Circuit Court for Harford County
Case No. 12-K-16-001250

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 390

September Term, 2017

O'NEIL DENOVAN CHAMBERS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 24, 2018

Three friends—Sapon, Chiche, and Marroquin—were sitting on a front yard in Edgewood. Two other men—later identified as Chambers and Radford—came up on them wearing women's nylon stockings over their heads. As Sapon, Chiche, and Marroquin ran to shelter, either Chambers or Radford fired a single shot, striking both Marroquin and Chiche. Radford pleaded guilty to first degree assault and was sentenced to 25 years' incarceration, suspending all but 12 years. Chambers elected to go to trial, at which the jury convicted him as an accomplice of attempted second degree murder of Marroquin and first degree assault of Chiche, but acquitted him of the handgun charge. The trial court sentenced Chambers to 55 years' incarceration and suspended all but 28 years.

On appeal, Chambers makes three allegations of error. *First*, he argues that the evidence was legally insufficient to prove that he had the specific intent to kill Marroquin. *Second*, he argues that the jury instructions regarding accomplice liability were erroneous. And *third*, he argues that there were two erroneous evidentiary rulings. Because we conclude there is no reversible error, we affirm.

I.

Chambers first argues there was insufficient evidence to prove that he had the required mental state to be convicted as an accomplice to attempted second degree murder. Chambers was indicted and tried on attempted second degree murder of Marroquin as both an accomplice and as a principal. On a special verdict sheet presented to the jury, the jury found Chambers guilty of attempted second degree murder and specifically checked a box indicating that it found him to have been an accomplice, but not the principal. That is, the jury found that Chambers was not the shooter.

Chambers argues that, to be convicted of attempted second degree murder, the State must produce sufficient evidence to demonstrate that he had the intent to kill Marroquin. Chambers contends that the only evidence of intent to kill was that one of the two assailants fired the gun, and that because the jury convicted him as an accomplice and not as the principal, the jury specifically found that Chambers had not fired the gun. Thus, there was sufficient evidence to convict Chambers as the *principal*, which can be inferred from the fact that the principal fired a gun at the victim. Because that only applies to the gunman, he argues, there is no evidence to show that the other participant had the intent to kill. Thus, there was no evidence with which to convict Chambers as an *accomplice*.

The State contends that any analysis of sufficiency of the evidence should not take the particular verdict into consideration, and that a jury's verdict does not affect the State's burden of production or the sufficiency of the evidence. The State argues that we may only look at whether the evidence was sufficient to convict prior to the verdict, and that because there was testimony that *Chambers* had been the one to fire the gun, there was sufficient evidence of the required mental state for attempted second degree murder.

Both are correct.

Chambers is correct that the State was required to prove that Chambers, as an accomplice, had the necessary intent to kill but that must be demonstrated independently from proof of the intent of the principal. "Where an attempted second-degree murder is charged, the State must show a specific intent to kill," *Spencer v. State*, 450 Md. 530, 567-

68 (2016) (cleaned up),[1] and "[t]o be an accomplice a person must … [have] common criminal intent with the principal offender." *State v. Williams*, 397 Md. 172, 195 (2007) (quoting *State v. Raines*, 326 Md. 582, 594-98 (1992)). Therefore, the State was required to show that Chambers had the intent to kill. Further, the intent of the principal does not prove the intent of the accomplice (the intent does not transfer), *id.* at 194-95 and, therefore, Chambers is also correct that the fact that the gunman shot the victim by itself does not suffice to prove that the *accomplice* intended to kill the victim.[2] The intent Chambers ascribes to the principal—that "directing a deadly weapon at a vital part of the human anatomy can give rise to a permitted inference of an intent to kill"—does not apply to the accomplice. *Harvey v. State*, 111 Md. App. 401, 413 (1996). Thus Chambers is right that the State was required to prove that Chambers, as the accomplice, had the intent to kill independent of the principal's intent.

The State is also correct. Under our standard of review, the question of the sufficiency of the evidence is judged at the close of the evidence, not after the verdict:

[1] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

[2] The natural and probable consequences doctrine allows a jury to find that an accomplice had the required mental state to commit any crimes that are "natural and probable consequences" of an underlying crime that the accomplice agreed to undertake with the principal. *Diggs & Allen v. State*, 213 Md. App. 28, 90-91 (2013). To convict someone under this theory, however, the State must prove that the defendant was engaged in the underlying crime. *Id.* at 87-88. The State did not charge this underlying crime, and therefore the jury did not find that Chambers was engaged in an underlying crime.

> Our standard of review for sufficiency of the evidence is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. We review the evidence in the light most favorable to the prosecution and will reverse the judgment only if we find that no rational trier of fact could have found the essential elements of the crime. Our concern is not whether the verdict below was in accord with the weight of the evidence, but rather, whether there was sufficient evidence at trial 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.

Vielot v. State, 225 Md. App. 492, 513 (2015) (cleaned up). Our review, moreover, is concerned only with the State's burden of production; whether the evidence produced was persuasive to this jury is irrelevant. *Ross v. State*, 232 Md. App. 72, 93 n.2 (2017).

In a light most favorable to the State, there was, however, a good deal of evidence that Chambers, as an accomplice, had the required intent to kill.

There was evidence, first, that Chambers was fully involved in planning the robbery. Colored by the fact that Chambers and Radford later went out and robbed the victims while using a gun, the jury could have inferred from this evidence of the two planning that the two shared all details about the planned robbery, including the gun. Text messages between Chambers and Radford show them planning a robbery and discussing an unidentified item that Chambers had procured:

> Radford: I'm coming thru tonight
>
> Chambers: Be ready bro
>
> [Chambers then sent an unrecovered picture message]

Radford: Oh yea that's waz up someone looked out for you?

[Chambers replied by texting Radford a thumbs up]

Chambers: What time you coming over … We need to get it done tonight

Radford: We will[,] definitely[,] just have everything we had last time and I should be there like around 8[3]

Chambers: Ok

A rational jury could infer that the unrecovered picture that Chambers sent, and the item that he procured, concerned a gun. Radford saying "someone looked out for you?" is in reference to the picture Chambers sent, and the statement could be read to imply that someone had given Chambers something. Because they were planning a robbery when this discussion occurred, a jury could infer that the object was used in the robbery; specifically, the gun that they would later use. Chambers and Radford also walked by the victims shortly before the attempted robbery, without masks, in a manner that suggests that they were "casing out" their intended victims. This evidence demonstrates that Chambers and Radford planned the robbery in advance. From this knowledge of the plan, a jury could infer that Chambers was aware of the entire plan. Because Radford brought and used a gun

[3] We have added two commas into Radford's text. Ordinarily, we might be more constrained in our alteration of quotations. Here, however, given that we must construe evidence in a light most favorable to the State, and because the commas help explain how a rational jury might have construed Radford's text as "we will [rob the victims], definitely," we have taken the liberty.

during the robbery, a rational jury could infer that Chambers was aware that Radford would do this, and had planned for it.

Further, there was evidence during the robbery itself that Chambers knew that Radford had a gun and had prepared himself for Radford to use it. Both men pulled nylon stockings over their heads to obscure their faces. Chambers did not act surprised or run away when Radford drew the gun. Rather, he continued to rob the victims. Chambers demanded money from the victims.[4] And after Radford fired the gun, Chambers didn't act surprised or run away, but continued to chase the victims as they ran away. From this evidence, a rational jury could infer that Chambers was a full participant in the robbery, knew that Radford was going to use the gun, and aided him in robbing the victims with the intent that Radford would use that gun. Taken together with the evidence that Chambers had planned the robbery with Radford, including planning for use of the gun, this suffices to show that Chambers had the necessary intent to kill.

This evidence of Chambers' involvement in the planning and in the robbery itself is sufficient to show Chambers' intent to kill independently of Radford's intent to kill as the shooter. Thus, there was sufficient evidence for the jury to convict him as an accomplice.

II.

Chambers' second argument asks us to engage in plain error review of allegedly improper jury instructions. Ordinarily, we will only review an alleged error if it was

[4] The victims all testified that the robbers demanded something from them, but none of them could understand what was being demanded. In a light most favorable to the State, the jury could certainly have inferred that Chambers and Radford were demanding money.

objected to at trial. Md. Rule 8-131(a); *Robinson v. State*, 410 Md. 91, 103 (2009). We are permitted an exception to that rule—what is called plain error review—only in the rare circumstance where an error below was so momentous, so egregious, so fundamental as to endanger a defendant's right to a fair trial. *Diggs v. State*, 409 Md. 260, 286 (2009). Here, Chambers' argument is that the accomplice liability instruction given, which was in all respects the pattern jury instruction, failed to describe properly the necessary mental state. If there was error in giving the pattern instruction we do not perceive it and, more importantly, even if it was error, it is not of the magnitude necessary for us to take notice of on plain error review.

III.

Chambers' third set of arguments concern evidentiary rulings made at trial. We will address them in turn.

A.

Prior to trial, Chambers moved for an order allowing him to introduce the testimony of Curtis Thompson. The trial court denied the motion and the testimony was not admitted. Chambers claims that this was error.

Thompson was Radford's cellmate and Thompson's proffered testimony was to the effect that Radford had admitted that he was the shooter. This admission was not direct. Rather, according to Thompson, Radford said that "allegedly they say [that] I shot," and simultaneously nodded and smiled at Thompson to indicate that he was, in fact, the shooter. The trial judge's rulings were (1) that Radford's nod and smile was not a statement subject

to hearsay analysis; and (2) that Thompson was not qualified to interpret Radford's smile. Neither of these conclusions is correct.

The definition of a statement for hearsay purposes specifically includes "nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a)(2). Thompson interpreted the nod and smile as asserting that Radford himself was the shooter, thus Radford's expression was a statement under the hearsay rule. Thompson's interpretation of Radford's nod and smile is the type of opinion based on the rational perception of a witness that fits comfortably within the rule permitting opinion testimony by lay witnesses. Md. Rule 5-701. Moreover, as Radford indicated he was a participant in the crime in his statement to Thompson, his statement was, though hearsay, certainly a statement against his penal interest. Md. Rule 5-804(b)(3). Thompson's proffered testimony was therefore admissible, and the trial court erred in excluding it.

We conclude, however, that the exclusion of this testimony was harmless error:

> Under harmless error review, reversal is warranted unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.

Newton v. State, 455 Md. 341, 353 (2017) (cleaned up). Thompson's testimony would have supported Chambers' claim that Radford had the gun, but it otherwise established Chambers as a participant in the robbery. Chambers, however, was convicted as an accomplice; that is, the crimes of which he was convicted did not require the jury to believe that he possessed or fired the gun. Thompson's testimony would have been material as to Chambers' liability as a principal, and to his use of a firearm in the commission of a felony,

but the jury did not find that Chambers was a principal, and it acquitted him of the use of a firearm charge. Therefore, the testimony that Thompson would have offered would not have affected the verdict, as the jury evidently believed, even without Thompson's testimony, that Chambers had not held or fired the gun.

Although not necessary to our analysis, we also note that if the portion proffered by Chambers had been introduced, under the rule of completeness, the whole of Radford's statement to Thompson would have been admissible by the State. *Conyers v. State*, 345 Md. 525, 541 (1997) ("[A] party [may] respond to the admission, by an opponent, of part of a … conversation, by admitting the remainder of that … conversation."). Thompson's statement to the police included several other things that Radford had said about Chambers' participation in the robbery, including that: (1) Chambers selected the victims; (2) Chambers planned the robbery; (3) Chambers knew that Radford had a gun before the robbery; and (4) Chambers was, indeed, present at the shooting. Thompson's testimony, therefore, would not have exonerated Chambers.

Given that Thompson's testimony would not have affected the jury's determinations regarding the crimes of which Chambers was actually convicted, and the inculpatory nature of Thompson's statement as a whole, we are persuaded that the trial court's exclusion of Thompson's testimony was harmless error.

B.

The final evidentiary question in this case need not delay us much. A black t-shirt similar to the one eyewitnesses said the shooter wore was recovered from a house at 405 Oak Street. As was his right, Chambers declined to stipulate that he was a resident of that

house. So the State introduced two pieces of evidence recovered at the house that tended to establish that fact: (1) a subpoena for Chambers in an unrelated criminal case; and (2) Chambers' lawful permanent resident card, his "green card." Chambers argues that the prejudicial effect of this evidence outweighed the minimal relevance of his possession of a dirty black t-shirt: the subpoena because it linked him to criminals in the eyes of the jury, and the green card because, as he was a criminal defendant, it played into the criminal immigrant narrative pervasive in this country.

We agree with Chambers both that the dirty t-shirt was minimally relevant and that there were other ways of proving that this was Chambers' residence. But that is not the question. Rather, the question is whether the trial court abused its discretion in admitting the two items; that is, whether it was an "exercise[] of discretion that [was], in the judgment of the appellate court, not only wrong but flagrantly and outrageously so." *Oesby v. State*, 142 Md. App. 144, 168 (2002). Regarding the subpoena, the trial judge noted that the subpoena was for a case against someone else, and that there was no reason to assume a negative inference from the fact that someone was a witness to a crime. Regarding Chambers' green card, the trial judge reasoned that the prejudice common in our State is against undocumented persons, and that Chambers having lawful status would not be subject to similar scorn. We wish that were true. Nevertheless, we are not persuaded that the judge's reasoning was "flagrantly and outrageously" wrong. *Id.* The trial court did not abuse its discretion.

IV.

Because we find no reversible error, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.