Circuit Court for Harford County
Case No. C-12-CR-19-000499

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1049

September Term, 2020

ROBERT ZEMAN

v.

STATE OF MARYLAND

Friedman,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 10, 2022

A jury, sitting in the Circuit Court for Harford County, found Robert Zeman, appellant, guilty of accessory after the fact to second degree murder; unlawfully wearing, carrying, and transporting a handgun on or about his person; unlawfully possessing a regulated firearm after being convicted of a disqualifying crime; and participating in the illegal sale of a regulated firearm. The court sentenced him to ten years for accessory after the fact to second degree murder; three years for unlawfully wearing, carrying, and transporting a handgun upon and about his person, to be served concurrently with the accessory sentence, five years for unlawfully possessing a regulated firearm after being convicted of a disqualifying crime, to be served consecutively to the accessory sentence; and five years for participating in the illegal sale of a regulated firearm, to be served consecutively to the unlawful possession sentence.

Mr. Zeman presents three questions for our review, which we have reordered and consolidated into two:

I. Did Mr. Zeman's trial counsel provide Mr. Zeman with ineffective assistance of counsel by failing to state with particularity the reasons why a motion for acquittal should be granted?
II. Did the State provide the jury with sufficient evidence to conclude beyond a reasonable doubt that Mr. Zeman was guilty of unlawfully selling a regulated firearm and accessory after the fact to second degree murder?

FACTUAL AND PROCEEDRUAL BACKGROUND

On March 5, 2018, Joseph Parrish, appellant's brother, was arrested and charged for the robbery of Jeffrey Coudon. Parrish was released on September 18, 2018, pending trial. On November 11, 2018, Jeffrey Coudon was found in his apartment with gunshot wounds

to his head and shoulder, from which he later died. In Coudon's apartment, police found a cigarette with Parrish's DNA on it, and a shell casing. Coudon's taser was missing and no gun was found.

On December 13, 2018, Jonathan Craig alerted police that he had been the victim of an armed robbery. Craig told police that Parrish had stolen the keys to both his car and apartment. Responding to Craig's apartment, police found and arrested Parrish. They did not find a gun.

Parrish telephoned Mr. Zeman from jail on December 14, 2018. He told Mr. Zeman that he was being accused of robbery and asked him to go to Chris Gray's house and "ask him where his bike is" and to get it. Mr. Zeman went to Gray's house and got the "bike," which was actually a book bag containing a phone, wallet, taser, some clothing, and a .380 Bersa pistol. According to Mr. Zeman, he sold the Bersa to Brian Humphreys that same day.

On February 8, 2019, the police executed a warrant to search Mr. Zeman's house for evidence related to the armed robbery. Mr. Zeman showed the police the taser and where the book bag was. A .380 bullet and a sweatshirt were found in the bag; no gun was recovered.

Detectives interviewed Mr. Zeman on February 13, 2019. He admitted to picking up the bag from Gray's house, but denied that a gun was in the bag when he got it. Mr. Zeman agreed to a second interview with police on February 28, 2019. In that interview,

he was informed that the bullet found in the book bag matched the shell casings found at the scene of the November 11, 2018, murder of Jeffrey Coudon, and that the taser, which had Parrish's DNA on it, belonged to Coudon. Mr. Zeman denied any knowledge of Coudon's murder.

On March 6, 2019, Havre de Grace police responded to a report of a shooting. When they arrived, Patty Walker informed them that Brian Humphreys and his housemate, Timothy Jordan, had been involved in the shooting. A search warrant for Mr. Humphreys' house was executed on March 22, and a .380 Bersa pistol was recovered. A test of the pistol resulted in a match with the bullets used in Coudon's murder. According to the police, Humphreys told them that he purchased the pistol from Mr. Zeman shortly after Mr. Zeman had been told by the police about the Coudon murder. Humphreys' housemate, Danyelle Marshall, informed police that she was at the house when Mr. Zeman sold the Bersa pistol and that she heard Mr. Zeman tell Humphreys that there was a "body on the gun."

Mr. Zeman was arrested on April 16, 2019. In a following interview, and after denying having sold the gun, he admitted to selling it on December 14, 2018, after picking up the bag from Gray's house. He stated that he sold it to Jordan for $250 because Jordan kept bothering him about wanting a gun. When detectives asked him if he told Jordan that there was "a body on the gun," he said he told Jordan "the exact truth" and "[y]o, this is

what happened."[1] According to Mr. Zeman, when he first got the gun, he hid it "down by the park . . . underneath some rocks and stuff." He maintained throughout the investigation that he did not know about Coudon's murder until police told him about it on February 28, 2019.

Two phone calls Mr. Zeman made from jail were recorded on May 5, 2019. The first was to his mother. He told her that he did not know that Coudon had died and that he didn't understand the charges against him because he did not know Coudon. He also told his mother that he got rid of the Bersa as soon as he got it because he did not want Parrish to get into trouble. In the call to his aunt, Mr. Zeman told her that he was stupid for trying to help Parrish, that he did not know about the murder until his house was searched on February 8, and that he sold the Bersa the day he got the book bag.

At Parrish's trial, Humphreys testified five times that he had purchased the gun from Parrish, but then that he had purchased it from Zeman. When asked when he purchased it, Humphreys said that it was on a Friday and "believe[d] it was the 28th maybe of February."

[1] For context, the conversation with police went like this:
"[Cpl. Cokewell]: Now, was [Jordan]—did [Jordan]—did [Jordan] know there was a body on it when you gave it to him?
[Mr. Zeman]: I told [Jordan] the exact truth. I was like, look—
[Cpl. Cokewell]: And you told [Jordan] there was a body on it?
[Mr. Zeman]: I was like, "Look, man. I don't want no parts of this." I was like, "Yo, this is what happened." Boom. I'm—
[Cpl. Cokewell]: Oh, you got—you got cash and then you got this fucken up off you?
[Mr. Zeman]: Yeah. Cause I didn't—I didn't want to get in no trouble. Honestly."

During Mr. Zeman's trial, Humphreys testified that he had "known [Zeman] for years" but "hadn't seen him in a while" before purchasing the pistol. Humphreys explained that he and Zeman "never really hung out . . . but maybe back in the day, fifteen years ago, ten years ago." According to Humphreys, Mr. Zeman had mentioned the gun during his visit and that he had bought it for $350. Humphreys testified that Jordan and Marshall were there when he bought it.

Marshall testified that when Mr. Zeman sold the gun to Humphreys, he told him that there was "a body on the gun."[2] Evidence was introduced at trial that both Humphreys and Jordan had convictions that disqualified them from possessing firearms, and it was stipulated that Mr. Zeman was also prohibited from possessing a handgun based on previous convictions.

At the end of the prosecution's case, there was the following exchange:

> [The State]: We believe all of our exhibits are in, Your Honor. We would rest.
>
> [The Court]: Okay. Did you want to make your motion at this time now?
>
> [Defense Counsel]: Your Honor, I'll make the motion just for the record without argument. I think it is obviously a jury issue.
>
> [The Court]: All right. The motion is denied. Do you anticipate putting anything on today?

[2] She first said "gun on the body," but after further questioning from counsel, she testified to Mr. Zeman saying there was a "body on the gun."

> [Defense Counsel]: Your Honor, I think if we were to call anyone it would probably just be our client and I haven't had the time to talk to him about his testimony at this point and advise him of his right to testify or not testify.

When Mr. Zeman chose not to testify, this exchange followed:

> [The Court]: Is there a motion at this time?
>
> [Defense Counsel]: Your Honor, I'll just make a general motion. Well, actually—no, I won't I'll make a general motion Your Honor.
>
> [The Court]: The State?
>
> [The State]: We'll submit also, Your Honor.

I. Ineffective Assistance of Counsel

Standard of Review

To establish an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, Mr. Zeman must prove that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance resulted in actual prejudice at trial. *Williams v. Taylor*, 529 U.S. 362, 391 (2000). To prove deficient performance, it is necessary to identify acts or omissions by counsel that do not indicate reasonable professional judgment. *See Strickland*, 466 U.S. at 690. To prove prejudice, a claimant must demonstrate that those acts or omissions "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687; *see also Bowers v. State*, 320 Md. 416, 427 (1990) (holding that a claimant is required to show a substantial possibility that the result of the proceedings would have been different to establish prejudice).

Contentions

Mr. Zeman contends that consideration of his ineffective assistance of counsel claims on direct appeal is warranted in this case. He asserts that the critical facts are not in dispute and that the only issue is whether the evidence supporting the accessory after the fact to second degree murder and sale of a regulated firearm convictions was sufficient for the jury to conclude beyond a reasonable doubt that Mr. Zeman was guilty of these charges.

Citing *Mosley v. State*, 378 Md. 548, 558-59 (2003), the State contends that considering an ineffective assistance of counsel claim on direct appeal in this case is not appropriate and that such claims are best dealt with in post-conviction proceedings. Moreover, citing *Albertson v. State*, 212 Md. App. 531, 569-70 (2013), the State argues that Rule 4-324(a) is mandatory and that an insufficiency of the evidence claim can only be reviewed "for the reasons given by appellant in his motion for judgment of acquittal." And, because Mr. Zeman's counsel did not state with particularity any grounds to support the acquittal motion, we should decline to consider his request. The State also argues that critical facts are in dispute, including when and to whom Mr. Zeman sold the gun, when he knew about the murder, and the credibility of the witnesses.

Discussion

To be sure, ineffective assistance claims are most often addressed in post-conviction review and not on direct appeal. *Testerman*, 170 Md. App. 324, 335 (citing *Mosley*, 378 Md. at 558-59 (2003) (explaining that post-conviction proceedings are the most appropriate

ways to raise ineffective assistance of counsel claims)); *In re Parris W.*, 363 Md. 717, 726 (2001) ("[O]rdinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel."). But when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *Id.* (citing cases).

To argue that consideration of the ineffective assistance claims is inappropriate on direct appeal, the State focuses on disputes about witness credibility, the timing of the sale, to whom the gun was sold, and when Mr. Zeman first knew about the murder. But those disputes have little, if any, bearing on why counsel, in complete disregard for the demands of Rule 4-324(a), would make an acquittal motion without particularities and fail to renew it. We are persuaded that the critical facts surrounding defense counsel's clearly deficient performance in regard to a motion for judgment of acquittal are not in dispute, and that the ineffective assistance of counsel claims can be evaluated on direct appeal in this particular case.

Rule 4-324(a) states:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the state and, in a jury trial, at the close of all evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the state' case.

Arguing that a "general motion" for acquittal completely disregards the demands of the rule, Mr. Zeman looks to *Testerman* for support. There, the motion was: "Your Honor, I would make a motion as to all charges and I would submit." *Id.* at 330. We evaluated that motion under an ineffective assistance of counsel claim on direct appeal. *Id.* at 330. We held that a general motion of acquittal "fell below an objective standard of reasonableness" and satisfied "the first *Strickland* prong." *Id.* at 335. To determine whether Mr. Zeman was prejudiced by counsel's deficient performance, we will analyze the two sufficiency claims.

II. Sufficiency of the Evidence

Standard of Review

A reviewing court does not retry a case and weigh evidence or try to resolve conflicts within evidence—it defers to rational inferences drawn by the jury so long as there is evidence to support them. *Smith v. State*, 415 Md. 174, 183 (2010). In other words, we do not "second-guess the jury's determination where there are competing rational inferences available." *Id.* (*quoting State v. Smith*, 374 Md. 527, 534 (2003)). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction. . . . 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." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). As we have said, "the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction." *Marlin v. State*, 192 Md. App. 134, 153 (2010)

A. Unlawful Transfer of a Firearm

Contentions

Mr. Zeman contends that the evidence was insufficient to support his conviction for the illegal sale of a regulated firearm. He argues that the State did not prove, beyond a reasonable doubt, that he "knew or had reasonable cause to believe that the firearm purchaser was prohibited from owning a firearm based on a prior disqualifying conviction. And evidence that he was "friends with" Humphreys and Jordan is, in his view, "both factually wrong and legally inadequate" to support an inference beyond a reasonable doubt that he knew they had disqualifying convictions.

The State contends that the evidence was sufficient to show that Zeman knew or had reasonable cause to believe that the person to whom he sold the firearm was prohibited from possessing it. It argues that Mr. Zeman knew Jordan couldn't own the gun because he met with Jordan when he "first got out of jail." And, he had known Humphreys for a long time, and they used to hang out together ten to fifteen years ago. In the State's view, the jury could reasonably infer that Zeman knew or had reasonable cause to believe both Humphreys and Jordan were prohibited from possessing a firearm.

Analysis

To support the conviction for the illegal sale of a regulated firearm, the prosecution had to prove, beyond a reasonable doubt, that Mr. Zeman sold a regulated firearm to an individual who was prohibited from possessing it as the result of a conviction for an offense

disqualifying them from possessing the firearm, and that, when he sold it, Mr. Zeman knew or had reasonable cause to believe that the person receiving it was prohibited from possessing it. Md. Code Ann., Pub. Safety (P.S.) § 5-134(b)(2). Disqualifying crimes under this subtitle are "crime[s] of violence," felonies, and misdemeanors that carry "statutory penalt[ies] of more than two years." Md. Code Ann. P.S. § 5-101(g).

The parties agree that *Att'y Grievance Comm'n of Maryland v. Reno*, 436 Md. 504 (2014), which involved an attorney discipline proceeding, is the only reported opinion interpreting P.S. § 5-134(b). In that case, an attorney bought and gave a handgun to a former client after the client's application to purchase a handgun had been denied and after the client had told the attorney that he had prior charges. *Id*. at 507. In those proceedings, the attorney admitted that she "should have known" that her client was prohibited from possessing the weapon. *Id.* at 508. Nevertheless, the hearing court found that the evidence "merely show[ed] a set of circumstances that [Reno] should have known [that] [her client] was a prohibited person, but it was not established by *clear and convincing evidence* that [Reno] in fact knew that [her client] was a prohibited person." *Id.* (emphasis added). The Court of Appeals reversed, stating that "Reno negatively impacted the public's perception of the legal profession through committing an illegal act." *Id.* at 509. In evaluating Reno's conduct under P.S. § 5-134(b), the Court, noting that the hearing judge did not address whether the attorney had "reasonable cause to believe that [the client] had been convicted of a disqualifying crime," concluded that Reno had reasonable cause to believe that her former client was prohibited from possessing a firearm was supported by the evidence. *Id.*

First, Reno entered a plea of not guilty on an agreed set of facts in the criminal case. On those facts, the trial court in that case had found, beyond a reasonable doubt, that Reno violated P.S. § 5-144(a)(1) because she knowingly participated in the illegal transfer of a regulated firearm. Therefore, she "necessarily had reasonable cause to believe that [her client] had been convicted of a disqualifying crime and violated P.S. § 5-134(b)(2) by transferring the handgun to him." In addition, the findings of the hearing court included several statements the client had made to Reno that provided her with reasonable cause to believe that the client had been convicted of a disqualifying crime. *Id.* at 511. For example, the client told Reno that "he had a prior drug charge for which he received probation before judgment," and a "prescription forgery charge." *Id.* The Court stated that Reno had a responsibility to ask her client whether one or both of those charges resulted in conviction before giving him the handgun. Moreover, Reno had "explicitly conceded" at the disciplinary hearing that she "should have known" that the transferee of the handgun had been convicted of a disqualifying crime.

The burdens of proof in this case and in *Reno* are different. The evidentiary standard in *Reno* was clear and convincing; here, it is beyond a reasonable doubt. *Carroll v. State*, 202 Md. App. 487 (2011) ("It is well established that the State must prove beyond a reasonable doubt each element of a charged offense."). A finding beyond a reasonable doubt involves "reach[ing] a subjective state of near certitude." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The evidence must support more than a "strong suspicion or mere probability" of guilt, and when "the evidence equally supports two versions of events, a

conviction cannot be sustained." *Bible v. State*, 411 Md. 138, 157 (2009); *Taylor v. State*, 346 Md. 452, 458 (1997).

Mr. Zeman never conceded that he knew or should have known Humphreys or Jordan could not own a firearm. Simply knowing that they had been in jail would not rationally support an inference beyond a reasonable doubt that he knew they had been convicted of a disqualifying crime. Nor does evidence that Mr. Zeman himself had been convicted of a disqualifying crime support a reasonable inference that he knew or had reasonable cause to believe that Jordan and Humphreys had been also. Not everyone in jail has been convicted of a disqualifying crime. And, unlike the attorney in *Reno*, he had no professional reason to ask. In short, such evidence might support a "strong suspicion or mere probability," but we are not persuaded that a rational trier of fact on this evidence could find beyond a reasonable doubt that Mr. Zeman knew or had reason to believe that Humphreys and Jordan were convicted of a disqualifying crime as defined under P.S. § 5-101(g).

Clearly, Mr. Zeman was prejudiced by defense counsel's ineffective assistance. Had a proper acquittal motion preserved this issue for appellate review, we would have "directly reviewed and reversed the sufficiency of the evidence of [Mr. Zeman's] conviction" for the unlawful sale of a regulated firearm, and we will do so now. *Testerman*, 170 Md. App. at 343. Both prongs of the *Strickland* test are satisfied in regard to Mr. Zeman's conviction for the illegal sale of a regulated firearm.

B. Accessory After the Fact for Second Degree Murder

Contentions

Mr. Zeman also contends that the evidence was insufficient for a jury to conclude, beyond a reasonable doubt, that he was guilty of having been an accessory after the fact to second degree murder. He argues that the evidence presented by the State was insufficient to prove that he knew about the murder when he sold the gun or that he personally assisted Parrish avoid the consequences of that crime. And that the State's conflicting evidence regarding the timing of the sale and to whom it was sold was "entirely unreliable and in any event, extremely limited." In his view, Humphreys' inconsistent testimony was such that no rational trier of fact could have reached a subjective level of near certitude as to his guilt.

The State contends that the evidence was sufficient to show that Mr. Zeman knew that Parrish committed the murder because police told him during the February 28 interview and that he sold the gun shortly after that interview. In addition, Humphreys testified that he bought the gun two or three weeks before the police seized it, and Marshall testified that she was present for the sale in "early March" and that during the sale Mr. Zeman had said there was "a body on the gun." Therefore, if that timeline was credited by the jury, the evidence was sufficient to support the conviction of accessory after the fact to second degree murder.

Analysis

To sustain the conviction for accessory after the fact to second degree murder, the State had to prove, beyond a reasonable doubt, that Parrish had committed a second degree murder, that Mr. Zeman knew that Parrish had done so, and that he had personally done something to assist Parrish in avoiding the consequences of the murder. *See State v. Hawkins*, 326 Md. 270, 284 (1992). Mr. Zeman argues that the evidence presented by the State was insufficient to prove beyond a reasonable doubt that he knew Parrish committed second degree murder when he sold the handgun.

Mr. Zeman focuses on the inconsistencies in the evidence regarding when he sold the handgun. But evidence does not need to be free from inconsistencies to support a conviction. *See State v. Smith*, 374 Md. 527, 533-34 (2003) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." (quoting *State v. Stanley*, 351 Md. 733, 750 (1998))). When reviewing sufficiency claims, we must review evidence in the light most favorable to the jury's verdict. *State v. Albrecht*, 336 Md. 475, 478 (1994). In other words, the issue "is not whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* at 478-79.

Mr. Zeman contends that inconsistencies in Humphreys' testimony relating to whom and when the gun was sold and Marshall saying "gun on the body" when she meant to say "body on the gun" renders the evidence insufficient. We are not persuaded. Who to believe was for the trier of fact.

Mr. Zeman cites *Robinson v. State*, 5 Md. App. 723 (1969), in support of his insufficiency argument. In that case, only two witnesses tied the alleged accessory to the crime of robbery. The first identified Robinson as having been in the alleged robber's car on the day of the robbery; the second, the arresting officer, simply found the defendant in the car three days after the robbery. In ruling that the evidence was insufficient, we explained that the first witness had only seen a glimpse of the defendant and that her testimony was "hesitant," with "a total lack of positiveness." *Id.* at 728.

Mr. Zeman argues because Humphreys was confused and it took repeated questioning for him to testify at Parrish's trial and Marshall only caught a glimpse of the transaction, their testimony suffers from the "fatal weakness" of the *Robinson* witnesses. Marshall did testify that she purposely left the room and did not see the handgun transaction, but she remained in the residence when it took place and she understood what was about to take place. She was able to identify the people who were about to engage in the transaction. She also testified that she had heard parts of the conversation. Humphreys' testimony and his inability to initially testify truthfully at Parrish's trial does not render his testimony insufficient at Mr. Zeman's trial. After repeated questioning at Parrish's trial,

Humphreys ultimately testified that Mr. Zeman sold him the gun. Marshall testified at Mr. Zeman's trial that the sale to Humphreys was in "early March," which was consistent with Humphreys' testimony that he bought the gun "probably about two week" before police recovered it from him on March 22, 2019. Any sale date in March would be shortly after the latest date that Mr. Zeman would have learned about the Coudon murder. If the testimony of Marshall and Humphreys was believed, it was sufficient for the jury to conclude that Mr. Zeman sold the handgun after learning about the murder in an effort to help Parrish. In short, Mr. Zeman has failed to show a substantial possibility that the result of the trial would have been different on the accessory charge, and therefore has failed to satisfy the prejudice prong of his ineffective assistance of counsel claim on that charge.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY IS AFFIRMED IN PART, REVERSED IN PART, AND THE CASE IS REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE CONVICTION FOR PARTICIPATING IN THE ILLEGAL SALE OF A FIREARM. COSTS TO BE PAID ONE-HALF BY HARFORD COUNTY, ONE-HALF BY THE APPELLANT.