UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1156

September Term, 2014

ANTHONY DICKSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: April 11, 2016

A jury in the Circuit Court for Baltimore City convicted Anthony Dickson, appellant, of conspiracy to possess with intent to distribute heroin, conspiracy to possess heroin, conspiracy to possess cocaine, reckless driving, negligent driving, speeding, failing to stop at a stop sign, and two counts of fleeing and eluding a police vehicle.[1] The court sentenced him to seven years on the conviction for conspiracy to possess heroin with intent to distribute, four years, concurrent, on the conviction for conspiracy to possess heroin, four years, concurrent, on the conviction for conspiracy to possess cocaine, and one year, concurrent, on each of the fleeing and eluding convictions.

On appeal, appellant raises the following issues for this Court's review:

> 1. Did the circuit court err in overruling defense counsel's objection and motion to strike hearsay testimony?
>
> 2. Should appellant's sentences for conspiracy to possess heroin and conspiracy to possess cocaine be vacated?
>
> 3. Should one of the sentences for fleeing and eluding be vacated?

For the reasons set forth below, we shall affirm, in part, and reverse, in part, the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2013, at approximately 5:55 p.m., Sergeant Eric Leitch and Officer Brian Huber, members of the Baltimore City Police Department, were sitting in a marked police vehicle when they observed a blue Dodge Intrepid at a stop sign. There were two black

[1] The jury acquitted appellant on the charges of possession with intent to distribute heroin, possession of heroin, and possession of cocaine.

males in the car. The Intrepid turned left, "accelerated at a high rate of speed," and then made a right turn. Given the speed of the vehicle, Sergeant Leitch made a U-turn and followed the vehicle. When the car ran through a stop sign, Sergeant Leitch activated his emergency lights and siren in an attempt to stop the car. The Intrepid began to accelerate "even more," and it ran two more stop signs before turning onto Potee Street, where it accelerated to a speed of approximately eighty miles-per-hour.

At the intersection of Potee and Patapsco, the Intrepid jumped the curb in an effort to get around vehicles stopped at a red light. In the process, the passenger side tires were punctured. The Intrepid continued westbound with the tires disintegrating until the vehicle was riding on bare rims. Eventually, the driver lost control, went across a median, narrowly missing another vehicle traveling in the opposite direction, hit a pole, and came to a stop.

At that point, the driver and the passenger of the Intrepid "bail[ed] out" of the vehicle and fled on foot. After initially chasing the driver on foot, Sergeant Leitch returned to his patrol car and attempted to intercept him. Officer Huber also pursued the driver on foot, but he lost sight of him for four or five minutes after the driver climbed over a fence topped with barbed wire. When Officer Huber saw a news helicopter "orbiting" a house, and he ran in that direction.

Officer Huber went inside the vacant house and found appellant lying "on the staircase leading to the basement." Appellant was sweaty, but he did not have any visible

injuries. Officer Huber later found a T-shirt with "fresh blood" on it in the basement. Both officers testified that appellant was the driver of the Intrepid.

When police searched the Intrepid they discovered seven clear gel caps on the floorboard, which were later identified as containing heroin, as well as a plastic bag in the cup holder. The bag contained a tannish powder later identified as heroin, in a quantity sufficient to make "at least 100 gel caps" for street distribution, as well as five heroin gel caps and three tied plastic bags filled with a white rock substance, which subsequently was identified as cocaine.

DISCUSSION

I.

Hearsay Objection

Appellant contends that "the trial court erred when it overruled defense counsel's objection and motion to strike hearsay testimony." This contention stems from the following colloquy during Officer Huber's direct testimony:

> [PROSECUTOR]: So once you photographed the vehicle, does Sergeant Leitch tell you what he's found in the vehicle?
>
> [OFFICER HUBER]: That's correct.
>
> [PROSECUTOR]: And did you have an opportunity to learn [appellant's] personal information like his birth date or anything like that?
>
> [OFFICER HUBER]: I conducted a MVA inquiry on [appellant].
>
> [PROSECUTOR]: And prior to conducting that inquiry, what, if any, information did you learn?

> [OFFICER HUBER]: That he did not have a driver's license, he had an ID only, and he was revoked and suspended.

Defense counsel then asked to approach the bench, where the following colloquy took place:

> [DEFENSE COUNSEL]: Thank you. Just a couple things. I think Madam State is going to try to introduce his driving record; is that correct, Madam State?
>
> [PROSECUTOR]: Yes.
>
> [DEFENSE COUNSEL]: So I'm going to object to that, that's a hearsay document. I'm also going to object and ask to strike his – the status of his driving privilege, that the officer – he just testified to.
>
> [PROSECUTOR]: And the basis for the –
>
> [DEFENSE COUNSEL]: The basis of those –
>
> * * *
>
> [DEFENSE COUNSEL]: – are hearsay. That's a report generated and I think it's a hearsay document.

After discussing the admissibility of appellant's driving record, the trial court sustained the hearsay objection to the MVA record. With respect to the objection to the officer's testimony, however, the court overruled the objection, stating: "I think the other objection is late."

Appellant contends that the court erred in this ruling, asserting that the status of his driving privilege "was classic hearsay," and his objection was not late. The State contends that the court properly exercised its discretion in overruling the objection because the testimony that appellant did not have a driver's license and "he was revoked and suspended"

was not hearsay, because the testimony was "not offered for the truth of the matter asserted, but to show why the police acted as they did." In any event, it argues that the court properly found that appellant's objection was late. Finally, the State asserts that, even if the court erred in overruling the objection, the error was harmless in light of the overwhelming evidence presented against appellant.

"'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). Unless it fits within an established exception to the rule against hearsay, "hearsay is not admissible." Md. Rule 5-802. On appeal, this Court makes a *de novo* determination whether a statement constitutes hearsay. *Parker v. State*, 408 Md. 428, 436 (2009).

A police officer's testimony regarding information learned through his or her investigation may not be hearsay if it is offered to show why the police acted as they did, rather than for the truth of the facts asserted in the statement. *Id.* at 438-39 (citing *Graves v. State*, 334 Md. 30, 38 (1994)). The Court of Appeals has "cautioned," however, that such testimony may be "inadmissible hearsay" if "the non-hearsay purpose of providing the basis upon which the arresting officer acted is not relevant to the question of a defendant's guilt or innocence." *Id.* at 439.

Here, the trial court did not decide whether the challenged testimony was inadmissible hearsay because it concluded that, even if it was, the objection came too late. We find no error in that ruling.

Under Maryland Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived." When a question by opposing counsel "'calls for an inadmissible answer,'" defense "'[c]ounsel cannot wait to see whether the answer is favorable before deciding whether to object.'" *Bruce v. State*, 328 Md. 594, 627, 628 (1992) (quoting 5 LYNN MCLAIN, MARYLAND EVIDENCE § 103.3 at 17 (1987)), *cert. denied*, 508 U.S. 963 (1993). *See also Holmes v. State*, 119 Md. App. 518, 523 ("An objection must be made when the question is asked or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike."), *cert. denied*, 350 Md. 278 (1998).

Here, the prosecutor's questions preceding the challenged testimony elicited testimony about what the officer learned about appellant from his investigation. The prosecutor asked a series of questions about what information the officer learned from Sergeant Leitch and from his own investigation, including whether the officer had "an opportunity to learn [appellant's] personal information like his birth date or anything like that." These questions expressly invited the witness to relate personal information about appellant that the officer had learned from other sources, written and oral. Thus, appellant cannot claim surprise that Officer Huber's answer recounted information he obtained from other sources. It was not until Officer Huber responded by relating appellant's unfavorable driving status that defense counsel asked for a bench conference to oppose the admission of appellant's MVA records and to move to strike the officer's testimony. Because the

State's questions called for information obtained from other sources, the trial court did not err in ruling that defense counsel should have objected before the officer answered.

In any event, we agree with the State that, even if the circuit court erred in admitting evidence of appellant's driving status, any error was harmless error that does not require reversal of appellant's convictions. The Court of Appeals has set forth the standard for assessing harmless error as follows:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976). *Accord Morris v. State*, 418 Md. 194, 221-22 (2011).

Here, we are satisfied that there is no reasonable possibility that the evidence of appellant's driving record contributed to his convictions for the non-traffic offenses. As the State notes, the evidence presented against appellant

> included testimony that at the sight of a marked police car, [appellant] and a passenger sped away, blasting through a stop sign at 80 miles per hour in a residential neighborhood, during which time the tires disintegrated so that the vehicle was riding on its rims. Testimony also showed that after crashing into a pole, [appellant] jumped out of the vehicle and fled on foot into a vacant house, where Officer Huber apprehended him. Police officers seized cocaine and heroin from inside the car [appellant] was driving. Moreover, the State did not use evidence of [appellant's] driving record or the status of his driving privilege during its argument. Finally, as [appellant's] brief correctly points out, charges of driving on a revoked license, driving on a suspended license, and driving without a license were not submitted to the jury. The notion that

> a one sentence exchange tainted the trial, or portrayed [appellant] in an unfairly negative light is incredible.

We agree. Appellant states no claim for relief in this regard.

II.

Separate Conspiracy Sentences

Appellant next contends that his sentences for conspiracy to possess heroin and conspiracy to possess cocaine must be vacated. He notes that he was sentenced to seven years on his conviction for conspiracy to possess heroin with intent to distribute, and he asserts that, because the "State proved only one conspiracy, albeit a conspiracy with multiple objectives, this Court must vacate [appellant's] sentences for conspiracy to possess heroin and conspiracy to possess cocaine."

The State first contends that this contention is not preserved. In any event, it argues that the court "properly imposed sentences for conspiracy to possess heroin and conspiracy to possess cocaine." It contends that it charged three separate conspiracies, and therefore, three sentences were appropriate.

We agree with appellant that the State did not prove multiple conspiracies. Therefore, we shall vacate the sentences imposed on the convictions for conspiracy to possess heroin and conspiracy to possess cocaine.

When the State charges a conspiracy offense, "[t]he unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). Thus, a "'conspiracy remains one offense regardless of how many

repeated violations of the law may have been the object of the conspiracy.'" *Id.* (quoting *Mason v. State*, 302 Md. 434, 445 (1985)). "[O]nly one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Id.*

The State "has the burden of proving a *separate* agreement for each conspiracy." *Savage v. State*, 212 Md. App. 1, 15 (2013).

> In the multiple conspiracy context, the agreements are "distinct," *Manuel v. State*, 85 Md. App. 1, 12, 581 A.2d 1287 (1990), and "independent" from each other, *Timney v. State*, 80 Md. App. 356, 368, 563 A.2d 1121 (1989), in that each agreement has "its own end, and each constitutes an end in itself." *United States v. Sababu*, 891 F.2d 1308, 1322 (7th Cir.1989).

Id. at 17. In determining whether there are two separate conspiracies, we examine not only the evidence and charging documents, but also the State's arguments to the jury, as well as the trial court's instructions. *Id.* at 24-26. When the State does not advance a two-conspiracy theory or fails to prove separate agreements, the defendant may not be convicted of and sentenced for multiple conspiracies. *Id.* at 26.

"If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id.* at 26. The underlying principle "is that, '[t]o convict [him] severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice.'" *Id.* at 15 (citation omitted).

There is precedent for multiple conspiracy convictions and sentences arising out of the distribution and possession of different controlled dangerous substances. *See, e.g.,*

Manuel, 85 Md. App. at 11-12 (convictions for conspiracy to possess and distribute cocaine did not merge with convictions for conspiracy to possess and distribute heroin because evidence established "separate, distinct agreements" with respect to heroin and cocaine trafficking rings). But when "the evidence is not sufficient to show the existence of separate conspiratorial agreements," then we must conclude that "there was merely one continuous conspiratorial relationship." *Vandegrift v. State*, 82 Md. App. 617, 645-46 (convictions for conspiracies to distribute marijuana, to distribute cocaine, and to import cocaine merged for sentencing purposes), *cert. denied*, 320 Md. 801 (1990). *Accord Ezenwa v. State*, 82 Md. App. 489, 498-99 (1990) (conspiracies to import heroin and to distribute heroin merged for sentencing purposes where "a single agreement underlay both conspiracy counts").

Thus, in the drug crime context, the Court of Appeals has held that "a defendant who distributes a number of controlled dangerous substances in accordance with a single unlawful agreement commits but one crime: common law conspiracy." *Mason*, 302 Md. at 445. "It is irrelevant that a number of controlled dangerous substances are involved in the single conspiracy." *Id.*

The State argues that appellant waived this challenge because he "did not argue that the evidence was insufficient to support two conspiracy convictions," "did not take issue to the court's instructions regarding the issue," and "did not object to the verdict by the jury on three counts of conspiracy." Although the State concedes that "no objection was required if the sentence imposed was illegal," it maintains that there was nothing inherently unlawful about any of the three conspiracy sentences.

We are not persuaded that appellant waived his challenge to the conspiracy sentences. The Court of Appeals has held that a defendant is not barred from challenging multiple conspiracy sentences on appeal, even though he may have failed to object when those counts were submitted to the jury, when the trial court instructed the jury, or when the jury returned guilty verdicts. *See Jordan v. State*, 323 Md. 151, 160-61 (1991). Such separate sentences imposed for a single conspiracy may be treated as "illegal" sentences that may be corrected "at any time" under Rule 4-345(a). *Id.* at 161.

Applying these principles to the record before us, we agree with appellant that only one conspiracy sentence may be imposed. The State did not establish the existence of multiple separate conspiracies. To the contrary, the cocaine and heroin were found commingled in a single vehicle that was occupied by only two people, and the State presented no argument or evidence that there were separate agreements relating to the heroin versus the cocaine, or to the possession versus the distribution. Accordingly, we shall affirm the sentence for conspiracy to possess with intent to distribute heroin and vacate the sentences for conspiracy to possess heroin and conspiracy to possess cocaine.

III.

Separate Sentences for Two Counts of Fleeing and Eluding

Appellant's final contention is that he was improperly convicted and sentenced for two counts of fleeing and eluding police. The State agrees, and so do we.

Maryland Code (2013 Supp.) § 21-904 of the Transportation Article ("TR") provides, in pertinent part, as follows:

> (b) If a police officer gives a visual or audible signal to stop and the police officer is in uniform, prominently displaying the police officer's badge or other insignia of office, a driver of a vehicle may not attempt to elude the police officer by:
>
> (1) Willfully failing to stop the driver's vehicle;
>
> (2) Fleeing on foot; or
>
> (3) Any other means.
>
> (c) If a police officer gives a visual or audible signal to stop and the police officer, whether or not in uniform, is in a vehicle appropriately marked as an official police vehicle, a driver of a vehicle may not attempt to elude the police officer by:
>
> (1) Willfully failing to stop the driver's vehicle;
>
> (2) Fleeing on foot; or
>
> (3) Any other means.

In *Washington v. State*, 200 Md. App. 641 (2011), this Court considered whether the circuit court erred in imposing separate sentences for two convictions of fleeing and eluding a uniformed officer. Similar to the facts here, the first conviction was for failing to stop his car for a marked patrol vehicle in violation of TR § 21-904 (c)(1), and the second for fleeing and eluding a uniformed officer on foot in violation of subsection (b)(2). *Id.* at 646-47. We concluded that the "unit of prosecution" under TR § 21-904 is the act of flight from a police officer who has signaled a stop, not the different modes by which such flight occurred. *Id.* at 654, 661. Because "fleeing or eluding police is one offense that carries one penalty, even though the offense may be carried out in more than one way in a single transaction," one of the sentences was vacated. *Id.* at 664.

In accordance with our holding and rationale in *Washington*, the State concedes, and we agree, that only one sentence may be imposed here because both convictions were

premised upon a single episode of flight. Accordingly, we shall vacate one of the two fleeing and eluding sentences.

CONVICTIONS AFFIRMED. SENTENCES FOR CONSPIRACY TO POSSESS HEROIN, CONSPIRACY TO POSSESS COCAINE, AND FLEEING/ELUDING A POLICE VEHICLE ON FOOT VACATED. COSTS TO BE PAID 33% BY APPELLANT, AND 67% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.