Circuit Court for Baltimore County
Case No. 03-K-15-005320

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1387

September Term, 2016

JOSHUA ADAM BERNERT

v.

STATE OF MARYLAND

Woodward, C.J.,
Meredith,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: October 25, 2017

Appellant, Joshua Adam Bernert, was tried and convicted in the Circuit Court for Baltimore County (Cavanaugh, J.) of attempted second-degree murder, use of a firearm in the commission of a crime of violence, conspiracy to commit first-degree assault and illegal possession of a regulated firearm. On August 16, 2016, Appellant was sentenced to 18 years' incarceration for attempted second-degree murder, all but 12 years suspended and a concurrent term of 10 years for use of a firearm in a crime of violence, with all but five years suspended and a concurrent term of five years for illegal possession of a firearm to be served without parole. Appellant was not sentenced however, on any conviction for conspiracy. Appellant filed the instant appeal, positing the following question for our review:

> Was the purely circumstantial evidence presented at Appellant's trial insufficient to convince any rational finder of fact that Appellant was guilty of participating in the assault on Gavin Rowe and, hence, support his convictions for attempted second degree murder, use of a firearm in the commission of a crime of violence, conspiracy to commit first degree assault and illegal possession of a firearm?

FACTS AND LEGAL PROCEEDINGS

Dundalk High School student Gavin Rowe was shot in the back of the neck at approximately 3:30 a.m. on September 12, 2015 as he was running with two other individuals, fellow classmate Shandon Dial and Amret Paul Mabi. Dial called 911 and reported that he was at the intersection of Mornington and Cornwall Roads in Dundalk, that Rowe had been shot and that the shooter had left the scene in a black SUV. Dial indicated that the shooter was white, although, in his 911 call, he said that he did not know

the race of the shooter.

The State proffered a theory that the shooting was connected to an altercation that occurred earlier at a party hosted by Dial and Rowe at their Yorkway house. Appellant's sister, Savida Singh, a seventeen-year-old student at Dundalk High School, offered the following testimony.

Singh was with her friend, Julia Johnson, at the party where she estimated there were approximately twenty people present drinking and smoking marijuana. While she was there, one of the older party goers, a "big guy" named Joe Menzer, "tried to say that [she] had their phone." Singh was adamant that she had not taken anyone's phone. She explained that she was sitting on the couch when Menzer started to tell her to dump her purse out, but she refused. Menzer then started threatening to hit her; he yelled at her, swung his arms in her direction and referred to her as a "bitch." A woman named Taylor then tried to grab Singh's purse but Singh pulled it back and "showed her what was in it and there was no phone."

Singh had already called Appellant to pick her up. Shortly after the purse incident, Appellant contacted her to say that he and their brother, Michael Bernert, were on their way in Appellant's green Chrysler Sebring. When Singh saw the Chrysler Sebring coming down the street, she and Julia left and got in the car. As they got into the car, Appellant and Michael Bernert got out and went up to the house and a fight broke out. Singh could not say exactly who was in the fight, but she was "pretty sure" that both Dial and her brothers were involved in the melee, and that her brothers were clearly outnumbered. She testified:

"It was the whole party against just them [sic] two." The brawl ended in a matter of minutes.

After the brawl, Appellant and Michael Bernert got back in the car and drove the fifteen minutes it took to arrive at the Eastdale home where Singh and Appellant lived with their mother. According to Singh, Appellant appeared "normal." He had gotten hit a couple of times, but it "wasn't like he got beat up."

Singh estimated that they arrived at the Eastdale home at approximately 1:00 a.m.; however, according to Singh, they did not remain at home. Sometime later, Singh "caught a ride" from a neighbor and they drove to Renee Belman's house, which was off Dunmanway Road. When asked why she went there, Singh testified that she "went out to confront someone," but she was clear that she never returned to the house where Dial and Rowe lived that night and she never obtained a weapon and shot at anyone that morning.

Singh stayed at Belman's house until approximately 3:00 a.m. when she called Appellant's girlfriend, Nicole Margotta, who drove her home in her black SUV. As they were driving home, Margotta stopped the car without saying why and Singh did not ask. At that time, according to Singh, at least one person jumped out of the car from the back seat and Singh did not know who it was, how many people jumped out and whether Appellant was one of the individuals who jumped out of the car. Singh testified only that she saw "a white boy in the back" of the car. Shortly thereafter, Margotta was stopped by police as they were driving from Dunmanway.

Singh was arrested on charges related to the shooting. While jailed, Singh was recorded placing a phone call to her mother where she stated that she "bluffed" to the police when she informed them that the SUV stopped to allow her to vomit and that she did not know what the police were talking about when they asked her if anyone fled from the SUV.

Officer Steven Baier, Baltimore County Police Department, Precinct 12 in Dundalk, responded to the shooting. Dial told him about the earlier altercation and that one of the "subjects" involved, whom Dial identified as a "black male," threatened the group. Officer Baier testified that Dial stated the black male said "you all better clear out."

Officer Stewart Grantham, Baltimore County Police Department, Dundalk patrol, the officer who detained Margotta's vehicle, testified that he was a half of a mile away from where the incident took place when he received the 3:30 a.m. phone call of "shots fired" in the area of Dunmanway and Yorkway, in which "a black SUV had pulled up into an alley and a person had got [sic] out and shot at subjects that fled the scene." At the time, the purported victims of the shooting were reported to have run one or two blocks away; one of the victims was hiding in the bushes and officers were "still trying to find" other victims.

As Officer Grantham was driving the short distance to the scene, he saw a black SUV pull out from Dunmanway and start speeding towards him on Sollers Point Road. Officer Grantham then made a U-turn, chased the SUV and stopped it, all the time "thinking this was possibly related to the incident." The SUV was occupied by two females when Officer Grathman approached the vehicle. The driver of the SUV was Nicole

Margotta, who was calm and who produced identification. Her passenger was a younger, "underage" woman, approximately 15 to 18 years old, whom he identified as Singh. The girls told Officer Grantham that they were coming from a party. Officer Grantham did not believe the women were connected with the shooting and allowed them leave in order that he might "get as quickly as possible back to the shooting."

Office Gratham testified that he did not see any other black SUVs or basically any other traffic in the area that morning. In court, he identified a video of this same SUV shortly before the stop. Officer Grantham testified that, while he did not see the events portrayed in this clip, this video showed "two or three subjects . . . exit[ing] the vehicle" before he stopped it. Officer Grantham was certain that neither Margotta, nor Singh, mentioned to him that people had exited Margotta's SUV prior to the stop.

Detectives Matthew Krauch and Parrish McClarin of the Baltimore County Police Department, Violent Crimes Unit, also responded to the report of shots fired. In the area of Cornwall Road and Mornington Road, near Yorkway and Dunmanway, they encountered Rowe, Dial and Mabi and asked them general questions regarding what they knew about the shooting. Officer Krauch estimated that the shooting took place in an alley entrance off Dunmanway and parallel to Yorkway where he surmised that Dial, Mabi and Rowe were "partaking in some sort of either alcohol or drug" activity. Despite these efforts, the police did not find any firearm or other ballistic evidence.

As a result of conducting the interviews, Detective McClarin interviewed Appellant on August 15, 2015, three days after the incident. Appellant acknowledged that Singh

called him that night to pick her up and that he and his brother, Michael, drove to the house where the party was taking place. Appellant relayed to Detective McClarin that he and his brother arrived at the party at approximately 2:00 a.m. but no later than 2:45 a.m. When they arrived, Singh told them that someone had "made her dump out her purse" and Michael "walked up to the . . . steps" and was accosted by "a whole lot of people." Appellant then exited the car to assist his brother and was assaulted by several people in the process. After the brawl, Appellant drove Michael, Singh and her friend to their mother's house, where they arrived at about 3:00 or 3:30 a.m. and where Appellant stayed until the next day. Appellant was adamant, in the interview, that he had not been involved in the shooting, that while he had been "jumped, beat up, stabbed all that . . . never in [his] life ha[d he] shot anyone up or shot anyone's place up or any of that."

Several days after the incident, Officer Krauch reviewed the video surveillance tapes from nearby Dundalk High School and Dundalk Middle School, regarding the relevant time frame. Officer Krauch admitted that Appellant is not recorded shooting anyone in any of the video surveillance. Moreover, nothing in the tapes allowed Krauch to determine who actually shot anything or anybody as a result of his examination of the tapes; however, one of the tapes showed individuals leaving a car and then returning to it shortly thereafter. Based on the tape, Krauch opined that this clip showed that the shooting took place off of Dunmanway by Yorkway. He testified, "It's not close enough for me to say exactly who did what in there, but I believe that's exactly where the shooting occurred . . . ."

Officer Krauch also reviewed surveillance footage from the Dundalk High School greenhouse from around 3:30 a.m. and again at 11:00 a.m. The first video footage, taken seconds after the individuals bailed out of the black SUV, showed two males near the greenhouse. The recording further shows that, at approximately 3:34 a.m., one of the individuals, a black male, approached the greenhouse, disappeared from camera view, but then is visible walking away through shrubbery. The second video footage, taken from the same camera at approximately 11:00 a.m. the same day, showed two individuals walking to that same greenhouse. The individuals were wearing the same clothing and similar in appearance to the individuals who were recorded approaching the greenhouse shortly after the shooting. The recording also shows that one of the individuals, a black male, walked toward the greenhouse and retrieved something from the shrubbery. According to Krauch, "[i]t looks like the same two individuals that came from the northern parking lot past the southern parking lot, came back to the greenhouse area to retrieve an item that was kept in this garden area just in front of the greenhouse." Krauch said that the reason he concluded that he saw somebody picking something up in the footage was that "[y]ou could tell by the mannerisms with them walking away, that there's something that they had, they were trying to put away. That they weren't, didn't have in their hand while they were walking toward that area."

Based on the statement, made by Dial, that the shooter "was a white guy," Officer

Krauch suggested that the white guy could possibly be Appellant's brother, Michael,[1] but that he was not sure and Michael had not been charged in this case.

After reviewing the surveillance tapes, a warrant was issued for Appellant's arrest. Appellant was arrested on September 21, 2015 and interviewed that same day. In his statement, Appellant again denied leaving the house that night after returning from picking Singh up. He also denied that he was with Margotta and Singh before they were stopped by the police.

According to Detective McClarin, in that interview, Appellant was shown stills from the surveillance tapes of the greenhouse showing an individual by the greenhouse at approximately 3:30 a.m. Appellant did not identify himself in those photographs. Officer Krauch showed Appellant a photograph from 11:00 a.m. that same day by the greenhouse, and Appellant identified himself and his brother in that photograph. Despite this identification of himself at the greenhouse some seven hours later, Appellant continued to maintain that he did not shoot anyone, that he did not "stash" anything in the greenhouse and that he was not in Margotta's car.

STANDARD OF REVIEW

The Standard of Review for the sufficiency of evidence is well-settled.

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . 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.

[1] Appellant is an African-American male. The State's brief describes Michael Bernert as "white" and Appellant's brief describes Michael Bernert as "appearing white."

Smith v. State, 415 Md. 174, 184 (2010) (second emphasis supplied) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)).

We do not retry the case as the fact-finder "possesses the unique opportunity" to engage with the evidence on a first-hand basis. *Id.* at 185 (citations omitted). We do not determine the innocence or guilt of the accused. *Allen v. State*, 39 Md. App. 686, 690 (1978). We do not measure the weight of the evidence presented to determine "whether the State has proved its case beyond a reasonable doubt." *Id.*

"When dealing with the issue of legal sufficiency in a jury trial, we are dealing only with the satisfaction of the burden of production." *Chisum v. State*, 227 Md. App. 118, 125 (2016). Evidence that is sufficient to support an accused's convictions 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 offense charged beyond a reasonable doubt." *Hall v. State*, 225 Md. App. 72, 80 (2015).

Of import here, the same standard applies to all criminal cases, including those resting upon circumstantial evidence. *Smith*, 415 Md. at 185. "[W]e do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Hall*, 225 Md. App. at 80 (quoting *Kyler v. State*, 218 Md. App. 196, 215 (2014)).

> Circumstantial evidence is sufficient to sustain a conviction, but not if that evidence "amount[s] only to strong suspicion or mere probability." Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture.

Smith, 415 Md. at 185 (alteration in original) (quoting *Bible v. State*, 411 Md. 138, 157 (1999)). Circumstantial evidence, which forms the basis for the conviction, must still support an inference of guilt beyond a reasonable doubt." *Id.* (quoting *Taylor v. State*, 346 Md. 452, 458 (1997)).

DISCUSSION

The sole issue presented, on this appeal, is whether the State presented sufficient evidence to permit the jury to convict Appellant, beyond a reasonable doubt, of attempted second-degree murder, use of a fire arm in the commission of a crime of violence, conspiracy to commit first degree assault and illegal possession of a regulated firearm. Appellant contends that there was no direct evidence presented and that the circumstantial evidence presented "constitutes mere probability or at most strong suspicion" of the convictions but "did not provide any rational trier of fact with enough evidence from which it could find [him] guilty beyond a reasonable doubt." Appellant requests that his convictions be overturned.

The State responds that the evidence presented was sufficient for "a rational trier of fact [to] infer that Bernert and his brother Michael returned to the scene of the earlier altercation and shot Rowe in the neck." The State argues that it is not "required to negate reasonable inferences of innocence." The State maintains that, "[e]ven though circumstantial, the evidence did not require the jury to speculate as to Bernert's guilt." Accordingly, the State asserts that the evidence supports an affirmance of Appellant's

convictions.

Appellant maintains that the evidence was legally insufficient to support his four convictions. Accordingly, we must review the essential elements of each conviction and determine whether the evidence that the State produced was sufficient to support any jury's rational inference of Appellant's guilt beyond a reasonable doubt.

"Murder is the killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation." *Harrison v. State*, 382 Md. 477, 488 (2004) (quoting *Ross v. State*, 308 Md. 337, 340 (1987)). The referenced "malevolent states of mind" that satisfy the offense of murder are: "(1) the intent to kill, (2) the intent to do grievous bodily harm, (3) the intent to do an act under circumstances manifesting extreme indifference to the value of human life (depraved heart), or (4) the intent to commit a dangerous felony." *Id.* (citing *Ross*, 308 Md. at 340).

The Maryland Code provides for two degrees of murder. Md. Code Ann., Crim. Law ("C.R.") § 2–201 sets out the various types of murder which constitute first-degree murder in the State of Maryland. *See Harrison*, 382 Md. at 488 (noting the "murders committed in the perpetration of enumerated felonies or any kind of willful, deliberate and premeditated killing" constitute first-degree murder). "Second-degree murder includes all other types of murder." *Harrison*, 382 Md. 477 at 488.

Md. Code Ann., Crim. Law. ("C.R.") § 2–206 provides for the statutory crime of attempt to commit a second-degree murder. "To be guilty of the crime of attempt, one must possess 'a specific intent to commit a particular offense' and carry out 'some overt act in

furtherance of the intent that goes beyond mere preparation.'" *Harrison*, 382 Md. at 488 (quoting *State v. Earp*, 319 Md. 156, 162 (1990)). "For attempted second-degree murder, the State has the burden to prove 'a specific intent to kill—an intent to commit grievous bodily harm will not suffice.'" *Id.* (citations omitted). "One has committed second-degree attempted murder when he or she harbors a specific intent to kill the victim and has taken a substantial step toward killing the victim." *Id.*

In the instant case, the State provided sufficient evidence to support a rational inference that Appellant was guilty beyond a reasonable doubt of attempted second-degree murder. The evidence presented did not require the jury to speculate. Appellant admitted to an earlier altercation at the victim's house. There was testimony that Appellant threatened the attendees at the party. At the time of the shooting, a black SUV was witnessed leaving the scene with the alleged shooter. There was video evidence that the black SUV stopped momentarily and two people alighted from the vehicle. On the night of the shooting, Appellant's girlfriend was driving a black SUV when she was stopped by police. Appellant's sister, Singh, was a passenger and she testified that people did exit the vehicle. There was also an audio recording of Singh admitting that she "bluffed" to police about why the SUV stopped and who may have been in the vehicle. A video recording shows two people at a greenhouse walking into shrubbery, which was near the location of where the black SUV was stopped. The same camera shows two people returning eight hours later to the greenhouse and retrieving something from the shrubbery. Appellant identified himself and his brother Michael as the two individuals in the video recording

from eight hours after the shooting.

The evidence was sufficient to support the premise that Appellant harbored the specific intent to kill Gavin Rowe and that he took overt action in furtherance of this intent that went beyond "mere preparation."

Even if the evidence was insufficient to support that Appellant, himself, was the shooter,

> [u]nder Maryland law, one may commit an offense as either a principal in the first degree, or a principal in the second degree[.] A first degree principal is the actual perpetrator of the crime. A second degree principal must be either actually or constructively present at the commission of a criminal offense and aid, counsel, command, or encourage the principal in the first degree in the commission of that offense.

Owens v. State, 161 Md. App. 91, 99 (2005) (citations omitted). "There is no practical distinction between principals in the first and second degrees 'insofar as indictment, conviction, and punishment is concerned.'" *Id.* (citations omitted).

There was sufficient evidence to support, at least, Appellant's presence during the commission of the criminal offense and his aid, counsel, command or encouragement of the shooter in the commission of the offense of attempted second-degree murder.

Regarding Appellant's three remaining convictions, we hold that the evidence presented was also sufficient to support the jury's rational inference of Appellant's guilt. We explain.

C.R. § 4–204 governs use of a firearm in the commission of a crime. There is no dispute that a gun was used in the commission of the crime. The victim was shot and a

bullet lodged in his neck. As discussed, *supra*, there is sufficient evidence to support Appellant's conviction for the underlying offense. Accordingly, the evidence is sufficient to support Appellant's conviction for use of a firearm in the commission of a crime.

C.L. § 3–202 governs first-degree assault. Subpart (a)(1) provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." Subpart (a)(2) further prohibits the commission of assault with a firearm. "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.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444 (1985)). As discussed, *supra*, the victim, Gavin Rowe, was shot. There was sufficient evidence to link Appellant to the shooting and to support the premise that Appellant, at least, acted in concert with another individual to accomplish an unlawful purpose. Accordingly, the evidence is also sufficient to support Appellant's conviction for conspiracy to commit first-degree assault.

Finally, Md. Code Ann., Pub. Safety ("P.S.") § 5–133(b)(1) provides for restrictions on the possession of regulated firearms for individuals convicted of a disqualifying crime.

> In order to secure a conviction for violating [P.S.] §§ 5–133(b)(1) . . . the State must establish that the handgun involved was a regulated firearm, that the defendant possessed this firearm, and that he was precluded from doing so because of a disqualifying status, in this case certain prior convictions.

Smith v. State, 225 Md. App. 516, 520 (2015), *cert. denied*, 447 Md. 300 (2016). "Although [P.S.] Section 5–133(b) is silent concerning the *mens rea* required, the Court of Appeals

has held that a 'possession conviction normally requires knowledge of the illicit item.'" *McNeal v. State*, 200 Md. App. 510, 524 (2011) (quoting *Parker v. State*, 402 Md. 372, 407 (2007)).

In the instant case, Appellant's conviction of a disqualifying crime or the status of the weapon as a regulated firearm are not at issue. Rather, Appellant argues that a gun was never recovered and that there is no evidence, linking Appellant to a weapon, that Appellant shot the victim or that Appellant was even at the scene of the crime. Appellant acknowledges that he was "*near* the scene, *seven hours after* the shooting, but not *at* the scene." (Second emphasis supplied). This, Appellant argues, is insufficient to establish his criminal agency as "the principal to a crime or an accessory to that crime." The State counters that evidence of Appellant as the "gun toter" or as to directly possessing the weapon is not necessary. Rather, the State maintains that the evidence presented supports Appellant's conviction based on his role as a second-degree principal, *i.e.*, aiding and abetting the shooting of Gavin Rowe. We agree.

As discussed, *supra*, a second-degree principal "either actually or constructively [is] present at the commission of a criminal offense and [provides] aid, counsel, command, or encourage[ment to] the principal in the first degree in the commission of that offense." *Owens, supra.* In the case *sub judice*, circumstantial evidence establishes that Appellant was involved in the attempted second-degree murder, *supra.* Logically, the weapon was in actual possession when it was used to shoot the victim, lodging a bullet in his neck. Whether Appellant pulled the trigger himself is not dispositive of his guilt, because he can

be equally liable as a second-degree principal. As discussed, *supra*, the evidence presented supports the rational inference that Appellant was actively or constructively present at the victim's shooting and, if not the principal actor himself, engaged in aid, counsel, command or encouragement to the principal.

Accordingly, we hold that the evidence is sufficient to support Appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.