UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2816

September Term, 2014

IRVING JONES

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: January 22, 2016

Appellant, Irving Jones, was tried and convicted by a jury in the Circuit Court for Wicomico County of the following offenses: possession of Fentanyl with the intent to distribute, conspiracy to possess Fentanyl with the intent to distribute, possession of Fentanyl; possession of Alprazolam ("Xanax") with the intent to distribute, conspiracy to possess Xanax with the intent to distribute, possession of Xanax; possession of marijuana with the intent to distribute and possession of marijuana. The Circuit Court imposed a sentence of ten years' incarceration, without the possibility of parole, for the possession of Fentanyl with the intent to distribute, a consecutive ten years of incarceration for the conspiracy to possess Fentanyl with the intent to distribute; a consecutive five years for the possession of Xanax with the intent to distribute, a consecutive five years incarceration for the conspiracy to possess Xanax with the intent to distribute and a consecutive five years imprisonment for the possession of marijuana with the intent to distribute. The Circuit Court merged the simple possession convictions for sentencing purposes, rendering the total sentence imposed of thirty five years' incarceration. Appellant filed the instant appeal from the sentences imposed and presents the following issues for our review:

1. Is the evidence insufficient to sustain appellant's convictions for conspiracy?

2. Did the lower court err in imposing multiple sentences for a single conspiracy?

3. Did the trial court abuse its discretion by admitting the testimony of a State's witness that appellant had sold heroin to her prior to the events at issue in this case?

FACTS AND LEGAL PROCEEDINGS

Trooper Gary Mazet ("Trooper Mazet") of the Maryland State Police was on patrol near the intersection of Lake and Isabella Streets in Salisbury, Maryland on June 19, 2014 when he observed a green Honda Civic ("Civic") stop for a red light in the turn lane on Lake Street beyond the white stop line. Having observed the commission of a traffic violation, Trooper Mazet decided to conduct a traffic stop when the traffic light turned green and the Civic made a left turn onto Isabella Street. Accordingly, he activated the emergency equipment on his patrol car. Rather than come to an immediate stop, the Civic continued down Isabella Street for approximately a fourth of a mile.

As Trooper Mazet followed behind the Civic, he observed "the front passenger reach into the back seat, ducking her head below the passenger's seat multiple times, [and] looking back at [the] patrol vehicle." "The way I saw it," he elaborated, "It looked as though [the front-seat and back-seat passengers] were maybe hand fighting back and forth, passing things back and forth, and it was to the effect that I could tell that the front passenger was extremely nervous, and she was trying to get rid of something."

Considering what he believed to be "frantic movement," when Trooper Mazet pulled the vehicle over, he decided to conduct a pat-down of the front-seat passenger, Stephanie Ireland. As a result of the pat-down of Ireland, Trooper Mazet recovered an empty clear plastic bag in her waistband, which Ireland explained had contained marijuana that had been smoked. Trooper Mazet summoned a female officer to respond to the scene to conduct a

search of Ireland. The female officer recovered, from Ireland's pants, an opaque shopping bag, which was sent to the Maryland State Police laboratory for testing. The analysis of the bag revealed that it contained individual bags of marijuana (12.6 grams and 0.74 grams), a cutting agent (12.57 grams), Fentanyl (0.78 grams and 0.19 grams), and Xanax (0.79 grams). The State's expert witness, Trooper Kenneth Moore of the Maryland State Police, testified that the amount and packaging of these drugs was "consistent [with] what we normally run into for that destined to be redistributed to persons."

Ireland testified that she was in the same vehicle with Jones on June 19, 2014, in order to purchase narcotics from him. The following transpired during her direct examination by the Assistant State's Attorney:

> [STATE'S ATTORNEY]: [C]ould you tell us briefly what happened when the police stopped you? How do you get in that car? What happened that day?
>
> [IRELAND]: *I had called to get some heroin off of him.*
>
> [APPELLANT'S COUNSEL]: Objection, Your Honor. Could we approach?
>
> [THE COURT]: Why?
>
> [APPELLANT'S COUNSEL]: Part of—
>
> THE COURT: Why do you have to approach? What's your objection?
>
> [APPELLANT'S COUNSEL]: *My objection is that she is testifying that she bought substances from my client, that he's not been charged [with], and I think it's prejudicial.*
>
> THE COURT: Is that what he was asking? I don't understand that to be the case.

[STATE'S ATTORNEY]: ***I think it goes to the continuity of events —***

THE COURT: Yes.

[STATE'S ATTORNEY]: ***Unless clarity, everything is deemed to be evidence—***

[THE COURT]: Overruled.

[IRELAND]: Okay. So I asked somebody to give me a ride. I — we picked him up. I'm not familiar with this area. I was staying at a halfway house. Picked him up. Got in the car.

[STATE'S ATTORNEY]: Who is him? Do you see him? Is him in the courtroom?

[IRELAND]: Yes.

[STATE'S ATTORNEY]: What is he wearing?

[IRELAND]: A blue shirt.

[STATE'S ATTORNEY]: Okay. Please let the record reflect that this witness has identified the defendant. *And is that the gentleman that you wanted* [*to buy*] *the drugs from?*

[IRELAND]: Yes.

[STATE'S ATTORNEY]: *Did you buy any drugs from him?*

[IRELAND]: Yes.

[APPELLANT'S COUNSEL]: Just a continuing objection to that, Your Honor.

THE COURT: You can have it.

(Emphasis supplied)

Ireland further asserted that, when Trooper Mazet tried to pull the Civic over, "a bag" was "thrown up on" her, but that she "didn't know what was in it." She "threw the bag back,"

but appellant, was seated in the rear of the vehicle, threw two bags at her and "said 'put them up.'" According to Ireland, although she put the bags in her pants, the drugs in the shopping bag were not her drugs, but rather belonged to appellant. Notwithstanding, Ireland conceded that she would be pleading guilty to drug possession the week after appellant's trial, in connection with the events of June 19th and could receive a sentence of up to four years' incarceration. No illicit drugs were recovered as a result of the search of appellant; however, two cell phones and a total of $1,004.00 in cash was recovered from appellant.

According to witnesses who testified on behalf of the State, the cash was collated into stacks, but the witness acknowledged that possessing cash or stacking it in a particular way does not make a person a drug dealer. Testifying on behalf of appellant, his brother, Eon, stated that he had loaned appellant $500.00 in cash and his sister, Tasia, stated that she had loaned him $400.00 in cash on the morning that the foregoing events transpired. The purpose for lending appellant the $900.00 in cash, according to Eon and Tasia, was to enable appellant to pay off motor vehicle fines in order that he could have his driver's license reinstated.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE FOR CONSPIRACY

Appellant argues that the evidence does not establish that appellant and Ireland "had agreed to undertake some sort of drug distribution enterprise." Appellant maintains that, at the time when Trooper Mazet effected the traffic stop, appellant and Ireland were simply two

passengers in the same car and that, at most, a drug buyer-drug seller relationship existed between appellant and Ireland. When, according to Ireland's testimony, appellant first threw the bag of drugs up to her in the front seat, appellant submits that she was merely the unwilling possessor of the bag. She "had not agreed to do anything" with, or for, appellant. When appellant threw the bag of drugs up to Ireland again, instructing her to "put them up," appellant argues, that only *then* did Ireland arguably agree to simply possess a plastic bag.

Appellant further argues that the evidence presented at trial failed to demonstrate that Ireland knew marijuana, Fentyanyl, Xanax, and a cutting agent were in the bag. Ireland testified that appellant sold her *heroin*—the inference being she would perhaps expect heroin in the bag, but not Fentanyl, Xanax, marijuana, and/ or a cutting agent. Appellant further argues that there was no evidence whatsoever presented at trial that Ireland took possession of the plastic bag with the specific intention of entering into a drug distribution enterprise with appellant; rather, asserts appellant, the evidence indicated that she took possession of the bag for the purpose of concealing it from the police for the duration of the traffic stop.

The State responds that appellant's argument "misunderstands" the convictions in this case. The conspiracy, asserts the State, related not to distribution or to a "drug distribution enterprise," but rather to an agreement between appellant and Ireland for Ireland to conceal drugs on her body during a traffic stop, thereby providing "material assistance to appellant's drug operation."

> In Maryland, conspiracy remains a common law crime. [The Court of Appeals has] described the offense as follows:
>
> > A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.
>
> Although a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred, the requirement that there must be a meeting of the minds—a unity of purpose and design—means that the parties to a conspiracy, at the very least, must (1) have given sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy—the object to be achieved or the act to be committed, and (2) whether informed by words or gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act. Absent that minimum level of understanding, there cannot be the required unity of purpose and design. As other courts have consistently held, therefore, conspiracy is necessarily a specific intent crime; there must exist the specific intent to join with another person in the accomplishment of an unlawful purpose or a lawful purpose by unlawful means.

Mitchell v. State, 363 Md. 130, 145–46 (2001) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)) (citations omitted).

In reviewing the sufficiency of the evidence presented at trial, the charge of the appellate court is to "view the evidence in the light most favorable to the prosecution," (*Moye v. State,* 369 Md. 2, 12 (2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) and determine "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." *Taylor v. State,* 346 Md. 452, 457 (1997) (quoting *Jackson*, 443 U.S. at 319) (emphasis in original).

In the case *sub judice*, the requisite specific intent for conspiracy exists. Against the above factual backdrop, during which Trooper Mazet pulled appellant's vehicle over, there was an agreement, *i.e.*, a meeting of the minds, between Ireland and appellant, for Ireland to secrete appellant's narcotics upon her person during the traffic stop. A rational trier of fact could conceivably find that Ireland's intent for concealing the narcotics was to assist appellant in avoiding detection by the police. Patently, in doing so, Ireland provided "material assistance to appellant's drug operation" in secreting drugs to evade discovery and seizure of the drugs by law enforcement officials. Moreover, Trooper Moore testified that the amount and packaging of the drugs found on Ireland were "consistent with what we normally run into for that destined to be redistributed to persons." Accordingly, the foregoing evidence was sufficient to support appellant 's convictions for conspiracy.

II. MULTIPLE SENTENCES FOR A SINGLE CONSPIRACY

As we will explain in Section III, we reverse the convictions and remand this case for further proceedings. We will address appellant's merger contentions because they may arise during the course of a new trial.

In *Mason*, the Court of Appeals considered whether the double jeopardy prohibition against successive prosecution barred the petitioner's conviction for conspiracy to distribute heroin. The State entered a *nolle prosequi* on a charge of conspiracy to distribute cocaine that

was "based on a single unlawful combination between two or more persons to transport controlled dangerous substances (heroin and cocaine) between Baltimore County and Baltimore City." *Id.* at 447. In concluding that a successive prosecution was barred, the Court spoke to the precise issue in the case *sub judice*:

> [A] defendant who distributes a number of controlled dangerous substances in accordance with a single unlawful agreement commits but one crime: common law conspiracy. It is irrelevant that a number of controlled dangerous substances are involved in the single conspiracy. A conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy. A simple example of the State's reasoning reveals the sophistry inherent in its argument. For instance, were we to accept the State's argument, a defendant involved in a single conspiracy to distribute ten Schedule I narcotic drugs could be subject to ten separate prosecutions under [the predecessor to § 5-602 of the Criminal Law Article] without contravening the double jeopardy proscription against successive prosecutions. This reasoning, coupled with artful pleading, would permit the State to fragment one conspiracy into several conspiracies on the basis of the number of controlled dangerous substances distributed. As a result, the number of prosecutions for conspiracy would always turn upon the number of prohibited drugs distributed. We reject this line of reasoning.

Id. at 445. *Mason* instructs that multiple sentences for a single conspiracy cannot lie, even where a number of controlled dangerous substances are involved, and controls the outcome of this case. Accordingly, one of appellant's sentences for conspiracy must be vacated.[1]

[1] The State concedes that the unit of prosecution for conspiracy is the agreement or combination rather than its objectives. The State acknowledges that the sentence imposed of five years imprisonment for conspiracy to possess with intent to distribute Xanax should be merged into the ten-year sentence for conspiracy to possess with intent to distribute Fentanyl."

III. IRELAND'S TESTIMONY REGARDING OTHER CRIMES

Appellant's final assignment of error is that Ireland's testimony that she, "met up with Jones," on June 19, 2014 in order to purchase heroin from him was "classic 'bad act' evidence," the probative value of which was substantially outweighed by unfair prejudice to him.

The State does not contest appellant's assertion that Ireland's testimony constituted evidence of other bad acts, but argues that the Circuit Court properly exercised its discretion in overruling appellant's objection to Ireland's testimony because the evidence provided special relevance in proving why Ireland was in the car and why Ireland and appellant acted nervously, rather than as proof of appellant's bad character. Specifically, the State cites "continuity of events" as the purpose for offering the bad acts evidence.

"The admissibility of other crimes or bad acts evidence, other than for impeachment purposes, is governed by longstanding evidentiary principles that are currently embodied in Md. Rule 5–404(b)." *Streater v. State,* 352 Md. 800, 806 (1999). Md. Rule 5–404(b) provides:

> **Other Crimes, Wrongs, or Acts.**—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Other crimes or bad acts evidence may not be introduced, "unless the evidence is introduced for some purpose other than to suggest that . . . it is more probable that [defendant] committed the crime for which he is on trial." *Streater*, 353 Md. at 806 (quotations and citations omitted).

"Evidence of other crimes may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989) (citing *Ross v. State*, 276 Md. 664, 669 (1976)). A non-exhaustive list of exceptions to the presumption of exclusion of other crimes evidence is codified in Md. Rule 5–404(b). *Streater*, 353 Md. at 807 (quoting Md. Rule 5–404(b)) ("The rule thus allows for the possibility of admission of the evidence, for example, as 'proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.')

The seminal case, *Faulkner*, *supra*, instructs that

> When a trial court is faced with the need to decide whether to admit evidence of another crime—that is, evidence that relates to an offense separate from that for which the defendant is presently on trial—it first determines whether the evidence fits within one or more of the [special relevancy] exceptions. That is a legal determination and does not involve any exercise of discretion.
>
> If one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. * * *

> If this requirement is met, the trial court proceeds to the final step. The necessity for and probative value of the 'other crimes' evidence is to be carefully weighed against any undue prejudice likely to result from its admission. This segment of the analysis implicates the exercise of the trial court's discretion.

Faulkner, 314 Md. at 634–35 (citations omitted).

"Under the first prong of the admissibility test, the other crimes evidence must carry special relevance unrelated to a defendant's predisposition to commit a crime." *Streater*, 352 Md. at 808.

> The second prong of the admissibility test requires the trial court to determine whether the State has shown with sufficient evidence that the defendant actually committed the prior acts. We have said that the sufficiency threshold is met when the evidence is clear and convincing to the trial judge. This determination protects the defendant against the risk that unsubstantiated charges of past misconduct will unduly influence the jury.

Id. at 809 (quotations and citation omitted) (emphasis added).

> The third prong of the admissibility test involves the trial court's assessment of the need for and probative value of the 'other crimes' evidence, which must be carefully weighed against any undue prejudice likely to result from its admission. Underlying this prong of the test is the concern that other crimes or bad acts evidence is generally more prejudicial than probative. Prejudice may result from a jury's inclination to convict the defendant, not because it has found the defendant guilty of the charged crime beyond a reasonable doubt, but because of the defendant's unsavory character or criminal disposition as illustrated by the other crimes evidence The rule therefore acknowledges the risk presented by a jury's tendency to improperly infer from past criminal conduct that the defendant committed the crime for which the defendant is currently charged.

Id. at 810 (quotations and citations omitted).

> As a final consideration, [The Court of Appeals has] emphasize[d] that, should the trial court allow the admission of other crimes evidence, it should state its reasons for

> doing so in the record so as to enable a reviewing court to assess whether Md. Rule 5–404(b), as interpreted through the case law, has been applied correctly.

Id. at 811.

> Where the accused has demonstrated that error existed at trial, reversal of the conviction is required unless the state can show beyond a reasonable doubt that the error did not contribute to the conviction. The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.

Ross, 276 Md. at 674.

The fact that a case is tried before a jury weighs heavily against erroneously admitted other crimes evidence in evaluating its harm. *Id.* Additionally, the lack of "cautionary instruction" given will also weigh heavily against the evidence. *Id.* (stating that, depending on the circumstances, even an appellant's failure to request cautionary instruction does not automatically render the error harmless).

In the case *sub judice*, Ireland's testimony that she had telephoned appellant "to get some heroin off of him" is patently the introduction into evidence of a crime or bad act with which appellant had not been charged. It was not, however, offered to prove, pursuant to Md. Rule 5–404(b), "motive, opportunity, intent, preparation, common scheme or plan, knowledge or absence of mistake or accident," or any other "special relevancy" exception. *See Faulkner, supra*. At trial, the State proffered, as the basis for the introduction of Ireland's testimony, "I think it goes to the continuity of events—" and "[u]nless clarity,

everything is deemed to be evidence." In its brief, the State argued that Ireland's testimony provides special relevance as to why Ireland was in the car and why Ireland and appellant were acting nervously. We disagree.

We are not persuaded that the phrasing, "continuity of events," sufficiently categorizes Ireland's testimony, "within one or more of the "[special relevancy] exceptions." The State failed to articulate any of the Md. Rule 5–404(b) exceptions to support the introduction of the evidence. The reasons the State proffered, *i.e.*, to prove why Ireland was in the car and why Ireland and appellant were acting nervously, were not contested issues that required the "special relevancy" of the prior bad acts testimony for resolution.

Moreover, we are unpersuaded that Ireland's testimony provided "special relevancy" to prove the crimes charged. As stated, *supra*, appellant was charged with possession of Fentanyl with the intent to distribute, conspiracy to possess Fentanyl with the intent to distribute, possession of Fentanyl; possession of Xanax with the intent to distribute, conspiracy to possess Xanax with the intent to distribute, possession of Xanax; possession of marijuana with the intent to distribute and possession of marijuana. Although the prosecutor elected not to charge appellant with distribution of heroin to Ireland, the State, nevertheless, introduced into evidence the fact that appellant distributed heroin prior to the time line of the offenses at issue. We fail to see how evidence of prior heroin distribution supports a "special relevance" exception (*i.e.*, motive, intent, etc.) to prove the elements of the crimes for which appellant was charged.

Regarding the second prong of the admissibility analysis under *Faulkner*, Ireland's testimony, in our view, met the "sufficiency" threshold. Her statement that she telephoned appellant "to get some heroin off of him" provided clear and convincing evidence of appellant's involvement in the prior bad act. Ireland's testimony was sufficient evidence to support the trial court's finding.

The third prong of the *Faulkner* admissibility analysis, however, is more problematic. The trial court's assessment of the need for and probative value of other crimes evidence must consider the possibility that the jury may be inclined to convict the defendant, "not because it has found the defendant guilty of the charged crime beyond a reasonable doubt, but because of the defendant's unsavory character or criminal disposition as illustrated by the other crimes evidence." *Streater*, *supra*. As *Streater* observes, the rule acknowledges the risk presented by a jury's tendency to improperly infer from past criminal conduct that the defendant committed the crime for which he or she is currently charged.

Judge Raker, writing for the Court of Appeals in *Faulkner*, outlined the procedure, *supra*, to be followed by a trial judge, faced with the need to decide whether to admit evidence of another crime or bad act. The Court set forth the following procedure:

> When a trial court is faced with the need to decide whether to admit evidence of another crime—that is, evidence that relates to an offense separate from that for which the defendant is presently on trial—its first determines whether the evidence fits within one or more of the *Ross*[2] exceptions.

[2] *Ross v. State*, 276 Md. 664 (1976).

> If one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. We will review the decision to determine whether the evidence was sufficient to support the trial judge's finding.
>
> If this requirement is met, the trial court proceeds to the final step. The necessity for and probative value of the " other crimes" evidence is to be carefully weighed against any undue prejudice likely to result from its admission. This segment of the analysis implicates the exercise of the trial court's discretion.

Faulkner, *supra* (citations omitted).

In the case *sub judice*, appellant's counsel lodged an objection to Ireland's testimony that she had "called to get some heroin off of him." Notwithstanding that counsel objected on the basis that appellant had not been charged with buying heroin from appellant, counsel complained that Ireland's testimony was prejudicial. The Court, overruled appellant's objection, and simply agreed with the prosecutor, whose explanation was " I think it goes to the continuity of events." Although it is within a trial court's discretion to rule on the prejudicial effect of evidence, the Court of Appeals expressly mandated the procedural analysis required of the trial court before it can admit evidence of other crimes. *See Faulkner, supra*. Because we hold that the trial judge improperly failed to conduct the three-part admissibility analysis, pursuant to *Faulkner*, specifically in determining whether evidence of other crimes or bad acts was admissible as a "special relevancy" exception,

> . . . reversal of the conviction is required unless the [S]tate can show beyond a reasonable doubt that the error did not contribute to the conviction. The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that

> there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.

See Ross, supra.

The State has not met its burden to show beyond a reasonable doubt that the error did not contribute to appellant's conviction. Accordingly, we reverse the decision of the trial court and remand for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED; COSTS TO BE PAID BY WICOMICO COUNTY.