Circuit Court for Baltimore City
Case No. 119241013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 808

September Term, 2020

SPENCER MARTIN EASON

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: October 6, 2021

A jury, sitting in the Circuit Court for Baltimore City, convicted Spencer Martin Eason, appellant, of robbery, second-degree assault, theft of property valued between $100 and $1,500, and three counts of conspiracy to commit each of those offenses. The court sentenced appellant to a term of three years' incarceration for robbery and a concurrent term of three years for conspiracy to commit robbery. The court merged the remaining convictions for sentencing purposes. Appellant timely appealed and presents two questions for our review, which we have rephrased slightly, as follows:[1]

I. Did the circuit court abuse its discretion by ruling that if he elected to testify, appellant's prior robbery conviction would be admissible to impeach his credibility?

II. Was the evidence sufficient to support appellant's conspiracy convictions?

We hold that the first issue is not preserved for appellate review. We further conclude that the evidence was legally sufficient to sustain appellant's conspiracy convictions, and shall, therefore, affirm the judgments of the circuit court.

[1] In his brief, appellant articulated the issues as follows:

1. Did the trial judge abuse discretion [sic] by ruling that the prosecutor could use a prior conviction for robbery to impeach Appellant?

2. Is the evidence legally insufficient to sustain Appellant's convictions for conspiracy?

BACKGROUND[2]

At or around 12:45 p.m. on April 7, 2019, Albert Thornton, the victim in this case, was riding his purple Huffy bicycle in the 4000 block of Rogers Avenue. When he pulled over to the side of the road to make a telephone call, Mr. Thornton was approached by a group consisting of three men and three women. One of the women requested a cigarette, but Mr. Thornton refused.

Although the group initially passed Mr. Thornton without incident, two members thereof, later identified as Andre Raymond and appellant, made an about-face, walked past Mr. Thornton, and attacked him from behind. Mr. Thornton testified that the hoods of Mr. Raymond's and appellant's jackets were initially "relaxed and hanging down" behind their heads. When Mr. Thornton looked back and saw the men running toward him, however, they had pulled the hoods over their heads in an apparent attempt to obscure their faces. One of the men instructed the other to kick Mr. Thornton's bicycle out from beneath him. They then "shoved," "pushed," and "hit" him. Although Mr. Thornton attempted to defend himself, he was ultimately overpowered. Mr. Thornton fell to the ground, whereupon Mr. Raymond and appellant commenced kicking him. While Mr. Raymond stole Mr. Thornton's bicycle, appellant rifled through his pockets, relieved him of his wallet and a

[2] Given that appellant challenges the sufficiency of the evidence to sustain his conspiracy convictions, we shall present the facts in the light most favorable to the State. *See Koushall v. State*, 249 Md. App. 717, 723 n.1 ("This recitation of facts reflects that, when reviewing a conviction for evidentiary sufficiency, we view the evidence 'in the light most favorable to the prosecution.'" (quoting *State v. Morrison*, 470 Md. 86, 105 (2020))), *cert. granted*, 474 Md. 718 (2021).

pack of cigarettes, and proclaimed: "[J]ackpot, I got his wallet." Mr. Thornton managed to stand and run to the curb where Mr. Raymond and appellant "jumped on [him] again." Following the fray, Mr. Raymond and appellant fled the scene, the former on Mr. Thornton's bicycle and the latter on foot.

Mr. Thornton began to give chase but was stopped by a nearby resident who dissuaded him from doing so. After calling 911, Mr. Thornton flagged down Baltimore City Police Officer Travis Ryckman, who was on routine patrol nearby. Officer Ryckman observed cuts and abrasions to Mr. Thornton's right cheek, left thigh, and knuckles. Mr. Thornton reported the robbery to Officer Ryckman and provided him with descriptions of the assailants and his stolen bicycle. Officer Ryckman broadcast descriptions of the suspects to other officers who were responding to the scene. While preparing to transport Mr. Thornton to the City Wide Robbery Unit ("the Robbery Unit"), Officer Ryckman learned that fellow patrol officers had apprehended one of the suspects, later identified as Mr. Raymond, riding Mr. Thornton's bicycle in the vicinity of Rogers and Wabash Avenues. En route to the Robbery Unit, Officer Ryckman stopped at that location, where Mr. Thornton positively identified Mr. Raymond as one of his assailants.

Mr. Thornton and Mr. Raymond were interviewed by Detective Evan Zimrin**.** Based on those interviews, Detective Zimrin developed appellant as a person of interest and generated a photographic array featuring appellant and five other individuals who resembled him. Employing a double-blind procedure, Detective Marvin Gross

administered that photo array to Mr. Thornton, who identified appellant as his second assailant.

Mr. Raymond testified that he and appellant had committed the acts that were the subject of the charges.

We will include additional facts as necessary to our resolution of the issues.

DISCUSSION

I.

Appellant contends that the trial court abused its discretion by granting the State permission to impeach his credibility with a 2019 robbery conviction, thereby purportedly preventing him from testifying in his own defense. The State responds that appellant's claim is unpreserved because he did not testify at trial. Alternatively, the State maintains that the court properly weighed the probative value of appellant's prior conviction against the danger of unfair prejudice.

A. The Relevant Record

At the close of the State's case-in-chief, appellant moved for judgment of acquittal. After denying that motion, the court asked whether appellant wished to testify. Defense counsel answered, "Well, if I could advise him, Your Honor. I don't think he does, but …." He then advised appellant of his right to testify as well as the risks and benefits of doing so. As is pertinent here, defense counsel cautioned him:

> [I]f you do testify, if you have a conviction in your prior record that may be raised as questions about whether you're able to tell the truth. The judge could decide whether to allow that conviction in or not. Now in your case,

> the only conviction that you have is one that is exactly like the charge that you're facing today. So I don't know that the [c]ourt would allow that in[.]

The court then asked whether it was the prosecution's position that appellant's 2019 robbery conviction constituted an impeachable offense. The State answered in the affirmative. Defense counsel argued that because the prior conviction was identical to an offense for which appellant was on trial, the danger of unfair prejudice outweighed the probative value of that conviction. The State responded that a curative instruction could mitigate any such danger. When ruling on the admissibility of appellant's prior conviction, the court expressly addressed each of the requirements set forth in Maryland Rule 5-609(a)[3] and considered each of the factors enumerated in *Jackson v. State*, 340 Md. 705 (1995).[4] The court reasoned:

> All right. The question before the [c]ourt is whether [appellant], if he chooses to testify[,] can be cross-examined, impeached based on a prior robbery conviction from January 4, 2019. Maryland rules, Md. Rule 5-609, 5-609(b). This conviction is within the last 15 years. So it is within the expressed provisions of the rule. Hasn't been reversed or anything along

[3] Maryland Rule 5-609 provides, in pertinent part:

> **(a) Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

[4] The factors enumerated in *Jackson* include: "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." *Id*. at 717 (citation omitted).

those lines. It certainly is for a crime that is relevant to the witness'[s] credibility. Robbery certainly is th[at] type of offense because of the theft nature of it that would go directly to a witness'[s] credibility. So the final step would be … to determine whether the probative value [of] the prior conviction outweighs the danger of unfair prejudice to the witness or the objecting party. As part of weighing the probative value versus the danger of unfair prejudice, the [c]ourt has to consider four factors. The first is the impeachment value [of] the prior crime. Second, the period between the prior conviction and the impeachment. The similarity between the prior crime and the conduct at issue in the instant case. And the importance of the witness'[s] testimony and credibility.

As to factor one is the impeachment value of the prior crime. The impeachment value here is extremely high. This is a robbery conviction and again, that is the type of offense in which impeachment, the impeachment value of a prior robbery conviction is very high[. A]s to the period between a prior conviction and the impeachment [taking] just a little over a year. So that also would weigh heavily in the State's favor. Again, the rule allows anything within the past 15 years. It might be a different story if we're talking about this conviction being ten, twelve years ago. But this conviction is just a little over a year old.

As to the similarity between a prior crime and [the] conduct at issue in the instant case, it's the exact same charge. [Appellant] is facing a robbery charge in the current trial and this is a robbery conviction from just over a year ago. So there is a substantial similarity.

Now, [defense counsel] has argued that the similarity goes to the unfair prejudice to [appellant], but the [c]ourt respectfully disagrees and I think that weighs in favor of the State because of the similarities between that and certainly as [the State] has argued, an instruction to the jury as to what they can take this prior conviction into account for would address any prejudice.

Finally, the importance of the witness'[s] testimony and credibility. This is basically because as [defense counsel] has argued throughout the course of this trial, there is no physical evidence here. There's no video of what happened. No CCT footage. This is basically the statement of the victim and the [c]o-[d]efendant against [appellant]'s testimony. So the importance of his testimony and his credibility is extremely high. For all of those reasons, the [c]ourt exercises its discretion and finds that a prior robbery conviction from January 4, 2019[,] would be the subject of impeachment if [appellant]

> were to testify. Obviously, it would simply be the name of the crime and the date of the conviction that he could be impeached on, nothing else other than that he has this conviction from January 4, 2019.

Defense counsel objected to the court's ruling, saying: "I would take exception with the [c]ourt's ruling and note that based on the decision [appellant] is deciding not to testify."

B. Preservation

Anticipating the State's non-preservation argument, appellant contends that by apprising the court of his desire to testify and that he declined to do so because of its ruling on the admissibility of his prior conviction, he satisfied the preservation requirements set forth in *Passamichali v. State*, 81 Md. App. 731, 741, *cert. denied*, 319 Md. 484 (1990). The State counters that *Passamichali* is distinguishable from this case because it involved "a purely legal claim that required no factual determination to be made which would have required appellant to take the stand." (quotation marks and citation omitted). We agree.

We commence our analysis with a brief review of the cases on which the parties respectively rely. In *Offutt v. State*, 44 Md. App. 670 (1980), *cert. denied*, 291 Md. 780 (1981), we addressed the preservation requirements for a ruling on the admissibility of impeachment evidence. The defendant in that case moved *in limine* to preclude the State from offering as impeachment evidence his prior conviction for heroin distribution. The court denied that motion, ruling that the conviction would be admissible for impeachment purposes if the defendant testified. He declined to do so, however, purportedly because of that ruling.

On appeal, we held that the denial of a motion *in limine* challenging the admissibility of impeachment evidence is reviewable only if such evidence is actually offered at trial. We explained:

> Although it is entirely possible that the ruling of the trial judge motivated the appellant not to testify, it is also possible that he had no intention of testifying regardless of the ruling of the trial court on the motion. It is also possible that had appellant testified the State would have changed its position and not used the conviction. We do not rule on academic questions.

Id. at 677.

In *Passamichali*, a case decided ten years after *Offutt*, we carved out a narrow exception to the general preservation rule recognized therein. As in *Offutt*, the defendant in that case moved *in limine* to exclude evidence of his prior conviction for impeachment purposes. At the close of the State's case, the court denied that motion, ruling: "[T]he courts have no discretion but to admit for purposes of testing credibility convictions for felonies, which robbery is. Therefore, I cannot preclude the State from cross examining the [d]efendant if he chooses to testify about his conviction for robbery." 81 Md. App. at 736. As a result of the court's ruling, the defendant abstained from testifying.

On appeal, the defendant challenged the constitutionality of Maryland Code (1973), § 10-905(a) of the Courts and Judicial Proceedings Article ("CJP"), which mandated the *per se* admissibility of infamous crimes for impeachment purposes.[5] Although the

[5] At the time of our decision in *Passamichali*, CJP § 10-905 provided, in pertinent part:

(continued…)

defendant did not testify at trial, we held that "by notifying [the court] of his desire to testify and of the sole reason for his refusal to testify," the defendant adequately preserved his constitutional challenge for appellate review. *Id.* at 741. Because the issue was purely a matter of law, we reasoned, the content of the defendant's testimony was irrelevant to the resolution thereof. We explained:

> It defies logic to suggest that a defendant must testify in order to preserve for appellate review a claim of deprivation of the constitutional right to testify. If such a requirement existed, this constitutional challenge could never be squarely presented for appellate review because the claim would dissipate upon the defendant's taking the oath. In the case *sub judice* there was no factual determination to be made which would have required appellant to take the stand. The issue was a purely legal one—the constitutionality of Section 10-905—and as Justice Brennan stated, to require appellant to testify in order to preserve the issue is inappropriate.

Id. at 740-41.

In *Jordan v. State*, 82 Md. App. 225 (1990), *aff'd in part and rev'd in part on other grounds*, 323 Md. 151 (1991), we were confronted with an issue ostensibly similar to that presented in *Passamichali*. In that case, the State offered into evidence an incriminatory

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> (a) *In general*. — Evidence is admissible to prove the interest of a witness in any proceeding, or the fact of his conviction for an infamous crime. Evidence of conviction is not admissible if an appeal is pending, or the time for an appeal has not expired, or the conviction has been reversed, and there has been no retrial or reconviction.

Following our decision in *Passamichali*, the Court of Appeals promulgated Maryland Rule 1-502—now codified as Maryland Rule 5-609. To the extent that they conflict, that later Rule superseded CJP § 10-905, thereby replacing CJP § 10-905(a)'s *per se* admissibility mandate with a fact-intensive balancing test whereby the court must weigh the probative value of a prior conviction against the danger of unfair prejudice. *See Beales v. State*, 329 Md. 263, 273 (1993).

statement that the defendant had made while in police custody. The defendant moved to suppress that statement "on the dual grounds that 1) it was involuntarily made and 2) it was taken in violation of his *Miranda* rights."[6] *Id.* at 230. At a pre-trial hearing on the defendant's motion, the court rejected the former basis for suppression, but found that the State had not met its burden of proving compliance with *Miranda*. Accordingly, the court ruled that the statement was admissible for the limited purpose of impeaching the defendant's testimonial credibility. At the close of the State's case-in-chief, the defense requested that the court reconsider its voluntariness ruling, claiming that "but for that ruling, he would take the stand and testify in his own behalf." *Id.* at 231. The court reiterated and reaffirmed its initial decision. Accordingly, the defendant abstained from testifying.

Relying in part on *Offutt* and distinguishing *Passamichali*, we held that because the defendant declined to testify and the statement was therefore never used, "the issue simply ha[d] not been properly presented for our review." *Id.* (citations and footnote omitted). Notwithstanding the defendant's proffer that the court's ruling precipitated his decision to remain silent, we reasoned that any harm incurred as a result of that ruling was too speculative to warrant appellate review. We explained:

> [T]he court may have changed its ruling or the appellant's testimony may not have produced the factual predicate which would have permitted use of the statement for impeachment purposes. This is particularly so where, as here, no proffer has been made as to what the testimony would have been; under the circumstances it is pure speculation that appellant's testimony, had he taken the stand, would have generated an impeachment issue.

[6] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Id. at 234.

The Court of Appeals affirmed our decision with respect to preservation, holding that the rule governing preliminary evidentiary rulings "obviously was not intended to authorize appellate review of a judge's … ruling that permits the State to introduce evidence at trial unless the evidence is ultimately introduced at trial." *Jordan*, 323 Md. at 159. The Court explained that any alleged injury to the defendant as the result of the court's decision was "remote and speculative," and was, therefore, not preserved for appellate review. *Id.* at 156. The Court reasoned:

> If Jordan had testified, it is possible, depending on how he testified, that the State might have elected not to use his statement to impeach him and thus not open the door to the issue of voluntariness. It is also possible that Jordan might have taken the stand and given testimony consistent with his statement to the police, thus precluding use of the statement since it would have no "impeachment" value; or Jordan might have taken the stand and given testimony so similar to his statement to the police that use of the statement to impeach, even if improper, would be harmless error.

Id. (footnote omitted).

The holdings in *Offutt* and *Jordan* are consistent with federal precedent. In *Luce v. United States*, 469 U.S. 38 (1984), the United States Supreme Court held that a defendant must testify in order to preserve a ruling permitting the Government to impeach him or her with a prior conviction. The Court reasoned that in order to weigh the probative value of a prior conviction against the danger of unfair prejudice, "the court must know the precise nature of the defendant's testimony, which is unknowable when … the defendant does not testify." *Id.* at 41 (footnote omitted). What if any harm a defendant might have incurred as the result of such a decision is, moreover, "wholly speculative," as the court's ruling

remains subject to revision and the Government could decline to impeach him or her. *Id.* Furthermore, because a defendant's "decision whether to testify seldom turns on the resolution of one factor," the court is loath to assume that a defendant would have testified but for the court's ruling. *Id.* at 42 (quotation marks and citation omitted). Even if the court could somehow surmount these hurdles, "almost any error would result in the windfall of automatic reversal," as a reviewing court "could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Id.*

As *Luce* and *Jordan* make indelibly clear, when a defendant declines to testify, a preliminary ruling on the admissibility of impeachment evidence is only preserved if the purported error was based on a purely legal issue. *See also Williams v. State*, 110 Md. App. 1, 33 (1996) ("Generally, preservation for review requires a question of law not dependent upon a factual predicate or a discretionary ruling. Additionally, if a defendant or other witness testifies and the State does not impeach him or her with the prior conviction …, the ruling ordinarily will not be preserved for review."). In this case, appellant elected not to testify at trial and was not, therefore, impeached with the evidence about which he now complains. Absent a constitutional or other purely legal challenge to the court's ruling, this issue is not properly before us and we decline to address it.

II.

Appellant's second contention will not detain us long. He claims that the evidence was legally insufficient to sustain his conspiracy convictions because "the prosecution failed to offer sufficient proof of an agreement between [a]ppellant and his co-actor[.]"

The State responds that the evidence indicated that Mr. Raymond and appellant acted in concert, thereby supporting a reasonable inference that they had agreed to commit the offenses at issue. Again, we agree with the State.

When reviewing the sufficiency of the evidence to support a criminal conviction, "'[t]he critical 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.'" *State v. Morrison*, 470 Md. 86, 105 (2020) (emphasis retained) (quoting *Smith v. State*, 415 Md. 174, 184 (2010)). Our function is neither "to second-guess any reasonable inferences drawn by the fact-finder" nor "to reweigh the fact-finder's resolution of conflicting evidence." *Jones v. State*, 213 Md. App. 483, 505 (2013) (citation omitted), *cert. denied*, 438 Md. 740 (2014). A conviction may be based entirely upon circumstantial evidence, but "the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Smith*, 415 Md. at 185 (citation omitted).

"Conspiracy is a common law crime consisting of an agreement to commit an unlawful act or to perform a lawful act by criminal means." *Sequeira v. State*, 250 Md. App. 161, 203 (2021) (citation omitted). That agreement need not be written, spoken, or formal, so long as "'there is a meeting of the minds reflecting a unity of purpose and design.'" *Id*. at 204. (quoting *Molina v. State*, 244 Md. App. 67, 168 (2019)). "In conspiracy trials, there is frequently no direct testimony … as to an express oral contract or an express agreement to carry out a crime." *Jones v. State*, 132 Md. App. 657, 660, *cert. denied*, 360

Md. 487 (2000). The existence of such an agreement may, however, be inferred from circumstantial evidence such as evidence that the alleged co-conspirators "act[ed] in what appears to be a concerted way to perpetrate a crime." *Darling v. State*, 232 Md. App. 430, 466, *cert. denied*, 454 Md. 655 (2017) (quotation marks and citation omitted). *See also Jones*, 132 Md. App. at 660 ("If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended.").

As appellant acknowledges, "the testimony of a single eyewitness, if believed, is sufficient to convict …, and … questions of credibility are for the fact-finder to resolve[.]" *See State v. Stanley*, 351 Md. 733, 750 (1998) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." (citation omitted)). As set forth above, Mr. Thornton's testimony regarding the manner in which the assailants approached him and the concerted nature of the ensuing robbery was sufficient for a rational jury to reasonably infer that Mr. Raymond and appellant had at least tacitly agreed to commit the offenses at issue. *See Dionas v. State*, 199 Md. App. 483, 532 (2011) ("[I]t is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose. In fact, the State [i]s only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." (quotation marks and citation omitted)), *rev'd on other grounds*, 436 Md. 97 (2013); *Jones*, 132 Md. App. at 661 ("[J]oint participation by two or more codefendants … gives rise at least to a permitted

inference of [conspiracy].”). Accordingly, we hold that the evidence was legally sufficient to support appellant’s conspiracy convictions.

For the foregoing reasons, we affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.