Circuit Court for Prince George's County
Case No. CT181222A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 956

September Term, 2019

EDWARD WRIGHT, III

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 8, 2020

After a jury trial in the Circuit Court for Prince George's County, Edward Wright, III, appellant, was convicted of the following crimes against Angel Argueta Orellana: carjacking; robbery; second-degree assault; unlawful taking of a motor vehicle; theft of property having a value of $1,500 to under $25,000; conspiracy to commit armed carjacking; conspiracy to commit carjacking; conspiracy to commit armed robbery; conspiracy to commit robbery; and, soliciting and intimidating a witness. Appellant was also convicted of the following crimes against Kaitlyn King: robbery; second-degree assault; theft of property having a value of $100 to under $1,500; conspiracy to commit armed robbery; conspiracy to commit robbery; and, soliciting and intimidating a witness. The court imposed an aggregate sentence of 30 years, with all but 13 years suspended, and gave credit for 397 days of time served. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the circuit court abuse its discretion in failing to ask the prospective jurors, during *voir dire*, if they understood and could follow the principal that an accused person has the right not to testify?
>
> II. Did the circuit court err in ruling that no discovery violation had occurred and, thereafter, in failing to consider a remedy?
>
> III. Did the circuit court err or abuse its discretion in restricting defense counsel's cross examination of Mr. Argueta Orellana?
>
> IV. Must the sentence for conspiracy to commit robbery with a dangerous weapon (Kaitlyn King)(Count 21) merge with the sentence for conspiracy to commit carjacking with a dangerous weapon (Angel Bladamir Argueta Orellana)(Count 11) where there was evidence of only one agreement between the co-conspirators?

V. Must the commitment record be corrected to reflect that appellant was sentenced to an executed 13 years commencing May 6, 2018?

For the reasons set forth below, we shall reverse appellant's convictions, remand for further proceedings consistent with this opinion, and address some of his other challenges to guide those proceedings on remand.

FACTUAL BACKGROUND

In February 2018, Angel Bladamir Argueta Orellana was living in the basement of a home in College Park. His sixteen-year-old girlfriend, Kaitlyn King, was staying with him. Orellana's friend of sixteen years, Darlan Menjivar, who was known as "Flacko," also lived in the basement. Menjivar had a friend named Nicole Curtis, who was known as Nikki. Orellana had known her for about one year. On February 23, 2018, Orellana sent a text message to Curtis asking if she knew anyone who had some Xanax. Curtis gave him a phone number. After sending a text message to that number, Orellana arranged to meet someone in the area of Oxen Hill and Fort Washington in a location that was not familiar to him.

Orellana drove King's Chrysler 200 to the meeting place and King accompanied him. King thought they were going to purchase "weed." The driver's window on the Chrysler had been broken the week before. When they arrived at the pre-arranged location, which was in a residential area, it was dark. Orellana parked the car and sent a text message to his contact person to say that he was at the meeting spot. Orellana did not receive any response to the text message, but he remained in the car. According to both Orellana and King, "out of nowhere," a man dressed in black and carrying a gun approached the driver's

side of the Chrysler. Orellana described the man as an African American, "at least" 6 feet tall, slim, and wearing a ski mask and dark clothing. Orellana could see the man's eyes through the face mask. King described the man as being extremely tall, skinny, and wearing a black mask, hoody, and shoes. She could see his eyes and described him as having a "younger looking" face with no wrinkles around his eyes."

The man had a gun, "like a sawed off shotgun," in his hand. He pointed the gun next to Orellana's head and told him to get out of the car. Orellana told the man that there was nothing in the car but a little bit of "weed" and handed him the money that he had on him. The man threw the money on the ground and yelled, "[g]et the fuck out of the car, just get out, don't fucking say anything." Orellana got out of the car and the man got in and pointed the gun at King's head. King, who had taken off her shoes and was barefoot, exited the car, leaving her shoes, jacket, phone, and other items in the car. The man took Orellana and King's cell phones and drove away in the Chrysler.

Orellana and King asked a motorist for help, and while they were speaking to that motorist, they saw the Chrysler "come back around." The motorist drove Orellana and King to the police station. At the police station, Orellana and King were separated. Thereafter, each of them wrote a statement. Orellana told police he had been planning to purchase marijuana. He was shown a photographic array from which he identified appellant as the person who took the Chrysler. Orellana also identified a photograph of Nicole Curtis. Orellana claimed that he had seen appellant a few days before when he was in Curtis's car with Menjivar. King reported that her Michael Kors backpack, a purse containing a diamond and emerald bracelet and a diamond pendant, and a Nikon camera

were taken along with her iPhone 8 Plus. King was shown a photographic array from which she identified appellant. She also identified photographs of Curtis and Menjivar. King told police that she had not seen appellant prior to the night of the incident. Later, Orellana reminded her that two to three nights before the incident, she had seen Curtis, Menjivar, and appellant sitting in Curtis's car outside Orellana's house. She had not met appellant before that time. Police recovered King's vehicle shortly before 10:30 p.m. on the night of the incident.

When Orellana returned to his home, he confronted Menjivar about what had happened, saying, "[w]hat the fuck, you set me up?" Menjivar responded, "[i]t wasn't supposed to go down like that." When Orellana asked Menjivar how it was supposed to go down, Menjivar said, "[d]on't say anything. These people are going to try to kill you." Menjivar said he could take Orellana to the car, but Orellana knew that the police had already located the vehicle.

Police later asked King to return to the police station. They showed her photographs of items that had been found in appellant's house. King identified her backpack, purse, diamond and emerald bracelet, and iPhone. Police returned the phone and the contents of the backpack and purse. When King went through the items that were returned to her, she found a face mask, which she returned to the police.

At about 8:30 or 9 p.m. on the night of the incident, Prince George's County Police Officer Kavon Lewis and his partner, Officer Aaron Thompson, were patrolling in an unmarked cruiser when they encountered appellant as he came out of a wooded area near the Heather Hills apartment complex. Officer Lewis testified that appellant tried to avoid

him and his partner and that he kept looking at them and moving from one side of the sidewalk to the other. Officer Lewis noticed that appellant had a women's bookbag and asked appellant to "come over" to him. Appellant told the officers that the bookbag belonged to his girlfriend and that he was taking it to her house. Appellant was "[v]ery nervous, sweating, [and] trying to avoid any conversation or speaking about anything." Officer Thompson testified that appellant gave permission for him to look inside the Michael Kors backpack. Officer Thompson observed some jewelry and appellant said that it belonged to his girlfriend. After that encounter, appellant walked away, but kept looking back at the police and eventually started running. About 15 to 20 minutes later, the officers received a call over the police radio that there had been a carjacking nearby.

Police executed a search warrant at appellant's home at 5909 Fisher Road, apartment 12, in the Temple Hills area of Prince George's County. They seized a brown Michael Kors backpack from a closet floor and a pink purse from under a bed. They also seized a white Apple iPhone from appellant's bedroom and later obtained a warrant to search that phone. Police also obtained a warrant and conducted a search of Nicole Curtis's residence, where they seized a black cell phone. Aven Odhner, who testified as an expert in cell phone technology and forensic extractions, testified that data was extracted from appellant's and Curtis's cell phones. A series of text messages between appellant and Curtis was admitted in evidence. Those messages indicated that appellant and Curtis planned to rob Orellana and King.

While appellant was in jail, he made telephone calls to Curtis and Menjivar that were recorded. Portions of those calls, in which appellant asked Curtis and Menjivar to

make sure that witnesses did not come to court, were admitted in evidence. We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion in failing to ask prospective jurors during *voir dire* if they understood the principal that an accused person has the right not to testify. We review "'for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question.'" *Brice v. State*, 225 Md. App. 666, 677 (2015)(quoting *Pearson v. State*, 437 Md. 350, 356 (2014)).

During *voir dire*, the trial judge asked the prospective jurors various questions including the following:

> THE COURT: At the conclusion of this case the Court will give you instructions as to the law of this case. These instructions will be binding upon you. In other words, you will be required to follow the Court's instructions.
>
> Will any member of the jury panel have difficulty in adhering to and following the Court's instructions?
>
> No affirmative response.
>
> Does any member of the jury panel have any issue with the concept of presumption of innocence in that the State must prove the guilt of the Defendant beyond a reasonable doubt?
>
> No affirmative response.

At the conclusion of the court's questioning, the judge asked the parties if they had any additional questions to ask. Defense counsel requested that the court ask questions 13

and 15 from a list of written questions he had submitted. Those proposed *voir dire* questions asked:

> 13. In a trial, the prosecutor has the "burden of proof." The prosecutor must prove Mr. Wright is guilty. In contrast, Mr. Wright does not need to prove that he is innocent and his attorneys are not required to call a single witness. Do any of you have a problem with the burden of proof?
>
> * * *
>
> 15. When a Defendant testifies, her life or freedom may depend on how well she does. Do any of you have a problem accepting that an innocent person may choose not to testify?

In response to defense counsel's request, the following colloquy occurred:

> THE COURT: I can't give, when a defendant testifies their freedom depends on it. I can't say that.
>
> [DEFENSE COUNSEL]: Then, you won't have any problem accepting that a person may choose not to testify.
>
> THE COURT: I'm going to give that instruction at the end, and it's right there. They have to follow all of the instructions that I give you, and they said they would.
>
> [DEFENSE COUNSEL]: I would still ask about that.
>
> [PROSECUTOR]: And the State objects to Number 15.
>
> THE COURT: I'm not doing 15.
>
> [THE PROSECUTOR]: I understand.
>
> THE COURT: I just said why, because I asked the general ones on all instructions.

Appellant acknowledges that the issue raised in Question 13, that the State has the burden of proof, was addressed in the court's question that contained the statement, "the State must prove the guilt of the Defendant beyond a reasonable doubt." He also

acknowledges that "the court was not required to present to the jury" the first sentence in his proposed Question 15, which stated that "[w]hen a Defendant testifies, her life or freedom may depend on how well she does[,]" because that language was "unnecessary." He maintains, however, that the portion of Question 13 that addressed the fact that his attorneys were "not required to call a single witness," was related to the issue addressed in Question 15, that "an innocent person may choose not to testify[,]" and that neither of those issues were fairly covered in the questions asked by the court.

The State acknowledges that Maryland law requires a trial judge to ask members of the venire whether they can comply with the judge's instructions about a defendant's right not to testify, but it asserts that appellant did not request a *voir dire* question inquiring specifically into whether the potential jurors would have a problem accepting the legal principle that a defendant has a right not to testify. According to the State, the questions proposed by appellant pertained to whether the jurors "would 'have a problem accepting' a behavioral phenomenon: that someone who chooses not to testify might be innocent, and that it is not only the guilty who refuse to take the stand." We are not persuaded by the State's argument.

Recently, in *Kazadi v. State*, 467 Md. 1 (2020),[1] the Court of Appeals specifically addressed the issue of *voir dire* questions pertaining to the presumption of innocence, the burden of proof, and a defendant's right not to testify, stating:

[1] *Kazadi* applies to "any other cases that are pending on direct appeal when" the opinion was filed. *Kazadi*, 467 Md. at 47. Accordingly, appellant is entitled to the benefit of its holding.

> On request, a trial court must ask *voir dire* questions that are reasonably likely to reveal a cause for disqualification involving matters that are liable to have undue influence over a prospective juror. Such matters may be comprised of biases related to the crime or the defendant. Certainly, the belief that a defendant must testify or prove innocence, or an unwillingness or inability to comply with jury instructions on the presumption of innocence, burden of proof, or a defendant's right not to testify, otherwise would constitute a bias related to the defendant. As a matter of fact, it is difficult to conceive of circumstances that could be more prejudicial to a defendant's right to a fair trial.

467 Md. at 45.

Certainly, the questions proposed by appellant were somewhat inarticulate, but the trial court should have modified the questions. In *Pearson v. State*, the Court of Appeals wrote:

> Where an overbroad proposed voir dire question encompasses a mandatory voir dire question, however, a trial court should: (1) rephrase the overbroad proposed voir dire question to narrow its scope to that of the mandatory voir dire question; and (2) ask the rephrased voir dire question. See [*State v. Shim*, 418 Md. 37, 55, 12A.3d 671 (2011)]("A proposed voir dire question need not be in perfect form, and the [trial] court is free to modify the proposed question as needed.")

Pearson, 437 Md. 350, 369 n. 6 (2014).

The record makes clear that appellant requested the court to inquire into whether the potential jurors believed that a defendant must testify, call witnesses, or prove his innocence. As the trial court failed to make the requested inquiry as required by *Kazadi*, we reverse appellant's convictions and remand for further proceedings. We shall address the other issues raised by appellant to guide the proceedings on remand.

II.

Appellant challenges the trial court's denial of his motion *in limine* with regard to statements made by him to police officers who questioned him after observing him exit the woods near his apartment. On the Friday before trial, which began on Tuesday, March 19, 2019, the State provided defense counsel with a document advising that, on the day of the incident, appellant had been stopped by the police and made certain statements including that the backpack he was carrying belonged to his girlfriend. Defense counsel moved, *in limine*, to prevent the State from raising "anything from that initial stop" of appellant. He argued that the failure to provide information about the statements constituted a discovery violation under Maryland Rule 4-263 and raised a Fourth Amendment issue as to whether there was a *Terry*[2] stop or reasonable suspicion to stop him. In light of the fact that the defense is now aware of the document asserting that appellant made statements to the police, we need not address this issue to provide guidance on remand.

III.

Appellant contends that the trial court erred or abused its discretion in restricting defense counsel's cross-examination of Orellana about his drug use. According to appellant, such evidence would have supported his defense that Orellana and King had traded their belongings for Xanax. We agree and explain.

Appellant's defense was that Orellana and King were drug addicts and that they traded their belongings to him in exchange for Xanax. Orellana testified that he suffered

[2] This is a reference to *Terry v. Ohio*, 92 U.S. 1 (1968).

from depression "because of [his] legal status and financial things," that he could not afford health insurance, that he did not "have enough to get a prescription, or a legal prescription," and that he used Xanax to treat his depression. On February 23, 2018, he could not get any Xanax, so he sent a text to Curtis asking if she knew anyone who had some. Curtis responded saying that she knew "a guy" and provided his phone number. Initially, Orellana testified that he was trying to buy "like ten" bars, a slang term used for Xanax, but he later acknowledged that he was attempting to purchase 35 bars. After defense counsel showed Orellana his text messages, the following exchange occurred:

> [Defense Counsel]: And those are your texts on February 23rd, 2018?
>
> [Orellana]: Yeah.
>
> Q. So, in fact, you asked first for 35 bars?
>
> A. Uh-huh.
>
> Q. At first you said you didn't want the green and yellow ones because those have fentanyl in them?
>
> A. Uh-huh.
>
> Q. And then you said, "That's fine, I'll take 35 green bars for 50."
>
> A. Uh-huh.
>
> Q. And then you came back just a little while later and said, "Just have them because I'll probably need 30 more."
>
> A. Yeah, but probably.
>
> Q. Just probably need 30 more.
>
> A. Yeah, but I probably would.

Orellana testified that he had never before texted Curtis about Xanax. On cross-examination, however, he acknowledged that February 23, 2018 was not the first time that he had purchased Xanax, and that he had, in the past, purchased drugs "[d]irectly from" Curtis.

Appellant argues that the trial court restricted his cross-examination of Orellana and prevented him from establishing the extent of Orellana's use of Xanax and his theory that Orellana was a drug addict who traded items in exchange for Xanax. Specifically, appellant directs our attention to the following exchanges:

> [Defense Counsel]: It's your testimony that you only use one pill at a time, or you, in fact, use more than one pill at a time?
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: That's sustained.
>
> * * *
>
> [Defense Counsel]: And you asked [Nicole Curtis] to front you the money?
>
> [Prosecutor]: Objection, Your Honor.
>
> [Orellana]: No.
>
> THE COURT: Yeah, I'm going to sustain that, and it's stricken.
>
> At a bench conference, that line of questioning was discussed as follows:
>
> [Defense Counsel]: He's trying to buy drugs again from [Curtis] –
>
> THE COURT: He admits he's tried. Now what's the next question?
>
> [Defense Counsel]: They're saying he's not an addict because he paid for his own apartment now a year later. Now, he's admitting he purchased drugs before –

> THE COURT: You can't open the door right now. In my courtroom, that's not going to happen.
>
> [Prosecutor]: He admitted –
>
> THE COURT: He testified he uses Xanax. And that's what he said he was going to buy that day. That doesn't make him a drug addict.

Appellant attempted to question Orellana about whether King had traded her purse for drugs, but the trial court sustained the State's objection to that inquiry. The court also restricted defense counsel from using certain social media posts made by Orellana to impeach his testimony that he used Xanax for medical purposes. After Orellana authenticated his Twitter account, appellant was permitted to question him about one Twitter post, identified as defense exhibit 11, made on May 17, 2018, that stated, "I love drugs drugs turn a boy into a king[.]" Orellana stated that the words in the post were lyrics from a song that he liked. The court did not permit the defense to question Orellana about other Twitter posts he had made.

The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights both guarantee a criminal defendant the right to confront adverse witnesses. *Pantazes v. State*, 376 Md. 661, 680 (2003); *Merzbacher v. State*, 346 Md. 391, 411-12 (1997); *Taylor v. State*, 226 Md. App. 317, 332-33 (2016). This right includes "the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." *Martinez v. State*, 416 Md. 418, 428 (2010)(and cases cited therein). "The ability to cross-examine witnesses, however, is not unrestricted." *Id.* (citations omitted). A trial court "may impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment,

prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Id.* (citation omitted). "Only when defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[,]' is the right of confrontation satisfied." *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). Thus, limitation of cross-examination "should not occur . . . until after the defendant has reached his constitutionally required threshold level of inquiry." *Smallwood v. State*, 320 Md. 300, 307 (1990)(internal quotation and citation omitted). We review a trial court's decision to limit cross-examination for abuse of discretion. *Pantazes*, 376 Md. at 681. In determining whether a trial court abused its discretion, we ask "whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial. *Id.* at 681-82.

In the case at hand, the defense attempted to demonstrate that Orellana was not taking Xanax as a medication to treat his depression, was taking it for pleasure and because he was addicted to it, and that because he had an addiction, he would be more willing to trade his belongings to get the drug than a person who was using the drug to treat depression. Evidence of Orellana's use of and addiction to Xanax was relevant. *Walter v. State*, 239 Md. App. 168, 198 (2018)("'Evidence is relevant if it tends to 'make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'")(quoting Md. Rule 5-401). The trial court's restrictions on appellant's cross-examination prevented him from establishing his defense and inhibited his ability to receive a fair trial.

IV.

Appellant contends that because there was only one conspiracy, the sentence imposed for conspiracy to commit robbery with a dangerous weapon as to King must merge with the sentence for conspiracy to commit carjacking with a dangerous weapon as to Orellana.[3] The State acknowledges that appellant was sentenced for two conspiracies arising out of a single criminal agreement and that one of the sentences should be vacated. We agree.

The State relied on text messages to show that there was an agreement to rob Orellana and King of the car and their belongings when they arrived at the agreed-upon location to purchase drugs. When two convictions arise from the same criminal agreement, the sentences must merge. *Savage v. State*, 212 Md. App. 1, 31 (2013). "'The unit of prosecution is the agreement or combination rather than each of [the] criminal objectives.'" *Jordan v. State*, 323 Md. 151, 161 (1991)(quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). This principle applies where there is a single conspiracy with more than one intended victim. *Ayers v. State*, 335 Md. 602, 641 (1994)(citing *Jordan*, 323 Md. at 161). Accordingly, the sentence imposed for conspiracy to commit robbery with a dangerous

[3] For Count 11, conspiracy to commit armed robbery of Orellana, appellant was sentenced to 30 years, with all but 13 years suspended, to be served concurrent with the sentence imposed for Count 2, the carjacking of Orellana, for which appellant was sentenced to 30 years, with all but 10 years suspended, and credit for 397 days of time served. Counts 12 through 14, which charged conspiracy to commit carjacking, armed robbery, and robbery, were merged into Count 11. For Count 21, conspiracy to commit armed robbery of King, appellant was sentenced to 20 years, with all but 10 years suspended, to be served concurrent with the sentence imposed for Count 2. Count 22, conspiracy to commit robbery of King, was merged into count 21. (Tr. 6/7/19 at 39-41)

weapon as to King must merge with the sentence for conspiracy to commit carjacking with a dangerous weapon as to Orellana.

V.

The final issue presented for our consideration is whether the commitment record must be corrected to reflect the proper sentence of 13 years, commencing on May 6, 2018. Appellant is correct that although the commitment record provides that the "total time to be served is: 15 Years to begin on 06-May-2018[,]" the transcript clearly reflects an aggregate sentence of 30 years with all but 13 years suspended, beginning on June 7, 2019, with 397 days of credit for time served. (Tr. 6/7/19 at 40) In Maryland, "'[w]hen there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails.'" *Potts v. State*, 231 Md. App. 398, 411 (2016)(quoting *Lawson v. State*, 187 Md. App. 101, 108 (2009)). In this case, however, because of our decision to vacate the judgments of the trial court and remand for further proceedings, the issue with regard to the commitment record is moot.

JUDGMENTS REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.