Circuit Court for Baltimore City
Case Nos. 117223005 and 117223006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 200

September Term, 2019

DWAYNE TORRENCE

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: June 24, 2020

After a jury trial in the Circuit Court for Baltimore City, Dwayne Torrence, appellant, was convicted, in Case No. 117223005, of conspiracy to commit first-degree murder of Maurice Finney and the related charge of use of a handgun in the commission of a crime of violence, and, in Case No. 117223006, of attempted first-degree murder of Diamonta[1] Boyd, conspiracy to murder Boyd, the related charge of use of a handgun in the commission of a crime of violence, and possession of a firearm by a prohibited person.

In Case No. 117223005, appellant was sentenced to life imprisonment for the conspiracy to commit murder of Finney and a concurrent term of twenty years, the first five years without the possibility of parole, for the handgun conviction. In Case No. 117223006, appellant was sentenced to a concurrent term of life imprisonment, with all but thirty years suspended, for attempted first-degree murder of Boyd; a concurrent term of life imprisonment, with all but thirty years suspended, for conspiracy to commit murder of Boyd; a concurrent term of twenty years, the first five years without the possibility of parole, for the handgun conviction; and, a concurrent term of fifteen years, the first five years without the possibility of parole, for possession of a firearm by a prohibited person. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Was the evidence legally insufficient to sustain the conspiracy convictions?

[1] We note that in the record Boyd's first name is also spelled Diamontay and Diamonte.

II. In the alternative, should one of the two conspiracy convictions be vacated?

III. Should one of the two convictions for use of a handgun in the commission of a crime of violence be vacated?

For the reasons set forth below, we shall vacate the conviction and sentence for conspiracy to commit the murder of Boyd in Case No. 117223006. In all other respects, the judgments of the circuit court shall be affirmed.

FACTUAL BACKGROUND

At about 7 p.m. on July 17, 2017, Baltimore City Police Officers Deontae Duck and Ernest McMillon, Jr. responded to a shooting at a Sunoco gas station on the northwest corner of West Baltimore Street and Hilton Street in Baltimore City. Upon arrival, Officer McMillon activated his body camera. The officers found two victims, Boyd and Finney. The officers secured the scene and medics arrived. Finney was unconscious and appeared to be dead. Officer Duck called for the Homicide Unit.

Both officers tended to Boyd, who was transported to the hospital. Officer McMillon accompanied Boyd on the ambulance ride to the hospital. Boyd was conscious and gave Officer McMillon the nickname of the person who shot him. According to Officer McMillon, drugs were dealt at the gas station and occasionally inside the gas station. Officer McMillon recovered $149, 7 baggies of marijuana, and some clothing from Boyd. Officer Duck recovered from Finney's body a clear plastic bag inside of which were five Ziploc baggies containing a green plant-like substance.

Dr. John Stash, an assistant medical examiner from the Office of the Chief Medical Examiner for the State of Maryland, who testified as an expert in forensic pathology,

performed an autopsy on Finney. He opined that the cause of death was a gun shot wound to the head and that the manner of death was homicide. A bullet was removed from Finney's body and given to the police.

Boyd, who survived the shooting, testified at trial. In his trial testimony, Boyd identified appellant as the person who shot him. He knew appellant by the nickname "Rico." On the evening of July 17, 2017, Boyd was at the gas station selling marijuana. Finney, whom Boyd knew as "Mitch," was also at the gas station speaking with another person. Neither of them had guns. Boyd's brother, Sam, and his cousin, Bruce, were also there.

Boyd testified that at the time of the shooting, he was sitting next to a gas pump and Finney was standing behind him, to his left. Boyd "heard" Mitch get shot and then took off running. According to Boyd, the shots came from behind them and the person who shot Finney wore a "stocking cap or something like that." The person who shot Finney came from a different direction than appellant. As he was running away, Boyd was shot several times. Boyd had seen appellant in the neighborhood and at the gas station on prior occasions. He was not aware of any "beef" between Finney and appellant.

Baltimore City Police Detective Gary Niedermeier responded to the scene of the shooting. He observed that there were surveillance cameras at the gas station and conducted a canvas of the neighborhood. The following day, Baltimore City Police Detective Francis Miller went to the gas station and downloaded video recordings from the surveillance cameras. Detective Niedermeier reviewed those video recordings, which were

also played at trial. Based on the video recordings, Detective Niedermeier began to look for two suspects.

During the course of his investigation, Detective Niedermeier was provided with the nickname "Rico." A search of a police database for an individual with that nickname revealed appellant. From that information, Detective Niedermeier prepared a photographic array containing a photograph of appellant. On July 18, 2017, he and Detective Miller went to Shock Trauma and interviewed Boyd. From the array Boyd identified appellant as the person who shot him.

On July 21, 2017, Detective Niedermeier interviewed appellant at the police station. Appellant waived his *Miranda* rights, and his interview was audio and video recorded. Appellant admitted that he was in the surveillance videos from the gas station, that he had a gun, and that he was present at the shooting. He told police that, as he was walking across the street, he heard some "shots go off." He shot back, but did not know the person at whom he was shooting. Thereafter, he went to his home on North Abington Street. Appellant denied killing anyone and claimed that he was defending himself and did not know what was going on.

Appellant told police that he had thrown his gun into a wooded area he referred to as Daisy Fields, and he agreed to show them the spot. That area, located off of Phelps Lane, was searched, but no gun was recovered. Appellant also told police that his older cousin by relation, "Hot," was killed the Saturday before the shooting. Detective Niedermeier testified that three days before the shooting, there had been a homicide nearby,

on the 3200 block of West Baltimore Street, across from Hilton Street. According to Detective Niedermeier, the area is known for "back and forth retaliations and shootings."

The parties stipulated that a technician from the Mobile Crime Unit of the Baltimore City Police Department responded to the scene of the shooting, took photographs, and recovered, among other things, sixteen nine millimeter shell casings, eleven .40 caliber Smith & Wesson fired shell casings, and one metal fragment. Detective Niedermeier, however, testified that there were eleven nine millimeter shell casings in the parking lot of the gas station and that there were six additional nine millimeter shell casings on the corner of Phelps Lane and Hilton Street.[2] The bullet specimen recovered from Finney's body during the autopsy and a bullet core recovered from Boyd's body by hospital staff were "too damaged to compare."

The parties also stipulated that appellant had been previously convicted of a crime that would prohibit his possession of a regulated firearm.

Appellant testified on his own behalf. He testified as follows. On the day of the shooting, he went to work and then went home, where he got high on "a little blow," "some percs," and "weed." Appellant first began taking percocet when he was eleven years old because he has sickle cell disease. After playing a video game, appellant went to "Aunt Shelly's" house to purchase some Xanax for the purpose of getting high. He purchased seven pills and used three or four of them immediately. Appellant walked past the subject

[2] The record does not resolve the inconsistency between the stipulation of sixteen nine millimeter shell casings and Detective Niedermeier's testimony of a total of seventeen nine millimeter shell casings at the scene of the shooting.

gas station to have a conversation with a person he knew as "Boo" and then returned to the gas station to purchase some paper to wrap his marijuana. Appellant testified that neither Aunt Shelly nor Boo were available to testify on his behalf because they both "got killed."

When he got to the gas station, "[s]hots went off" from the Hilton Street side and he "reacted" by shooting the first person he saw. Appellant explained that he kept a nine millimeter handgun with him because he lives in Baltimore City and does not want to die. He claimed that previously he had been stabbed, shot, and robbed, and that he is "a target."

Appellant knew Finney because they had gone to elementary and middle school together. He denied knowing the other shooter and said that he did not have a "beef" with either Finney or Boyd, whom he referred to as "Yo." Appellant asserted that, when he pulled out his gun he was defending himself and trying to "not die." He shot at Boyd because he believed Boyd was shooting at him. According to appellant, Boyd was the only person he saw "where bullets was coming from." He did not look at Boyd's hands to see if he had a gun. Appellant stated that bullets came from the side of the gas pump where Boyd was and that Boyd ran toward him. Appellant testified that he did not intend to kill Boyd, but he "was going to bus him." Appellant acknowledged that he ran from the scene of the shooting in the same direction as the other shooter. Appellant stated that he believed that Boyd shot Finney and that the other shooter was just "another dude running."

Appellant acknowledged that he lied to the police about throwing his gun into a wooded area and testified that he did not know where the gun was. Appellant denied that the shooting was in retaliation for the prior shooting of "Hot." He explained that "Hot"

was a person he knew and, although he told police that "Hot" was his cousin, he was actually like a cousin to him because they "relate," in that they get high and smoke together.

DISCUSSION

I.

Appellant contends that the evidence was legally insufficient to sustain the conspiracy convictions because there was no evidence of any statements made by the other shooter or any other independent evidence of an agreement between that person and appellant. Specifically, according to appellant, the evidence failed to show that (1) there was a meeting of the minds reflecting a unity of purpose and design, and (2) that he gave "sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate" that the object of the conspiracy was murder. Appellant also asserts that the evidence failed to show that, by either word or gesture, he understood that the other shooter agreed to cooperate in the achievement of that murder. Finally, appellant argues that the surveillance videos did not establish an agreement, either express or implied, between him and the other shooter. We are not persuaded.

When assessing the sufficiency of the evidence, our inquiry 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.'" *Redkovsky v. State*, 240 Md. App. 252, 262 (2019) (quoting *Grimm v. State*, 447 Md. 482, 494–95 (2016)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Our concern is not whether the "verdict is in accord with what appears to us to be the weight of the evidence[;]" rather, our concern is "only with whether the verdict[ ] [was] supported with

sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 478–79 (1994); *see also Bible v. State*, 411 Md. 138, 156 (2009) (same).

"In Maryland, conspiracy remains a common law crime." *Mitchell v. State*, 363 Md. 130, 145 (2001). "A criminal conspiracy is 'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444 (1985)). "The essence of a criminal conspiracy is an unlawful agreement." *Mitchell*, 363 Md. at 145 (citations omitted). "The State has the burden to prove the agreement or agreements underlying a conspiracy prosecution." *Savage*, 212 Md. App. at 14. "'The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose or design.'" *Bordley v. State*, 205 Md. App. 692, 723 (2012) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)). The conspiracy "'is complete when the unlawful agreement is reached,' so that 'no overt act in furtherance of the agreement need be shown.'" *Id.* (quoting *Townes*, 314 Md. at 75). "[A] conspiracy may be shown by circumstantial evidence, from which a common design may be inferred[.]" *Mitchell*, 363 Md. at 145 (2001). In *Mitchell*, the Court of Appeals explained:

> Although a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred, the requirement that there must be a meeting of the minds – a unity of purpose and design – means that the parties to a conspiracy, at the very least, must (1) have given sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy – the objective to be achieved or the act to be committed, and (2) whether informed

> by words or by gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act. Absent that minimum level of understanding, there cannot be the required unity of purpose and design.

Id. at 145–46 (citations omitted).

In the instant case, the surveillance videos showed that Boyd sat down next to a gas pump at the Sunoco station facing Hilton Street. Finney was standing closer to Hilton Street and was a few feet to the left of Boyd. While Boyd is sitting, appellant crossed Hilton Street at the intersection of West Baltimore Street and Hilton Street, entered the gas station parking lot and walked behind Boyd toward the convenience store. Appellant, however, was not looking in the direction that he was walking. Instead, appellant was looking northbound on Hilton Street where the other shooter was jogging, with a gun in his right hand, southbound on Hilton Street toward Finney. When Boyd either saw the other shooter running toward Finney or heard gunshots, Boyd immediately stood up, turned, and ran away from the other shooter and past where appellant was standing. Appellant turned to face Boyd, reached into his waistband, and retrieved his gun. He chased Boyd and fired at him repeatedly. After taking several steps, Boyd collapsed and then attempted to pull himself behind one of the gas pumps. Appellant repeatedly shot Boyd as he was curled up on the ground. All the while, appellant was turned completely away from the other shooter, and the other shooter did not fire any shots at appellant. While appellant was shooting Boyd, the other shooter turned around, ran northbound on Hilton Street, turned right on Phelps Lane, and began to chase and shoot at an unidentified person running down Phelps Lane. After firing repeatedly at Boyd, appellant turned around and

ran back across the parking lot, past Finney who was lying on the ground, and headed northbound on Hilton Street. Approximately nine seconds after the other shooter is seen running from the gas station, appellant is seen running diagonally across Hilton Street and then down Phelps Lane, following the path of the other shooter. As he followed the other shooter, appellant fired additional shots at another person who also ran up Hilton Street.

Appellant admitted that he had a nine millimeter handgun and fired it at the gas station. As we have already noted, the parties stipulated that the nine millimeter shell casings, which were found in the gas station parking lot and near the corner of Hilton Street and Phelps Lane, were fired from the same handgun.

From the evidence, a reasonable jury could infer a unity of purpose and design and a meeting of the minds between appellant and the other shooter. Both appellant and the other shooter arrived at the gas station at almost exactly the same time moments before the shooting. When appellant walked behind Boyd, he looked northbound on Hilton Street as the other shooter was jogging, with a gun in his right hand, southbound on Hilton Street toward Finney. Then, when the shootings started, appellant pulled out his gun, chased Boyd, fired at him repeatedly, and then shot at him several times while Boyd was on the ground. In so doing, appellant turned his back to the other shooter, who did not fire at appellant. Finally, after the shootings, appellant and the other shooter fled from the scene at almost the same time and in the same direction, both running northbound on Hilton Street, turning right on Phelps Lane, and shooting at other people as they ran. Thus a rational jury could conclude that appellant and the other shooter entered into an unlawful agreement to engage in a coordinated attack for the purpose of murdering Finney and Boyd.

Appellant argues that, to the extent that the evidence showed some action in concert by appellant and the other shooter, there was, at most, a singular agreement to shoot Boyd and Finney, not to murder them. Appellant points out that, although the trial court found the evidence legally sufficient to support a conspiracy based on the "simultaneousness of the shooting" or "the conjunction of the shooting," the court granted a judgment of acquittal on the charge of first-degree murder of Finney under the State's accomplice liability theory based on the same set of facts. We disagree, for the simple reason that the jury could reasonably infer that the natural and probable consequence of shooting Finney in the head and firing multiple rounds at Boyd was the death of each of the victims. *See Buck v. State*, 181 Md. App. 585, 641–42 (2008) (it is permissible to infer that one intends the natural and probable consequences of one's act); *Chilcoat v. State*, 155 Md. App. 394, 403 (2004) (The jury is permitted to infer "that one intends the natural probable consequences of his act."); *State v. Raines*, 326 Md. 582, 591 (1992) ("under the proper circumstances, an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body").

II.

Appellant argues that, even if the evidence was sufficient to sustain his conspiracy convictions, one of the conspiracy convictions must be vacated because there was only one agreement and, therefore, only one conspiracy in relation to the shooting of Boyd and Finney. As a result, according to appellant, a conviction and sentence on each of the two conspiracy counts was erroneous. The State agrees and so do we.

It is well established that "only one sentence can be imposed for a single criminal common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Tracy v. State*, 319 Md. 452, 459 (1990). The unit of prosecution for a conspiracy is "the agreement or combination rather than each of its criminal objectives." *Id*. A conspiracy "remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy." *Mason v. State*, 302 Md. 434, 445 (1985). The conviction of a defendant for more than one conspiracy turns, therefore, "on whether there exists more than one unlawful agreement." *Savage*, 212 Md. App. at 13. Where the State fails to establish a second conspiracy, "there is merely one continuous conspiratorial relationship . . . that is evidenced by the multiple acts or agreements done in furtherance of it." *Id.* at 17 (cleaned up). "If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id.* at 26.

To avoid double jeopardy violations, we have vacated any unproven conspiracy convictions. In *Savage*, for example, we addressed the appellant's argument that his two conspiracy convictions violated the prohibition against double jeopardy because agreements that he made with two individuals were part of one overall conspiracy to burglarize a home. *Id.* at 13. The State had not advanced a two-conspiracy theory, and the jury was not instructed that it had to find two separate agreements to find appellant guilty of more than one count of conspiracy. *Id.* at 31. We determined that "one of appellant's two conspiracy convictions must be vacated to avoid [a Double Jeopardy Clause] violation." *Id.* at 26. Similarly, in *Tracy*, the Court of Appeals determined that one

conspiracy conviction had to be vacated because, "even though there were two criminal objectives, there was only one conspiracy, one continuous conspiratorial relationship." 319 Md. at 460. The Court explained that "[t]he agreement from its inception was to commit robbery and murder, but there was only one conspiracy since both crimes were the objective of the same agreement." *Id.*

In the instant case, the State did not argue that there were two conspiracies. The jury was not instructed that it had to find the existence of more than one agreement to find appellant guilty of more than one count of conspiracy. Nor was the jury instructed as to each victim. In closing argument, the State referred to "an agreement" and "the conspiracy" and argued that appellant's "mission was to take out whoever was with Maurice Finney and it just happened to be [Boyd]." The verdict sheet delineated each conspiracy count by the respective indictment number and victim, but did not require the jury to find that each victim was the subject of a separate agreement. Accordingly, the conviction and sentence for one count of conspiracy must be vacated. *See Savage*, 212 Md. App. at 31.

Appellant argues that under the circumstances of this case, we should remand the case to allow the sentencing court to determine which conspiracy conviction and sentence should prevail. He points out that the sentencing court imposed a life sentence on the conspiracy to commit the murder of Finney conviction in Case No. 117223005 and a concurrent term of life imprisonment with all but thirty years suspended, for the conspiracy to commit the murder of Boyd conviction in Case No. 117223006. At the time the sentence

was imposed, the judge commented that he "ran these sentences concurrent with the word redemption in mind." We disagree with appellant.

When one of two conspiracy convictions and sentences is vacated on the basis of a single overarching agreement, the conviction and sentence to be preserved is the one "with the greatest maximum penalty." *McClurkin v. State*, 222 Md. App. 461, 491 (2015) (citing *Jordan v. State*, 323 Md. 151, 162 (1991)); *Wilson v. State*, 148 Md. App. 601, 641 (2002). This Court's authority to remand cases under Maryland Rule 8-604(d)(2) is not applicable, because the error in the instant case stems from the conviction itself, not the sentence imposed.[3] *See Stanley v. State*, 118 Md. App. 45, 58 (1997), *aff'd in part*, 351 Md. 733 (1998) (observing that "a remand for sentencing is not mandated if the trial court specified sentences for each conviction, one of the convictions was overturned on appeal, and the companion sentence for the reversed conviction was vacated as well"). Finally, it is clear from the record that whatever "redemption" was envisioned by the sentencing court was accomplished by the court's decision to run *all* of appellant's sentences concurrently with the life sentence imposed on the conviction for conspiracy to murder Finney. Accordingly, we shall vacate appellant's conviction and sentence for the charge of conspiracy to commit the murder of Boyd in Case No. 117223006. Appellant's conviction and sentence for conspiracy to commit the murder of Finney in Case No. 117223005 shall be affirmed.

[3] Md. Rule 8-604(d)(2) states: "Criminal Case. In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing."

III.

Appellant's final argument is that one of the two convictions for use of a handgun in the commission of a crime of violence must be vacated. Appellant was charged with two counts of use of a handgun in the commission of a felony or crime of violence pursuant to § 4-204 of the Criminal Law Article, which provides, in part, that "[a] person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." Ostensibly, the handgun charge in Case No. 117223005 related to the murder of Finney and the handgun charge in Case No. 117223006 related to the attempted murder of Boyd. The charge of first-degree murder of Finney, however, was not submitted to the jury, because at the close of the evidence, the trial court granted a judgment of acquittal on the charge of first-degree murder of Finney under the theory of accomplice liability. That left only two charges as to Finney – conspiracy to murder and use of a handgun in a felony or crime of violence.

In Maryland, a conspiracy is not a felony, but a common law misdemeanor. *Johnson v. State*, 362 Md. 525, 528 (2001). Section 5-101 of the Public Safety Article defines a "crime of violence" to include eighteen enumerated offenses; conspiracy is not one of them. Appellant argues that, because the State failed to establish any qualifying predicate offense for the conviction of use of a handgun in the commission of a felony or crime of violence with respect to Finney, that conviction and sentence must be vacated.

The State responds that this issue is not preserved for our consideration because appellant failed to raise it before the trial court, failed to object to the submission of the use

of that handgun count to the jury, failed to object to the jury's verdict as being inconsistent, and failed to object at the sentencing hearing. The State also argues that appellant failed to articulate in his brief the legal theory by which we might consider such issue for the first time on appeal. The State is correct.

Maryland Rule 8-131(a) provides, in relevant part, that ordinarily we "will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Appellant did not seek at trial a judgment of acquittal on the use of a handgun charge regarding Finney, nor did he raise that issue in any other way. *See* Md. Rule 4-324(a) ("[D]efendant shall state with particularity all reasons why the motion should be granted."). He did not object to the submission of the use of a handgun charge regarding Finney to the jury, did not object to the verdict, and did not object at the sentencing hearing. Ordinarily, a defendant "is not entitled to appellate review of reasons stated for the first time on appeal." *Albertson v. State*, 212 Md. App. 531, 570, *cert. denied*, 435 Md. 267 (2013) (quoting *Starr v. State*, 405 Md. 293, 302 (2008)). Finally, appellant did not request in the instant appeal that this Court grant plain error review of an issue that was not raised in the trial court. *See McIntyre v. State*, 168 Md. App. 504, 528 (2006) (noting that the defendant's opening brief "did not even discuss the foregoing preservation problem, nor did he ask this Court to apply the 'plain error doctrine'" and that "Maryland Rule 8–504(a)(5) requires a party to present argument in support of the party's position in the party's initial brief"). For all these reasons, we conclude that the issue presented by appellant has not been preserved for appellate review. Md. Rule 8-131(a).

CONVICTION AND SENTENCE IMPOSED BY THE CIRCUIT COURT FOR BALTIMORE CITY FOR CONSPIRACY TO COMMIT MURDER IN CASE NO. 117223006 VACATED; IN ALL OTHER RESPECTS JUDGMENTS IN CASE NOS. 117223005 AND 117223006 AFFIRMED; COSTS TO BE PAID ONE-THIRD BY THE MAYOR AND CITY COUNCIL OF BALTIMORE AND TWO-THIRDS BY APPELLANT.