UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 595

September Term, 2015

PAUL HOLLIS GONZALES

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 23, 2017

A jury in the Circuit Court for Prince George's County convicted Paul Gonzales, appellant, of one count of theft scheme between $1,000 and $10,000, seven counts of theft, three counts of counterfeiting checks, seven counts of uttering counterfeit checks, and two counts of conspiracy to commit theft. The court sentenced appellant on the theft scheme conviction to ten years, all but four suspended, and it imposed concurrent sentences of four years on the 12 convictions for uttering, counterfeiting, and conspiracy convictions. It merged the remaining convictions for theft and imposed restitution in the amount of $1,600.[1]

On appeal, appellant presents the following questions for our review:

1. Did the circuit court err in prohibiting appellant from adducing testimony concerning a text message?

2. Was the evidence legally insufficient to sustain the convictions for counterfeiting checks and uttering counterfeit checks?

3. Did the circuit court err in imposing multiple sentences for conspiracy?

For the following reasons, we answer questions 1 and 2 in the negative and question 3 in the affirmative. Accordingly, we shall vacate one of appellant's convictions and sentences for conspiracy to commit theft and otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2013, Geraldine Lovell discovered that several checks linked to her checking account had been written to appellant and cashed. When she went to the bank

[1] The restitution was ordered to be paid to Sun Trust Bank, which had reimbursed Ms. Lovell's account.

and inquired about these checks, Ms. Lovell learned that seven checks, totaling $5,800, had been signed and made payable to appellant. Ms. Lovell did not sign any of the checks, nor did she give anyone permission to sign the checks on her behalf. Appellant was dating Ms. Lovell's daughter at the time, and appellant had been in Ms. Lovell's home and had access to her checkbook in the prior weeks, including on or about November 7, 2013.

Richard Barnes, Vice President and Manager of Investigations for TD Bank, investigated Ms. Lovell's claim and discovered that appellant had opened a bank account on November 7, 2013, using one of Ms. Lovell's checks. Images taken from the bank's video surveillance confirmed that appellant visited the bank on that date. Additional video surveillance showed appellant visiting the bank at the same time the other checks were cashed. In addition, appellant's bank statements revealed that all seven checks had been deposited into his bank account.

DISCUSSION

I.

Appellant first argues that the trial court "erred in prohibiting appellant from adducing testimony concerning a text message Ms. Lovell testified her daughter sent her after Ms. Lovell confronted her daughter about the checks." Appellant contends that the text was not inadmissible hearsay because "the content of the text message was not offered for the truth of the matter asserted, but rather, to show its effect on the intended recipient." We disagree.

This issue arose after Ms. Lovell, on cross-examination, testified that her daughter admitted to being involved in the theft of the checks. On redirect, the State questioned

Ms. Lovell about her daughter's admission, and Ms. Lovell testified that she "yelled" at her daughter through text messages. On recross-examination, defense counsel requested permission to question Ms. Lovell regarding a text message her daughter sent her. The following then occurred at a bench conference:

> [DEFENSE]: Your Honor, I have one question in reference to the text that was brought up. The question is: Isn't it true that the text message said X, Y and Z. I just want to read from the – I have the text message. I just want to read it. She can either admit it or deny it, or say she doesn't remember. But I think I'm entitled to ask the question because the text message itself was referred to a moment ago by [the State].
>
> THE COURT: You need to tell me what the relevance –
>
> [DEFENSE]: Well, the text message says – the text message says, I made a mistake. [Appellant] didn't do anything. And maybe one or two other things. But that is the essence of what it says.
>
> THE COURT: All right. The only way I'm going to allow recross is to – normally, I do not allow recross unless you can make an argument as to some new material that was covered during new direct. I will allow that one question.
>
> [STATE]: I will object to it.
>
> ***
>
> I think we have . . . an authentication issue of who said this, and whatever was said, the content of it is hearsay.
>
> THE COURT: Okay. Let's first deal with the hearsay component. How do you get over that?
>
> [DEFENSE]: Again, Your Honor, it's just effect on the listener – the reader in this case. She read it. It appeared to be from her daughter's number. It may or may not be true.
>
> THE COURT: Why is the effect on her relevant?
>
> [DEFENSE]: Because it lets her know who is responsible . . .

***

or who is not responsible.

THE COURT: Then you are offering it to prove the truth of the matter asserted.

[DEFENSE]: That may be an unintentional side effect.

THE COURT: Objection is sustained.

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. *Hopkins v. State*, 352 Md. 146, 158 (1998). On the other hand, "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). Accordingly, "the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review." *Gordon v. State*, 431 Md. 527, 538 (2013).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Such out-of-court statements are inadmissible unless they are permitted by applicable constitutional provisions or statutes, or unless they fall under one of the hearsay exceptions recognized by the Maryland Rules. Md. Rule 5-802. On the other hand, if the statement "is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State*, 389 Md. 681, 689 (2005). Whether a statement is offered for its truth "depends on the purpose for which the statement is offered at trial." *Hardison v. State*, 118 Md. App. 225, 234 (1997).

Here, the statement at issue was hearsay, and therefore, it was properly excluded. Although appellant argues on appeal that the text message was offered to show its effect on Ms. Lovell, the record belies this assertion. When defense counsel first expressed his intention to question Ms. Lovell about the text message, he indicated that he "just want[ed] to read it…because the text message itself was referred to a moment ago by [the State]." Defense counsel then stated that Ms. Lovell could "admit it or deny it, or say she doesn't remember," implying that Ms. Lovell's response to the text message was immaterial. Only after the trial court pressed defense counsel about the admissibility of the text message did he argue that it was being offered for its "effect on the listener." Nevertheless, when the trial court asked about how this was relevant, defense counsel admitted, "because it lets her know who is responsible…or who is not responsible."

Defense counsel clearly intended to admit the text message for its truth. *See Handy v. State*, 201 Md. App. 521, 539-40 (2011) ("An out-of-court statement will be considered to be offered to prove that 'truth,' only if it would have no probative value (as to the relevant fact it is offered to prove) unless the declarant was both sincere and accurate when he or she made the statement.") (citations and emphasis omitted), *cert. denied*, 424 Md. 630 (2012). By defense counsel's own admission, the probative value of the text message lay in the veracity of the declarant's statement that appellant "didn't do anything." Accordingly, the trial court did not err in excluding the text message as hearsay.

II.

Appellant next argues that the evidence was insufficient to sustain his convictions for counterfeiting checks and uttering counterfeit checks. He asserts that "the evidence

showed that the checks at issue were valid checks, not fraudulent," and therefore, "the State failed to establish that appellant counterfeited checks…or uttered counterfeit checks."

Appellant concedes that his trial counsel waived his sufficiency challenge by failing to move for judgment of acquittal on the grounds advanced in this appeal. *See* Md. Rule 4-324(a) ("A defendant may move for judgment of acquittal on one or more counts . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted."); *Berry v. State*, 155 Md. App. 144, 180 (because defense motion for judgment of acquittal "did not remotely mention, much less argue with particularity, the argument being pressed for the first time on appeal . . . . [that] argument is not preserved for appellate review"), *cert. denied*, 381 Md. 674 (2004); *Anthony v. State*, 117 Md. App. 119, 126 ("The issue of sufficiency of the evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal."), *cert. denied*, 348 Md. 205 (1997). We agree that, because appellant failed to challenge the sufficiency of the evidence on the particularized grounds he raises in this appeal, those challenges are not properly before this Court.

Appellant argues, however, that trial counsel's failure to raise these issues below constituted ineffective assistance of counsel, an issue we should address on appeal. As the State notes, however, ineffective assistance of counsel claims rarely are addressed on direct appeal.

To establish that the assistance of trial counsel fell below constitutionally acceptable standards, "a defendant must prove that counsel's competence failed to meet an objective

standard of reasonableness and that counsel's performance prejudiced the defense." *Mosley v. State*, 378 Md. 548, 557 (2003). Ineffective assistance of counsel claims are generally resolved in post-conviction proceedings "because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's effectiveness." *Id.* at 560. *Accord Tetso v. State*, 205 Md. App. 334, 379 (2012) ("'Where . . . the record sheds no light on why counsel acted as he did, direct review by this Court would primarily involve "the perilous process of second-guessing," perhaps resulting in an unnecessary reversal in a case where sound but unapparent reasons existed for counsel's actions.'") (quoting *Addison v. State*, 191 Md. App. 159, 175 (2010)). In this case, the general rule applies and any claim of ineffective assistance should be determined in a post-conviction proceeding rather than on direct appeal.[2]

III.

Appellant's final contention is that the trial court erred in imposing two separate sentences for conspiracy to commit theft. He argues that only one sentence can be imposed for a single conspiracy, regardless of the number of criminal acts committed in furtherance of that conspiracy. Appellant asserts, therefore, that one of his two convictions and sentences for conspiracy must be vacated.

We agree that the court should have imposed only one sentence for conspiracy. The Court of Appeals has made clear "that only one sentence can be imposed for a single

[2] We do note, however, that even if the issue was preserved, we would affirm the sufficiency of the evidence on the merits.

common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Tracy v. State*, 319 Md. 452, 459 (1990). "The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Id.*

Here, the "conspiracy" was the agreement between appellant and Ms. Lovell's daughter to forge Ms. Lovell's checks, commit felony theft, and to commit misdemeanor theft. *See* Md. Code (2012 Repl. Vol.) § 7-104(g)(1)(i) & (4) of the Criminal Law Article (defining theft below $1,000 as a misdemeanor and theft between $1,000 and $10,000 as a felony). Because there was only one agreement, appellant should have been sentenced on only one of the conspiracy convictions, "regardless of how many repeated violations of the law may have been the object of the conspiracy." *Mason v. State*, 302 Md. 434, 445 (1985).

The State agrees that there "was no evidence of separate agreements to commit theft of property under $1,000 and theft of property between $1,000 and $10,000," and therefore, appellant should have been sentenced on only one of the conspiracy convictions. It argues, however, that only one sentence, not the underlying conviction, should be vacated. We disagree.

When, as is the case here, the State puts forth evidence of only one conspiracy, and the jury is not instructed that it could find more than one conspiracy, the proper remedy is to vacate both the sentence and the conviction of the cumulative conspiracy offense. *See Savage v. State*, 212 Md. App. 1, 26-31 (2013), *cert. denied*, 450 Md. 237 (2016). Accordingly, we shall vacate Appellant's conviction and sentence for the charge carrying the lesser penalty, which is conspiracy to commit theft less than $1,000. *See Wilson v. State*, 148 Md. App. 601, 641 (2002) (When a defendant is improperly convicted and

sentenced on multiple conspiracies, where only one was proven, "the most severe sentence imposed for the crimes of conspiracy should remain."), *cert. denied*, 374 Md. 84 (2003).

ONE CONVICTION AND SENTENCE FOR CONSPIRACY TO COMMIT THEFT LESS THAN $1,000 VACATED. JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 70% BY APPELLANT AND 30% BY PRINCE GEORGE'S COUNTY.