UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2321
September Term, 2014

DONCHE BARNES
v.
STATE OF MARYLAND

No. 2398
September Term, 2014

JULIO GONZALEZ CORTEZ
v.
STATE OF MARYLAND

CONSOLIDATED CASES

Graeff,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 5, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The convictions in these consolidated cases arose from the non-fatal shooting of Aaron Officer in February 2014. Donche Barnes, appellant, was convicted by a jury in the Circuit Court for Montgomery County of first degree assault, conspiracy to commit first degree assault, use of a handgun, first degree burglary, and conspiracy to commit first degree burglary. Julio Gonzalez Cortez, appellant, was convicted by a jury in the Circuit Court for Montgomery County of attempted second degree murder, first degree assault, conspiracy to commit first degree assault, use of a handgun, first degree burglary, and conspiracy to commit first degree burglary.

The court sentenced Mr. Barnes to 20 years imprisonment for the first degree assault conviction; 5 years imprisonment for the use of a handgun conviction, to run consecutively; 20 years imprisonment for the conspiracy to commit first degree assault conviction, to run concurrently; 20 years imprisonment for the first degree burglary conviction, to run concurrently; 20 years imprisonment for the conspiracy to commit first degree burglary conviction, to run concurrently.

The court sentenced Mr. Gonzalez Cortez to 30 years imprisonment for the attempted second degree murder conviction; 20 years imprisonment for the first degree assault conviction, to run concurrently; 20 years imprisonment for the conspiracy to commit first degree assault conviction, to run concurrently; 20 years imprisonment for the first degree burglary conviction, to run concurrently; 20 years imprisonment for the conspiracy to commit first degree burglary conviction, to run concurrently; 5 years imprisonment for the use of a handgun conviction, to run consecutively.

On appeal, Mr. Barnes contends that the court erred in (1) not severing the trials of the appellants; (2) in giving a flight instruction; and (3) in imposing more than one sentence for conspiracy. Mr. Gonzalez Cortez contends that the court erred in (1) failing to require the prosecutor to proffer a facially valid, race-neutral explanation after defense counsel raised a *Batson*[1] challenge and; (2) imposing more than one sentence for conspiracy.

With respect to each appellant, the judgments of conviction and sentence for conspiracy to commit first degree burglary are vacated. The judgments are otherwise affirmed.

Background

At some time prior to February 19, 2014, both appellants: Aaron Officer, the victim; Nelson Agok; and Garrett Hoover, were involved in an attempted marijuana purchase that did not go well. Messrs. Officer and Agok paid $1500 but did not receive marijuana as expected. On February 19, Messrs. Officer, Agok, and Hoover were walking when occupants of a car shot at them. The testimony of the witnesses was conflicting in many respects, but there was some testimony that the occupants of the vehicle were appellants and another person. When the shots occurred, Mr. Officer ran away and went to a restaurant where he had three alcoholic drinks. Later he went to a 7-11 convenience store and, after that, to a friend's house. When he left the friend's house, driving a car, a "black car" followed him, but he eventually lost the car. Mr. Officer testified that he thought something bad might happen, and he went to the apartment of his friend, Oz, to warn him.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Messrs. Agok, Hoover, and others were in the apartment. He tried to tell them something bad might happen, but they ignored him because they were upset with him for running away after the drive-by shooting.

A knock occurred at the door. When opened, Jeffrey Garcia, an individual Mr. Officer "used to chill with," was there along with appellants, and Mr. Barnes's brother. Mr. Gonzalez Cortez, and perhaps others, had guns. During the struggles that ensued, Mr. Officer was shot several times. Ultimately, Mr. Officer ran to a bedroom and jumped out of a window.

As stated above, the testimony of each of the witnesses involved in the altercation and related events, Messrs. Officer, Agok, and Garcia, contained material inconsistencies, both internally and with each other. As neither appellant challenges the legal sufficiency of the evidence to sustain the convictions, we shall not set forth the testimony in detail.

Forensic Specialist Ryan Costello responded to the scene of the shooting and recovered shell casings located outside and inside of the apartment and a 9 mm handgun located under some stairs. After appellants were identified as suspects, their homes were searched pursuant to warrants. Police recovered a .45 caliber handgun, a 9 mm handgun, and ammunition from Mr. Gonzalez Cortez's home. Laura Lightstone, an expert in firearms examination, testified that ballistics evidence recovered from the shooting scene was consistent with the handguns recovered from Mr. Gonzalez Cortez's home. There was no evidence that bullets fired at the scene were in fact fired from the handguns recovered. DNA recovered from the handguns was unstable and could not be linked to appellants.

We shall set forth additional facts when we discuss the issues.

Questions Presented

As stated by Mr. Barnes:

1. Did the circuit court err in not severing the trials of Appellant and his co-defendant?

2. Did the circuit court err in giving a flight instruction?

3. Did the circuit court err in imposing more than one sentence for conspiracy?

As stated by Mr. Gonzalez Cortez:[2]

1. Did the trial court err as a matter of law in failing to require the State to proffer a facially valid, race-neutral explanation after the Appellant's attorney made a *Batson* challenge during voir dire?

2. Did the circuit court err in imposing more than one sentence for conspiracy?

Discussion

Severance

Mr. Barnes filed a pre-trial motion to sever the trials. In support of the motion, he relied on the following. Handguns were recovered from Mr. Gonzalez Cortez's home, but searches of Mr. Barnes's car and the homes of his brother and girlfriend did not result in the recovery of incriminating evidence. Mr. Barnes also observed that the State likely would introduce or attempt to introduce evidence of Mr. Gonzalez Cortez's criminal history and statements to police. Significant to the current argument on appeal, Mr. Barnes

[2] Mr. Barnes submitted on brief. Counsel for Mr. Gonzalez Cortez appeared for oral argument. Although in his brief, Mr. Gonzalez Cortez raised only a *Batson* challenge, at oral argument, he adopted Mr. Barnes's question challenging the imposition of more than one sentence for conspiracy. Because an illegal sentence can be raised at any time, *see* Rule 4-345 (a), we shall address that question.

observed that Mr. Garcia had written a note explaining that he had falsely implicated Mr. Barnes but later recanted. Mr. Barnes concluded that there would be evidence that was mutually inadmissible and he would be unfairly prejudiced.

At oral argument on the motion, counsel for Mr. Barnes did not orally address the Garcia letter that was referenced in his motion. In response to defense counsel's argument, the State proffered that it would not use Mr. Gonzalez Cortez's statements to police; that it would introduce his criminal history only for impeachment if necessary; that evidence would tie Mr. Barnes to the .45 caliber handgun recovered from Mr. Gonzalez Cortez's home; Mr. Barnes's presence at the shooting scene would be established by Mr. Agok; and Mr. Barnes would be liable as an accomplice. The court denied the motion.

At trial, on direct examination, Jeffrey Garcia implicated Mr. Barnes in the events at the apartment where the shooting occurred. As stated by Mr. Barnes in his brief:

> After the State passed the witness, counsel for Mr. Barnes approached the bench to indicate that he intended to impeach Mr. Garcia with his handwritten statement exonerating Mr. Barnes, which he wrote while detained pretrial. In response, the State noted, *inter alia*, that it was unaware of Mr. Garcia's statement and argued that "had the Court been aware of this [letter] at the motion for severance [hearing], the severance motion would have been granted, because this letter only deals with the defendant [Mr. Barnes], not Mr. Cortez." The State also commented that Mr. Garcia's letter "could have easily changed the Court's view on mutual admissibility of evidence." For her part, counsel for Mr. Gonzalez-Cortez also indicated that she was unaware of Mr. Garcia's letter. As counsel for Mr. Barnes correctly reminded the parties, however, the motion to sever expressly mentioned Mr. Garcia's statement.

The circuit court permitted counsel for Mr. Barnes to cross examine Mr. Garcia about the letter. Mr. Garcia testified that he wrote the letter at Mr. Barnes's request and that, contrary to what he stated in the letter, Mr. Barnes was involved in Mr. Officer's shooting.

Md. Rule 4-253(c) provides: "[i]f it appears that any party will be prejudiced by the joinder for trial of counts, . . . the court may . . . order separate trials of counts . . . or grant any other relief as justice requires." The determination is to be made by use of two questions propounded in *Conyers v. State*, 345 Md. 525, 553 (1997). "If the answer to both questions is yes, then joinder of offenses . . . is appropriate." *Id.*

The first question is whether "evidence concerning the offenses [is] mutually admissible?" *Id.* "To resolve this question, the trial court is to apply the 'other crimes' analysis announced in *State v. Faulkner*, 314 Md. 630 (1989), and its progeny," which includes a non-exclusive list of "substantially relevant 'exceptions' to the general rule excluding other crimes evidence—motive, intent, absence of mistake or accident, identity, or common scheme or plan." *Cortez v. State*, 220 Md. App. 688, 694 (2014) (citations omitted), *cert. denied*, 442 Md. 516 (2015).

The second question is whether "the interest in judicial economy outweigh[s] any other arguments favoring severance?" *Conyers*, 345 Md. at 553. "To resolve this second question, the trial court weighs the likely prejudice against the accused in trying the charges together against considerations of judicial economy and efficiency, including the time and resources of both the court and the witnesses." *Cortez*, 220 Md. App. at 694 (citations omitted). Ordinarily, "once a determination of mutual admissibility has been made, any

judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Conyers*, 345 Md. at 556.

The Court of Appeals has noted that "[r]ulings on matters of severance or joinder of charges are generally discretionary." *Carter v. State*, 374 Md. 693, 704-05 (2003) (citations omitted). It elaborated:

> This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. In such a case, the defendant is entitled to severance. Nevertheless, where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent.

Id. (internal quotation marks and citations omitted).

With that background in mind, we turn to the contentions in this appeal. Mr. Barnes argues that not all of the evidence was mutually admissible, explaining that Mr. Garcia's letter would not have been admissible in a separate trial for Mr. Gonzalez Cortez. Mr. Barnes adds that he relied on the letter in support of his motion. As a fallback position, Mr. Barnes also argues that, if severance was not required as a matter of law, the danger of unfair prejudice outweighed the interest in judicial economy. He explains that there was no eyewitness testimony that Mr. Barnes shot Mr. Officer and no ballistics evidence tying him to a firearm.

The State contends that (1) the severance was not preserved because the argument on appeal was not made in circuit court; and/or (2) waived because Mr. Barnes's counsel offered the evidence that he now relies upon; and (3) Mr. Barnes's arguments are meritless.

Preservation

The States observes that, at the hearing on the motion to sever, Mr. Barnes identified the following evidence as mutually inadmissible: (1) a statement by Mr. Gonzalez Cortez in which he mentioned Mr. Barnes; (2) a .45 caliber handgun recovered from Mr. Gonzalez Cortez's home; (3) Mr. Gonzalez Cortez's criminal history; and (4) identification testimony relating to Mr. Gonzalez Cortez. He did not rely on the letter from Mr. Garcia.

In *Peterson v. State*, 444 Md. 105, 124-126 (2015), the Court of Appeals explained the purpose of the preservation rule. In order to prevent unfairness, and to give a trial court an opportunity to correct possible errors, it requires that issues must be raised in and decided by the trial court. Counsel for Mr. Barnes referenced the Garcia letter in his motion to sever, and the motion was the subject of the hearing. Although the letter was not orally argued at the hearing, we will give Mr. Barnes the benefit of any doubt and reach the merits of his motion.

Waiver

We also decline to find waiver. After Mr. Barnes's motion to sever was denied, he was entitled to try his case in the way he saw fit without waiving his objection to the joint trial. Otherwise, he would have been required to withhold what he believed was relevant, helpful evidence in the belief that this Court would agree with his position on severance. As we shall discuss in the next section, that is not the case.

Merits

As Mr. Barnes acknowledges, the letter from Mr. Garcia was admissible against him but argues that is "beside the point" because it was inadmissible against Mr. Gonzalez Cortez. It is not beside the point, however. In reviewing a trial court's discretionary ruling when incidents giving rise to the charges occur at the same time and location, severance is mandated even if evidence is mutually inadmissible only when a defendant will be significantly prejudiced. Significant prejudice occurs only when evidence is admitted against a co-defendant that is not admissible against the movant. *Eiland v. State*, 92 Md. App. 56, 74 (1992), *rev'd sub nom. on other grounds, Tyler v. State*, 330 Md. 261 (1993). Moreover, the use of the letter for impeachment purposes was designed to undermine the credibility of Mr. Garcia, a tactic that benefitted him. At trial, Mr. Garcia testified that Mr. Barnes was involved in the shooting. In his letter, he exonerated Mr. Barnes. We fail to see significant prejudice.

Flight Instruction

At trial, the State requested a flight instruction. During a colloquy with the court before instructions were given to the jury, counsel for Mr. Gonzalez Cortez objected to the instruction. Counsel for Mr. Barnes did not object then or at any time thereafter. The court gave the Maryland Criminal Pattern Instruction 3:24:

> A person's flight immediately after the commission of a crime is not enough, by itself, to establish guilt. But it is a fact that may be considered by you as evidence of guilt. Flight, under these circumstances, may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If

> you decide there is evidence of flight, then you must decide whether this flight shows a consciousness of guilt.

Mr. Barnes contends that the evidence showed that he merely left the scene of the shooting and did not support an inference that his behavior suggested flight. The State contends that the issue is unpreserved and, in any event, lacks merit.

Preservation

We agree with the State. Mr. Barnes did not object to the instruction. See Maryland Rule 4-325 (e). A defendant may not rely on an objection to a jury instruction by a co-defendant, even if the objection is properly made. *Colkley v. State*, 204 Md. App. 593, 617 (2012), *rev'd sub nom. on other grounds, Fields v. State,* 432 Md. 650 (2013).

Merits

Were we to reach the merits, the result would be the same. As the parties state, the Court of Appeals has adopted a four prong test for assessing whether evidence is sufficient to support a flight instruction.

> Therefore, for an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson v. State, 393 Md. 291, 312, (2006).

As mentioned, Mr. Barnes argues that the evidence does not support the first prong. We disagree. Mr. Agok testified that, after appellant came into the apartment, he and Mr. Officer hid in the bathroom. He told Mr. Officer to call the police. Mr. Officer dropped

his phone, which made a noise. Mr. Gonzalez Cortez kicked open the door and shot Mr. Officer. Mr. Officer escaped. Mr. Agok heard more shots and the door to the apartment "shut like hard." When Mr. Agok came out of the bathroom, appellants were gone. Although slight, the evidence was sufficient to support an inference that appellants left to avoid the police.

Mr. Barnes relies on *State v. Shim*, 418 Md. 37 (2011) and *Hoerauf v. State*, 178 Md. App. 292 (2008). In *Shim,* the victim worked as a security guard at a FedEx facility. There was evidence that the victim was killed at approximately 2:30 am but the body was not discovered until 6:30 am. There was no evidence of flight whatsoever. 418 Md. at 41-42. Similarly, in *Hoerauf,* the defendant walked away from the crime scene with others who had perpetrated robberies with no evidence that arrival of police officers was imminent. 178 M. App. at 327. In *Shim* and *Hoerauf,* unlike the case before us, there was mere departure such as exists in every case in which a defendant is not apprehended at the crime scene.

Batson

During the jury selection process, Mr. Gonzalez Cortez raised a *Batson* challenge to two peremptory strikes by the State. The prospective jurors were African-American. Neither responded to questions during voir dire.

In response to the challenge, the court observed that the State had 20 strikes to exercise but exercised only three. Two of the strikes were as stated above, and the third prospective juror was not African-American. In denying the challenge, the court stated:

> I'll just state for the record that the State has not stricken other individuals who are on the jury, who are African-American as well. So it doesn't appear to be a pattern to the extent that they're excluding all African-Americans from the jury panel because they are left with at least two, and another person who is non-Caucasian on the jury. So I think that in this particular case, I'm not sure that two establishes a pattern given the fact that there are others that are remaining on the panel. So I won't find at this point that there's a pattern of discriminatory striking.

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a prospective juror on the basis of race.

> When a criminal defendant raises a *Batson* claim, the trial judge must follow a three-step process. The burden is initially upon the defendant to make a *prima facie* showing of purposeful discrimination. *Stanley v. State,* 313 Md. 50, 59, 542 A.2d 1267, 1271 (1988). If the requisite showing has been made, " 'the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.' " *Id.* at 61, 542 A.2d at 1272 (quoting *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723); *Tolbert v. State,* 315 Md. 13, 18, 553 A.2d 228, 230 (1989); *see also Mejia v. State,* 328 Md. 522, 531 n. 6, 616 A.2d 356, 360 n. 6 (1992) (updating the *Batson* test in light of subsequent decisions). "Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion of Kennedy, J.); *see also Stanley,* 313 Md. at 62, 542 A.2d at 1273.

Whittlesey v. State, 340 Md. 30, 46-47, (1995).

Mr. Gonzalez Cortez observes that the record reflects that he is of "Latino or Hispanic descent" and the two prospective jurors who were struck were African-American. He contends the court erred in failing to proceed to steps two and three of the *Batson* analysis.

The question before us is whether the court committed clear error in finding that Mr. Gonzalez Cortez failed to establish a prima facie case. *Whittlesey*, 340 Md. at 48. In *Whittlesey*, the State used peremptories to strike two prospective jurors who were African-Americans. After strikes for cause, there were six African-Americans remaining in the fifty-five person venire. *Id*. at 47. The circuit court found that no prima facie showing had been made. This Court affirmed, even though, unlike here, the circuit court gave no reason for its conclusion. *Id*. at 48. Similarly, we find no clear error in this case.

Conspiracies

The circuit court sentenced each appellant to a period of incarceration for conspiracy to commit first degree assault and conspiracy to commit first degree burglary convictions. Each appellant contends that he can only be convicted and sentenced for one conspiracy conviction. The State agrees.

A defendant can be convicted and sentenced for multiple conspiracies only if multiple unlawful agreements existed. *Savage v. State*, 212 Md. App. 1, 13 (2013). Here, there was no evidence of separate agreements to commit first degree assault and first degree burglary. The jury was not instructed with respect to finding separate agreements. The State did not argue there were separate agreements.

The conviction and sentencing of each appellant for more than one conspiracy constitutes an illegal sentence, which can be raised at any time. Consequently, it is of no moment that Mr. Gonzalez Cortez did not raise this contention in his brief but raised it for the first time at oral argument. Maryland Rule 4-345 (a).

Accordingly, as to each appellant, we vacate his conviction and sentence for conspiracy to commit first degree burglary, the crime carrying the lesser penalty. See Maryland Code, § 1-202 of the Criminal Law Article ("The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit."); *Jordan v. State*, 323 Md. 151, 162 (1991).

DONCHE BARNES'S JUDGMENT OF CONVICTION AND SENTENCE BY THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR CONSPIRACY TO COMMIT FIRST DEGREE BURGLARY VACATED. JULIO GONZALEZ CORTEZ'S JUDGMENT OF CONVICTION AND SENTENCE BY THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR CONSPIRACY TO COMMIT FIRST DEGREE BURGLARY VACATED. JUDGMENTS OF CONVICTIONS AND SENTENCES OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-THIRD BY DONCHE BARNES; ONE-THIRD BY JULIO GONZALEZ CORTEZ; AND ONE-THIRD BY MONTGOMERY COUNTY.