Circuit Court for St. Mary's County
Case No. C-18-CR-18-000311

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1107

September Term, 2019

WAYNE A. JORDAN

v.

STATE OF MARYLAND

Fader, C.J.
Shaw Geter,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: August 3, 2020

On September 1, 2018, in Lexington Park, two men assaulted James Stewart, Alyssa Taylor, and Kyle Romer at gunpoint. After Stewart and Taylor fled, Romer was beaten and robbed.

Crediting evidence that Wayne A. Jordan, appellant, participated and aided in these crimes, a jury in the Circuit Court for St. Mary's County convicted him of robbery with a dangerous weapon ("armed robbery"), first degree assault, and related offenses involving all three victims, for which he was sentenced as follows:

> Count 1: Armed robbery of Kyle Romer, 20 years, suspend all but 15 years, with five years supervised probation
>
> **Count 2: Attempted armed robbery of Alyssa Taylor, 20 years consecutive, suspend all but 12 years, with five years supervised probation**
>
> **Count 3: Attempted armed robbery of James Stewart, 20 years consecutive, suspend all but 12 years**
>
> **Count 4: First degree assault of Romer, merged**
>
> **Count 5: First degree assault of Taylor, merged**
>
> **Count 6: First degree assault of Stewart, merged**
>
> Count 7: Second degree assault of Romer, merged
>
> **Count 8: Second degree assault of Taylor, merged**
>
> **Count 9: Second degree assault of Stewart, merged**

Jordan challenges his convictions on the counts highlighted in boldface, raising the following issues:

1. Was the evidence insufficient to sustain the convictions for two counts of attempted robbery with a dangerous weapon, three counts of first-degree assault, and two counts of second-degree assault?

2. Must the commitment record, probation order, and docket entries be corrected to accurately reflect [his] convictions?

We conclude the evidence is sufficient to support Jordan's convictions and that, as the State concedes, the requested corrections are warranted. Consequently, we shall affirm Jordan's convictions and remand for corrections to the docket entries, commitment record, and probation order.

BACKGROUND

At trial, the State presented evidence that Jordan and his friend Jonathan Barnes assaulted the three victims at gunpoint in an attempt to rob them, that they beat and robbed one of those victims, and that they were soon apprehended with the gun and stolen property. Jordan's defense was that even if he was present during the assault and robbery, he did not have a weapon, did not know what Barnes was going to do, and did not participate in those crimes.

The three victims testified that between midnight and 1 a.m. on September 1, 2018, they were gathered outside Alyssa Taylor's apartment building in Spring Valley. While they were "hanging out[,]" Jordan, whom none of them recalled meeting before, approached and talked to them for "[a] good 10, 15 minutes[,]" eventually speaking to Taylor in a manner that she found "rude." After arguing with Taylor, Jordan walked away and talked on his phone for about "five or ten minutes," until Barnes arrived.

According to both Taylor and Stewart, while Jordan was still on his phone, Barnes walked up to him. Barnes "bumped" Jordan's shoulder, prompting the two to exchange

"looks," then immediately turn and "walk back together" toward their group. All three victims gave consistent accounts of what happened next.

Barnes, who is 6'6" or 6'7" and about 250 lbs,, stood next to Stewart "for a long time" while Jordan, who also was described as a "large" person, stood next to Romer. Taylor, feeling that "something's not right[,]" said, "what's up, like how you doing." Barnes replied "hi," pulled out a small black handgun, and commanded all three to "empty y'all pockets."

Stewart testified that Barnes then "punched" him. After Barnes "tapped" him, Stewart "took off running." Taylor, realizing they were "trying to rob us right now[,]" also fled.

Romer stayed. After Jordan "punched" him "in the chin area[,]" Barnes pointed his gun at Romer, saying "Stay still, don't move." Romer testified that as he lay on the ground with the gun at his head, both Barnes and Jordan "ran through [his] pockets[.]" They took his iPhone, a five dollar bill, and his Newport cigarettes.

Taylor corroborated Romer's account. She testified that while fleeing, she heard Romer "say I only have 5 dollars," then looked back and saw Jordan "uppercut" Romer.

Romer, who was concussed, eventually "got the strength to get up and walk around to . . . Alyssa's back slider door." After returning to their respective homes, Taylor and Stewart each reported the robbery via 911. Police quickly tracked Romer's iPhone through his "find my iPhone" app, picking up a moving signal indicating that it was in a vehicle.

When the signal stopped in a residential area, police identified a vehicle from which the signal seemed to be originating, parked in front of a house. Barnes exited from the passenger side and fled. He was soon apprehended nearby.

Meanwhile, Jordan got out of the driver's seat, ignored police commands to stop, and went into the house. Once the owner of the residence consented to police entering, Jordan was found hiding underneath a bed, near a "crumpled" five dollar bill like the one stolen from Romer. In the vehicle, police found a handgun matching the victims' description, as well as Romer's phone and cigarettes.

DISCUSSION

I. Sufficiency Challenges

Jordan challenges the sufficiency of evidence supporting his convictions other than the two counts for armed robbery and second degree assault involving Romer (Counts 1 and 7), on two grounds. First, he contends that "the evidence was insufficient to sustain any of the seven other convictions because the State failed to prove that [he] operated as Jonathan Barnes's accomplice." Second, Jordan argues that "the three convictions for first-degree assault were also insufficient because the State failed to establish that the alleged robbery weapon met the statutory definition of a firearm." After reviewing sufficiency standards, we address each challenge in turn.

A. Standards Governing Sufficiency Review

In reviewing a claim that evidence was insufficient to convict, courts ask "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."

Grimm v. State, 447 Md. 482, 494-95 (2016) (internal quotation marks and citations omitted). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (2016) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)). We also accept "all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference." *Cox v. State*, 421 Md.630, 657 (2011) (quotation marks and citation omitted). Recognizing that a jury is free to "accept all, some, or none" of a witness's testimony, *Correll v. State*, 215 Md. App. 483, 502 (2013), "the limited question before us is not 'whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (citation omitted).

B. Accomplice Challenge

Jordan claims that because "at most the State proved only [his] mere presence," "the State failed to prove that [he] was an accomplice" in the attempted armed robbery and assault of Taylor and Stewart. In his view, there was no evidence that he did anything "in concert with Barnes[] against either Stewart or Taylor."

The Court of Appeals has summarized principles governing the criminal responsibility of an accomplice as follows:

> As a general rule, when two or more persons participate in a criminal offense, each is ordinarily responsible for the acts of the other done in furtherance of the commission of the offense and the escape therefrom . . . .

> An accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another. . . . In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first degree (perpetrator), a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter)[.]

Sheppard v. State, 312 Md. 118, 121-23 (1988) (citations omitted), *abrogated in part on other grounds by State v. Hawkins*, 326 Md. 270 (1992). *See also* Md. Code (2018 Repl. Vol.), § 4-204(b) of the Criminal Procedure Article (abrogating "the distinction between an accessory before the fact and a principal" and providing that "an accessory before the fact may be charged, tried, convicted, and sentenced as a principal").

> Whereas principals in the first degree "commit the deed as perpetrating actors, either by their own hand or by the hand of an innocent agent," principals in the second degree are "present, actually or constructively, aiding and abetting the commission of the crime, but not themselves committing it[.]" "An aider is one who assists, supports or supplements the efforts of another in the commission of a crime." "An abettor is one who instigates, advises or encourages the commission of a crime."

Kohler v. State, 203 Md. App. 110, 119 (2012) (citations omitted). Aiders and abettors must have the same criminal intent as the principal in the first degree. *State v. Williams*, 397 Md. 172, 194 (2007), *abrogated in part on other grounds by Price v. State*, 405 Md. 10 (2008).

Here, the State's theory was that Jordan, in addition to participating in the armed robbery and assault of Kyle Romer, aided and abetted his friend Jonathan Barnes in attempting to rob Alyssa Taylor and James Stewart and in assaulting them at gunpoint. Jordan contends that the evidence was not sufficient to convict him on the six charges involving Taylor and Stewart (Counts 2, 3, 5, 6, 8, 9), because "at most the State proved

only [his] mere presence" while Barnes assaulted and attempted to rob them. In Jordan's view, the evidence established only his association with Barnes, so that he neither participated in nor encouraged the commission of those crimes.

As Jordan points out, "the mere presence of a person at the scene of a crime is not, *of itself*, sufficient to establish that that person was either a principal or an accessory to the crime." *Tasco v. State*, 223 Md. 503, 509 (1960). Yet, when "presence at the scene of the crime is proven, that fact may be considered, along with all of the surrounding circumstances, in determining whether the defendant intended to aid a participant and communicated that willingness to a participant." MPJI-Cr 6:00. *See Tasco*, 223 Md. at 509. (T2.448)

Moreover, aiding and abetting may be proved "by acts, words, signs, motions, or any conduct which unmistakably evinces a design to encourage, incite, or approve of the crime." *Pope v. State*, 284 Md. 309, 331-32 (1979). *See Moody v. State*, 209 Md. App. 366, 388-89 (2013). An accomplice's intent to provide such assistance also may be inferred from his or her "acts, conduct and words[,]" *State v. Raines*, 326 Md. 582, 591 (1992), including "acts occurring subsequent to the commission of the alleged crime[,]" such as flight. *State v. Coleman*, 423 Md. 666, 674 (2011).

This case is easily distinguished from the cases cited by Jordan, who does not contest that the evidence is sufficient to establish that he was present for the attempted robbery and assault of Taylor and Stewart, and that he was a perpetrating principal in the robbery and assault of Romer. None of the cited cases involved a defendant who participated as a principal in other crimes committed during a single criminal encounter.

Cf. Wilson v. State, 319 Md. 530, 537-38 (1990) (holding that evidence was insufficient where State showed only that the defendant had access to room from which items were stolen); *Warfield v. State*, 315 Md. 474, 491-492 (1989) (holding that evidence was insufficient to convict on theft and breaking and entering charges where people other than the defendant also had access to the garage from which property was stolen); *Pope*, 284 Md. at 331 (holding evidence that the defendant witnessed child abuse, without aiding or encouraging the perpetrator, was insufficient to convict).

In this case, the record refutes Jordan's claims that he was a mere witness to the attempted robbery and assault of Taylor and Stewart. Jordan's "uppercutting" and robbery of Romer supports an inference that he aided in the attempted robbery and assault that preceded that attack. *See Coleman*, 423 Md. at 674. From the evidence that after Barnes pointed the gun and announced the robbery, Jordan did not flee like Taylor and Stewart, but instead proceeded to hit and rob the only remaining victim, the jury could infer that Jordan was either a willing accomplice or a participant throughout the encounter. *Cf. Todd v. State*, 26 Md. App. 583, 585–86 (1975) (affirming murder conviction based on evidence that defendant kicked the victim, then stood by as his companions stabbed her to death, because the fact finder could "draw a reasonable inference that [the defendant] was not a mere onlooker, but rather a participant in the commission of the [original] crime."). Indeed, as the prosecutor pointed out in closing, Jordan's claim that he played no role in Barnes's crimes against Stewart and Taylor would have required the jury to conclude that when Barnes drew his gun and demanded the victims empty their pockets, Jordan stood by,

silently thinking "I have nothing to do with this[,]" but then seconds later, changed his mind and joined in the assault and robbery of Romer.

In addition to the inference of guilt arising from Jordan's crimes against Romer, the evidence establishes other inferences that further support the jury's finding that Jordan aided and abetted the crimes against Taylor and Stewart. From the evidence that Jordan argued with the victims before Barnes arrived, the jury could conclude that Jordan's animus toward them motivated the joint attack. From the evidence that upon arrival, Barnes greeted Jordan in a manner that Taylor perceived to be a signal, and that Jordan responded by immediately getting off his phone, turning, and walking together with Barnes over to the victims, the jury could infer that Jordan and Barnes were acting in concert. Likewise, from the evidence that the two large men then positioned themselves in a manner that "menaced" the three smaller victims, the jury could infer that Jordan provided support to Barnes as he assaulted and attempted to rob them. Finally, from the evidence that Jordan stayed with Barnes, fled from police, hid under a bed, and was in possession of a folded five dollar bill like the one Romer had, the jury could determine that Jordan was not the uninvolved bystander he claimed to be. Collectively, this evidence supports inferences that Jordan provided assistance to Barnes by confronting the victims, physically intimidating them, standing guard as Barnes threatened them with a gun and commanded them to empty their pockets, then hitting and robbing the only victim who did not flee.

Based on this record, we hold that the evidence is sufficient to support Jordan's convictions for attempted armed robbery, first degree assault, and second degree assault of Taylor and Stewart.

B. Firearm Challenge

Jordan alternatively argues that "the evidence was also insufficient as to all three convictions for first-degree assault because the State failed to demonstrate that the collected weapon met the statutory definition of a firearm." According to Jordan, there was no evidence that the weapon described by the victims and recovered in the van was an operable handgun or firearm, as required to convict him of first degree assault under Md. Code (2012 Repl. Vol.), § 3-202(a)(2)(i)-(iv) of the Criminal Law Article ("A person may not commit an assault with . . . a handgun, . . .[or] a regulated firearm, as defined in § 5-101 of the Public Safety Article.").[1] We disagree.

Although the State admittedly did not present forensic evidence that the weapon was operable, such proof was not necessary to establish that it is a handgun or regulated firearm within the defined meaning of those terms. *See Charleau v. State,* 200 Md. App. 549, 562 (2011); *Brown v. State*, 182 Md. App. 138, 166 (2008); *Curtin v. State*, 165 Md. App. 60, 70-72, *aff'd*, 393 Md. 593 (2006). This Court has "held evidence sufficient to conclude that a weapon was a handgun based on eyewitness testimony stating that a handgun was used." *Brown*, 182 Md. App. at 168. In doing so, we cited the following cases cataloging a broad range of evidence that has been found sufficient to establish that a particular weapon met definition of a handgun:

[1] *See* Md. Code (2018 Repl. Vol.), § 5-101(h)(1) of the Public Safety Article ("PS") (defining "firearm" to mean "a weapon that . . . is designed to expel . . . a projective by the action of an explosive"); PS § 5-101(n)(1) (defining "handgun" to mean "a firearm with a barrel less than 16 inches in length"); PS § 5-101(r)(1)-(2) (defining "regulated firearm" to include "a handgun").

> *Cf. Curtin*, 165 Md. App. at 70-72 (witness described the weapon as "a dark colored semi-automatic handgun"); *Facon v. State*, 144 Md. App. 1, 44-45 (2002) ("loaded .38 gun" was recovered from defendant's car and produced at trial, and witness identified gun as "'exactly the same thing'" used in the robbery), *rev'd on other grounds*, 375 Md. 435 (2003); . . . *Brown*, 64 Md. App. at 333-37 (witness described gun as a "'detective type special' .38 caliber revolver"); *Manigault*, 61 Md. App. at 285-87 (witnesses described gun as "'big,'" "'black,'" and "'metal,'" one witness described gun as a ".38," and other witness testified that defendant's hand covered most of the gun during the shooting); *Johnson*, 44 Md. App. at 516-19 (witness testified that she saw "where 'you put the bullets in'" and "'what you shoot out of,'" and that gun was small enough that it had been concealed in defendant's coat or duffel bag); *Couplin*, 37 Md. App. at 575-78 (witness described weapon as a "'handgun'" and as a "'small pistol'").

Id. at 166.

Here, the record contains comparable evidence that the weapon described by the victims and recovered from the vehicle met the definition of a handgun or regulated firearm for purposes of Crim. § 3-202(a). Without objection, all three victims testified that the weapon was a small, black handgun and identified the gun recovered by police as the weapon used against them. Taylor described it as "a little handgun" that was "like the size of" her small hand. Stewart testified that it was an "all black" "handgun[.]" Romer described it as a "black semi-automatic pistol" and a "compact" ".38" that "looked as if was loaded[,]" before identifying the actual weapon recovered by police in the vehicle from which Barnes and Jordan fled as the one used in the assault.

That weapon and photos of it also were admitted as evidence for the jury to examine. In addition, the jury heard evidence that police removed from the weapon a magazine that was also admitted into evidence. Jessica Barnard, the crime lab technician who recovered

the weapon from the vehicle, also testified that it was a "pistol" with "a magazine cartridge" while opening up that exhibit in front of the jury.

Based on this record, the evidence was sufficient for the jury to find that Jordan and Barnes assaulted the three victims with a handgun or regulated firearm.

II. Correction of Commitment Record, Docket Entries, and Probation Order

Jordan requests correction of the following mistakes in the record:

- The commitment record mistakenly states the Jordan was found guilty on a charge of wearing, carrying, and transporting a handgun (Count 10), even though that charge was nol prossed before trial,

- The commitment record, docket entries, and probation order mistakenly state that Jordan was found guilty on charges of conspiracy to commit armed robbery against Taylor (Count 2) and Stewart (Count 3), but both of those convictions are for attempted armed robbery.

The State concedes these discrepancies. The transcript confirms that Count 10 was dismissed before trial and that the convictions on Counts 2 and 3 are for attempted robbery with a dangerous weapon. When there are discrepancies between a transcript and docket entries, a commitment record, or other pleadings, the transcript controls. *See Savoy v. State*, 336 Md. 365, 360 n.6 (1994) (docket entry); *Stephens v. State*, 198 Md. App. 551, 555 n.1 (2011) (docket entries); *Dutton v. State*, 160 Md. App. 180, 191-92 (2004) (commitment record). Consequently, we shall remand for the necessary corrections to be made.

JUDGMENTS OF CONVICTION AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ST. MARY'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 2/3 BY APPELLANT, 1/3 BY ST. MARY'S COUNTY.