Circuit Court for Calvert County
Case No. 04-K-16-000014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1511

September Term, 2016

CORDELL TYRONE SOLLERS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 15, 2018

A jury in the Circuit Court for Calvert County, the Honorable E. Gregory Wells presiding, convicted Cordell Tyrone Sollers of conspiracy to commit robbery, conspiracy to commit theft, and conspiracy to commit assault. The court sentenced him to a total of eight years' imprisonment. In this appeal, Mr. Sollers presents the following question for our review:

Did the trial court err in admitting impermissible hearsay into evidence?

Our answer is "no," and so we will affirm the judgments of the circuit court.

BACKGROUND

On November 23, 2015, Marselle Williams was driving to his place of employment to receive and cash his paycheck. Also in the car was a passenger, later identified as Sollers. At the time, Williams was in possession of approximately $2,500 in cash, which he kept in the pockets of his jacket.

After Williams informed Sollers about the cash, the two discussed "selling marijuana." Specifically, Sollers informed Williams that "he knew somebody who wanted [an] ounce, and to sell it to him for 350." Sollers then indicated that he was going to give Williams's phone number to "a friend" and that this friend would later contact him. Williams then drove Sollers to a nearby apartment complex, and Sollers exited the vehicle. Sollers later sent Williams a text message saying that he had given Williams's number to his friend.

Later that evening, Sollers's "friend" called Mr. Williams, and the two arranged to meet at a local carwash. Mr. Williams then drove to the carwash and parked, at which

time a "white male with reddish hair," later identified as Jeffrey Myers, approached Williams, who by this time had exited his vehicle. Myers introduced himself as "Jay" and stated that "he heard it was 350," at which time Williams "gave him the marijuana." Myers then asked Williams if he "had change," so Williams walked back to his car "to get change."

When Williams got to his car, another individual, later identified as Douglas Hayes, "ran around from the front" and "put a knife" in Williams's face. Hayes then made several comments, including "where is Cordell" and "he owes me money, he said that you have the money that he owes me." Hayes eventually took Williams's jacket, which contained his cell phone, identification, bank card, keys, and cash. Hayes then told Williams to "get out of there." As he was leaving, Williams managed to obtain the license plate number of the assailant's vehicle, which Sollers had first observed upon pulling into the carwash. Williams then got in his car, drove to the police station, and reported the robbery.

At the police station, Williams made contact with Maryland State Police Trooper Shawn Matthews. Williams told Trooper Matthews about the robbery and gave him a description of the vehicle. Williams also gave the officer his cell phone number, which the officer used to locate the phone via computer software designed to pinpoint the location of a particular cell phone. Trooper Matthews then drove to this location and observed a vehicle that matched the description of the vehicle provided by Williams. Trooper Matthews testified that approximately six minutes had elapsed between the time

Williams reported the robbery and the time Trooper Matthews spotted the suspects' vehicle.

After spotting the suspects' vehicle and following it for a brief period, Trooper Matthews initiated a traffic stop. Upon doing so, Trooper Matthews observed that the vehicle contained three occupants: a driver, later identified as Jeffrey Myers; a front-seat passenger, later identified as Douglas Hayes; and a backseat passenger, later identified as Sollers. All three occupants were removed from the vehicle, arrested, and searched. Upon searching the assailants, the police recovered a knife and approximately $800 in cash from Hayes, approximately $380 in cash from Myers, and approximately $450 in cash from Sollers. The police also searched the suspects' vehicle and found Williams's jacket, which was lying on the floor near the front passenger seat. From the jacket's pockets the police recovered approximately $1,400 in cash, along with Williams's driver's license, bank card, and car keys. Williams's cell phone was later found lying on the side of the road near where the assailants were apprehended.

Williams testified at Sollers's trial. As part of that testimony, the State asked him about the comments made by Hayes during the robbery:

[STATE]: What happened then?

[WITNESS]: When I got in my car another guy ran around from the front and put a knife in my face, and he said where is Cordell, he said –

[DEFENSE]: I'm going to object to the hearsay.

[STATE]: Your Honor –

THE COURT: Whether it's true or false – is it being offered for the truth of the matter asserted?

[STATE]: It is not, Your Honor. May we approach?

The court then held a bench conference, at which time the following colloquy ensued (emphasis added):

[DEFENSE]: I'm going to object. These statements are prejudicial. I mean there is no way I can cross-examine that, the person that was allegedly saying those things.

THE COURT: What else is he going to –

[DEFENSE]: And that links him to the –

[STATE]: Your Honor, I misspoke when I said I was not offering it for the truth of the matter asserted, I am. *I agree that it is a hearsay statement, but I believe it falls directly within the exception to hearsay in that it is a statement of a co-conspirator made during the conspiracy while the conspiracy is taking place and in furtherance of.* I would proffer to the Court that what I intend to show this evidence for is that it is evidence that the defendant conspired with Mr. Hayes. He is making statements asking where is Cordell, where is Cordell. The State's theory in this case and what I am going to argue is that [Sollers], while he is making those, while Mr. Hayes is making those statements, is sitting 10 feet away in the car in the next wash bay over. The reason why he is making those statements of where is Cordell and other statements that you are going to hear is that it's giving the defendant separation from that crime. He wants the victim to believe that [Sollers] is not present, that he doesn't have anything to do with what's happening at the car wash.

[DEFENSE]: I think they have got to first establish that there is some type of conspiracy for that to be admitted, and they haven't done that yet.

THE COURT: In your opinion would the conspiracy or at least the outlines of the conspiracy be shown if all three of them are in the car?

[DEFENSE]: No. No. And that's – that's what the State is actually trying to prove.

[STATE]: Your Honor, even at – even at this point we have evidence that shows that [Sollers] is the one that provided the ability for these people to be at the car wash. He provided the number to Jeff Myers who is there to purchase marijuana that he told [Sollers] about earlier. It plays directly into the theory of the State's case that he has arranged this sale in order for the robbery to take place.

[DEFENSE]: I disagree with that. The statement was basically that this was arranged between Jeffrey Myers and Mr. Williams.

THE COURT: My understanding of the testimony is that this man has said that his cousin, [Sollers], said do you want to buy, or, you know, we can make some money off of the sale of marijuana, my friend is going to call you, and he did call him, and he met him at the bay of the car wash.

[DEFENSE]: Well, then that's prejudicial because…he is not charged with distribution, he is charged with robbery. I think that's evidence of other crimes.

THE COURT: No. No, that is not what it is being offered for at all. *It is being offered to show that [Sollers] according to the State's theory set this whole thing up, and now he is actually at the scene and one of the alleged co-conspirators is asking where the other co-conspirator is.* I think he has got enough. I am going to overrule your objection.

The trial resumed, and the State continued its examination of Mr. Williams:

[STATE]: Mr. Williams, you were discussing what happened during the robbery itself. What, if anything, do you recall the person who had the knife, what did he say to you?

[WITNESS]: He said where is Cordell, he said that you have – he owes me money, he said that you have the money that he owes me. He said stop f-ing with Cordell, he is going to get you hurt or killed, and tell him that when I see him I'm going to kill him.

Williams also testified regarding his report of the robbery to the police:

[STATE]: And what did you do after you left the car wash?

[WITNESS]: I went to the State Police barracks.

* * *

[STATE]: And what happened when you arrived?

[WITNESS]: I told them that I got my jacket stolen.

[STATE]: Okay. Did you give the officers the description of the vehicle?

[WITNESS]: Yes.

[STATE]: Did you give them the tag plate number?

[WITNESS]: Yes.

Later, Trooper Matthews testified regarding his response to the reported robbery. During that testimony, the State asked Trooper Matthews about the statements made by Williams as he was reporting the robbery (emphasis added):

[STATE]: Did Mr. Williams explain how he got to the barrack?

[WITNESS]: He did.

[STATE]: And how was it?

[WITNESS]: He stated that he drove to the barrack immediately after the incident occurred.

[STATE]: *What did you learn from speaking with Mr. Williams?*

[DEFENSE]: *I'm going to object. Mr. Williams had already taken the stand.*

THE COURT: *He is now establishing exactly what part of his investigation was [sic], so he gets to tell us this. I have to overrule you*. Go ahead.

Trooper Matthews then went on to explain, without objection, what Williams told the officer:

[STATE]: What did you learn from speaking with Mr. Williams?

[WITNESS]: Mr. Williams advised me that he had just been robbed at knifepoint by an individual, a black male that he described at the car wash.

[STATE]: Did he give a – did he give a description of that person?

[WITNESS]: He did.

[STATE]: And what was that description?

[WITNESS]: The description he gave was a black male. He had his face covered up with a black bandana. He had dreadlocks, and he had a black like ski jacket on.

[STATE]: Did he describe anyone else that he had seen at the car wash that night?

[WITNESS]: He did. He described he also saw a white male which approached him while he was at the car wash.

[STATE]:	Did he describe to you what property was stolen from him during the robbery?
[WITNESS]:	Yes, he did.
[STATE]:	And what was that description?
[WITNESS]:	The description he gave at the barrack was he told me that his red Helly Hansen Jacket had been stolen, which in the jacket he had his silver iPhone, he had about $2,500 in cash, his car keys, and his driver's license.
[STATE]:	Did you receive any information regarding how the suspects left the car wash that evening?
[WITNESS]:	The suspects, yes. He said that he observed a vehicle there with the suspect.
[STATE]:	Did…he have another set of car keys at that time?
[WITNESS]:	He did….That's how he drove to the barrack, he had a spare set.
[STATE]:	You received a description of the vehicle?
[WITNESS]:	I did.
[STATE]:	And what was that description?
[WITNESS]:	The description of the vehicle that Mr. Williams provided me at the barrack was a small orangish red passenger vehicle, and he provided the Maryland tag of 2ANP09.

Sollers was ultimately convicted of three counts of conspiracy, after which he noted this appeal. Sollers now claims that the trial court erred in admitting into evidence the extrajudicial statements made by Hayes at the time of the robbery and Trooper

Matthews's testimony as to the statements made by Williams when he reported the robbery.

The Standards of Review

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay statements are inadmissible unless they are permitted by applicable constitutional provisions or statutes, or unless they fall under one of the hearsay exceptions recognized by the Maryland Rules. Md. Rule 5-802. On the other hand, if the statement "is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State,* 389 Md. 681, 689 (2005).

Whether a statement is offered for its truth "depends on the purpose for which the statement is offered at trial." *Hardison v. State,* 118 Md. App. 225, 234 (1997). "An out-of-court statement will be considered to be offered to prove the 'truth,' only if it would have no probative value (as to the relevant fact it is offered to prove) unless the declarant was both sincere and accurate when he or she made the statement." *Handy v. State,* 201 Md. App. 521, 539-40 (2011) (internal citations omitted).

Our review of a trial court's ruling regarding the admission of extrajudicial statements, or "hearsay," involves a two-pronged approach. On the one hand, we review *de novo* the trial court's ultimate decision to admit hearsay evidence because "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State,* 390 Md. 1, 8 (2005). But on the other, a hearsay

determination may require a court to exercise its discretion and make factual findings, especially if the court must decide whether a hearsay exception is applicable. *Gordon v. State,* 431 Md. 527, 536 (2013). As a result of this dichotomy, "the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review." *Id.* at 538. "Accordingly, the trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error." *Id*.

Analysis

1. Williams's Testimony as to Hayes's Statements

Sollers's first argument is that the trial court erred in permitting Williams to testify to statements made by Hayes during the course of the robbery. Sollers maintains that such testimony was hearsay and thus was inadmissible. Sollers further maintains that the testimony did not fall under the "co-conspirator exception" to the hearsay rule because the State "failed to provide adequate independent evidence of any conspiracy between Sollers and Myers and/or Hayes." Sollers avers, therefore, that the trial court's admission of the hearsay statements was erroneous.

The State contends that the statements at issue were not hearsay because they were not offered for the truth of the matter asserted. The State also contends that, even if offered for their truth, the statements were properly admitted under the co-conspirator

exception because there was "ample evidence, independent of the challenged statements, that [Sollers] was part of the conspiracy to rob Williams of his money and drugs." We agree with the State.

A. The Statements Were Not Hearsay.

It is clear to us that the out-of-court statements in question were not offered for the truth of the matters asserted in them. For example, the first statement: "Where is Cordell?" is a question, not a statement of fact. The second statement at issue is:

> [H]e owes me money, he said that you have the money that he owes me. He said stop f-ing with Cordell, he is going to get you hurt or killed, and tell him that when I see him I'm going to kill him[.]

This statement was not offered by the State to prove that Sollers actually owed Hayes money, or that Sollers was in danger of being injured by Hayes. Rather, the State sought to use the fact that the statement was made to show that "Cordell," i.e., Sollers, was part of the conspiracy to rob Williams. In other words, the State wasn't attempting to prove that Hayes had actually threatened Sollers, but rather that Hayes made a statement to Williams to disguise Sollers's role in the robbery.

To return to the test set out in *Handy,* 201 Md. App. at 539-40, the State did not take the position that Hayes's statements to Williams were "both sincere and accurate" when they were made, but rather that Hayes made false statements to deceive Williams as to Solllers's role in the robbery.[1]

B. Assuming that the testimony was hearsay, it was nonetheless admissible.

Md. Rule 5-803(a)(5) permits admission of a hearsay "statement that is offered against a party and is…[a] statement by a co-conspirator of the party during the course and in furtherance of the conspiracy." "Under this rule, 'declarations of one conspirator, made during the pendency and in furtherance of the conspiratorial purpose, are admissible against the other co-conspirators.'" *Shelton v. State,* 207 Md. App. 363, 376 (2012) (internal citation omitted). In order for such a statement to be admissible, the proponent "must present evidence that the defendant and the declarant were part of a conspiracy, that the statement was made during the course of the conspiracy, and that the statement was made in furtherance of the conspiracy." *Id.* The State satisfied these requirements in the present case.

"A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful

[1] Our analysis of this issue is not affected by the prosecutor's statement to the trial court that the statements were hearsay. That the prosecutor erred—or perhaps decided to err on the side of caution—on a matter of law doesn't bind an appellate court. *See, e.g.*, *Greenstreet v. State*, 392 Md. 652, 667 (2006); *Suessmann v. Lamone*, 383 Md. 697, 722 (2004).

means." *Townes v. State,* 314 Md. 71, 75 (1988). The agreement need not be explicit as long as "there is a meeting of the minds reflecting a unity of purpose and design." *Id.* "The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy." *Carroll v. State,* 428 Md. 679, 697 (2012). A conspiracy "may be shown by circumstantial evidence, from which a common design may be inferred[.]" *Mitchell v. State,* 363 Md. 130, 145 (2001). Moreover, "it is not necessary that a conspiracy be conclusively established *before* the declarations are admissible. Flexibility in the order of proof is allowed."[2] *Grandison v. State,* 305 Md. 685, 733 (1986) (emphasis in original).

Here, the evidence showed that, just prior to the robbery, Williams informed Sollers that he was in possession of a large amount of cash and that he was holding the cash in the pocket of his jacket. Sollers then proposed that he and Williams sell marijuana to a "friend," to whom Sollers would provide Williams's cell phone number. Shortly after Sollers informed Williams that he had given Williams's number to this "friend," Williams was contacted by Myers, who suggested that they meet at the car wash. Upon arriving at the carwash, Williams came in contact with Myers, who stated that he needed "change" for the drug deal. When Williams went to get change, he was accosted by Hayes, at which time Hayes made the statements at issue. Hayes then stole Williams's jacket, which contained the cash and several personal items. After being robbed,

[2] *Grandison* disposes of Sollers's argument that the State was required to establish the existence of the conspiracy before the statements could be admitted.

Williams went straight to the local police station to report the robbery and give a description of the suspects' vehicle. Approximately six minutes later, Trooper Matthews located the vehicle and observed three occupants: Hayes, Myers, and Sollers. Williams's jacket and several other stolen items were later recovered from inside of the vehicle. From this evidence, a reasonable inference can be drawn that Sollers conspired with Hayes and Myers to accomplish an unlawful purpose, namely, robbery, which is proscribed by § 3-402 of the Criminal Law Article of the Maryland Code.

Likewise, the evidence sufficiently established that Hayes's statements were made during the course of the conspiracy. Although the crime of conspiracy is complete at the moment the agreement is made, the duration of the conspiracy continues until "the accomplishment of [the conspiracy's] 'main aim.'" *Irvin v. State,* 23 Md. App. 457, 473 (1974). Here, the "main aim" of the conspiracy was the robbery, which Hayes was in the process of effectuating at the time he made the statements.

Finally, the evidence sufficiently established that Hayes's statements were made in furtherance of the conspiracy. "'A statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy.'" *Shelton,* 207 Md. App. at 378 (quoting *United States v. Warman,* 578 F.3d 320, 338 (6th Cir. 2009)). "[T]he 'furtherance' requirement is interpreted broadly." *Irvin,* 23 Md. App. at 472. "'If some connection is established between the declaration and the conspiracy then the declaration is taken as in furtherance of the conspiracy.'" *Id.* (internal citation omitted). Moreover, "[a] particular statement may be found to be in furtherance of the conspiracy even though

it is susceptible of alternative interpretations . . . so long as there is some reasonable basis for concluding that it was designed to further the conspiracy." *Shelton,* 207 Md. App. at 379 (quoting *United States v. Shores,* 33 F.3d 438, 444 (4th Cir. 1994) (citations omitted)).

Here, the State argued that Hayes made the statements to separate Sollers from the crime, which in turn would have made it more difficult for Williams to identify his attackers or connect Sollers to the robbery. We find this theory to be reasonable, as unlawful agreements usually include the desire of the conspirators not to be caught. *See, e.g., State v. Rivenbark,* 311 Md. 147, 158 (1987) ("Before the conspirators can be said to have successfully attained their main object, they often must take additional steps, *e.g.*, fleeing, or disposing of the fruits and instrumentalities of crime. Such acts further the conspiracy by assisting the conspirators in realizing the benefits from the offense which they agreed to commit.").

In sum, the State presented sufficient evidence that Hayes, Myers, and Sollers were part of a conspiracy, and that Hayes's statements were made during and in furtherance of said conspiracy. Accordingly, even if the statements were hearsay, which we do not believe they were, they fell within the "co-conspirator's exception" to the hearsay rule, and the trial court did not err in admitting them.

2. Trooper Matthews's Testimony as to Williams's Extrajudicial Statements

Sollers next argues that the trial court erred in permitting Trooper Matthews to testify to statements Williams made to the officer at the time the robbery was reported. Sollers avers that these statements constituted inadmissible hearsay. We do not agree for several reasons.

A. The Appellate Contentions Are Not Preserved for Review.

Although Sollers concedes that defense counsel failed to lodge the appropriate objections and that, ordinarily, such a failure would result in the issue being unpreserved for our review, Sollers argues that defense counsel's initial objection was sufficient to preserve the issue because the objection was applicable to the entire line of testimony and "any further objection would have been futile."

We disagree. "It is well-established that a party opposing the admission of evidence shall object at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. If not, the objection is waived and the issue is not preserved for review." *Fone v. State*, 233 Md. App. 88, 112–13 (2017) (citation and quotation marks omitted). In the alternative, a party may request a continuing objection to a line of questions. Md. Rule 4-323(b). Here, defense counsel did neither; instead, she lodged a single objection prior to the time the questions were asked. Consequently, the issue is unpreserved. *See Brown v. State,* 90 Md. App. 220, 225 (1992) ("For his objections to be timely made and thus preserved for our review, defense counsel either would have had to

object each time a question . . . was posed or to request a continuing objection to the entire line of questioning.").

In fact, even if defense counsel's initial objection was applicable to the entire line of questioning, Sollers's appellate contention would still be unpreserved because his trial counsel objected on a different ground. At trial, the State asked Trooper Matthews what he learned "from speaking to Mr. Williams," at which time defense counsel objected, arguing that "Mr. Williams has already taken the stand." At no time did defense counsel indicate that she was objecting on hearsay grounds. Thus, Sollers would be barred from raising the issue of hearsay for the first time on appeal, even if defense counsel's objection was to be considered sufficient. *See State v. Jones,* 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'") (internal citations omitted); *See also* Md. Rule 4-323(b) (A continuing objection "is effective only as to questions clearly within its scope.").

Recognizing these procedural hurdles, Sollers asks that we review his claim for plain error or, in the alternative, that we address the claim based on ineffective assistance of counsel. Sollers contends that "there is simply no plausible tactical reason for trial counsel not to have properly made the objection to each of the questions that called for patently inadmissible hearsay; and trial counsel's failure to object in this regard denied Sollers his constitutional right to effective assistance of counsel." Sollers maintains that

he was prejudiced by defense counsel's deficient performance because the admission of the "impermissible hearsay…inappropriately bolster[ed] Williams' testimony." We will address these matters separately.

B. We decline to exercise plain error review.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which vitally affect a defendant's right to a fair and impartial trial." *Malaska v. State*, 216 Md. App. 492, 524 (2014) (citation and quotation marks omitted). Moreover, "it is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Chaney v. State,* 397 Md. 460, 468 (2007).

Assuming, for purposes of analysis, that the court would have sustained the objections that appellate counsel suggests should have been made, the statements did not "vitally affect" Sollers's right to a fair trial because this part of the trooper's testimony was cumulative to portions of Williams's own testimony. *See, e.g., Frobouck v. State,* 212 Md. App. 262, 283 (2013) (finding no undue prejudice in the admission of extrajudicial statements that had been previously admitted without objection). Plain error review is not appropriate in this case.

C. The record is not sufficient for us to address Soller's ineffective assistance of counsel argument.

We also decline to consider Sollers's claim of ineffective assistance of counsel, but for a different reason. The record proves no explanation as to why defense counsel did not object to the admission of Williams's extrajudicial statements. Accordingly, addressing Sollers's inadequacy of counsel arguments at this juncture is inappropriate. *See, e.g. Mosley v. State,* 378 Md. 548, 562 (2003); *Johnson v. State,* 292 Md. 405, 435 (1982) (*disapproved of on other grounds by Hoey v. State,* 311 Md. 473, 494 (1988)).

THE JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY ARE AFFIRMED.

APPELLANT TO PAY COSTS.