Circuit Court for Montgomery County
Case No. 132534C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 806

September Term, 2018

MALIK-ALI SHAMOL McDONALD

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: August 21, 2020

Malik-Ali McDonald ("Appellant") was convicted by a jury in the Circuit Court for Montgomery County of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, kidnapping, conspiracy to commit kidnapping, and use of a handgun in the commission of a felony or crime of violence. Appellant was sentenced to terms of incarceration totaling 50 years.[1] Appellant timely filed this appeal and presents the following questions for our review, which we have rephrased:[2]

I. Did the trial court err by responding to a jury note and reinstructing the jury on the offense of robbery?

II. Did the trial court err by not merging the kidnapping conviction into that for robbery with a dangerous weapon?

III. Was Appellant's conviction and sentence on multiple conspiracies proper?

---

[1] The court imposed the following sentences: twenty years' imprisonment for robbery with a dangerous weapon; a concurrent term of twenty years for conspiracy to commit robbery with a dangerous weapon; a consecutive term of twenty years' imprisonment for kidnapping; ten years for conspiracy to commit kidnapping, concurrent with the sentence for kidnapping; and a consecutive term of ten years' imprisonment for use of a handgun in the commission of a felony or crime of violence.

[2] Appellant presented the following questions *verbatim*:

1. Did the trial court err by improperly responding to a jury note and re-instructing the jury on the offense of robbery?

2. Should the trial court have merged Appellant's kidnapping conviction into his conviction for armed robbery?

3. Was Appellant improperly convicted and illegally sentenced for multiple conspiracies?

4. Did the trial court err in denying the motion to suppress the show-up identification?

IV. Did the trial court err in denying Appellant's motion to suppress the show-up identification?

For the following reasons, we find merit in Appellant's third issue regarding multiple conspiracies, and we therefore vacate the conviction and sentence for conspiracy to commit robbery with a dangerous weapon. As to the remaining issues, we otherwise affirm.

BACKGROUND

Appellant was charged in a five-count indictment with robbery with a dangerous weapon, conspiracy (with an "unknown male") to commit robbery with a dangerous weapon, kidnapping, conspiracy to commit kidnapping, and use of a handgun in the commission of a felony or crime of violence. The following facts were introduced throughout the course of the State's case-in-chief. On September 12, 2017 at approximately 3:00 a.m., Christopher McGirl, a restaurant manager, had left work and was on the way to his girlfriend's apartment in Germantown, Maryland where he intended to stay for the night. Upon arriving at the parking lot, he parked his car, and as he reached to take something out of the back seat, he was accosted by two men, one of whom was Appellant. Appellant pointed a handgun at McGirl, ordering him to the ground. With the Appellant aiming the gun towards his head, the two men rifled McGirl's pockets, taking his wallet, cell phone, keys, and a pack of cigarettes. Appellant's companion then held the gun to McGirl's head, while Appellant ransacked the passenger compartment of McGirl's car.

After realizing McGirl was not carrying any cash, the men told him that they were going to drive to a nearby bank branch and withdraw money from his account. They ordered McGirl into the back seat of his car where Appellant joined him, held the gun to

his head, and ordered him to keep his head down while the companion drove the car to the bank branch. The men coerced McGirl into disclosing his personal identification number ("PIN") and withdrew $300 from his account. The three then returned to the apartment complex, and the assailants fled. After it was safe to do so, McGirl exited the car and ran to his girlfriend's apartment where he called the police. Shortly thereafter, Montgomery County police officers responded to the scene and interviewed McGirl. While he provided the officers a description of the assailants, a patrol officer spotted a possible suspect.[3] McGirl was then transported to conduct a show-up identification. He positively identified Appellant as one of the assailants.

Appellant's defense at trial was based on the lack of evidence of criminal agency. His counsel emphasized that McGirl had experienced a traumatic and frightening event and averred that he had honestly, albeit mistakenly, identified Appellant as the assailant. Moreover, defense counsel asserted, among other things, that the cash seized from Appellant was "not the money" that was "taken with Mr. McGirl's card" from the ATM because Appellant's cash was not "all folded together," nor did it amount to half the proceeds from that forced cash withdrawal. In sum, according to the defense, the State had presented "nothing except for Mr. McGirl's mistaken identification" and that the verdict should be not guilty.

[3] After Appellant and his companion left McGirl at the parking lot, they hailed a cab. One of the police officers responding to the robbery observed the cab, appearing to be lost. That officer ultimately performed a traffic stop of the cab, and, as he did so, one of the assailants fled, but Appellant remained in the cab.

(continued)

The jury began deliberations around midday on Thursday, March 22, 2018. On Friday, shortly before noon, the jury sent the court a note informing it that it was deadlocked. After conferring with counsel, the court gave a modified *Allen* charge[4] and sent the jury to continue its deliberations. After the jury failed to reach a verdict at the close of the day, the court, over defense objection, sent the jury home for the weekend and instructed them to return Monday morning to resume deliberations.

The jury resumed its deliberations Monday morning, and, that afternoon, it sent the court two additional notes. Both sought clarifications as to whether robbery required that property be taken from the victim's person, and one of the notes expressly asked whether forcibly obtaining cash from an ATM constituted robbery. During the ensuing bench conference, the court began by noting that "throughout the trial" the defense acknowledged that McGirl had been the victim of an armed robbery, contending that he was sufficiently traumatized and that his identification of Appellant was unreliable. Then, after observing that "[t]here was never any argument of this wasn't a robbery folks, this was just a theft," the court expressed its intention to give a supplemental instruction, to which the defense objected. The court overruled that objection and instructed the jury as follows:

> THE COURT: Ladies and gentlemen, I have received two notes from you and they deal with the ATM.
>
> They deal with robbery versus theft and I will answer as follows, but before I start any mention of facts in a case are your domain, your prerogative. You determine what facts you

[4] *Allen v. United States*, 164 U.S. 492 (1896). In Maryland, a court may deliver a "modified" *Allen* charge if the jury indicates that it is deadlocked. *See Goodmuth v. State*, 302 Md. 613, 622-23 (1985); Md. Crim. Pattern Jury Instr. 2:01 ("Jury's Duty to Deliberate").

believe, what facts you don't believe, not the Court. Any reference to facts are advisory.

With respect to the law the law is binding on you that I give to you and you take the law and you apply it to the facts. Any element that exists robbery and the more serious offense of robbery with a dangerous weapon any of those elements that you conclude took place you must all 12 agree that the State has proven each [] element beyond a reasonable doubt and that is your domain. That is your job. That is your prerogative and I am not delving into whether the evidence is sufficient, insufficient, beyond a reasonable doubt, or not beyond a reasonable doubt. That is your call.

I am trying to answer the questions as written before me. Now you have this in the beginning. Robbery is the taking and carrying away of property, of any property of value from someone's presence and control by force or threat of force with the intent to deprive that person of the property. The property taken from a person does not have to be on his person, but it must be within his control.

If someone obtained a person and this is a hypothetical and there again it is up to you what you believe happened or didn't happen or what you find there is evidence to support or not support. If someone obtained a person's pin number from a bank account by force or threat of force and then immediately took the money from the bank or ATM that would be robbery.

If a weapon, a dangerous weapon was used that would be robbery with a dangerous weapon or armed robbery. In that example the money and the ATM machine would be under the control of the victim whose account it was. If the money is removed from the ATM machine it must be removed during the time that the force or threat of force is being used against the victim. The main element that distinguishes robbery from theft is the presence of force or threat of force.

For example, a person, if I a person watches another person perform a transaction at an ATM machine and sees that person's pin number, writes it down or memorizes it, and later out of the presence of the victim comes back to that ATM machine or any other ATM machine in the [world] and takes

> money out from that machine that would be a theft as opposed to a robbery or an armed robbery because it was not done by force or the threat of force.

Later that evening,[5] the jury reached its verdict finding Appellant guilty of all charges. Upon sentencing, Appellant noted this appeal.

DISCUSSION

I. *Jury Instruction*

A. Parties' Contentions

Appellant contends that the circuit court erred in giving a supplemental jury instruction concerning robbery from an ATM. He asserts that the instruction at issue was based upon a purportedly "hypothetical" fact pattern that was "*identical*" to that which the jury was asked to determine, thereby invading the province of the jury. The State contests that the court "did not abuse its discretion when it gave the jury a supplemental instruction in response to the two jury notes at issue." We agree with the State.

B. Standard of Review

"We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard." *Appraicio*, 431 Md. at 51 (citing *Stabb v. State*, 423 Md. 454, 465 (2011)). "Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is,

[5] It is unclear from the transcript how long the jury deliberated after receiving the supplemental instruction. The jury notes were received at 3:25 p.m., but the transcript does not indicate when the jury reached its verdict. Apparently, that occurred Monday evening, as shown by the salutations given by counsel at the beginning of the bench conference when the verdict was announced.

discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

C. Analysis

"The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." Md. Rule 4-325(a). A circuit court may give a supplemental instruction "in response to a jury question," and it must do so "'when presented with a question involving an issue central to the case.'" *Appraicio v. State*, 431 Md. 42, 51 (2013) (quoting *Cruz v. State*, 407 Md. 202, 211 (2009)). "In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses." Md. Rule 4-325(d).

In the instant case, there is no dispute that the jury presented the court "with a question involving an issue central to the case," *Appraicio*, 431 Md. at 51, thereby triggering an obligation for it to give a supplemental instruction. The only dispute concerns the content of that instruction. Moreover, there is also no dispute that the instruction was a correct statement of the law;[6] the only issue is whether the circuit court abused its discretion

[6] Generally, a trial court has no discretion to base its exercise of discretion on an erroneous legal underpinning, and, ipso facto, such an exercise would necessarily be an abuse of discretion. *Martin v. State*, 218 Md. App. 1, 30 n.31 (citing *Bass v. State*, 206 Md. App. 1, 11 (2012)), *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 575 U.S. __, 135 S. Ct. 2068 (2015).

in using the given fact pattern as an illustrative framework within which to answer the jury's question.

Appellant's argument founders on Rule 4-325(d), which expressly provides that a trial court, in instructing the jury, "may refer to or summarize the evidence in order to present clearly the issues to be decided," provided that, if it does so, it must "instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses." In the instant case, as described earlier, the court did precisely that.

Given that the court was obligated to answer the jury's questions; that, in so doing, it took care to comply with Rule 4-325(d) and emphasize to the jurors that they alone were the finders of fact; and that the factual context, that cash had been forcibly taken from an ATM, was essentially uncontested by the defense, we conclude that Appellant has failed to demonstrate that the court's exercise of its discretion was either "manifestly unreasonable" or based upon "untenable grounds." *Appraicio*, *supra*, 431 Md. at 51 (citation and quotation omitted). Accordingly, he has failed to show any grounds for reversal.

II. Merging Convictions

A. Parties' Contentions

Appellant contends that the circuit court erred in imposing separate sentences for kidnapping and robbery with a dangerous weapon because, he maintains, the kidnapping

was merely "incidental" to the robbery. This contention is without merit.[7] The State, however, contends that the kidnapping was not incidental to the robbery because "a fully executed armed robbery was committed before [Appellant] and his co-conspirator kidnapped the victim." Thus, the State argues that Appellant's sentence for both kidnapping and armed robbery was proper. Again, we agree with the State.

B. Standard of Review

Upon appellate review, we consider the following factors to determine whether the evidence before the trial court was sufficient to support a separate conviction of kidnapping:

> (1) How far, and where, was the victim taken?
>
> (2) How long was the victim detained in relation to what was necessary to complete the crime?
>
> (3) Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime?
>
> (4) Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

State v. Stouffer, 352 Md. 97, 113 (1998) (numeration and line breaks added for structure).

[7] It was, however, preserved for review. At the close of the State's case, the defense moved for judgment of acquittal, asserting that, "if the facts are believed to be as presented it seems that the kidnapping was only done to accomplish the armed robbery to take Mr. McGirl to the ATM to actually commit the robbery." *See* Md. Rule 4-324(a) (providing that, in moving for judgment of acquittal, the defendant "shall state with particularity all reasons why the motion should be granted"); *Starr v. State*, 405 Md. 293, 301-05 (2008) (holding that failure to comply with particularity requirement of Rule 4-324(a) results in failure to preserve issue for appeal).

C. Analysis

The case *State v. Stouffer*, 352 Md. 97 (1998) is the leading Maryland authority addressing the question "whether, and under what circumstances, the detention, confinement, or asportation of a victim initially accosted for the purpose of robbery, sexual assault, or some other crime will suffice to sustain a separate conviction for kidnapping." *Id.* at 106. In that case, the Court of Appeals, after surveying decisions from other jurisdictions, aligned itself with "the majority approach that examines the circumstances of each case and determines from them whether the kidnapping—the intentional asportation—was merely incidental to the commission of another offense." *Id.* at 113. In doing so, however, the Court did not adopt "any specific formulation of standards for making that determination," instead setting forth:

> those factors that seem to be central to most of the articulated guidelines, principally: How far, and where, was the victim taken? How long was the victim detained in relation to what was necessary to complete the crime? Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime? Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

Id.

In the instant case, application of the *Stouffer* factors makes it clear that the kidnapping at issue was far more than merely "incidental" to the armed robbery. We think it especially noteworthy that the movement was neither "inherent as an element," nor, "as a practical matter, necessary to the commission, of" the armed robbery. Indeed, prior to committing the kidnapping, Appellant already had committed a completed armed

robbery—from his perspective, he was simply dissatisfied with the proceeds and, in an attempt to get more, kidnapped McGirl and forced him to accompany him to a bank branch where he could then coerce McGirl into withdrawing funds from the ATM. Moreover, McGirl testified that the trip from the parking lot of his girlfriend's apartment complex to the bank branch lasted "[p]robably 15, 20 minutes," further weighing against an "incidental" asportation. And finally, the asportation subjected McGirl to "additional significant danger"—during that trip, Appellant held a gun to his head the entire time.

In contrast, in *McGrier v. State*, 125 Md. App. 759, *cert. denied*, 355 Md. 613 (1999), the defendant forced his victim to move "several feet" from a hallway to the stairs leading to a basement to facilitate a rape, and we applied the *Stouffer* factors to conclude that there, the asportation was incidental to the underlying rape. *McGrier*, 125 Md. App. at 773. The instant case is far different, and our conclusion is as well. The circuit court properly declined to merge the kidnapping conviction into that for robbery with a dangerous weapon.

III. Propriety of Conviction and Sentence

A. Parties' Contentions

Appellant contends that he was improperly convicted and illegally sentenced for multiple conspiracies, where the evidence supported only a single unlawful agreement. The State counters that the jury was properly instructed as to multiple conspiracies and that there was sufficient evidence of separate conspiracies, and it, therefore, contends that we must leave the verdicts and separate sentences intact. We agree with Appellant that the evidence supported only a single conspiracy.

B. Analysis

"It is well settled in Maryland that only one sentence can be imposed for a single 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 is the agreement or combination rather than each of its criminal objectives." *Id.* "Ordinarily, a single agreement to engage in criminal activity does not become several conspiracies because it has as its purpose the commission of several offenses." *Mason v. State*, 302 Md. 434, 445 (1985). "Therefore, under Maryland common law, irrespective of the number of criminal goals envisioned by a single criminal agreement, the conspirator is usually subject to but one conspiracy prosecution." *Id.* (citing P. Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* §§ 4.01 to .02 (1984)).

The "conviction of a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement." *Savage v. State*, 212 Md. App. 1, 13 (2013) (citation and quotation omitted). To answer that question, we "analyze the nature of the agreement to determine whether there is a single conspiracy or multiple conspiracies." *Mason*, 302 Md. at 445.

"The State has the burden to prove the agreement or agreements underlying a conspiracy prosecution," and, if it "seeks to establish multiple conspiracies, it has the burden of proving a *separate* agreement for each conspiracy." *Savage*, 212 Md. App. at 14-15 (citations and quotation omitted). To establish multiple conspiracies, the State must show that the agreements are "distinct" and "independent" from each other, such that "each

agreement has its own end, and each constitutes an end in itself." *Id.* at 17 (citations and quotations omitted).

The "question of whether one or more than one conspiracy has been established is a question of fact *for a properly instructed jury*." *Id.* at 20-21 (citation and quotation omitted). A properly instructed jury must have been "adequately instructed that they could not find [the] defendant guilty of more than one count of conspiracy unless they were convinced beyond a reasonable doubt that he entered into two separate agreements to violate the law." *Savage v. State*, 212 Md. App. 1, 21 (2013) (internal citation, marks, and brackets omitted).

Two cases illustrate, respectively, when the State has met and failed to meet its burden to prove multiple conspiracies: *Manuel v. State*, 85 Md. App. 1 (1990), *cert. denied*, 322 Md. 131 (1991), and *Tracy v. State*, *supra*, 319 Md. 452, and we briefly examine those cases now.

In *Manuel*, the defendant and a co-defendant, Aniunoh, conspired with several others (including Onwuneme, Ohakwe, and Brewer) to import heroin from Nigeria for sale in the United States. *Manuel*, 85 Md. App. at 8. While Aniunoh and Thomas, a confidential informant,[8] were conducting a heroin deal, Aniunoh informed Thomas that he knew several suppliers from whom he could obtain cocaine, "if Thomas was interested." *Id.* at 11-12.

[8] Thomas, a street-level heroin dealer who was supplied by the conspirators in that case, was a confidential informant who tipped off police officers to the existence of the heroin conspiracy. Police obtained numerous recordings from a body wire he wore, and, armed with information he provided, police also obtained authorization to place wire taps on the conspirators' telephones, yielding thousands of recorded conversations. *Manuel*, 85 Md. App. at 10, 11.

Thereafter, Aniunoh contacted one of those suppliers, and he, Manuel and Thomas then negotiated the terms of a cocaine deal with that supplier. *Id.* at 12.

After Manuel and Aniunoh were convicted of separate conspiracies to possess and distribute heroin and to possess and distribute cocaine, they claimed, on appeal, that the cocaine conspiracies should be merged with the heroin conspiracies. We disagreed, noting that, although "the conspiracy to distribute cocaine emanated from the heroin conspiracy, it was a separate, distinct agreement." *Id.* For one thing, the cocaine conspiracy "was the offspring solely of conspirators Aniunoh and Manuel, whereas the heroin ring was the prodigy of Onwuneme, Ohakwe, Brewer, Aniunoh, Manuel and many others." *Id.* Moreover, the other heroin conspirators "did not broach the topic of cocaine distribution; rather their focus centered on heroin." *Id.* And, finally, the cocaine and heroin originated from different suppliers; whereas the cocaine "derived from a source in the southeast portion of the United States," the heroin "primarily originated [from a source] in Nigeria." *Id.* "Under these circumstances," we declared, "the cocaine conspiracy constituted a separate offense which does not warrant merger with the heroin conspiracy conviction." *Id.*

In *Tracy*, the State also alleged two conspiracies: first, that Jordan (the co-conspirator) "would kill [the victim] with a knife, and they would take [the victim's] car and drive it west"; and second, when, "during the commission of the crimes," Jordan was unable to stab" the victim, "a new agreement" allegedly arose, whereby "Tracy would carry out the murder and robbery with a gun." *Tracy*, 319 Md. at 459. But the Court of Appeals determined otherwise, concluding that it was "clear that Tracy's and Jordan's

decision to change which of the two participants would actually carry out the intended murder and to change the type of weapon to be used to commit the crimes would not be sufficient to constitute a second conspiracy." *Id.* (citation omitted).

In the instant case, the nature of the agreement was to rob McGirl. To that end, Appellant and his cohort employed a handgun, and in furtherance of that agreement, they kidnapped McGirl and transported him to a bank branch where they coerced him into withdrawing cash from the ATM. The instant case is far more similar to *Tracy* than *Manuel*. As in *Tracy*, where the Court of Appeals determined that the conspirators' on-the-fly "decision to change which of the two participants would actually carry out the intended murder and to change the type of weapon to be used to commit the crimes would not be sufficient to constitute a second conspiracy." *Tracy*, 319 Md. at 459. So, too, in the instant case, when the initial robbery of McGirl yielded minimal proceeds because he was not carrying cash, the ad hoc decision to take him to an ATM to forcibly withdraw cash from his account was not sufficient to constitute a second conspiracy. During the entire time period at issue in this case, there was only a single, unlawful purpose—to rob McGirl. The State failed to show that there were "distinct" and "separate" agreements to commit armed robbery and then to kidnap McGirl, nor did it show that each alleged agreement had "its own end" or "constitute[d] an end in itself." *Savage*, *supra*, 212 Md. App. at 17.

Our conclusion that there was only a single conspiracy is further confirmed by examining the jury instructions and the State's closing argument. After defining robbery and robbery with a dangerous weapon, the court instructed the jury as follows:

> Two count 2 is conspiracy to commit robbery with a dangerous weapon. So, what's conspiracy? Well, we have a definition here. And it says conspiracy to commit robbery with a dangerous weapon. Conspiracy is an agreement between two or more people to commit a crime. That's a conspiracy.
>
> An agreement between two or more people to commit a crime. That's a conspiracy. In order to convict the defendant of conspiracy to commit robbery with a dangerous weapon, the State must prove that the defendant agreed with at least one other person to commit the crime[] of robbery with a dangerous weapon and that the defendant entered into an agreement with the intent that the crime of robbery with a dangerous weapon be committed. So, the parties have to agree. There is no requirement of how they agree but they have to agree.
>
> * * *
>
> Conspiracy to commit kidnapping. And the conspiracy no matter what the crime is to conspire conspiracy is the same. That it has to be an agreement between two or more people to commit a crime. That's a conspiracy. Now conspiracy to commit the crime of kidnapping the State must prove that the defendant agreed with at least one other person to commit the crime of kidnapping and that the defendant entered into the agreement with the intent that the crime of kidnapping be committed.
>
> So, just to possibly note when you are dealing with the conspiracy they don't have to consummate a crime. They can. They might. But the requirement is the meeting of the minds and agreement between two or more people to commit a crime. That's a conspiracy. . . .

At no time did the court instruct the jury that it "could not find [Appellant] guilty of more than one count of conspiracy unless" it was "convinced beyond a reasonable doubt that he entered into two separate agreements to violate the law." *Savage*, *supra*, 212 Md. App. at 21; *see id*. at 31 ("Had (1) the jury been properly instructed, (2) a two-conspiracy argument been advanced by the State, and (3) the jury found either a single conspiracy or

multiple conspiracies, we would, in a sufficiency review, review the evidence in the light most favorable to the jury's verdict. Under the circumstances present in this case, we cannot do so. Therefore, one of appellant's conspiracy convictions must be vacated"). Moreover, the State, in its closing argument, largely repeated the trial court's instruction concerning conspiracy to commit robbery with a dangerous weapon, and then, regarding conspiracy to commit kidnapping, declared:

> We have conspiracy to commit kidnapping. Again, it is very similar to the conspiracy to commit robbery with a dangerous weapon. The defendant agreed with at least one other person to commit the crime of kidnapping and the defendant entered into that agreement with the intent that kidnapping be committed.

Once again, there was nothing to suggest that the two conspiracies were "distinct" and "separate." Were we to adopt the State's reasoning in this case, "the number of prosecutions for conspiracy would always turn upon the number of" crimes committed, a line of reasoning the Court of Appeals firmly rejected. *Mason*, 302 Md. at 445.

We conclude that the court should have entered only a single conspiracy conviction. Following *Tracy* and *Jordan v. State*, 323 Md. 151, 161-62 (1991), we remand to the circuit court with instructions to vacate the conviction and sentence for the conspiracy carrying the lesser maximum penalty, in this case, robbery with a dangerous weapon, which carries a maximum sentence of 20 years' imprisonment, and leave intact the conviction and

sentence for kidnapping, which carries a maximum sentence of 30 years' imprisonment (although the court here imposed a ten-year sentence).[9]

IV. Motion to Suppress

A. Parties' Contentions

Appellant contends that the circuit court erred in denying his motion to suppress the show-up identification. He maintains that the show-up procedure used was impermissibly suggestive and that the ensuing identification was unreliable. The State contends that "[u]nder the totality of the circumstances, the identification of McDonald was reliable," and that the court "did not err in denying the motion to suppress." We agree with the State and find that Appellant's contention has no merit.

C. Standard of Review

In reviewing the denial of a motion to suppress evidence, we ordinarily look only to the record of the suppression hearing. *Prioleau v. State*, 411 Md. 629, 638 (2009); *Morales v. State*, 219 Md. App. 1, 13 (2014). We view the evidence adduced at the hearing in a light most favorable to the prevailing party, under a clearly erroneous standard. *See Morales*, 219 Md. App. at 13. However, we make "an independent, *de novo*, appraisal of whether a constitutional right has been violated by applying the law to facts presented in a particular case." *State v. Andrews*, 227 Md. App. 350, 371 (2016) (citation omitted).

[9] The maximum sentence for robbery with a dangerous weapon is found at Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-403(b). The maximum sentence for kidnapping is found at CL § 3-502(b).

D. Analysis

"In the context of pre-trial identifications, we are mindful that due process principles apply to protect against the admission of identifications obtained through unnecessarily suggestive police procedures." *Morales*, 219 Md. App. at 13 (citing *James v. State*, 191 Md. App. 233, 251-52 (2010)). We "apply a two-step inquiry to determine the admissibility of identifications alleged to be the product of impermissibly suggestive procedures." *Id.* Initially, the defendant bears the burden to demonstrate "that the procedures employed by the police were impermissibly suggestive." *Id.* at 13 (citations omitted). If he meets that burden, the burden then "shifts to the State to prove by clear and convincing evidence that the reliability of the identification outweighs 'the corrupting effect of the suggestive procedure.'" *Id.* at 13-14 (quoting *Thomas v. State*, 139 Md. App. 188, 208 (2001)). "If the accused fails to carry his or her burden demonstrating impermissibly suggestive police procedures, however, our inquiry ends and the identification is deemed reliable." *Id.* at 14 (citing *James*, 191 Md. App. at 252).

Two witnesses testified at the suppression hearing: Officer Austin Fogarty, of the Montgomery County Police Department, and McGirl. Officer Fogarty was on patrol in his police cruiser in Germantown, Maryland on the night in question when he received a call to respond to a nearby apartment to pick up McGirl, the victim of a "serious" crime, and transport him to a show-up. Officer Fogarty did as directed and found McGirl, at his girlfriend's apartment, along with several other police officers. The officer then left with McGirl in his marked police cruiser, making small talk as they drove a short distance to the scene of the show-up.

Upon arriving, McGirl, who appeared shaken by his stressful ordeal, asked Officer Fogarty whether the subject could see him during the identification procedure. The officer assured him that he could not be seen, and, while Officer Fogarty shone a spotlight on Appellant, McGirl positively identified him as one of his assailants. McGirl testified at trial that, upon arriving at his girlfriend's apartment after the robbery, he called police. Three Montgomery County police officers responded to that apartment, and they proceeded to question him about the robbery. McGirl gave them descriptions of the assailants.

While officers were interviewing McGirl, a call went out stating that patrol officers had apprehended suspects that possibly matched the description of the assailants, and McGirl was told by an unidentified police officer that "I think we got your peeps." After another police officer (apparently, Officer Fogarty) arrived at the scene, McGirl left with him and was informed that he was being taken "to identify a possible suspect." McGirl asked Officer Fogarty whether he could be identified by the suspect during the show-up procedure and was told that he could not. McGirl then positively identified the suspect, who was later identified as Appellant.

Defense counsel argued that the statement of the unidentified police officer, informing McGirl that "I think we got your peeps," was impermissibly suggestive, but the motions court found otherwise and denied the motion to suppress.

As the motions court observed, McGirl testified that Officer Fogarty told him that he was being taken to "to identify a possible suspect," not that the suspect was definitely one of the assailants. Even the statement that the defense found most suggestive, "I think

we got your peeps," was, as the court observed, stated only as a belief and not as a definitive proposition.

As for Appellant's contention that the procedure itself, during which he was "handcuffed, surrounded by officers, and illuminated by a spotlight," was impermissibly suggestive, the State points out that courts throughout the country have upheld show-up identifications against similar challenges. *See*, *e.g.*, *United States v. Pickar*, 616 F.3d 821, 827-28 (8th Cir. 2010) (holding that show-up identification procedure, in which defendant was "handcuffed and standing in front of a marked police cruiser," with a "small flashlight" shone in his face, was not unduly suggestive); *United States v. Bautista*, 23 F.3d 726, 730 (2d Cir. 1994) (similar); *People v. Castro*, 52 N.Y.S.3d 385, 387 (N.Y. App. Div. 2017) (observing that "[s]howup procedures, although generally disfavored, are permissible where employed in close spatial and temporal proximity to the commission of the crime for the purpose of securing a prompt and reliable identification").

In sum, the motions court did not clearly err in finding that McGirl had been told only that he was being taken to identify a "possible" suspect. Moreover, the procedure itself was unobjectionable and indeed, similar to that used by police departments throughout the country. The motions court did not err in denying Appellant's motion to suppress the show-up identification.

CONVICTION AND SENTENCE FOR CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON REMANDED WITH INSTRUCTIONS TO VACATE. CONVICTIONS OTHERWISE AFFIRMED. COSTS TO BE ALLOCATED 75% TO APPELLANT AND 25% TO THE COUNTY.