a look-out during the crimes and was subsequently compensated for his efforts with a stolen cell phone. As a look-out, E.J. would be involved in the crimes as an accomplice. See, e.g., McBryde v. State, 30 Md. App. 357, 360 (1976).[2]

[2] The State argues that McBryde stands for the proposition that a passenger in a getaway car is an accomplice to the crime in question. McBryde is factually distinct from this case. In that case, there was evidence of pre-crime concert of action between the individuals in the car and the perpetrator, specifically that the perpetrator made a "hand

E.J. responds, and we agree, that there is a crucial difference between permissible inference and impermissible speculation. A fact-finder may apply common sense and accumulated life experiences to properly draw reasonable inferences from a given set of facts. Bible v. State, 411 Md. 138, 156 (2009); Neal v. State, 191 Md. App. 297, 318 (2010) (quotation omitted). "An inference is a factual conclusion that can rationally be drawn from other facts." Smith v. State, 415 Md. 174, 183 (2010) (quotation omitted) (cleaned up). On the other hand, the finder of fact may not resort to speculation to form an ultimate conclusion. Taylor v. State, 346 Md. 452, 458 (1997). "Speculation" means an instance "of theorizing about matters over which there is no certain knowledge." Black's Law Dictionary 1617 (10th ed. 2014). In other words, evidence "which merely arouses suspicion or leaves room for conjecture is obviously insufficient," as is evidence that leads only to a "strong suspicion or mere probability" of guilt. Taylor, 346 Md. at 458 (citations omitted).

The distinction between inference and speculation is a fine one; this is particularly true when reviewing findings made by a trier of fact in a criminal case, "where the requirement that guilt be proved beyond a reasonable doubt is somewhat at odds with the deference owed to a fact-finder's determinations." Bible, 411 Md. at 156.

signal" to the car's occupants. 30 Md. App. at 358. In this case, there is no evidence of E.J.'s behavior before, at or after the time of the crimes, let alone evidence that would tie him to the perpetrators' conduct. As such, this Court's observation in McBryde that "persons waiting in a getaway car during the commission of a felony . . . are principals in the second degree," id. at 360, was predicated on facts not present here.

What is more, these definitions and distinctions are "simpler in formulation than they are in application." Id. The decision about whether a connection between fact and finding was a "rational conclusion" or an "instance of theorizing [without] certain knowledge" is largely a judgment call. That said, we do not believe that this case is a particularly close one. The underlying facts are no doubt sufficient to arouse suspicion, and reasonably so. But even rationally-based suspicion is not, alone, enough to support a conviction (or finding of involvement).

E.J.'s presence in the car, along with the perpetrators and gun, by itself, is insufficient to find that he was assisting in the crime by acting as a look-out. See, e.g., Johnson v. State, 227 Md. 159, 163 (1961) ("presence, alone, at the place where a crime has been committed is not sufficient to establish participation in the perpetration of the crime"). Being in the car might allow for a reasonable suspicion that E.J. was the look-out, but a suspicion is as far as it goes, as that same fact allows for numerous innocuous explanations as well.

The same goes for the fact that the stolen cell phone was found on the seat where E.J. had been sitting. There is no evidence of how it got there, when it got there, or why it got there, and thus no evidence that the cell phone was ever in E.J.'s possession. It would be just as logical to surmise that one of the perpetrators tossed the cell phone to the back seat after jumping in the car during the attempted getaway—or that it was thrown there

when the perpetrators saw the police cruiser following them—as it would be to assume that E.J. had received the cell phone as a reward for serving as a look-out.[3]

Even if we assume (without evidence) that E.J. had held the stolen phone, we are unable to take the next step and infer that he was given the phone as payment for his assistance in the robbery. In fact, there is no evidence that E.J. was *given* the phone at all. It does not take much imagination to think of numerous innocuous reasons in this day and age that a teenager might look at a cell phone. And even if he was given the phone, there is no evidence that he was given the phone as payment—maybe he was given the phone because the perpetrators didn't want it, or perhaps as a token of friendship. At bottom, there is simply no evidence that E.J. ever held the phone, let alone evidence that he was given it as payment for a role in the crimes. To reach that conclusion, we would have to speculate about virtually everything that happened to that cell phone from the moment it was stolen until the moment the police found it. This we cannot do.[4]

[3] In fact, the State pointed out at trial that the officers witnessed the car's occupants making furtive movements when they pulled up behind them and that items were strewn all over the car, which suggests that the perpetrators may have hidden the loot only after they realized they were being pulled over.

[4] At oral argument, counsel for the State also suggested that the fact that the vehicle was traveling at a fast rate of speed with its lights off should also be considered in the sufficiency of the evidence calculus. These facts don't move the needle, even minimally. E.J. was not the driver of the vehicle and there is no evidence that he had the ability to control the car's speed or lights. Moreover, even if we assume that this behavior would have suggested to E.J. that the other occupants were trying to get away from the scene of the crime, mere knowledge of the fact that a crime has been committed is not sufficient to establish his liability as an accomplice. Cf. Pope v. State, 284 Md. 309, 332-33 (1979) (even knowledge that a crime *is currently being committed* does not constitute aiding or encouraging for purposes of accomplice liability).

Citing to Molter v. State, 201 Md. App. 155, 171 (2011), the State argues that the "unexplained possession of recently stolen goods gives rise to an inference that the possessor is the thief." As a general proposition, that's true enough, and it makes sense. After all, possessing the stolen property is a natural and logical consequence of stealing the property. On the other hand, the same cannot be said for acting as a look-out or an accomplice. There is nothing inherent in a look-out's task that would naturally or logically result in possession of the stolen goods. Molter therefore has no application to this case, and we cannot infer E.J.'s involvement in the robbery as an accomplice or co-conspirator merely from his theoretically-possible possession of the stolen phone. As such, there is insufficient evidence to support a finding that E.J. was involved in the robbery, theft and assault counts.

II. WITHOUT EVIDENCE THAT E.J. WAS AN ACCOMPLICE TO THE ROBBERY, THE GUN AND CONSPIRACY COUNTS MUST ALSO FAIL

Because both the gun and conspiracy counts are based on a finding that E.J. was involved in the robbery, they cannot survive on their own.

The State argues that the evidence was sufficient to find that E.J. had joint constructive possession of the gun, and thus was involved in the gun-related counts. When determining whether E.J. had joint possession of the gun, we must look to the following factors:

> 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the

> defendant was participating with others in the mutual use and enjoyment of the contraband.[5]

Cerrato-Molina, 223 Md. App. at 335 (quotation omitted). Here, there is no evidence that the gun was in the view or knowledge of E.J.—we do not know whether E.J. could see into the "cracked" center console from where he was sitting,[6] nor do we even know whether the gun was *there* at any time prior to the traffic stop (or instead was placed there by the perpetrators when they saw they were being followed by the police). Likewise, there is no evidence that E.J. owned or had a possessory right in the car. Finally, as explained above, we cannot reasonably infer from the circumstances that E.J. was participating in the use of the gun.

This leaves the first factor—proximity between E.J. and the gun—as the only factor that could conceivably support a finding of joint constructive possession. This is not enough to establish possession. See, e.g., Taylor, 346 Md. at 460 (quotation omitted) ("[M]ere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or property on which

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[5] The State also urges us to draw an analogy to probable cause cases and consider additionally whether the totality of the circumstances, including the space in which the arrest is made, indicate a common criminal enterprise among the potential possessors. Even assuming that such a consideration is proper, this factor overlaps with the fourth Cerrato-Molina factor—" the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband." It is therefore unnecessary to address this additional contention separately.

[6] Counsel for E.J. points out that in most cars, the center console opens from the front and the lid blocks the console's contents from view of the backseat passengers. Therefore, even if the console was "cracked," E.J. would not have been able to see the gun. Because there is no evidence regarding the layout of the console in the vehicle in this case, we do not express an opinion on this issue.

it is found, is insufficient to support a finding of possession"); see also Parker v. State, 402 Md. 372, 411 (2007) (applying holding of Taylor to a gun charge). As such, there is insufficient evidence to show that E.J. had possession of the gun.

The conspiracy count fares no better. For its part, "[a] criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." Mitchell, 363 Md. at 145 (quotation omitted). A conspiracy requires a meeting of the minds between the conspirators in which they appreciate the objective to be achieved and have mutually committed to cooperate to achieve it. Id. at 145-46. The conspiracy claim suffers from the same infirmity as the accomplice and gun-related charges: a complete lack of evidence tying E.J. to any such agreement. Accordingly, there is an insufficient evidentiary basis to find E.J. involved as to the conspiracy counts.

CONCLUSION

Here, there is ample evidence that the perpetrators committed the crimes on July 11, 2017. What is missing is *any* evidence that E.J. intended to (or *did*) assist or encourage them. Without such evidence, the State—and, in turn, the circuit court—relied on impermissible speculation and conjecture to tie E.J. to the crimes. Therefore, the circuit court's finding that E.J. was involved in these crimes was clearly erroneous, and we must reverse.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.