UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0887

September Term, 2015

ROBERT ANTHONY ALLEN

v.

STATE OF MARYLAND

Woodward,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: May 19, 2016

Appellant, Robert Anthony Allen, was indicted in the Circuit Court for Prince George's County, Maryland, and charged with armed robbery and related offenses. A jury subsequently convicted him of conspiracy to commit second degree assault. After appellant was sentenced to seven years of incarceration, he timely appealed, presenting the following questions for our review:

1. Was the evidence sufficient to sustain Appellant's conviction of conspiracy to commit second degree assault?

2. As applied to any count charging "conspiracy," was it error to give a jury instruction that "[t]he defendant may be guilty of the crimes charged as an accomplice"?

For the following reasons, we shall affirm.

BACKGROUND

On the evening of August 1, 2014, Carolyn Braxton and her husband, Anthony Braxton, needed a ride from their apartment complex in Upper Marlboro, Maryland, in order to run errands and go grocery shopping. Mr. Braxton approached appellant for assistance, and appellant was able to obtain a ride for the Braxtons from an unidentified female. In return, Mr. Braxton agreed to pay this woman $60. When they left the Braxtons' residence, the group included the Braxtons, the unidentified female driver, appellant, and another unidentified female.

The first stop was a liquor store, so that the Braxtons could cash their Social Security checks. From there, the group drove to a grocery store. While Mr. Braxton and appellant went inside to shop, Mrs. Braxton remained behind in the vehicle with the two females. About an hour and fifteen minutes later, Mr. Braxton and appellant returned to the car with

a basket of groceries. The group then left the store parking lot and went to their third stop, a gas station, where Mr. Braxton bought some synthetic marijuana. Following this, the group returned the Braxtons to their residence.

En route, Mr. Braxton and the driver of the vehicle discussed the fee for taking the couple to the store. When they arrived home, which was approximately between 9:00 and 10:00 p.m., someone from the vehicle started unloading the groceries and placing them on the lawn near the sidewalk. As the groceries were being unloaded, the two females and appellant continued to ask when the Braxtons were going to pay the $60. Mrs. Braxton told her husband to pay them, and Mr. Braxton initially confirmed that he was going to honor the arrangement and pay the fee.

But, soon after that, presumably because Mr. Braxton seemed to withhold payment, the females became "very upset," and demanded that Mr. Braxton pay. At around that same time, appellant grabbed Mr. Braxton, "dragged" him out of the car, and also demanded payment. The encounter then became even more physical when Mrs. Braxton heard one of the females state "you pay us now or, you know, we're going to take it from you." Following this, Mrs. Braxton saw the females push and shove her husband, and then start digging into his pockets for money. It was at that point, according to Mrs. Braxton, that Mr. Braxton replied, "no, I'm not going to give you anything . . ."

There was evidence that the encounter then became a "full-blown fight." Although she never identified appellant in court, Mrs. Braxton indicated that the unidentified

females, as well as "the guy," began punching and hitting Mr. Braxton with their fists. Mrs. Braxton testified:

> Two girls, and the guy started hitting my husband. They punched him and he started hitting him and they punched him all in his face. They started punched [sic] him in the chest and all on his backside. They pushed him to the ground and they choked him in his neck and they said give us the money, give us the money now, and jumped on top of two girls and the guy, and the guy jumped on top of him.

Mr. Braxton, however, did identify appellant in court. During the altercation, Mr. Braxton testified that appellant "held me very roughly" and "I couldn't move." Mr. Braxton said that appellant and the two females continued to kick and punch him while he was on the ground.

Finally, some other unidentified man, possibly a relative of one of the initial assailants, appeared and broke up the fight. The police arrived soon thereafter. Mr. Braxton sustained head, neck, and hand injuries, and was hospitalized for a day and a half. He testified that, in addition to a wristwatch, approximately $700 was stolen from him.

The defense called Detective David Cooper. Detective Cooper testified that he responded to the scene of the altercation and learned from Mr. Braxton that his watch and approximately $300 had been stolen.

We shall include additional facts in the following discussion.

DISCUSSION

I.

Appellant first contends that there was insufficient evidence of a conspiracy to commit second degree assault, because the assault was a "spur-of-the-moment reaction," and that a conspiracy "is not proven by the merely simultaneous actions and motives of two or more people." In other words, the essence of appellant's argument is that there was no conspiracy to commit second degree assault because there was no evidence of any agreement to commit second degree assault.

The State responds that this argument was not preserved and, even if preserved, is without merit. As to preservation, the State asserts that the grounds appellant presents on appeal are different from the grounds that were argued during the motion for judgment of acquittal at the end of the State's case-in-chief. The following grounds were argued in the circuit court:

> Conspiracy to commit robbery with [ ] conspiracy counts for Count 6, 7, 8, and 9, Your Honor, there is testimony that Mr. Braxton approached [appellant]. There is no testimony at any time that would indicate that there was any time for there to be any type of agreement made to conspire about any of those counts with the armed robbery.
>
> With respect to the armed robbery, I incorporate the early arguments about their [sic] not being any weapons or in fact [appellant] being the person who even took the $300 and/or watch in this case.
>
> The same thing with respect to the conspiracy to rob, there is testimony that was about that Mr. Braxton brokered the ride to the store to cash his checking, to do grocery shopping and to go to the gas station. And he talked about the purchases he made and he said

> that that was within what he brokered for and that was what the deal was, and actually accomplished those things.
>
> So there wasn't any conspiracy to rob him, wasn't any conspiracy to assault him in the first degree. There was testimony that the witness, Mr. Braxton, did not give up the money right away for both him and his wife. There was insufficient evidence to show that there was a conspiracy to rob him at that point, that this was whole altercation [sic] was because—there is testimony that the individuals that were in the vehicle were consuming alcohol, they were under the influence and high, and they were upset that they didn't get their money, and not that they conspired to do anything.

In response, and after nol prossing the counts charging armed robbery and conspiracy to commit armed robbery, the prosecutor argued, in pertinent part:

> With respect to the remaining conspiracy counts, I disagree with counsel in terms of the timing of the conspiracy. **To engage in these crimes, rather than it taking place when [appellant] was first approached, the conspiracy took place in the state when they returned to the parking lot.** And there was an indication that Mr. Braxton would be reluctant to give them the money until he had remove[d] all his groceries when he went—and on that point they don't need to have words or some type of verbal agreement, **they can conspire and the jury can find so by their actions and by their conduct or work as a team whipping him and beating him down it [sic] the parking lot and removing his money from him.** So with respect, I'd ask that the Court deny defense counsel's request for a motion for a judgment of acquittal with respect to the remaining counts.

(Emphasis added).

After noting that the State nol prossed the armed robbery-related counts, the trial court granted the motion on the counts charging first degree assault and conspiracy to commit first degree assault. The court then denied the motion for judgment of acquittal with respect to the remaining counts. After presenting evidence, appellant renewed the

motion, incorporating the arguments previously made. The court also denied the renewed motion.

On appeal, the State characterizes appellant's motion at trial as limited to the absence of any conspiracy to commit the specific crimes of armed robbery, robbery, or first degree assault. Based on this, the State argues that the appellate challenge to the conspiracy to commit second degree assault conviction is not preserved. Moreover, the State also suggests that the argument at trial only "focused on whether any inferences could be drawn about *mens rea* prior to, and during, the fateful excursion." In contrast, the State continues, "[o]n appeal, [appellant] now argues that there was no criminal conspiracy formed *after* the trip to the grocery store." (Emphasis in original).

"It is a well-established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal." *Claybourne v. State*, 209 Md. App. 706, 750, *cert. denied*, 432 Md. 212 (2013); *see also Montgomery v. State*, 206 Md. App. 357, 385-86 ("[A] motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Maryland] Rule [4-324(a),] and thus does not preserve the issue of sufficiency for appellate review." (alterations in original)), *cert. denied*, 429 Md. 83 (2012). "'This means that a defendant must argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Poole v. State*, 207 Md. App. 614, 632 (2012) (quoting *Arthur v. State*, 420 Md. 512, 522 (2011)).

We disagree with the State's preservation argument. Defense counsel's argument expressly listed Count 9, the count charging conspiracy to commit second degree assault, in the motion for judgment of acquittal. Moreover, the State's response to the motion addressed the timing of the agreement. We conclude that the sufficiency challenge is adequately preserved for appellate review. *See Bacon v. State*, 82 Md. App. 737, 740-41 (1990) (concluding that a sufficiency challenge was preserved where, although the specific argument as to insufficiency may not have been raised by defense counsel, the court clearly considered the issue in denying the motion for judgment of acquittal), *rev'd on other grounds*, 322 Md. 140 (1991).

On the merits, the test of appellate review of evidentiary sufficiency is whether, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011)

(alterations in original) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery*, 206 Md. App. at 385 (alterations in original) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)).

Appellant was convicted of conspiracy to commit second degree assault. Briefly, Section 3-203 of the Criminal Law Article, entitled "Assault in the second degree," prohibits a person from committing an assault. Md. Code (2002, 2012 Repl. Vol.), § 3-203 of the Criminal Law (I) Article. Maryland recognizes three modalities of assault: "'1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery.'" *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992)).

Conspiracy in Maryland is a common law crime. The Court of Appeals discussed the elements of the crime of conspiracy in *Carroll v. State*, explaining as follows:

> 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 means. The agreement at the heart of a conspiracy need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy.

428 Md. 679, 696-97 (2012) (citations and internal quotation marks omitted).

A criminal conspiracy may be shown by "circumstantial evidence from which an inference of common design may be drawn." *McMillian v. State*, 325 Md. 272, 292 (1992). For instance, in *Jones v. State*, we determined that evidence that two people emerged from an alley, one of whom fired several gunshots, in addition to an identification of the appellant as one of the two men, was sufficient to allow a reasonable inference that the two men were acting in concert with a conspiratorial purpose of killing their intended victim. 132 Md. App. 657, 661, *cert. denied*, 360 Md. 487 (2000). In reaching this holding, we recognized the following:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. **If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended.** Coordinated action is seldom a random occurrence.

Id. at 660 (emphasis added).

A case on point is *In re Lavar D.*, 189 Md. App. 526 (2009), *cert. denied*, 414 Md. 331 (2010). There, Ronald B., Britny C., and Lavar D. were charged as juveniles with assault and related offenses in connection with an altercation with the victims, Sarah Kreager and Troy Ennis, on a Mass Transit Administration ("MTA") bus on the afternoon of December 4, 2007. *Id.* at 531. Each appellant was found involved in assault in the first degree, assault in the second degree, conspiracy to commit assault in the first degree, disorderly conduct, and reckless endangerment. *Id.* at 531-32.

The facts were that, at around 3:00 p.m. on the afternoon of December 4, 2007, Kreager and Ennis boarded a crowded MTA bus, filled with approximately forty middle school students. *Id.* at 542-43, 561. Finding two seats together, Kreager sat down, but Ennis decided to remain standing near the back door of the bus. *Id.* at 543-44. At that point, Kreager heard a person later identified as Nakita M. tell her that she "needed to move," and "that's my home girl's seat" and "If she doesn't want to move, we'll move that bitch." *Id.* at 544.

Attempting to avoid further confrontation, Kreager got up and stood by Ennis. *Id.* at 544. After Kreager told Ennis that she believed that the juveniles were "trying to start something with [her]," Ennis told her to stand with him, observing that their five-year-old daughter "has more manners than they do." *Id.* At that point, Nakita M. stood up, and asked what Ennis had said. Nakita M. also turned around and told other individuals in the back of the bus, "look, she has a little boyfriend with her," and "[y]ou white motherfuckers think you own shit. This is our bus." *Id.* (alterations in original). Kreager replied, "Look, you can have the seat. It's not a big deal. Have the seat." *Id.*

At that point, Nakita M. swung at Kreager, struck her in the face, and pulled her hair. *Id.* Kreager then heard a "commotion 'coming from everywhere'" on the bus. *Id*. at 545. While Nakita M. held onto Kreager's hair, another girl grabbed her by the hair and started to pull her down into an increasingly aggressive crowd on the bus. *Id.* Ennis then grabbed Kreager and pulled her behind him. *Id.* At that point, some people started to attack Ennis. *Id.* When the bus stopped, Ennis and Kreager exited the bus. *Id.*

Despite Ennis's attempts to keep a large group of students from exiting the bus, Nakita M. and seven to twelve teenagers emerged and surrounded Kreager. *Id.* at 545. Nakita M. then attacked Kreager with a nail file. *Id.* at 546, 562. Meanwhile, a male hit Kreager with a closed fist, and Nakita M. and another female tackled her. *Id.* Kreager fell onto the ground, rolled up into a ball, and felt numerous people kicking and hitting her. *Id.* Someone then lifted Kreager by the hair, and Kreager heard a female, possibly Nakita M., yell, "Kick that bitch." *Id.* at 546-47. A male then kicked Kreager in the eye and Kreager sustained significant injuries, including, but not limited to injury to her eye, as well as several stab wounds to her head. *Id.* at 547. Ennis also was assaulted by five to six unidentified males. *Id.* at 555. Eventually, a witness yelled for the group to stop their attack, and the group did so and fled the scene. *Id.* at 547.

At the adjudication hearing, the court heard conflicting evidence as to how the incident began and whether Kreager initiated the assault. *Id.* at 563-73. This included evidence that Kreager may have already had a black eye when she got on the bus, that Ennis told Kreager, before the altercation initially began with Nakita M., to "spit on those nigga's," that Kreager did, in fact, spit on Nakita M., and that, after Ennis and Kreager got off the bus, that Ennis came back on momentarily and threatened some of the students with a knife. *Id.* There was no dispute, however, that Nakita M. and several other young people did, in fact, assault and injure Kreager. *Id.* Six juveniles were charged in connection with this incident. *Id.* at 531.

One of the issues on appeal concerned the sufficiency of the adjudication of the charge. *Id.* at 590. The challenge was that there was insufficient evidence of an agreement. *Id.* This Court disagreed, stating:

> "Although the essence of a criminal conspiracy is an unlawful agreement, the State is not required to offer proof of any formal arrangement; rather, a conspiracy can be inferred from the actions of the accused. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design."

Id. at 590-91 (quoting *Cooper v. State*, 128 Md. App. 257, 267 (1999)).

Similarly, in this case, a meeting of the minds may be inferred from the actions of appellant and the two females. There was evidence that appellant dragged Mr. Braxton out of the car and held him tight enough that Mr. Braxton could not move. The jury also heard that appellant, along with two unidentified females, kicked and punched Mr. Braxton while he was on the ground. This evidence showed a concert of action. A rational fact finder could infer that there was an agreement between appellant and the two females to assault Mr. Braxton. The evidence thus was sufficient to sustain appellant's conviction for conspiracy to commit second degree assault.

II.

Appellant next asserts that, as applied to the conspiracy counts, the trial court erred by giving an instruction on accomplice liability. Specifically, appellant points to the words "The defendant may be guilty of the crimes charged as an accomplice," and asserts that the court committed plain error because the accomplice instruction permitted the State to prove conspiracy without having to prove an element thereof, namely, an agreement. (Emphasis

in original). The State does not address preservation or plain error and simply responds that the court properly exercised its discretion because the instruction was a correct statement of law and supported by the evidence.

Prior to the giving of jury instructions, the following ensued:

THE COURT:	So we'll take out 501, and that leaves accomplice liability. So other than getting the instruction for impeachment of a witness, does the State have any objections or corrections?
[PROSECUTOR]:	No, Your Honor.
THE COURT:	And other than that one remaining instruction, [Defense Counsel], do you have any additions or corrections, objections?
[DEFENSE COUNSEL]:	I don't like the accomplice liability instruction.
	[Laughter.]
THE COURT:	The allegations are Mr. Braxton's testimony was that allegedly he was hit by more than one person and they all joined in to assault him and, in effect, his money or property was taken, so I'll give that instruction over the defense objection.

During jury instructions, the court gave the following instruction:

> **The defendant may be guilty of the crimes charged as an accomplice, and even though the defendant did not personally commit the acts that constitute that crime.** In order to convict the defendant of the crimes as an accomplice, the State must prove that the crimes occurred, and that the defendant, with the intent to make

> the crime happen, knowingly aided, counselled [sic] and/or encouraged the commission of the crime or communicated to a primary actor in that crime was ready, willing and able to lend support if needed.
>
> A person need not be physically present at the time and place of the commission of the crime in order to act as [an] accomplice. The mere presence of the defendant at the time and place of the commission of a crime is not enough to prove the defendant is an accomplice. If presence at the scene of the crime is prove[n] that fact may be considered along with all surrounding circumstances.
>
> In determining whether the defendant intended to and was willing to aid a primary actor, for example, by standing by as a lookout to warn the primary actor of a danger and whether the defendant communicated the willingness.
>
> To the primary actor [sic]. Ask counsel to approach.

(Emphasis added).

Thereafter, the following ensued at the bench:

THE COURT:	Any exceptions, objections by the State?
[PROSECUTOR]:	No, Your Honor.
[DEFENSE COUNSEL]:	No, Your Honor, not by the defense.
THE COURT:	Except for your accomplice liability instruction.
[DEFENSE COUNSEL]:	Yes.
THE COURT:	You reserve that objection.
[DEFENSE COUNSEL]:	Yes, Your Honor.

Although not raised by the State, we first consider whether this issue is properly before us. *See Haslup v. State*, 30 Md. App. 230, 239 (1976) (appellate court may

determine *sua sponte* whether party has preserved issue for appellate review). Maryland Rule 8-131(a) provides, in pertinent part:

> Ordinarily, 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Maryland Rule 4-325(e) specifically addresses preservation of claims of instructional error:

> **No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection**. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added).

Although "general" objections are permitted for some issues, such as the admissibility of evidence, *see, e.g.,* Maryland Rule 4-323(a), it is clear that Rule 4-325(e) requires a distinct and specific objection to a jury instruction in order to preserve the issue for appeal. *See Newcomb v. Owens*, 54 Md. App. 597, 603 (1983) (observing, without deciding, that there is "some justification" for an argument that a general objection to an instruction is not sufficient and that the Rule then in effect required appellant to make a specific objection, stating distinctly the grounds therefor). Here, there is no dispute that the trial court's instruction on accomplice liability followed the pattern instruction and was

a correct statement of law. Appellant's complaint is that this instruction did not apply to the conspiracy counts. Appellant, however, never objected on that ground, nor did he seek a limiting instruction. We thus hold that this issue is not preserved.

Apparently anticipating our preservation ruling, appellant casually raises the prospect of plain error. It is well settled that appellate courts "'possess plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court.'" *Tetso v. State*, 205 Md. App. 334, 403 (quoting *Danna v. State*, 91 Md. App. 443, 450 (1992)), *cert. denied*, 428 Md. 545 (2012). We exercise such discretion, however, only when the indicated error is one which is "'compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.'" *Tetso*, 205 Md. App. at 403-04 (alterations in original) (quoting *Boulden v. State*, 414 Md. 284, 313 (2010)). For this Court to notice plain error, "1) There must be error. 2) It must be plain. 3) It must be material." *Morris v. State*, 153 Md. App. 480, 507 n. 1 (2003) (citations omitted), *cert. denied*, 380 Md. 618 (2004).

"One source of continuing confusion in this area is whether the doctrines concerning complicity and conspiracy are essentially the same, so that liability as a conspirator and as an accomplice may be based upon essentially the same facts." 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(a) (2d ed. 2015). This Court has recognized:

> A thin line may sometimes separate 1) joint participation as a second-degree principal aiding and abetting the first-degree principal in the perpetration of a crime and 2) an antecedent agreement to cooperate in that fashion. Theoretically, one might decide on the spur of the moment to aid and abet another in a crime without ever having been solicited to do so and without any even

> implicit understanding between the parties. In such a case, there would be joint participation but no antecedent conspiracy. More frequently, however, joint participation by two or more codefendants and a conspiracy, to wit, a mutual understanding, jointly to participate overlap. The former gives rise at least to a permitted inference of the latter.

Jones, 132 Md. App. at 660-61.

Because conspiracy and accomplice liability could arise from the same set of facts in the case *sub judice*, it was not error, much less plain error, for the trial judge to give the pattern jury instructions for both conspiracy and accomplice liability. *See id*. However, appellant's suggested interpretation by the jury of several words in the accomplice liability instruction, is so remote as to border on the impossible. *See Butler v. State*, 91 Md. App. 515, 552 n.15 (1992), *aff'd*, 355 Md. 238 (1994) ("Listening to a judge drone on for 20 or 30 minutes with dozens of subtle legal definitions, a juror does not seize upon a passing phrase or clause that is not being highlighted, pounce upon it with the ferocity of a law professor . . . . To suggest that jurors thus react to instructions is not mere fiction; it is fantasy."). Accordingly, we decline to exercise plain error in the instant case.

JUDGMENT AFFIRMED; APPELLANT TO PAY COSTS.