UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2220

SEPTEMBER TERM, 2014

ANTHONY COOPER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 4, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In the Circuit Court for Prince George's County, Anthony Cooper, the appellant, was charged in a 31-count indictment with crimes that took place on August 24, 2013. Before trial, he entered a plea of not criminally responsible ("NCR") and request for a competency evaluation. At a pretrial motions hearing, the circuit court permitted the appellant to withdraw the NCR plea.

Thereafter, the State moved, successfully, to sever the counts and prosecuted the appellant in three separate trials.

In Trial One, the jury convicted the appellant of armed robbery and robbery of Edgar Ibanaz (Counts 18 and 19), attempted armed robbery and attempted robbery of Raul Mendes (Counts 8 and 9), attempted armed robbery and attempted robbery of Brenda Aleman (Counts 13 and 14), three counts of first-degree assault (Counts 10, 15, and 20), three counts of second-degree assault (lesser included uncharged counts), three counts of use of a handgun in commission of a crime of violence (Counts 11, 16, and 21), three counts of conspiracy to commit armed robbery (Counts 12, 17, and 22), possession of a firearm after a felony conviction in violation of Md. Code (2003, 2011 Repl. Vol., 2015 Cum. Supp.), section 5-133(c) of the Public Safety Article ("P.S.") (Count 23), and illegal possession of a regulated firearm in violation of P.S. section 5-133(b) (Count 24).

In Trial Two, the appellant was found not guilty on seven counts with respect to victim Andres Molina.

In Trial Three, the jury convicted the appellant of armed robbery and robbery of Miguel Angel Cortes-Cruz ("Cortes") (Counts 25 and 26), first and second-degree assault (Count 27, uncharged lesser count), use of a handgun in the commission of a crime of

violence (Count 28), possession of a firearm after a felony conviction in violation of P.S. section 5-133(c) (Count 29), illegal possession of a regulated firearm in violation of P.S. section 5-133(b) (Count 30), and conspiracy to commit armed robbery (Count 31).

The circuit court sentenced the appellant to an aggregate sentence of fifty (50) years, the first ten without the possibility of parole, on the convictions in Trial One and Trial Three. As to Trial One, this was accomplished by sentencing the appellant to three separate concurrent sentences of twenty years each, the first ten without the possibility of parole, for the attempted armed robberies of Mendez and Aleman (Counts 8 and 13), and the armed robbery of Ibanaz (Count 18). These concurrent twenty-year sentences were to be followed consecutively, and respectively, by three concurrent sentences of twenty years for use of a handgun (Counts 11, 16, and 21), and then again by three consecutive, but concurrent to each other, sentences of ten years for conspiracy to commit armed robbery (Counts 12, 17, and 22), for a total time to be served of fifty (50) years. Concurrent sentences of five years were imposed for the two regulated firearm convictions (Counts 23 and 24).

A similar sentencing format was followed as to Trial Three, with the appellant sentenced to twenty years, the first ten mandatory, for the armed robbery of Cortes (Count 25), to be served concurrent with the sentences imposed in Trial One. This sentence was followed by a consecutive twenty-year sentence for use of a handgun (Count 28), a consecutive ten years for conspiracy to commit armed robbery (Count 31), and concurrent five-year sentences for the two regulated firearm convictions (Counts 29 and 30), with all these sentences to be concurrent with the sentences imposed in Trial One.

The appellant timely appealed, presenting the following questions, which we have rephrased slightly:

I. Did the circuit court err by failing to ensure that the appellant was competent to stand trial, and by allowing him to withdraw the plea of not criminally responsible without first establishing that he was competent?

II. Was the evidence legally sufficient to support the convictions?

III. Did the circuit court enter too many convictions and sentences for conspiracy?

IV. Did the circuit court enter too many convictions and sentences for illegal possession of a regulated firearm?

For the following reasons, we answer questions I and II in the negative and questions III and IV in the affirmative. We shall vacate three of the appellant's convictions for conspiracy to commit armed robbery and three of his convictions for illegal possession of a regulated firearm. Otherwise, we shall affirm the judgments.

FACTS AND PROCEEDINGS

Competency Hearing

The appellant filed an initial plea of NCR. He asserted that he was not guilty and

> [t]hat at the time of the alleged offenses, [he] was not responsible for criminal conduct in that as a result of a mental disorder or retardation he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

He also requested an "evaluation as to whether he is incompetent to assist in his defense and understand the nature of the charges." The circuit court granted that request, ordering that the Department of Health and Mental Hygiene ("DHMH"):

> Examine the Defendant pursuant to Maryland Criminal Procedure 3-111 et seq. to determine whether the Defendant is incompetent to stand trial

> pursuant to Criminal Procedure 3-101, and was not criminally responsible pursuant to Criminal Procedure 3-109, that is, whether the Defendant is able to understand the nature or object of the proceeding or to assist in his/her defense and whether at the time of the alleged criminal conduct the Defendant because of mental retardation or mental disorder, lacked substantial capacity to appreciate the criminality of the conduct or to conform that conduct to the requirements of law.

The court's order set forth procedures to be followed to facilitate an examination of the appellant and directed DHMH to furnish a report to the court within sixty (60) days, with a copy of the report to be provided to counsel.

Notwithstanding the NCR plea, the request for a competency examination, and the court's order, the appellant refused to be examined. This was made clear at a competency hearing, in which the following ensued:

> THE COURT: Is this for a competency hearing?
>
> [DEFENSE COUNSEL]: Well, Your Honor, I don't believe it will be that much of a competency hearing. There is -- the issue is I filed an NCR plea in both of my client's cases; however, when the opportunity came for him to be evaluated, he refused to be evaluated. As such, I discussed it again with him.
>
> He does not wish to go forward. I guess he wants to withdraw his NCR plea; however, I'm at somewhat of an ethical dilemma because we still need to ensure his competency.
>
> I would ask the Court to at least voir dire him for purposes of competency; otherwise -- he doesn't want to go to Perkins. He doesn't want to basically participate in this NCR process.
>
> THE COURT: Okay. And that is what is scheduled for today?
>
> [DEFENSE COUNSEL]: That is correct, Your Honor. So we basically have no discerning paperwork from Dr. Katz since there was no evaluation done.
>
> THE COURT: All right. So why don't you stand up, Mr. Cooper. Good morning.
>
> THE DEFENDANT: Good morning.

THE COURT: Why don't you state your name for the record.

THE DEFENDANT: Anthony Tyrell Cooper.

THE COURT: You understand that you're here today -- I gather it's not for trial today at all --

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: -- it's just for competency -- that you have two cases pending against you and that your attorney has filed a not criminally responsible plea. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: But in order to proceed with that, you have to be examined. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: It's my understanding from [Defense Counsel] that you do not wish to be examined for the purposes of pursuing an NCR plea; is that correct?

THE DEFENDANT: Can you repeat that again, please?

THE COURT: No problem. It's my understanding from [Defense Counsel] that you do not wish to be examined to pursue the NCR plea; is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: So though your attorney, who, of course, has studied law and is a lawyer, feels that it would be in your best interest to be examined for that purpose, you have indicated to him that you do not wish to have such an examination, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: Can you tell me why you don't want one, why you don't want to pursue the NCR plea? What is your personal reason why?

THE DEFENDANT: Am I obligated to give you an answer?

THE COURT: You're not obligated to give me an answer, no. If you don't want to, you don't have to.

THE DEFENDANT: Okay.

THE COURT: But you do understand that if you don't pursue the NCR plea, that this case will just proceed in the regular course in terms of motions and trial?

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And I don't know what you're charged with in each of these cases.

What is he charged with?

[DEFENSE COUNSEL]: Multiple counts of armed robbery and first degree assault. And that's two separate cases, Your Honor.

THE COURT: Okay. And you understand that the penalties are very severe for the first degree assault and armed robbery?

Armed robbery, is it 25 years?

[PROSECUTOR]: Twenty.

[DEFENSE COUNSEL]: Twenty years, Your Honor.

THE COURT: And first degree assault is 25?

[PROSECUTOR]: Twenty-five, yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And knowing that, you're going to proceed without the NCR plea, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. And this is a choice -- and you understand all your options today, is that right --

THE DEFENDANT: Yes, ma' am.

THE COURT: -- or do you need me to explain any of them to you, because I will?

THE DEFENDANT: You can explain if you like.

THE COURT: Well, your options are, of course, to go along with what [Defense Counsel] has recommended and have an examination for the NCR plea or you can proceed in the regular course; just have motions, trial and assist [Defense Counsel] in your defense for both the motions and trial.
Do you want to do that? What do you want to do?

THE DEFENDANT: I told you I want to go forward with trial.

THE COURT: With the motions and trial, no NCR, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: So you're withdrawing your NCR plea?

THE DEFENDANT: Yes, Ma'am.

THE COURT: And you're doing that voluntarily and understanding all the rights that you have that are associated with it, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Well, he has, [Defense Counsel], made that decision, and it is only his decision to make.

[DEFENSE COUNSEL]: That is correct, Your Honor. I just would like -- for ethical purposes, I wanted to make sure the Court voir dired him as far as the competency issue as well.

THE COURT: Okay. You understand what motions -- really the big part is that you understand that you're facing some very serious charges that carry very serious time with them.
And you understand that, right?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you're ready to proceed?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. He's ready, [Defense Counsel].

[DEFENSE COUNSEL]: Thank you, Your Honor, just for the record.[1]

Trial One

At the relevant time, Ibanaz and Aleman were married and living in a house in the 5000 block of 55th Street, in Hyattsville. On August 24, 2013, at about 11:30 p.m., they were putting items into a shed in their backyard. As they were doing so, they were approached by two men, one of whom was holding a black revolver. One man was a young, tall, African-American with long, braided hair. The other man was of a similar height and age, also with long hair. The man with the gun placed it to the back of Ibanaz's head, forced him down to the ground, and stole his wallet, containing about $300, and his cell phone, a Samsung Galaxy 4. The man then pointed the gun at Ibanaz and Aleman, and told them not to call the police or they would kill them. During this encounter, another victim, Mendes, exited the house. Ibanaz believed he was robbed as well. Afterward, the two men walked away, still pointing the gun at the victims as they left.

Ibanaz and Aleman did not call the police to report the robbery. The next day, however, the police called Ibanaz to tell him that they had recovered his cell phone. When the police met with him, Ibanaz reported the details of the robbery. Ibanaz identified

[1] The docket sheet for this hearing, which was signed by the judge, states that "Defendant withdraws NCR (Not Criminally Responsible) Plea on the Record" and that "Defendant found competent."

photographs of the assailants, as well as a photograph of the gun that was used in the robbery.

At trial, Ibanaz testified about the robbery, as recited above, and identified the gun.

Aleman corroborated her husband's account of events, testifying that she first saw two men "squatting down," near the house, as if they were there to "break into the house." When Ibanaz returned from the shed, one of the men pointed a gun at Aleman's chest. Aleman identified the appellant as that man. Aleman testified that the appellant pointed the gun at Ibanaz, pushed him to the ground, and "took everything that my husband had on him[.]" Aleman told the appellant she did not have anything on her to take; he searched her anyway. He then left, all the while pointing the gun at them and telling them not to contact the police.

Because of the appellant's threats, Aleman did not call the police. When the police contacted her, she went to the police station and gave a statement and identified a photograph of the appellant. She also identified a photograph of the gun that had been pointed at her chest.

Mendes testified that, at the relevant time, he was living with Ibanaz and Aleman. Around the same time Ibanaz and Aleman were approached by the two African-American men, the men approached him as well. One was holding a gun. They ordered him to the ground, and the man with the gun started searching him while holding the gun inches away from his head. At one point, the other assailant took the gun and walked toward Ibanaz and Aleman. Mendes tried to flee, but both men returned and started kicking and hitting him about the head and back. They also hit him with the gun. Mendes testified that he did

not have any money on him at the time and nothing was stolen from him. He did not report the robbery immediately, but eventually spoke to the police. He identified photographs of the assailants and gave a statement concerning the incident. He identified a photograph of the gun that was pointed at his head. He did not make any in-court identifications.[2]

Tywaun Bachelor testified in the State's case as part of a plea agreement.[3] Bachelor explained that he was friends with Marcus Ford and the appellant. They all lived in Washington, D.C. On August 24, 2013, the three men left Washington, D.C., and traveled to Hyattsville in a red Ford Taurus. Bachelor was at the wheel. The men spotted a Hispanic couple. Bachelor stopped the car and Ford and the appellant got out, in Bachelor's words, "to rob somebody." Ford was carrying a revolver, which was later admitted into evidence. While Bachelor waited in the car, Ford and the appellant robbed the couple. They returned to the car. Later, Bachelor drove them back to Washington, D.C. Once there, the three

[2] Many of the exhibits from the first trial, including the victims' statements and the photo arrays, are not included with the record on appeal. We also note that, instead of copies, many of the exhibits in the record appear to have been reused at the bifurcated trials, with new labels affixed over old ones. Generally, "[a]ll exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy for any exhibit." Md. Rule 4-322(a).

[3] Bachelor agreed to plead guilty to attempted armed robbery of Mendes and Aleman, armed robbery of Ibanaz, and three counts of use of a handgun. At the time of the appellant's first trial, he was awaiting sentencing. The plea agreement called for him to be sentenced to 12 years in exchange for testifying in the cases against the appellant.

men split the proceeds of the robbery. Bachelor received $40 or $45. Bachelor testified that the men also stole a cell phone from the couple.

Detective Stephen Johnson, of the Robbery Suppression Team for the Prince George's County Police Department ("PGCPD"), was the lead investigator in the case. He testified that he was conducting surveillance in the area of 912 Eastern Avenue in Washington, D.C., when he saw Ford, Bachelor, and the appellant get out of a red Ford Taurus. On August 25, 2013, he obtained and executed a search warrant for that address, which was Ford's residence. An operable .357 Colt Lawman magnum revolver was located in the hallway closet. Photographs of that handgun were shown to Ibanaz, Aleman, and Mendes, all of whom identified it as the gun used in the robbery.[4]

On August 25, 2013, at around noon, Ford was arrested. He was in possession of Ibanaz's stolen Samsung cell phone.

Trial Three

On August 24, 2013, between 11:30 p.m. and midnight, Cortes was attending a children's party at 6330 Auburn Avenue in Riverdale. His wife asked him to go outside and retrieve their daughter's sweater from their van. As he was doing so, he was approached by two masked men. One man held a gun to his stomach. The other man pushed him up against the van, demanded money, and started to search him. That second man removed his mask, revealing long, braided hair. The men took about $125 from Cortes's wallet, and his Samsung cell phone. They ran from the scene.

[4] The parties stipulated that the appellant "has been previously convicted of a crime classified as a crime of violence and disqualifying crime."

Cortes called the police and reported the robbery. He described the two robbers as African-American, and the one who took his mask off as about 23 years old, 180 pounds, with his hair in dreadlocks. The day after the robbery, Cortes was shown two photographic arrays, but did not identify anyone.

The police showed Cortes a number of photographs of handguns. Although he was uncertain what the gun looked like, and did not know the difference between a revolver and a semiautomatic pistol, he identified a black semiautomatic handgun as being similar to the weapon that was used during the robbery. At trial, when shown the actual revolver that was recovered in connection with his case, Cortes testified that "that's about what the gun looked like." Cortes identified the appellant as the robber who had removed his mask. Cortes testified that the police recovered his stolen cell phone and returned it to him.

Bachelor testified that, on the night of August 24, 2013, at around 11:30 p.m., he, Ford, and the appellant left Washington, D.C., and drove to Prince George's County to rob someone.[5] They were in the appellant's red Ford Taurus, and Bachelor was driving. In Riverdale, they saw a Hispanic man outside, near a car. Bachelor stopped the car. The appellant and Ford, who was carrying a handgun, got out of the car. Ford put the gun to the victim's head and the appellant "went through his pockets." Ford and the appellant got back in the car, with a cell phone and some money. Bachelor drove away from the scene. The men split the proceeds, with Bachelor getting the cell phone.

[5] The witness provided a different spelling for his last name at Trial Three, *i.e.*, Batchelor. We shall use the spelling the witness used at Trial One, as that spelling was used most frequently throughout the transcripts in this case.

Later, the three men drove to meet some women. At one point, Ford got out of the car and Bachelor called him from the stolen phone. Cell phone records confirmed that Cortes's phone was used to call Ford at 4:03 a.m. on August 25, 2013. In the early afternoon of August 25th, at different locations and slightly different times, the three men each were stopped by police. Bachelor still had Cortes's cell phone with him. The appellant was driving the red Ford Taurus when he was stopped.

In a statement to the police, Bachelor identified the revolver that was used in the robbery.

Detective Johnson, also the lead investigator in this case, spoke to Cortes, who told him he had been robbed by two African-American males with long dreadlocks, who used a "dark colored handgun." After learning that Cortes's cell phone had been taken in the robbery, Detective Johnson contacted Cortes's service provider, through which he obtained an approximate location of the phone. Shortly after midnight, Detective Johnson responded to Georgia Avenue and Fourth Street, N.W., in Washington, D.C. He tracked the cell phone to a red Ford Taurus, in which there were three occupants.

Detective Johnson followed the Taurus and ran the tag. He learned that the car was owned by the appellant. The Taurus stopped in front of 912 Eastern Avenue. Ford, Bachelor, and the appellant got out of the car. The appellant had long dreadlocks down to the middle of his back. This matched the description of one of the robbers provided by Cortes.

Upon further investigation, Detective Johnson determined that 912 Eastern Avenue was Ford's address and applied for and obtained a search warrant for the location. The

search revealed a black .357 Colt Lawman revolver in a shoebox in the hallway closet. The red Ford Taurus was seized and processed. Detective Johnson obtained a search warrant for Bachelor's residence and ultimately recovered Cortes's stolen cell phone.[6]

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

The appellant contends the circuit court erred by not making an adequate inquiry into his competency to stand trial. He does not argue that he was not competent to stand trial, however. The appellant also contends the circuit court erred by permitting him to withdraw his NCR plea.

(a)

Title 3 of Maryland Code (2001, 2008 Repl. Vol., 2015 Cum. Supp.) of the Criminal Procedure Article ("Crim. Proc.") governs incompetency and criminal responsibility in criminal proceedings. *See generally Byers v. State*, 184 Md. App. 499 (2009) (discussing in detail the mechanics of Title 3).

With respect to criminal responsibility, Crim. Proc. section 3-109 provides:

> (a) A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to:
>
> (1) appreciate the criminality of that conduct; or
>
> (2) conform that conduct to the requirements of law.

[6] The parties stipulated that the appellant "has been previously convicted of a crime classified as a crime of violence and disqualifying crime."

(b) For purposes of this section, "mental disorder" does not include an abnormality that is manifested only by repeated criminal or otherwise antisocial conduct.

"The purpose of [what once was called] the insanity defense is to ensure that the criminal sanction is imposed only on those who had the cognitive and volitional capacity to comply with the law." *Robey v. State*, 54 Md. App. 60, 73, *cert. denied*, 296 Md. 224 (1983) (citations omitted). "Persons whose mental disorders deprive them of this capacity are neither culpable nor deterrable, and thus 'ought not to be subject to the same penalties or treatment as are justly meted out to those who are sane.'" *Id.* (Quoting *Devilbiss v. Bennett*, 70 Md. 554, 556 (1889)). "This rationale for exemption from the criminal sanction extends only to those who are mentally incapacitated during commission of the offense; only insanity at the time of the crime can excuse a defendant." *Id.* An individual "is presumed to have been responsible for criminal conduct and sane at the time of such conduct[.]" *Rozzell v. State*, 5 Md. App. 167, 176 (1968) (internal citations omitted), *cert. denied*, 252 Md. 733 (1969).

An NCR plea must be filed in writing by the defendant or his counsel, at the time of the initial pleading, unless the court grants leave for a later filing. Crim. Proc. § 3-110(a)(1) and (2). An NCR verdict may not be entered by the court if a written NCR plea has not been filed. *Id.* at (d).

The process for determining criminal responsibility is two-pronged. "[O]nce the State has proven that a defendant is guilty of the offenses charged, the defendant has the burden of proving by a preponderance of the evidence that he or she is not criminally

responsible for the crime." *Winters v. State*, 434 Md. 527, 538 (2013) (emphasis omitted) (citing Crim. Proc. §§ 3-110(b) & (c)); *see also Treece v. State*, 313 Md. 665, 684–85 (1988) ("[T]he burdens of pleading, producing evidence, and persuading the fact-finder that criminal punishment should not be imposed are all borne by the defendant."). "The trial court is not concerned with the defendant's current mental state, because 'the insanity defense only excuses the defendant who lacks the requisite cognitive or volitional capacities *at the time of the commission* or omission that allegedly violates the criminal law.'" *Buck v. State*, 181 Md. App. 585, 648 (2008) (emphasis added) (quoting *Robey*, 54 Md. App. at 76).

The question whether an accused is not criminally responsible for an offense is different from the question whether he is competent to stand trial. As the Court of Appeals has explained:

> Prior to the enactment of chapter 709, Laws of Maryland, 1967 . . . the Maryland courts had applied the same standard for both insanity at the time of commission of the crime and insanity at the time of trial. . . . The enactment of 1967 Maryland Laws, Chapter 709 codified a distinction between the two standards. It is evident that whether an accused enters a plea of not criminally responsible has no bearing on the accused's competency to stand trial. . . . [T]he test for competency to stand trial and the test for criminal responsibility at the time of the commission of the offense [are] separate and distinct.

Roberts v. State, 361 Md. 346, 358 (2000) (internal citations and quotation marks omitted).

A person is not competent to stand trial if he is unable: "(1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Crim. Proc. § 3-101(f). There is an initial presumption that "a person accused of committing a crime is . . . competent to stand trial." *Wood*, 436 Md. at 285 (citing *Peaks v. State*, 419 Md. 239, 251 (2011)).

A claim that a criminal defendant is incompetent to stand trial may be raised before or during trial. If it appears to the court that the defendant is not competent to stand trial, or if the defendant alleges that he is not competent, "the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." Crim. Proc. § 3-104(a).

The requirement that a defendant be competent to stand trial has its roots in principles of due process. "It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992) (citing *Drope v. Missouri*, 420 U.S. 162 (1975)). "The proper procedure the trial court must follow when determining a criminal defendant's competence to stand trial [to ensure due process is met] is codified in" Crim. Proc. section 3-104(a). *Kennedy v. State*, 436 Md. 686, 693 (2014). Moreover, "[c]ompetence to stand trial is dependent upon when a proceeding occurs and other factors, such as medication administration, among others, which necessitates an explicit judicial determination when the issue is in doubt." *Sibug v. State*, 445 Md. 265, 315–16, (2015). The failure "to determine competency 'upon testimony and evidence presented on the record' . . . nullifies not only the determination itself but also the trial and resulting conviction." *Peaks*, 419 Md. at 253–54 (quoting *Jones v. State*, 280 Md. 282, 289 (1977)).

(b)

In *Treece*, 313 Md. at 681, the Court of Appeals held that because the potential consequences to a defendant of an NCR plea are "grave and far reaching[,]" "ordinarily a

competent defendant should be allowed to decide, personally, whether to invoke it. Absent the most unusual circumstances, the decision binds not only counsel but the trial judge."

"Obviously, a defendant who does not have the mental capacity to decide whether to reject the defense of not criminally responsible cannot be allowed to make that decision. And the question of competence to stand trial is ultimately one for the trial court to make." *Id.* The decision whether to assert or withdraw an NCR plea is ultimately for the defendant, however, and, "if the defendant is competent and makes what appears to be a knowing, intelligent choice, [defense] counsel must honor that choice." *Id.* at 681–82. "The decision is one for the defendant to make, after proper consultation with counsel, just as a competent defendant must, ultimately, decide the wisdom of self-representation or of a plea of guilty. The judge, however, must be sure that the defendant's decision is intelligent and voluntary." *Id.* at 682.

In ruling on a defendant's request to withdraw an NCR plea, the first step is "to decide the defendant's competence to stand trial if competence is at issue either because raised by the defense or by the court." *Id.* The second step is to ascertain whether the defendant's decision is intelligent and voluntary." *Id.* at 683. "In this context, we note, 'intelligent' does not necessarily equate to 'wise.' It simply means that the defendant must have an understanding of the alternatives and consequences that is not based on ignorance or incomprehension." *Id.* (citations omitted).

In the case at bar, the trial court first determined that the appellant's decision to withdraw his NCR plea was knowing and voluntary and then, at defense counsel's express request, determined that the appellant was competent to make that decision.

As to the NCR plea, the court questioned the appellant in open court and determined that he knew his attorney had filed an NCR plea and that such a plea requires an examination. The court gave the appellant an opportunity to explain why he did not want to pursue that plea, and he declined to give a reason. The court then discussed the nature of the crimes the appellant was charged with, informing him of the possible penalties. It informed the appellant that he still could proceed with the NCR plea or he could proceed with motions and trial, assisting defense counsel with his defense. The appellant insisted that he wanted to withdraw the NCR plea. The court then asked him, "[Y]ou're doing that voluntarily and understanding all the rights that you have that are associated with it, correct?" The appellant replied, "Yes, ma'am." The information elicited by the court was sufficient to support its finding that the defendant was making a knowing and voluntary decision to withdraw his NCR plea.

Upon defense counsel's request that the court *voir dire* the appellant on the issue of competency, the court continued its inquiry, asking the appellant whether he understood that the charges against him were "serious" and carried "very serious time with them." The appellant responded that he understood. The court asked the appellant if he was "ready to proceed," to which the appellant replied, "Yes, ma'am." The court then informed defense counsel that "[h]e's ready[.]"

"[T]he determination of the court [regarding competency] need not be in the form of a formal hearing." *Peaks*, 419 Md. at 252 (citing *Roberts*, 361 Md. at 368). It must be explicit, however. Whether competency to stand trial is raised by the defendant or defense counsel, or by the trial judge, an "implicit finding of competency" is not sufficient.

Kennedy, 436 Md. at 702 n.6. The court must find beyond a reasonable doubt that the defendant is competent to stand trial, resolving any inferences or ambiguities in the defendant's favor. *See Langworthy v. State*, 46 Md. App. 116, 130, *cert. denied*, 288 Md. 738 (1980), *cert. denied*, 450 U.S. 960 (1981). Competency to stand trial is a factual finding that only will be reversed on appeal for clear error. *See Peaks*, 419 Md. at 252.

The court's factual finding that the appellant was competent to stand trial, by stating, "He's ready," was not clearly erroneous. The court engaged in an inquiry of the appellant in open court, making sure he understood the nature of the charges and the possible penalties, and giving him the opportunity to explain why he wanted to withdraw his NCR plea. Ultimately, "[i]t is the [defendant's] understanding of what is going on that is the critical criterion." *Muhammad v. State*, 177 Md. App. 188, 258 (2007) (emphasis omitted), *cert. denied*, 403 Md. 614 (2008). As we have noted, "competence to stand trial (or to waive counsel) is a very different thing than criminal responsibility. It is far more a matter of raw intelligence than it is of balanced psychiatric judgment or legal sanity or of mental health generally." *Id.* at 259.

To the extent the court's competency ruling was perfunctory, we cannot ignore the context in which the issue arose. The State directs our attention to *Wood*, *supra*. In that case, at defense counsel's request, a competency examination was ordered, but the defendant refused to cooperate. When brought to the court's attention, the judge stated, "[T]he only thing I can say is we ordered the examination, made it available to him." 436 Md. at 282. In a subsequent pretrial hearing, defense counsel informed the court that he would be withdrawing his motion for a competency evaluation, and his client had agreed

to that. After the court assured itself that the defendant understood that withdrawal of the request meant that he would not be evaluated for competency, it found that the issue was moot.

The case ended up before the Court of Appeals, which held that there is nothing in Maryland law that prohibits a defendant from withdrawing a request for a competency evaluation. The Court further held that, when that happens, "the issue of competency is moot so long as the trial judge did not have a bona fide doubt that [the defendant] was competent based on evidence presented on the record." *Id.* at 288. It explained:

> In the present case, the record demonstrates that [the defendant] was afforded an opportunity to be heard, and there was sufficient evidence on the record for the trial court to discern [his] competence. In *Roberts*, we held that . . . while a defendant need not be afforded a formal hearing, "an accused must be afforded an opportunity to present evidence upon which a valid determination can be made." 361 Md. at 356. "A judge with no jury present is not required to use any magic words to designate as a separate hearing the presentation to him of testimony and evidence for his determination of the competency of the accused to stand trial." *Peaks*, 419 Md. at 252. This opportunity was indeed afforded to [the defendant] in the present case. The trial judge, upon defense counsel's motion, granted [the defendant's] request for a competency evaluation and scheduled a hearing on the matter. As the trial judge explained, the court did all it could do in the present situation by "ma[king the evaluation] available to [the defendant]." It was [the defendant's] explicit choice not to participate in the competency evaluation. Moreover, the trial judge scheduled a pretrial hearing on [the defendant's] competency, thereby acting to ensure Petitioner had an opportunity to be heard.

Id. at 288–89 (alteration in original) (parallel citations omitted).

The Court concluded that, under the circumstances, "unless the trial judge or another party later had a basis to question [the defendant's] competence to stand trial[,]" the issue of competency was moot. *Id.* at 290. "[W]here the evidence raises a 'bona fide doubt' as

to a defendant's competence to stand trial, the trial judge must *sua sponte* raise the issue and make a competency determination based on evidence presented on the record." *Id.* (Citing *Gregg v. State*, 377 Md. 515, 528 (2003)). Where there is such bona fide doubt, the trial court should consider "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial[.]" *Id.* at 291 (citations omitted). The Court concluded that there was no bona fide doubt about the defendant's competence, and therefore the withdrawal of the competency evaluation request rendered the issue moot.

In the case at bar, there is no indication that there was a bona fide doubt about the appellant's competency at the time of the hearing. Other than the initial NCR plea and request for a competency examination, there is nothing in the record to suggest that the appellant did not understand the nature or object of the proceeding or that he was unable to assist in his defense. Moreover, although the correct order in which to make its findings was not followed, as competency was found after, not before, the court found that the appellant was making a knowing and voluntary decision to withdraw his NCR plea, competency was found; the incorrect order of findings is immaterial.

In sum, the appellant withdrew his NCR plea, and the court did not err in finding that the withdrawal was knowing and voluntary. Additionally, the record supports the court's finding that the appellant was competent to stand trial, and in particular that he was competent to withdraw his NCR plea.

II.

The appellant challenges the sufficiency of the evidence to support his convictions, arguing that the State failed to prove criminal agency on his part. He complains that Aleman was not a credible witness, Mendes did not identify him in court, and Cortes did not identify his photograph from an array he was shown the day after the robbery. As for the conspiracy counts, the appellant challenges the credibility of his accomplice Bachelor. He argues that the evidence was legally insufficient to sustain the gun related charges against him because the handgun used in the crime was found in Ford's residence.

The State initially responds that the sufficiency issue is not preserved for review because "[m]ost of [the appellant's] sufficiency arguments were not raised in his motions for judgment of acquittal." On the merits, the State argues that it was the jury's function to resolve any inconsistencies in the evidence, determine credibility, and draw rational inferences.

We first address preservation. At the close of the evidence in Trial One, the appellant moved for judgment of acquittal, arguing that the evidence was "contradictory" as to victim Mendes. With respect to victim Ibanaz, the appellant argued that the evidence suggested that Ford was the man holding the gun during the attempted robbery, and that he was not involved. At the close of the evidence in Trial Three, the appellant's motion was simply: "I believe the State's evidence is very contradictory. Everything basically contradicts—each witness contradicts the next one."

A defendant who moves for judgment of acquittal must "state with particularity all reasons why the motion should be granted." Md. Rule 4-324(a). That rule "is not satisfied

by merely reciting a conclusory statement and proclaiming that the State failed to prove its case." *Arthur v. State*, 420 Md. 512, 524 (2011). Moreover, grounds that are not raised in support of a motion for judgment of acquittal may not be raised on appeal. *Starr v. State*, 405 Md. 293, 302–04 (2008).

The State maintains that the appellant's argument below, that the evidence was "contradictory," is not the same as the arguments he makes on appeal, *i.e.*, that the witnesses were not "credible." We disagree. A challenge to a witness's credibility may be based on contradictions in the evidence. *See Harris v. State*, 237 Md. 299, 302 (1965) ("The general rule is that a witness may be contradicted or impeached by other witnesses on such matters and facts as are likely to affect his credibility."); *Williams v. State*, 15 Md. App. 320, 327 (1972) (holding that a witness may be challenged by "any question which reasonably tends to explain, contradict or discredit the witness or which tends to test his accuracy, memory, veracity, character or credibility" (citations omitted)). Viewed in context, the arguments advanced below, though skimpy, are generally the same as the arguments being advanced on appeal. Accordingly, the sufficiency issue is preserved for review.

The issue lacks merit, however. The standard of 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)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Our concern is not with whether the verdict is in accordance 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 offenses 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) (quoting *Bible v. State*, 411 Md. 138, 156 (2009) (alteration in *Bible*)); *see also Wallace v. State*, 219 Md. App. 234, 248 (2014) (observing that the appellate court "'need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'" (quoting *State v. Mayers*, 417 Md. 449, 466 (2010))).

Further, "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)); *accord State v. Smith*, 374 Md. 527, 533–34 (2003). We give deference to the fact finder's credibility findings "in part, because it is the trier of fact, and not the appellate court, that possesses a better opportunity to view the evidence presented first-hand, including the demeanor-based evidence of the witnesses, which weighs on their credibility." *State v. Manion*, 442 Md. 419, 431 (2015) (citing *Walker v. State*, 432 Md. 587, 614 (2013)); *see also Sifrit v. State*, 383 Md. 116, 135 (2004) (the jury is "free to believe some, all, or none of the evidence presented"). Moreover, "it is well established in Maryland that the testimony of even a single eyewitness, if believed,

is sufficient evidence to support a conviction." *Marlin v. State*, 192 Md. App. 134, 153, *cert. denied*, 415 Md. 339 (2010).

In Trial One, the evidence viewed most favorably to the State as the prevailing party, showed that two men, one armed with a revolver, robbed Ibanaz and Aleman, stealing $300 and Ibanaz's Samsung cell phone. When Mendes came upon the scene, he was accosted by both men. The next day, Ibanaz's cell phone was recovered from Ford, and Aleman identified the appellant as the assailant who was holding the gun. Mendes identified a photograph of one of the assailants, but did not identify anyone at trial. All three witnesses identified the gun, recovered from Ford's residence, that was used in the robbery. The appellant's accomplice Bachelor confessed to his role in the crimes and testified that the appellant was one of the robbers.

In Trial Three, the evidence showed that Cortes was robbed by two African-American men, who took his money and cell phone. Cortes identified the appellant as one of the robbers. And, as in the Trial One, Bachelor testified that he was with the appellant on the night when these robberies and attempted robberies were committed. Cortes's stolen cell phone was tracked to a red Ford Taurus that the appellant was driving.

The evidence in both trials was legally sufficient to support rational jury findings of the appellant's criminal agency and to support all of the appellant's convictions, beyond a reasonable doubt. Any inconsistencies or contradictions in the evidence and issues of credibility were for the jurors, not this Court, to resolve.

III.

In Trial One, the appellant was convicted of three counts of conspiracy to commit armed robbery, one each of Ibanez, Aleman, and Mendes (Counts 12, 17, and 22); and in Trial Three, he was convicted of one count of conspiracy to commit armed robbery (Count 31). On appeal, he contends there was only one conspiracy, and therefore three of his conspiracy convictions must be vacated. Alternatively, he argues that there were two conspiracies, *i.e.*, one conspiracy to commit armed robbery of Ibanaz, Aleman, and Mendes, and one conspiracy to commit armed robbery of Cortes, and therefore two of his conspiracy convictions must be vacated.

The State concedes that there was but one conspiracy as to Ibanaz, Aleman, and Mendes, but maintains that there was a separate conspiracy as to Cortes; therefore, two conspiracy convictions must be vacated.

A "criminal conspiracy" is "the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means." *Mason v. State*, 302 Md. 434, 444 (1985). A conspiracy may have multiple purposes, *i.e.,* the conspirators may agree to commit a number of crimes. *See Savage v. State*, 212 Md. App. 1, 13 (2013). "The unit of prosecution is the agreement or combination rather than each of its criminal objectives," however. *Tracy v. State*, 319 Md. 452, 459 (1990). Accordingly, there may only be one conviction for a single conspiracy and only one sentence. *See Savage*, 212 Md. App. at 26.

As to Trial One, the State concedes, correctly, that, although the appellant and his cohorts agreed to commit multiple crimes against the three victims, there was but one

conspiracy. The question remains whether there was a single conspiracy to commit armed robberies for which the appellant was convicted in Trial One *and* Trial Three.

Although we have set out the facts as adduced in Trial One and Trial Three separately, they are interrelated. On the night of August 24, 2013, the appellant, Bachelor, and Ford got together in Washington, D.C., where they lived, and decided to drive to Maryland to commit armed robbery. With Bachelor at the wheel, they first drove to Hyattsville and, at about 11:30 p.m., robbed Ibanez and attempted to rob Aleman and Mendes at gunpoint. They then drove a short distance to Riverdale, and, between 11:30 p.m. and midnight, robbed Cortes at gunpoint. After that robbery, they drove back to Washington, D.C. and split up the proceeds of the robberies.

These facts bear out the appellant's contention that there was a single conspiracy to commit armed robbery, which he and his cohorts carried out by robbing Ibanez and Cortes and attempting to rob Aleman and Mendes. The robberies and attempted robberies were accomplished in the course of one trip from Washington, D.C. to Prince George's County and back, within a short period of time and with the actual robberies being committed in close distances (about two miles) from each other. It cannot be said that there was a separate conspiracy as to Cortes.

Because there was a single conspiracy, there could only be one conviction for conspiracy. Accordingly, we also shall vacate the conspiracy conviction on Court 31. One conspiracy conviction and sentence, on Count 12, will stand.

IV.

In Trial One, the appellant was convicted of one count of possession of a regulated firearm after having been convicted of a disqualifying crime, under P.S. section 5-133(b), and one count of possession of a regulated firearm after having been convicted of a crime of violence, under P.S. section 5-133(c).[7] In Trial Three, the appellant also was convicted of those two crimes.

On appeal, the appellant contends that there is a single unit of prosecution for violations of P.S. section 5-133, so he could not properly be convicted of violating P.S. section 5-133(b) and 5-133(c). Moreover, because the crimes in Trial One and Trial Three were part of a continuous criminal episode, there only could be one violation of P.S. section 5-133. Therefore, three of the P.S. section 5-133 convictions must be vacated.

[7] P.S. section 5-133(b) provides:

> (b) Subject to § 5-133.3 of this subtitle, a person may not possess a regulated firearm if the person:
>
> (1) has been convicted of a disqualifying crime; . . .

P.S. section 5-133(c) provides, in part:

> (c)(1) A person may not possess a regulated firearm if the person was previously convicted of:
>
> > (i) a crime of violence;
> >
> > (ii) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, or § 5-614 of the Criminal Law Article; or

(iii) an offense under the laws of another state or the United States that would constitute one of the crimes listed in item (i) or (ii) of this paragraph if committed in this State.

The State disagrees, arguing that there were separate criminal episodes and multiple acts of possession. It maintains that all four convictions properly were entered.

In *Wimbish v. State*, 201 Md. App. 239 (2011), we held that when an accused is charged with more than one offense under P.S. section 5-133, the proper question is not whether the offenses merge, but whether separate convictions can stand, each being based upon the individual's possession of a single gun, which forms the "unit of prosecution." *Id.* at 270–72.

The defendant in *Wimbish* was convicted of violating P.S. section 5-133(c)(1), which prohibits the possession of a regulated firearm by a person who has previously been convicted of a crime of violence, and P.S. section 5-133(d), which prohibits the possession of a regulated firearm by a person under age twenty-one. We opined that the conduct the legislature sought to punish by enacting P.S. section 5-133 was "'the prohibited act of illegal possession of a firearm.'" *Id.* at 271–72 (quoting *Melton v. State*, 379 Md. 471, 486 (2004)). Therefore, although Wimbish's possession of a single regulated firearm was statutorily proscribed for two different reasons—his previous conviction and his age—it constituted but a single violation of the statute. The proper remedy for the illegal conviction was to affirm the defendant's conviction for the offense carrying the greater potential penalty and vacate the conviction for the less serious offense. *See id.* at 272 (vacating conviction for possession of a regulated firearm by a person under twenty-one years-of-age, because it carried the lesser potential penalty (citing *Melton*, 379 Md. at 503)).

In Trial One and Trial Three, the appellant's convictions for violating P.S. sections 5-133(b) and (c) were based upon his possession of a single regulated firearm and constituted only a single offense. Moreover, as explained in our discussion of Issue III, there was one continuing criminal episode from the time the appellant, Bachelor, and Ford left Washington, D.C., drove to Prince George's County, committed armed robberies in two locations, and then drove back to Washington, D.C. During this episode, the appellant possessed a regulated firearm. Accordingly, there only can be one conviction of violating P.S. section 5-133.

We shall vacate the appellant's convictions for violating P.S. section 5-133(b) in both trials (Counts 24 and 30), as those offenses are misdemeanors, carrying a statutory maximum penalty of five years' imprisonment or a fine of $10,000 or both. We shall affirm the appellant's conviction and sentence in Trial One, for violating P.S. section 5-133(c) (Count 23), a felony with a minimum sentence of five years without the possibility of parole, and shall vacate his conviction in Trial Three for violating P.S. section 5-133(c) (Count 29). *See* P.S. § 5-144(b) (penalty provision for violations of P.S. § 5-133(b)); P.S. § 5-133(c)(2) (penalty provision for violations of § 5-133(c)(1)).

CONVICTIONS ON COUNTS 17, 22, 24, 29, 30, AND 31 VACATED. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY PRINCE GEORGE'S COUNTY.