UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0524

September Term, 2015

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ROBERT EUGENE CALDWELL

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Berger,
Arthur,

JJ.

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Opinion by Berger, J.

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Filed: June 10, 2016

Following a jury trial in the Circuit Court for Prince George's County, appellant, Robert Eugene Caldwell ("Caldwell"), was convicted of two counts of conspiracy to commit second-degree burglary. One count was related to conspiracy to commit second-degree burglary of the Alkaline Water Company. The second count was related to conspiracy to commit second degree burglary of Bella Furniture, which shares a warehouse with the Alkaline Water Company. The jury, however, acquitted Caldwell of seven other charges. For the charges upon which he was convicted, the court sentenced Caldwell to 15 years' incarceration for his conviction for conspiracy to commit burglary of the Alkaline Water Company. Additionally, Caldwell received a concurrent sentence of 15 years' incarceration with all but five years suspended for his conviction for conspiracy to commit burglary of Bella Furniture.

On appeal, Caldwell presents three issues for our review,[1] which we rephrase and reorder as follows:

[1] The issues, as presented by Caldwell, are:

1. Was Mr. Caldwell's constitutional guarantee against double jeopardy violated when he was convicted on two counts of conspiracy to commit second-degree burglary?

2. Was Mr. Caldwell's conviction for conspiracy to commit second-degree burglary of the storehouse of Daryl Riddick supported by sufficient evidence?

3. Did the circuit court abuse its discretion when it refused to grant a mistrial based on witnesses' prejudicial blurts of inadmissible evidence?

1. Whether the circuit court erred in denying Caldwell's motions for a mistrial.

2. Whether Caldwell's challenge to the sufficiency of the evidence sustaining one of his convictions for conspiracy is adequately preserved for appellate review.

3. Whether the circuit court erred in convicting and sentencing Caldwell for two counts of conspiracy when only one unit of prosecution was argued to the jury.

For the reasons set forth below, we shall affirm in part, and remand the judgment of the Circuit Court for Prince George's County with instructions for the circuit court to vacate one of Caldwell's conspiracy convictions and re-sentence the appellant.

## FACTUAL AND PROCEDURAL BACKGROUND

The Alkaline Water Company was a tenant in a warehouse located at 9212 Hampton Overlook, Capitol Heights, Maryland. The Alkaline Water Company had a loading dock door for egress from the warehouse. In addition, the Alkaline Water Company's portion of the warehouse shared an interior wall with the Bella Furniture company.

On March 22, 2014 Malik Salam ("Salam"), Kenneth Snowden ("Snowden"), and Caldwell convened for the purpose of appropriating some "high dollar furniture" from Bella Furniture. On that day, the three drove a blue Toyota Camry from Alexandria, Virginia, to the warehouse occupied by the Alkaline Water Company and Bella Furniture. When they arrived, Salam and Snowden exited the vehicle and stole a box truck. Salam and Snowden then drove the box truck to the loading dock door of the Alkaline Water Company's portion

of the warehouse. Meanwhile, Caldwell parked the blue Toyota Camry in a nearby used car lot where he was to serve as the lookout.

Detective Joseph Pugliese of the Howard County Police Department had been investigating Snowden and Caldwell. A global positioning system affixed to one of the defendant's vehicles, and information gleaned from tracking one of the defendant's cell phones--both obtained by means of a valid search warrant--led the Howard County officers' investigation to the warehouse in Prince George's County. Notably, the specific details involving Howard County's investigation of Snowden and Caldwell were suppressed at trial, but the State was permitted to elicit testimony indicating that Howard County officers were in Prince George's County for the purpose of conducting an investigation. That evening, Detective Pugliese was disguised as an electrician in a bucket truck. Detective Pugliese testified that he observed Caldwell driving the blue Toyota Camry drive into a parking lot and position itself near a white box truck for approximately three minutes and then drive away.

Salam and Snowden then drove their stolen white box truck and backed it up against the loading dock door of the Alkaline Water Company. The two breached the water company's portion of the warehouse and acquired a forklift inside the warehouse. Snowden then used the forklift to drive through the shared wall that separated the Alkaline Water Company from Bella Furniture. After breaching Bella Furniture's portion of the warehouse, an alarm was triggered causing Salam and Snowden to retreat back to Caldwell in the blue Toyota Camry where the three waited for approximately one-half hour.

Thereafter, Salam and Snowden returned to the warehouse where they proceeded to remove furniture from Bella Furniture, through the demolished wall, and onto or near the stolen white box truck. While the two were loading furniture, they received a call from Caldwell's phone that was immediately disconnected. Snowden then returned the call which was answered by someone other than Caldwell. Snowden and Salam then fled. As Snowden and Salam fled, the police arrived and apprehended Salam. Meanwhile, Caldwell was apprehended in the blue Toyota Camry at the used car lot.

Snowden and Caldwell were tried together, and Salam testified as a witness against them both. After a four-day trial, a jury found Caldwell guilty of two counts of conspiracy. One count was for conspiracy to commit second-degree burglary of the Alkaline Water Company, and the second was conspiracy to commit second-degree burglary of Bella Furniture. Caldwell was acquitted of all other charges. On May 8, 2014, the court sentenced Caldwell to 15 years' incarceration for his conviction for conspiracy to commit burglary of the Alkaline Water Company. Additionally, Caldwell received a concurrent sentence of 15 years' incarceration with all but five years suspended for his conviction for conspiracy to commit burglary of Bella Furniture. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

## DISCUSSION

Caldwell presents three allegations of error. Caldwell contends that the circuit court erred by denying Caldwell's motion for a mistrial when State's witnesses discussed evidence that had been suppressed. Additionally, Caldwell asserts that the evidence was insufficient

to sustain a conviction for conspiracy to commit a burglary of the Alkaline Water Company. Finally, Caldwell alleges that the imposition of two convictions and sentences for conspiracy violates the double jeopardy clause of the U.S. Constitution. The State contends that the circuit court did not err in denying Caldwell's motion for a mistrial, and that his challenge to the sufficiency of the evidence was not preserved. The State, however, agrees that it was improper for Caldwell to receive two separate sentences for conspiracy, but that both convictions should be affirmed. We shall address these issues in turn.

## I. The Circuit Court Did Not Err by Failing to Declare a Mistrial.

Caldwell asserts that the circuit court abused its discretion by failing to declare a mistrial when the State's witnesses testified in violation of the Court's order limiting the scope of the officer's testimony. The State counters that the testimony given was not in violation of the court's order, and even if it was, it was within the court's discretion to deny Caldwell's motion for a mistrial. We agree with the State.

"We review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67 (2014).

> "'Abuse of discretion' . . . has been said to occur 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.' It has also been said to exist when the ruling under consideration 'appears to have been made on untenable grounds,' when the ruling is 'clearly against the logic and effect of facts and inferences before the court,' when the ruling is 'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,' when the ruling is 'violative of fact and logic,' or when it constitutes an 'untenable judicial act that defies reason and works an injustice.'"

*Id.* at 67 (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994) (alterations in original) (internal citations omitted)). In *Nash*, *supra*, Judge Harrell, writing for the Court of Appeals, articulated that:

> Regarding the range of a trial judge's discretion in ruling on a mistrial motion, reviewing appellate courts afford generally a wide berth. *See Alexis* [*v. State*], 437 Md. 457, 478, 87 A.3d 1243, 1255 [(2014)] (noting that the range of a trial judge's discretion when assessing the merits of a mistrial motion, as with other decisions "[i]n handling the progress of a trial," is "'very broad and [his or her ruling] will rarely be reversed,'" as compared to other circumstances in which "'the discretionary range is far more narrow'") (quoting *Canterbury Riding Condo.* [*v. Chesapeake Investors, Inc.*], 66 Md. App. [635,] 648, 505 A.2d [858,] 864 [(1986)]). Competing forces affect potentially the range of discretion with respect to the particular mistrial motion in this case. On the one hand, an allegation of juror bias or misconduct may implicate a defendant's constitutional right to a fair and impartial verdict. *See Dillard v. State*, 415 Md. 445, 454-55, 3 A.3d 403, 408-09 (2010); *Jenkins v. State*, 375 Md. 284, 299-300, 825 A.2d 1008, 1017-18 (2003). On the other hand, declaring a mistrial is an extreme remedy not to be ordered lightly. *See Burks v. State*, 96 Md. App. 173, 187, 624 A.2d 1257, 1265 (1993) ("It is rather an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice."); *Ezenwa v. State*, 82 Md. App. 489, 518, 572 A.2d 1101, 1115 (1990) ("Because [a mistrial] is an extraordinary measure, it should only be granted where manifest necessity as opposed to light or transitory reasons, is shown.").

*Nash*, *supra*, 439 Md. at 68-69.

In determining if the court should have granted a mistrial, we are tasked to consider:

> "[W]hether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent

> and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists . . . ."

*Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

During the course of Caldwell's trial he moved for a mistrial on two occasions. The first motion arose during the following colloquy as the State questioned Prince George's County Police Detective Michael Bassaro.

> [THE PROSECUTOR:] And did there come a time when you arrived in the area of Capitol Heights, Prince George's County, Maryland?
>
> [THE WITNESS:] Yes, there was.
>
> [THE PROSECUTOR:] Is that your typical jurisdiction?
>
> [THE WITNESS:] No, not normally. However, we were requested by Howard County Police Department. They were conducting a burglary investigation, and it ended up coming into Prince George's --
>
> [DEFENSE COUNSEL:] Objection.
>
> THE COURT: Sustained.
>
> [THE PROSECUTOR:] So, you indicated that you were working with another police department. Is that correct?
>
> [THE WITNESS:] Yes, Ma'am.
>
> [THE PROSECUTOR:] And that was Howard County. Correct?
>
> [THE WITNESS:] Yes, Ma'am.

Thereafter, Caldwell moved for a mistrial, which Snowden joined. The defense argued that the detective's comment indicating that he was investigating a burglary in Capital Heights upon the directive of the Howard County Police Department violated the trial judge's prior order suppressing evidence as to the specific circumstances that led a Howard County investigation into Prince George's County. The trial judge acknowledged that both parties and the court were using their best efforts to avoid the admission of evidence that would lead the jury to conclude that the police had reason to investigate Caldwell prior to this incident. Nevertheless, the judge found this statement to be inadvertent and denied the defendants' motion for a mistrial. The court further offered the defendants an opportunity to formulate a curative instruction of their choosing, which they declined. Thereafter, Detective Bassaro noted twice more that he was cooperating with a Howard County investigation.

After considering the factors set forth in *Rainville*, *supra*, we hold that the circuit court did not err by denying Caldwell's motion for a mistrial. Initially, we observe that the trial court's pre-trial order only indicated that "the officer can say that as part of an investigation we were at the scene. . . . But to say that we were doing an investigation of Mr. Caldwell or Mr. Snowden, I would grant the defense motion." Moreover, the court declared that the witnesses may testify that they were at the scene of the burglary "as part of an investigation or as part of our duty, . . . but not that those duties were specifically related to suspicions they had about either defendant."

Accordingly, pursuant to the trial judge's order, the witnesses were expressly permitted to testify that they were at the scene of the burglary for an investigation. The witnesses were merely prohibited from identifying the defendants as the subject of that investigation. We note, however, that the judge did not expressly prohibit the State from indicating that the investigation that led them to the scene was a burglary investigation. Indeed, at no point did Detective Bassaro violate the judge's order and indicated that he was investigating these particular defendants. The judge, however, did recognize that there was a danger that the jury might infer, based on Detective Bassaro's testimony, that he was investigating the defendants, from which jurors might assume that the defendants had committed a prior burglary, and ultimately that the defendants may have a propensity to commit burglaries. Accordingly, the judge sustained the defendants' objection and offered them the opportunity for a curative instruction, which the defendants denied.

The testimony by Detective Bassaro at trial did not violate the court's prior evidentiary ruling. Indeed, any conceivable inference that Caldwell had a propensity to commit burglaries could only be deduced from a long and convoluted chain of assumptions. As such, the trial judge did not abuse his discretion by denying Caldwell's motion for a mistrial. We, therefore, hold that the circuit court did not err by denying Caldwell's motion for a mistrial during Detective Bassaro's testimony.

Additionally, Caldwell takes issue with testimony offered by his co-conspirator, from which jurors might conclude through inference that Caldwell might have committed another crime. At trial, Salam testified as follows:

> [THE PROSECUTOR:] And why are you here testifying today?
>
> [THE WITNESS:] For one, I made a statement implicating myself into this crime. And another one is for personal reasons, such as I was getting jerked out of money. I was upset.
>
> [THE PROSECUTOR:] What do you mean you were getting jerked out of money?
>
> [THE WITNESS:] I mean, of course there's a profit. At that particularity time I was going through a very strenuous time, but I knew that once the value of the furniture was – was estimated, I knew that I wasn't getting a fair share because of previous deals.

Thereafter, the defendants argued that Salam's reference to "previous deals" prejudiced the jury to an extent that a mistrial was necessary. The judge, again, denied the defendants' motion for a mistrial, but offered them the opportunity to present the court with a curative instruction. The defendants declined a curative instruction and the proceedings continued. Similar to the first instance of objectionable testimony, after considering the factors set forth in *Rainville*, *supra*, we hold that the circuit court did not err by denying Caldwell's motion for a mistrial.

Initially, we note that the question posed by the State was an entirely appropriate attempt to provide the jury with information that they could use in assessing the credibility of its witness. The State did not solicit inadmissible evidence involving Caldwell's prior bad acts. Indeed, the statement offered by Salam would not necessarily have even been inadmissible under Md. Rule 5-405 (Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes). Rather, the judge exercised his discretion and sustained the

defendants' objection because the probative value of the statement was substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403. Recognizing, however, that Salam's disclosure--prejudicial as it may have been--did not compromise the integrity of the proceedings so as to warrant a mistrial, the trial judge declined the defendants' motion for a mistrial.

Here, the testimony by Salam did not specifically allege that Caldwell was engaged in prior criminal activity, nor did the State specifically elicit inadmissible testimony. Further, the testimony offered by Salam was of minimal probative value relative to the testimony of the other ten witnesses that testified at trial. Accordingly, the trial judge did not abuse his discretion by denying the defendants' motion for a mistrial. We, therefore, hold that the circuit court did not err by denying Caldwell's motion for a mistrial during Salam's testimony.

The trial judge's responses to the defendants' objections were measured attempts to appropriately satisfy the competing interests in providing Caldwell a fair trial, while permitting the State to coherently and efficiently present its case. Upon weighing the potential prejudice of the Detective Bassaro's and Salam's statements, the value of their testimony, and the inadvertent nature of the statements, the judge declined to impose the extreme remedy of declaring a mistrial. Under these circumstances, the trial judge's decision denying Caldwell's motion for a mistrial was not an abuse of discretion.

## II. Caldwell's Challenge to the Sufficiency of the Evidence Supporting His Conviction for Conspiracy to Burglarize the Alkaline Water Company is Unpreserved.

Caldwell further alleges that there was insufficient evidence to sustain a conviction for the offense of conspiracy to commit burglary of the Alkaline Water Company. The State, for its part, avers that Caldwell's argument is waived because the issue was never presented to the trial court. Caldwell acknowledges that the issue as to whether the evidence is sufficient to sustain his conviction was not raised before the trial court. Nevertheless, Caldwell asserts that we should engage in plain error review and reverse the conviction. Alternatively, Caldwell contends that review of this sufficiency claim is proper because Caldwell's trial counsel was ineffective for failing to challenge the sufficiency of the evidence before the trial court. We hold that this issue is not preserved and we decline to consider whether there was sufficient evidence to convict Caldwell of conspiracy to burglarize the Alkaline Water Company.

The scope of appellate review is articulated in Md. Rule 8-131(a) which provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." This rule has "a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and th[is] rule[] must be followed in all cases. . . ." *Conyers v. State*, 354 Md. 132, 150 (1999). If, however, a litigant fails to adequately preserve an argument for appellate review, we may, in the narrowest of circumstances, address the issue by engaging

in plain error review. Plain error analysis is only applied infrequently when an error is so material that it deprives the defendant of an impartial trial out of recognition that:

> Error in a trial court may be committed only by a judge, and only when he rules, or, in rare instances, fails to rule, on a question raised before him in the course of a trial, or in pre-trial or post-trial proceedings. Appellate courts look only to the rulings made by the trial judge, or to his failure to act when action was required, to find reversible error.

*Williams v. State*, 34 Md. App. 206, 209 (1976) (alterations omitted) (quoting *Braun v. Ford Motor Co.*, 32 Md. App. 545, 548 (1976)). Indeed:

> The quintessential thrust of the rule is that an objection unmistakably articulated before the trial judge, giving him the opportunity to rule thereon, is the sine qua non of appellate review . . . . [T]he oft-neglected truth [is] that an appellate court is not some omnipresent, omniscient and omnipotent ombudsman ready, willing and able to set aright all the ills of the world . . . . [A]n appellate court sits rather in a more limited judgment upon the rulings of a trial judge when he has been called upon to rule.

*Williams*, *supra*, 34 Md. App. at 209 (citations omitted).

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014); *Malaska v. State*, 216 Md. App. 492, 524-25 (explaining that plain error review can remedy defects that denied "a defendant's right to a fair and impartial trial."), *cert. denied*, 439 Md. 696 (2014), *and cert. denied*, 135 S. Ct. 1162 (2015). Review for plain error is reserved for

error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011).

Critically, Md. Rule 4-324(a) requires that a defendant making a motion for judgment of acquittal to "state with particularity all reasons why the motion should be granted." The State maintains that "'no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered.'" (quoting *McIntyre v. State*, 168 Md. App. 504, 528 (2006)). Indeed, to engage in plain error analysis here would be to effectively impose upon trial courts the affirmative obligations to *sua sponte* identify and remedy instances when there is insufficient evidence to sustain the charged offenses.

We decline to review the unpreserved claim in this case that the evidence was insufficient to sustain one of Caldwell's convictions. Indeed, the Maryland Rules expressly place the onus on the defendant to lodge such an objection in the first instance. "We know, of course, that the possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7-11." *Garner v. State*, 183 Md. App. 122, 152 (2008). Here, we decline Caldwell's invitation to engage in a plain error analysis when the Maryland Rules expressly and affirmatively require him to argue the sufficiency of the evidence to the trial court.

Alternatively, Caldwell asserts that it is proper for us to address whether the evidence was sufficient to convict him of conspiracy to burglarize the Alkaline Water Company on the grounds that the failure of his attorney to present this argument at trial constitutes ineffective assistance of counsel. In support, Caldwell relies on our opinion in *Testerman v. State*, for the proposition that review of an ineffective assistance of counsel claim on direct appeal is appropriate when "'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.'" 170 Md. App. 324, 335 (2006) (quoting *In re Parris W.*, 363 Md. 717, 726 (2001)).

In *Testerman*, a defendant was convicted of eluding a uniformed police officer when, upon the initiation of a traffic stop, the defendant switched seats in the vehicle with a passenger. *Testerman*, *supra*, 170 Md. App. at 330. At the close of evidence, the defendant's counsel made a motion for judgment, but he did not specify his reasons. *Id.* at 331. In that case, we acknowledged that:

> [G]enerally a post-conviction proceeding is the "most appropriate" way to raise a claim of ineffective assistance of counsel, *Mosley v. State*, 378 Md. 548, 558-59, 836 A.2d 678 (2003), because "ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. 717, 726, 770 A.2d 202 (2001). But, we may nonetheless do so, "where 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.*; *see Mosley*, 378 Md. at 566, 836 A.2d 678; *Lettley v. State*, 358 Md. 26, 32, 746 A.2d 392 (2000).

*Testerman*, *supra*, 170 Md. App. at 335.

In *Testerman* we determined that the defendant's counsel was ineffective on direct appeal. This was so because after an "examination of hundreds of 'eluding' cases" it appeared obvious that the defendant's conduct in this case could not constitute "eluding." *Id.* at 340-41. Moreover, not only was the legal question at issue well settled, but had the defendant's counsel argued against the sufficiency of the evidence, the court would have had no choice but to grant the defendant's motion for judgment. Accordingly, we determined that it was objectively unreasonable and unprofessional for the attorney to fail to argue that the defendant did not elude police, and no additional facts could have made the failure to present that argument reasonable. Moreover, had the attorney made such an argument, the outcome definitely would have been different. We, therefore, reversed the defendant's conviction on direct appeal because his counsel was ineffective.

The circumstances that led us to review an otherwise unpreserved error under the auspices of ineffective assistance of counsel in *Testerman* are not present in this case. First, in this case, there is a significant and unresolved legal question as to whether breaking into a building with the intent to steal from another building constitutes a burglary. Caldwell concedes so much when he acknowledges that "there is ambiguity in the second-degree burglary statute as to the location of the theft that was intended to be committed." Accordingly, as a practical matter it is difficult to determine that the professional conduct of Caldwell's counsel fell below the relevant standard of care when he failed to raise an unsettled issue relating to the interpretation of our second-degree burglary statute.

Moreover, assuming *arguendo* that Caldwell had argued against the sufficiency of the evidence at the close of evidence *and* the law was clear that Caldwell could not conspire to burglarize a building with the intent to steal from another building, it is not at all certain that the trial judge would have necessarily granted Caldwell's motion had the argument been raised. Indeed, in this case it is plausible that the jury might have found that Caldwell conspired to burglarize Bella Furniture, or alternatively, the Alkaline Water Company. *See Ezenwa*, *supra*, 82 Md. App. 489, 501 (1990) ("If two counts charging conspiracy are the same, the defect in the indictment is that it contains multiplicitous counts. . . . Such a defect is a pleading defect and, consequently not fatal to the indictment." (internal citation omitted)). Accordingly, although Caldwell could not have been punished twice for the same conspiracy, so long as the State satisfied its burden of production it was entirely permissible for the court to submit both counts to the jury so that they may assess the alternative theories.

In this case, we cannot say in this direct appeal based on the facts in this record that Caldwell's counsel was ineffective. *Steward*, *supra*, 218 Md. App. at 572 ("Because neither the facts nor the law in the instant case were so conclusively established as to be immutable upon subsequent review, we are unable to decide appellant's ineffective assistance claim at this time."). Critically, we merely hold here that there is a need for collateral fact-finding in order to determine the effectiveness of Caldwell's counsel before we opine on that issue. *Testerman*, *supra*, 170 Md. App. at 335.

For the reasons stated herein, we do not address Caldwell's challenge to the sufficiency of the evidence sustaining his conviction for conspiracy to burglarize the

Alkaline Water Company because that question is not preserved for appellate review. We further decline to engage in plain error analysis in order to consider this otherwise unpreserved error. Finally, we believe that this case is significantly distinguishable from *Testerman*, *supra*. We, therefore, decline to consider in this direct appeal whether Caldwell received ineffective assistance of counsel. Accordingly, we do not reach the question as to whether the evidence was sufficient to sustain Caldwell's conviction for conspiracy to burglarize the Alkaline Water Company.

## III. The Circuit Court Erred by Failing to Vacate One of Caldwell's Conspiracy Convictions.

Caldwell challenges the separate convictions and sentences he received for the crimes of conspiracy to commit burglary of the Alkaline Water Company and conspiracy to commit burglary of Bella Furniture. The State agrees that it was improper for Caldwell to receive two sentences for conspiracy when the State did not argue that Caldwell committed two separate conspiracies. The parties, however, disagree as to how to resolve this issue. The State maintains that while the cumulative sentence must fall, the underlying convictions should nevertheless remain, and that we should remand the case for re-sentencing. Caldwell, however, contends that we should simply vacate the conviction and sentence for the charge that we determine is least supported by the weight of the evidence. For the reasons stated herein, we hold that one of Caldwell's identical convictions must be vacated, and we remand this case to the circuit court with instruction for the court to vacate one of Caldwell's convictions and re-sentence him accordingly.

Caldwell cites Md. Rule 4-345(a) as the authority to review what he contends is an illegal sentence. "There are limited grounds on which a sentence may be properly reviewed by this Court despite the failure to object at the time of the proceedings. One such avenue for review, relevant to this case is Md. Rule 4-345(a) . . . ." *Bryant v. State*, 436 Md. 653, 662 (2014). Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "A sentence is illegal when the illegality inheres in the sentence itself." *Taylor v. State*, 224 Md. App. 476, 500 (2015) (internal quotations omitted). For example, the "'failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule.'" *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (quoting *Pair v. State*, 202 Md. App. 617, 624 (2011)). Moreover, "a defendant may attack the sentence by way of direct appeal, or collaterally and belatedly through the trial court, and then on appeal from that denial." *Bishop v. State*, 218 Md. App. 472, 504 (2014) (internal quotations omitted).

A motion made pursuant to Md. Rule 4-345(a), however, "is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case." *State v. Wilkins*, 393 Md. 269, 273 (2006). Accordingly, a motion made under Md. Rule 4-345(a) is only available to correct an illegal sentence and is not generally a mechanism to challenge the underlying conviction. *Carlini v. State*, 215 Md. App. 415, 442 (2013). Having concluded that the question as to the sufficiency of the evidence sustaining one of Caldwell's conspiracy questions is not preserved for appellate review, *see* Part II, *supra*, the question in this case turns on whether

the imposition of two conspiracy convictions, in addition to sentences for both convictions, can be challenged in a motion to correct an illegal sentence.

> "The Fifth Amendment to the United States Constitution forbids any person from being 'twice put in jeopardy of life or limb.'" *Odum v. State*, 412 Md. 593, 603, 989 A.2d 232 (2010) (quoting U.S. CONST. am. V). The Fifth Amendment prohibition "against making a defendant twice accountable for the same offense" is applicable to the states through the Fourteenth Amendment. *State v. Long*, 405 Md. 527, 535-36, 954 A.2d 1083 (2008) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

*Scriber v. State*, 437 Md. 399, 407-08 (2014). Within the Fifth Amendment, "[o]ur cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984). In this case, we are confronted with an instance where Caldwell alleges that he was punished multiple times for the same offense.

With regard to whether a defendant has received multiple punishments for the same offense, "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). Part of the reasons why this area of law can be so troublesome is because the question as to whether a state-law punishment passes constitutional muster depends on how the state-law offense is intended to be interpreted. Indeed, issues involving multiple punishments for criminal conduct require us to discern whether it was the intent of the

legislature for the offender to receive multiple punishments for the prohibited conduct. *Spitzinger v. State*, 340 Md. 114, 121-27 (1995); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the intent of "[l]egislatures, not courts, prescribe the scope of punishments"); *Newton v. State*, 280 Md. 260, 274 n.4 (1977); *see also* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L.Rev. 595, 596-97 (2006) (arguing that it is improper to rely on principles of double jeopardy in the multiple punishment context because the analysis renders the Constitution subservient to legislative intent).

Accordingly, if the present question involved a statutory crime, we would employ principles of statutory construction, and we would seek to discern what the legislature intended the scope of a conspiracy to be for the purpose of determining whether two conspiracies are the "same offense." *See Spitzinger*, *supra*, 340 Md. at 119-20 ("'[W]hen dealing with the question of multiple punishment imposed after a single trial, and based on the same conduct, a critical question is one of legislative intent.'" (alterations in original) (quoting *Randall Book Corp. v. State*, 316 Md. 315, 324 (1989))).

Unlike a statutory crime, a conspiracy is "a 'common law crime' that 'arrived in our then proprietary colony as part of the unseen cargo of the Ark and the Dove.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Rudder v. State*, 181 Md. App. 426, 432, 956 A.2d 791 (2008)). Indeed, the crime of conspiracy exists under the common law and applies under Article 5 of the Maryland Declaration of Rights. MD. CONST., art. V ("[T]he inhabitants of Maryland are entitled to the Common Law of England."). We inherit the

common law from England, subject to legislative alterations, as well as our holdings, the emanations from both form a penumbra which accommodates changed circumstances. *See Danforth v. Groton Water Co.*, 178 Mass. 472, 477, 59 N.E. 1033, 1034 (1901) (Holmes, J.) (noting "common law [rules] end in a penumbra" subject to limitations on the state police power).

With regard to the substantive law of conspiracy, determining whether there is one or more conspiracy is "a 'challenge' with which '[c]ourts have long wrestled.'" *Savage*, *supra*, 212 Md. App. at 16 (alteration in original) (quoting Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: a Proposed Approach*, 92 Geo. L.J. 1183, 1274 n.507 (2004)). It is, however:

> [W]ell settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit. The unit of prosecution is the agreement or combination rather than each of its criminal objectives. In *Mason v. State*, 302 Md. 434, 445, 488 A.2d 955, 960 (1985), [the Court of Appeals] stated that a "conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy."

*Tracy v. State*, 319 Md. 452, 459 (1990). Determining whether conduct violative of a single criminal law can give rise to multiple units of prosecution because the defendant conspired to commit multiple criminal acts, depends on whether "there was a 'break,' for an 'appreciable time, in the sequence of events,' in order to "categorize' the agreements as 'separate and distinct.'" *Savage*, *supra*, 212 Md. App. at 25 (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). If so, multiple punishments premised on two separate conspiracies

may be sustained. If, however, a conspiracy to commit one offense is a necessary step in furtherance of the larger conspiracy that is not "separate and distinct" from the larger criminal agreement, then there is only one unit of prosecution. *Savage*, *supra*, 212 Md. App. at 25.

In the instant case, Caldwell contends that the conspiracy here constitutes only one unit of prosecution. Further, the State concedes that "Caldwell is entitled to have one of the two sentences on his conspiracy convictions vacated." This is so because, as both parties agree, the State did not argue that Caldwell had engaged in two conspiracies nor was the jury instructed that it must find two separate and distinct conspiracies in order to convict Caldwell of two counts of conspiracy. *See id.* at 31 ("Had (1) the jury been properly instructed, (2) a two-conspiracy argument been advanced by the State, and (3) the jury found either a single conspiracy or multiple conspiracies, we would, in a sufficiency review, review the evidence in the light most favorable to the jury's verdict."). Notably, the State stops just short of taking the position that Caldwell committed only one conspiracy. But where the two offenses for which Caldwell was punished are not only the "same offense" for double jeopardy purposes--but they are quite literally the same crime--the only manner in which Caldwell would be entitled to have a sentence vacated is if he only committed one conspiracy. Nevertheless, the State contends that Caldwell's sentences should merge, but that both convictions should remain intact.

In support of its contention that both conspiracy convictions should survive, the State cites to numerous cases where we determined that the merger of two sentences did not

require the separate conviction to be vacated. *See*, *e.g.*, *Lovelace v. State*, 214 Md. App. 512, 543 (2013); *Carroll v. State*, 202 Md. App. 487, 518-19 (2011); *White v. State*, 100 Md. App. 1, 12 (1994). Indeed, we agree with the State that generally "merger does not affect the underlying conviction." *Lovelace*, *supra*, 214 Md. App. at 543. We, however, disagree that a merger is what is mandated in this instance.

The doctrine of merger applies when a defendant has committed two separate crimes that are the "same offense" under the double jeopardy clause of the U.S. Constitution (or the legislative intent of the statute, as Professor Poulin advocates), for which a defendant may only receive one sentence. As Judges Gilbert and Moylan explain:

> To punish an individual both for an aggravated assault and for the lesser included simple assault would constitute multiple punishment for the same offense, one of the classic evils against which the double jeopardy provision protects. The question remains of what to do with the lesser included offenses. It is not literally appropriate to acquit the defendant of the lesser offenses, for it is the indisputed fact that he has perpetrated each and every element of those lesser included offenses. The law's solution is not to reach the illogical conclusion that the defendant is not guilty of the lesser included offenses (at least in the sense of being not guilty upon the merits) but rather to conclude that for purposes of punishment, the lesser included offenses are subsumed or merged into the conviction for the greater inclusive offense. The problem of multiple punishment is thereby avoided . . . . **Most of our conceptual problems are eliminated when we appreciate that the very notion of merger is something designed simply to avoid multiple punishment.** It is not the case that the defendant is not guilty of the lesser offenses; it is rather the case that he is guilty of those lesser offenses but simply is not to be twice punished.

Richard P. Gilbert & Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure* 452-53 (1983) (emphasis added).

The supporting principle behind the doctrine of merger is that although the legislative intent of two offenses might prohibit the imposition of cumulative punishments, "[i]t **is not** literally appropriate to acquit the defendant of the lesser offenses, for it is the indisputed fact that he has perpetrated each and every element of those lesser included offenses." *Gilbert & Moylan*, *supra*, at 452 (emphasis added). Indeed, the prevailing idea supporting the doctrine of merger is that while double jeopardy or legislative intent may prohibit cumulative punishments for conduct deemed to be the "same offense," the cumulative punishment only constitutes the sentence where both convictions are otherwise valid. Accordingly, in such circumstances the convictions should merge for sentencing purposes, but the lesser included conviction is not vacated in the sense that the defendant should have been acquitted of the crime.[2]

In this case, however, the evidence did not demonstrate that Caldwell participated in two district crimes which happen to be the "same offense" as that term is used in legal parlance. Rather, Caldwell was convicted twice of the exact same crime for conduct

[2] We note that seldom do multiple punishment cases present themselves in a manner such as this where both parties agree that a defendant improperly received cumulative punishments, yet they disagree as to the remedy. Accordingly, we are cognizant of the fact that the "authority from Maryland has, at times, used the words 'merge' and 'vacate' interchangeably in the conspiracy context." *Savage*, *supra*, 212 Md. App. at 26 n.21.

amounting to only one unit of prosecution. In this instance, unlike one in which merger is appropriate, it **is** literally inappropriate to convict the defendant of the multiplicitous charge.

We have already determined that this case presents an instance where Caldwell allegedly received "multiple punishments for the same offense." *Justices of Boston Mun. Court*, *supra*, 466 U.S. at 306-07. Within that class of cases, however, there are "two different sets of circumstances: those involving two separate statutes embracing the same criminal conduct, and those involving a single statute creating multiple units of prosecution for conduct occurring as a part of the same criminal transaction.'" *Purnell*, *supra*, 375 Md. at 692 (quoting *Richmond v. State*, 326 Md. 257, 261 (1992)). The doctrine of merger aims to remedy both of these scenarios. Indeed, in certain circumstances, when there are two separate crimes, the defendant may rightfully be said to be guilty of both even if he cannot be punished for both. Likewise, where two *actus rei* violate one criminal law, the defendant can rightfully be said to be guilty of the crime twice, even if he cannot be punished twice because there exists only one unit of prosecution. In both of these scenarios, the doctrine of merger applies to consolidate the defendant's sentences, but nevertheless allow each conviction to remain intact.

In the instant case, Caldwell's two conspiracy convictions do not stem from separate criminal statutes, nor do they arise from separate units of prosecution. Here, unlike a circumstance where merger is appropriate, sustaining two convictions--as opposed to two sentences--for the same crime and the same unit of prosecution would constitute a

cumulative punishment that violates double jeopardy principles. As the United States Supreme Court has recognized:

> The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. . . . Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

*Ball v. United States*, 470 U.S. 856, 864-65 (1985); *see also Rutledge v. United States*, 517 U.S. 292, 301 (1996) (quoting *Ball*, *supra*.).

Critically, the principle expressed by the United States Supreme Court in *Ball*, *supra*, does not obliterate the doctrine of merger where the purpose of the criminal law at issue is for a defendant to receive two convictions, but only one sentence, for conduct that constitutes multiple crimes. Moreover, a defendant can surely be punished twice for the same offense where the defendant engages in two instances of conduct that constitute two units of prosecution. Where, as here, a defendant has been convicted twice of the same offense, and the conduct that gave rise to the convictions constitutes only one unit of prosecution, merger is not appropriate and the second conviction itself is a cumulative punishment that runs contrary to the purpose of the criminal offense. Accordingly, we reject

the State's position that Caldwell's sentences should merge, and that his two convictions for conspiracy should survive.

Caldwell contends that we should simply vacate his conviction for conspiracy to burglarize the Alkaline Water warehouse because that conviction is less supported by the weight of the evidence.[3] We, however, reject Caldwell's contention that the proper course of action is for us to vacate one of the multiplicitous counts of conspiracy because "the State failed to present any evidence, or even argue, that there was an agreement" to burglarize the Alkaline Water Warehouse. While Caldwell has strong support for the proposition that his convictions violate the double jeopardy clause of the U.S. Constitution, he offers no support for his assertion that we must vacate his conviction for count seven to remedy that violation.

To subscribe to Caldwell's argument would effectively permit him to mount his challenge to the sufficiency of the evidence as to count seven of the indictment without having adequately preserved this argument. For the reasons stated in Part II, *supra*, we decline Caldwell's invitation to consider whether the evidence was sufficient to sustain his conviction for count seven. Accordingly, we reject Caldwell's contention that we must vacate his conviction for count seven because it appears to be less supported by the weight of the evidence. Rather, because Caldwell's two convictions are for the same crime arising

[3] Although immaterial for our analysis, Caldwell's preference is undoubtedly influenced by the fact that if we vacate count seven, his sentence will be 15 years' incarceration with all but five years suspended. If, however, we remand the case for re-sentencing, Caldwell could be sentenced to up to 15 years' incarceration with no time suspended.

out of the same unit of prosecution, the convictions are identical and it is immaterial which one is ultimately vacated.[4] Accordingly, we remand this case with instructions for the circuit court to vacate one of Caldwell's multiplicitous conspiracy convictions, and for re-sentencing.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND REMANDED IN PART FOR FURTHER PROCEEDINGS TO VACATE ONE OF THE CONSPIRACY CONVICTIONS AND SENTENCES. APPELLANT TO PAY TWO THIRDS OF THE COSTS. PRINCE GEORGE'S COUNTY TO PAY ONE THIRD OF THE COSTS.**

[4] We emphasize that in this case Caldwell's multiplicitous convictions--as opposed to his cumulative sentences--violate principles of double jeopardy. That the two convictions derive from two separate counts in the indictment, or that the two convictions are premised upon two different theories of conspiracy is immaterial where a defendant is convicted twice for one offense for conduct amounting to one unit of prosecution. Accordingly, there is no meaningful distinction between Caldwell's convictions for the separate counts of conspiracy charged in the indictment. Therefore, after vacating one of the identical convictions on remand, the trial judge will be tasked to re-sentence Caldwell for the remaining conspiracy conviction, and the resulting sentence cannot exceed the "entire sentencing package" originally imposed by the trial judge. *Twigg v. State*, 447 Md. 1, 28 (2016) (interpreting Md. Code (2006, 2013 Repl. Vol., 2015 Suppl.), § 12-702 of the Courts and Judicial Proceedings Article).