UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0949

September Term, 2014

DELONTE BRITTON

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James, A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 14, 2015

A jury in the Circuit Court for Prince George's County convicted Delonte Britton, a/k/a Delontae Britton, a/k/a Delontae Brittion[1], appellant, of two counts of robbery with a dangerous weapon, two counts of theft, one count of conspiracy to commit armed robbery, and five counts of second-degree assault. He was sentenced to incarceration for a term of twenty years for robbery with a dangerous weapon, a concurrent term of twenty years for the second count of robbery with a dangerous weapon, a consecutive term of twenty years, suspended, for conspiracy to commit armed robbery, and three concurrent ten year terms for second-degree assault. The remaining convictions merged for sentencing. This timely appeal followed.

QUESTIONS PRESENTED

Britton presents two questions for our consideration:

> I. Did the circuit court abuse its discretion in phrasing questions on the verdict sheet as to whether appellant "or another participating in the crime with" appellant committed the offense?
>
> II. Was the evidence insufficient to sustain appellant's conviction for conspiracy to commit armed robbery.

For the reasons that follow, we shall affirm.

FACTUAL BACKGROUND

On August 17, 2013, Alyssa Hollander was the manager of R. J. Bentley's restaurant in College Park. She arrived for work at about ten o'clock in the morning and began opening

[1] We note that appellant's name is spelled a number of different ways in the Record, including Delontae Britton, Delonte Britton, and Delontae Brittion. In his Brief, he states that the correct spelling of his name is Delontae Britton.

the restaurant with four other employees, Caitlin Carmen, Dominick Simms, Reina Fernandez, and Calvin Adams. She went into the manager's office, closed the door, and began to count out the money for the day. The money, which was kept in three different "banks," totaled a little more than $1,900. While Hollander was counting the cash, an employee, Caitlin Carmen, opened the door to the manager's office and asked when the bartender would be arriving. As she was asking that question, the door flew open and a man, who was wearing a mask that covered part of his face and carrying a black and silver gun, entered the office and started taking the money and putting it into his pants. The man asked for the money from the other "banks," and Hollander gave it to him. After taking all the money, the man left. Hollander recognized the man with the gun as a former employee, but at the time of the robbery, she could not recall his name. At trial, Hollander identified Britton as the man with the gun.

Hollander pulled Carmen into the office and closed the door. They "waited a couple of seconds till [they] thought everyone was gone," and then they went out into the kitchen, where they saw other employees lying on the floor. They locked the doors to the restaurant and called 911.

At trial, Hollander was shown a recording from a surveillance camera that was taken on the day of the robbery. She testified that it was a fair and accurate depiction of what occurred during the incident, and she identified the individuals who appeared in it.

Carmen was working as a server and bartender on the day of the robbery. She arrived at the restaurant at about 10:00 a.m. and began preparing for the restaurant to open. When she went to the door of the manager's office to ask Hollander a question, a man with a mask covering part of his face and carrying a handgun, ripped open the door and demanded the money that Hollander was counting. According to Carmen, the mask covered everything except the man's eyes and the bridge of his nose. The man told Hollander to cooperate and give him all the money, including the money that was kept in the safe that she had not yet counted.

Carmen also saw a second person who wore a full mask. He held a gun over kitchen employees who were lying on the floor. Carmen did not recognize either of the men involved in the robbery.

Dominick Simms arrived at the restaurant at about 10:20 a.m., and went outside to bring in the trash cans and some rugs for the kitchen and bar areas. As he set down a second rug, a man holding something shiny that looked like a handgun, approached and said, "get down, Big Man." Simms did not get up from the floor until Hollander tapped him on the back.

Simms knew Britton, who lived in his neighborhood, and previously had helped him get a job at R.J. Bentley's. Simms did not believe that Britton was one of the two men who robbed the restaurant on August 17, 2013.

Reina Fernandez, who was working in the restaurant's kitchen on the day of the robbery, testified at trial through a Spanish language translator. She knew Britton, who, at one time, had been a co-worker at the restaurant, and they used to ride the bus together. On the day of the robbery, Fernandez arrived at the restaurant at about 10:30 a.m. She testified that two people robbed the restaurant, and that she thought one of them was Britton, but she was not certain.

At the time of the robbery, Fernandez was on the telephone when a man holding a gun approached her. She said, "don't play with me like that." She called the man "Delontae," but he said that wasn't his name. Fernandez testified that the man's voice was different from Britton's. Fernandez said to the person who robbed her, "what are you going to rob from me? I have three children. I am a poor person." The robber took her cell phone, which was worth $350.

Fernandez acknowledged that the police showed her a photograph of a person and that she identified that person as Britton, and one of the people who robbed the restaurant. At trial, she testified that she "was confused" and did not know if Britton was one of the people who committed the robbery. Fernandez acknowledged that Britton had, in the past, given her a ride home, so he knew where she lived.

Prince George's County Police Detective Ruben Paz, who is fluent in Spanish, interviewed Fernandez after the robbery. Detective Paz testified that Fernandez identified Britton as one of the robbers. Detective Paz described his interview of Fernandez as follows:

> Basically asked her to just tell me what happened the day of the robbery. She said that she was working, and someone came that she knows by the name of Delontae, came in and pointed a gun at her saying, get back. She thought that he was playing. It's like, stop playing, Delontae.
>
> That person said, I'm not Delontae.
>
> She was like, yes, you are Delontae. Stop playing.
>
> So, she just kept on doing what she was doing. It wasn't until another suspect came and placed a gun in the back of her head when she realized it was actually a robbery that was happening.
>
> I showed her a single photo of Delontae which she said, yeah, that's Delontae. She signed the back of that picture. I asked her questions, and she dated the back of the picture.

According to Detective Paz, Fernandez never hesitated in her identification and never indicated that she was unsure whether Britton robbed her. She was able to identify Britton because they had worked together and taken the bus together, and he once gave her a ride home. Although he was wearing a mask at the time of the robbery, Fernandez could see his eyes and nose and she recognized his voice. Fernandez expressed to Detective Paz her fear of retaliation for identifying Britton as one of the robbers. Portions of Fernandez's recorded interview were played, and translated by Spanish language interpreters, for the jury.

Detective Charles Seward, of the Prince George's County Police Department, was the lead investigator of the robbery. When he arrived at the restaurant, all of the victims had been separated and were writing down statements about what had transpired. Hollander and Fernandez identified Britton as one of the men who had robbed them. Detective Seward

downloaded video recordings from the restaurant, from a nearby parking garage, from the City of College Park, and from a "tag reader" on a telephone pole at the corner of Knox Road and Route 1 that recorded all of the license plates from cars that passed by.

Detective Seward interviewed Britton, who claimed that at the time of the robbery, he was at a pee-wee football game at H.D. Woodson High School with his cousins. The detective later confirmed that a parks and recreation pee-wee league was using the fields at the high school on the day of the robbery.

Sergeant Clarence Shannon, of the Prince George's County Police Department, assisted Officer Sewell in obtaining a search warrant for Britton's home in Washington, D.C., and coordinating with the District of Columbia Metropolitan Police Department regarding its execution. During the search, officers recovered a ski mask on top of documents addressed to Britton.

Britton's cousin, Ashley Clark, was the sole witness to testify for the defense. According to her, on August 17, 2013, she attended her little cousin, Mark Williams's, football game at H.D. Woodson High School. Ernest Simms, Simms' son, and Britton were with her.[2] They arrived at about 8:30 or 9:00 a.m., prior to the game, which started at about 10:30 a.m., and did not leave until about noon or 12:30 p.m. Afterwards, they all went back

[2] There is nothing in the record to indicate whether Ernest Simms and his son were related to the victim Dominick Simms.

to Clark's home. Clark testified that Britton did not leave her house until late in the day and that she never saw him leave her presence until after they had returned to her house.

DISCUSSION

I.

Britton first contends that the trial court abused its discretion in including parenthetical material as part of the following questions on the verdict sheet:

> 1. Robbery with a Dangerous Weapon (Alyssa Hollander)
>
> ___ Not Guilty ___ Guilty
>
> ***(i.e. Did the Defendant or another participating in the crime with the Defendant, rob Alyssa Hollander with a dangerous weapon?)***
>
> ***If guilty skip question #2 and answer questions #3; otherwise, answer question #2.***
>
> 2. Robbery (Alyssa Hollander)
>
> ___ Not Guilty ___ Guilty
>
> ***(i.e. Did the Defendant or another participating in the crime with the Defendant, rob Alyssa Hollander?)***
>
> 3. First Degree Assault (Alyssa Hollander)
>
> ___ Not Guilty ___ Guilty
>
> ***(i.e. Did the Defendant or another participating in the crime with the Defendant, assault Alyssa Hollander in the first degree?)***
>
> ***If guilty, skip question #4 and proceed to question #5; otherwise, answer question #4.***

4. Second Degree Assault (Alyssa Hollander)

___ Not Guilty ___ Guilty

(i.e. Did the Defendant or another participating in the crime with the Defendant, assault Alyssa Hollander in the second degree?)

If you entered not guilty to questions 1-4, enter not guilty to question #5; otherwise, answer question #5.

At trial, defense counsel objected to the parenthetical material as "confusing" because it was worded differently from the jury instruction. He explained:

> [I]t is, again, stating the crime within the verdict sheet as opposed to in a different way than is just, did the person, did Delontae Britton commit a robbery with a dangerous weapon? Did he rob Alyssa Hollander with a dangerous weapon?
>
> The jury instructions explain[ ] in full detail, fully explaining what accomplice liability is and what the crime of robbery with a dangerous weapon is. This is taking fairly long jury instructions and making them one sentence, and it is abbreviating the jury instructions. So instead of – what Mr. Danai [the prosecutor] wrote, which was, do you find the defendant, Dolantae Britton, not guilty or guilty of robbing Alyssa Hollander with a dangerous weapon on or about August 17, 2013. If they have questions about that, then they should refer back to the jury instructions and see what the full definition of robbery with a dangerous weapon is.
>
> And if the Court does, over our exceptions, read the accomplice liability part, if they think that would be part of it, then they could read the full explanation of what accomplice liability is, as opposed to this shorthand version of both of those charges. So that's why we specifically don't like the parts in parenthesis on the verdict sheet.

The trial court denied defense counsel's request to remove the parenthetical material from the verdict sheet, stating:

> The late Hovey Johnson in his cases put the questions this way. His spirit shall remain alive in this courthouse and shall as long as I'm here, which is about another two years and nine months until the Court of Special Appeals or higher authority advises me that we were wrong all these years. So your exceptions are noted, but we'll keep the verdict sheet.

Britton argues on appeal that the verdict sheet improperly highlighted and gave credence to the State's theory of aiding and abetting, and improperly directed the jurors to specifically deliberate on that theory of liability. By specifically directing the jurors to consider the aiding and abetting theory, the trial court implied that there was more than just some evidence to simply warrant a jury instruction. Alternatively, Britton contends that even if it was not improper to include the State's theory of aiding and abetting on the verdict sheet, in this particular case it was erroneous because the language used was incomplete and misleading. Britton maintains that in order to find him guilty under a theory of aiding and abetting, the jury would have to find not only that he or another person participating in the crime with him committed the charged acts, as stated on the verdict sheet, but also that, if his presence was proven, that he intended to make the crime succeed, and knowingly aided, counseled, commanded or encouraged the commission of the crime, as stated in the jury instruction. As a result, the short-hand language used on the verdict sheet constituted an incomplete and improper supplemental jury instruction on the law of accomplice liability that supplanted the trial court's prior oral instructions to the jury.

The State argues that the issue was not preserved properly for our consideration. We disagree. The arguments made by defense counsel at trial were, in our view, sufficient to put

the trial court on notice of Britton's objection to including parenthetical material on the verdict sheet that contained only a shorthand version of what was included in the jury instructions. *See Robinson v. State*, 410 Md. 91, 103 (2009)(fairness and the orderly administration of justice is advanced by requiring counsel to bring the position of their clients to the attention of the trial court so it can pass upon, and possibly correct any errors in the proceedings)(relying on *State v. Bell*, 334 Md. 178, 189 (1994)).

Although the issue was preserved for appellate review, under the facts of this particular case, reversal is not required. A verdict sheet "is merely a tool for the jury to use in order to aid in its deliberation . . . ." *Ogundipe v. State*, 424 Md. 58, 76 (2011). The verdict sheet and the jury instructions do not carry equal weight. In *Davis v. State*, we considered whether the trial court violated the presumption of a defendant's innocence when it utilized a verdict sheet that listed the first option under each charge as "guilty" rather than "not guilty." *Davis*, 196 Md. App. 8, 107 (2010). In concluding that the placement of the "guilty" option did not dilute the principle that guilt must be established beyond a reasonable doubt, we considered the verdict sheet in light of the instructions given to the jury. We recognized that the verdict sheet and the jury instructions do not carry equal weight in guiding a jury, stating:

> The verdict sheet provides a much more limited guide for the jury, while the instructions are the foremost guide for the jury. A verdict sheet does not typically recount the elements of the crimes charged, the burden of proof on the State, the role of the jury in weighing the evidence, or the myriad other topics addressed in the instructions. A verdict sheet guides a jury in navigating

> the charges that are before it, reminds the jury of the findings that must be made, and provides a mechanism for recording the jury's determination on each charge.

Id. at 113.

In the case at hand, we are not persuaded that the parenthetical material included on the verdict sheet coerced the jury into considering the State's aiding and abetting theory.[3] The jury received the verdict sheet after it had been given a thorough and detailed

[3] In its closing argument, the State argued that accomplice liability was an issue:

> [T]he defendant raised the stakes when he introduced a handgun. He raised the stakes when he introduced somebody else with a handgun. That is where accomplice liability comes into play. . . . I'm not going to sit here and argue to you for one second that physically the cell phone was taken by Delontae Britton. However, what accomplice liability says is that the actions of the defendant and the actions of the co-conspirator, they both can be held accountable for. What does that mean? In the commission of this robbery, the fact that the defendant wasn't the one who physically obtained the cell phone does not mean he's not guilty. In fact, they both worked in tandem. They both worked as a team. And the actions of the co-conspirator coupled with the actions of the defendant are what lead to the robbery of Reina Fernandez. That's what that means.
>
> And so to put it another way, if you go to a fast food restaurant and order something from anybody, any restaurant, and order something from a waitress, does that waitress prepare the food? No. Usually not, unless it's a small establishment. The cook will prepare the food, bring the food. The waitress will bring the food and present it to a customer. They work in tandem. Without that cook, the food doesn't get on your plate. Without that waitress, the food doesn't get on your plate. Without Delontae Britton, this robbery cannot occur. Without the co-conspirator, Reina Fernandez cannot get robbed.

explanation of conspiracy and the concepts of aiding and abetting via the jury instructions.[4]

[4] The jury was instructed, in part, as follows:

> The defendant is charged with the crime of conspiracy to commit robbery with a dangerous weapon and/or robbery. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy, the State must prove, (1) that the defendant agreed with at least one other person to commit the crime of robbery with a dangerous weapon and/or robbery. And, (2), that the defendant entered into the agreement with the intent that the crime of robbery with a dangerous weapon and/or robbery be committed.
>
> * * *
>
> You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove beyond a reasonable doubt that the crime was committed and the defendant committed it.
>
> And, lastly, as to accomplice liability, this is the theory that may be argued to you in this case. The defendant may be guilty of robbery with a dangerous weapon, robbery, first degree assault and/or second degree assault as an accomplice, even though the defendant did not personally commit the acts that constitute that crime.
>
> In order to convict the defendant of robbery with a dangerous weapon, robbery, first degree assault and/or second degree assault as an accomplice, the State must prove that the robbery with a dangerous weapon, robbery, first degree assault and/or second degree assault occurred and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to the primary actor in the crime that he was ready, willing and able to lend support, if needed.

(continued...)

The language at issue did not highlight or specifically direct the jury to consider that theory, but simply acknowledged that jurors were permitted to consider that theory of criminal liability. The trial court specifically instructed the jurors that they would receive a written copy of the instructions, that the "instructions that I give you about the law are binding upon you," that "you must apply the law as I explain it in arriving at your verdict," and that "any comments that I may have made or may make about the facts are not binding upon you and are advisory only. You are the ones to decide the facts and apply the law to those facts."

In light of the particular circumstances of this case, it was not an abuse of discretion on the part of the trial judge in including the parenthetical language on the verdict sheet. That is not to say that including such parenthetical material is a practice we encourage. Under the facts of this case, however, the use of the word "participate" was merely a synonym for the term "aid and abet," as defined in the instructions given.

[4](...continued)

> A person need not physically be present at the time and place of the commission of the crime in order to act as an accomplice. The mere presence of the defendant at the time and place of the commission of the crime is not enough to prove that the defendant is an accomplice. If presence at the scene of the crime is proven, that fact may be considered along with all the surrounding circumstances, in determining whether the defendant intended to and was willing to aid the primary actor, for example by standing by as a lookout to warn the primary actor of danger and whether the defendant communicated that willingness to the primary actor.

II.

Britton next contends that the evidence was insufficient to sustain his conviction for conspiracy to commit armed robbery. More specifically, he argues that the State did not produce any evidence to show "the formation of an agreement prior to the completed crime." This issue is not properly before us.

Maryland Rule 4-324(a) requires a defendant to "state with particularity all reasons why" a motion for judgment of acquittal should be granted. At the conclusion of the State's case, defense counsel requested judgment of acquittal with respect to a number of counts, including conspiracy to commit armed robbery and conspiracy to commit robbery as to Adams, Carmen and Simms. As to Adams, counsel argued that there was no evidence presented as to what happened to him on the day of the robbery other than the fact that he was in the restaurant. As to Carmen and Simms, counsel argued that there was no evidence that anyone attempted to take anything from them.

The court granted the motion for judgment of acquittal stating that "the evidence adduced in this case supports there was one conspiracy, whether it was a conspiracy to rob with a dangerous weapon or conspiracy to rob, is really a question of fact." The court determined that the counts charging conspiracy to commit armed robbery and conspiracy to commit robbery of Adams, Carmen, and Simms were "duplicative conspiracies or conspiracies which are subsumed into the bigger conspiracy to rob the establishment of which Hollander was a custodian of the funds."

At the close of the evidence, defense counsel renewed the motion for judgment of acquittal. As to the one remaining conspiracy count, counsel stated that the defense would "submit on our prior arguments." The court denied the motion.

At no time did defense counsel argue, in support of its motion for judgment of acquittal, that the State failed to produce evidence of the formation of a conspiratorial agreement. As a result, the issue was not preserved properly for our consideration.

But, even if the issue was properly before us, Britton would fare no better. The standard for reviewing the sufficiency of the evidence 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hobby v. State*, 436 Md. 526, 537-38 (2014). We give "due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Harrison v. State*, 382 Md. 477, 488 (2004)(and cases cited therein). In performing its function, the jury is free to accept the evidence it believes and reject that which it does not believe. *Muir v. State*, 64 Md. App. 648, 654 (1985). When reviewing a challenge to the sufficiency of the evidence, we "view the evidence, and all inferences fairly deducible from the evidence, in a light most favorable to the State." *Hackley v. State*, 389 Md. 387, 389 (2005)(citations omitted).

A conspiracy is "the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Carroll v. State*,

428 Md. 679, 696 (2012). The agreement underlying the conspiracy "need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Stevenson v. State*, 423 Md. 42, 52 n.2 (2011). A conspiracy may be, and often is, established by circumstantial evidence from which an inference of common design may be drawn. *McClurkin v. State*, 222 Md. App. 461, ___, 113 A.3d 1111, 1126 (2015); *Armstead v. State*, 195 Md. App. 599, 646 (2010)(and cases cited therein).

In this case, Carmen testified that one of the robbers went into the manager's office and took money while another person pointed a gun at employees, and held them in the kitchen. Evidence was also presented that, initially, Fernandez thought "Delontae" was playing with her, but later realized she was being robbed when the person with Britton held a gun to the back of her head and took her cell phone. From this evidence, the jury could find that there was a meeting of the minds between Britton and the other person to rob the restaurant.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.