Circuit Court for Wicomico County
Case No. 22-K-15-000502

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1904

September Term, 2016

KY'SHIR TARIQ CONNALLY

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: November 20, 2017

Following a three-day trial, a Wicomico County jury convicted appellant Ky'Shir Connally of second-degree murder, first-degree assault, two counts of conspiracy to commit first-degree assault, second-degree assault, use of a firearm in the commission of a crime of violence, possession of a regulated firearm while under the age of 21, illegal possession of a regulated firearm, and being an accessory after the fact to second-degree murder. The court sentenced Connally to 45 years of executed time, which included five years without the possibility of parole for the use of a firearm in the commission of a crime of violence. The court merged the second conspiracy sentence into the first.

Connally filed this timely appeal.

FACTUAL AND PROCEDURAL HISTORY

On the evening of Saturday, August 1, 2015, Connally, who was 17 years old at the time, attended an "Under 21" party at the America's Best Value Inn in Salisbury. Marquel Pinder, who owned a white Chevy Impala, drove himself, as well as Connally, Larry "Blaze" Ennis, Terrell Ervin, Khalil Reid, and a person named "Zack"[1] to the party. Between 150 and 300 young people attended the party.

In the days leading up to the party, Connally, Ennis, and others, the self-styled "Dream Team" from Delmar, had been involved in two fights with another group. During the party itself, Connally, Ennis, and Zack were involved in a verbal altercation

[1] Zack was not identified by his last name and did not testify at trial.

with a group of 15 to 20 youths. The hotel security personnel asked Connally and Ennis to leave.

In the parking lot after the altercation, Ennis suggested that they call their friend Jarret "Tana" Stokes, another member of the Dream Team. Connally made a call while the others (Pinder, Ennis, Ervin, Zack, and Reid) sat in the car. The group was approached by security and told that they either had to go back into the party or leave. They left.

On the way back to Delmar, the members of the group were angry. Connally complained that he had been "bitched out" and said that he was "not no bitch." Ennis suggested that they go back "100 deep" to fight. Connally, Ennis, and Reid talked about getting a "burner" or a "baby nine," by which they meant a gun.

Pinder dropped off Ervin and Zack, and the discussion continued at Connally's house in Delmar. Ennis told Connally and Pinder to get in the car so that they could meet up with Stokes at an IHOP about two minutes away from the hotel. Pinder believed that they were going back for a fight.

At the IHOP, Stokes, who was carrying a firearm, got into the car. At that point, Pinder knew that there would be a shooting. At one point, Stokes cocked the gun, chambering a round, and said that he was "settling this tonight."

At around 11:30 pm, after another altercation, the security officers shut down the party and ushered the partygoers into the parking lot. Pinder drove the group to a parking

lot adjacent to the hotel and positioned the car so that Stokes was facing the crowd of partygoers at a distance of five to ten feet.

For about 10 minutes, Connally, Ennis, and Stokes looked and pointed at people in the crowd. According to Pinder, Connally leaned forward and pointed out a young man in a red shirt. About 30 seconds later, Stokes started shooting. Pinder heard four shots; a security officer heard between five and seven. One struck and killed Rakim "Roc" Russell; another went into the second-floor room of a hotel guest. A white Chevy Impala was seen speeding away from the scene.

After the group left the scene of the shooting, they began looking for shell casings in the car. Connally, Stokes, and Ennis each located casings, and Ennis discarded them in some bushes. Connally took the handgun and hid it in a wooded area across the street from his house. The gun was never recovered.

The next day, Connally sent a message to Pinder via Snapchat instructing him to tell the police that Connally, Ennis, and Stokes were at a party on Line Road in Delmar at the time of the shooting. Shortly thereafter, the authorities asked to speak with Pinder.

Pinder met with the authorities. Eventually, he told them that Stokes was the shooter and that Ennis and Connally had been present and had been pointing out potential victims.

While Pinder was meeting with the authorities, Connally sent him another message via Snapchat. In the message Connally directed Pinder to clean the inside and

outside of his car. Pinder understood the message to mean that he was to try to get rid of the gunshot residue.

A few days later, Pinder surreptitiously recorded a call to Connally. During the call, Connally said that the gun and shells had been removed from Pinder's car and that all Pinder needed to do was clean it before the police got to it.

Following his arrest, Connally waived his *Miranda* rights. He told the police that Pinder drove him, Stokes, and Ennis back to the hotel party to "end the beef," that the "target" was a group of young men from Berlin, but that no specific member was the target. According to Connally, Rakim Russell, who was from Salisbury, hung out with the Berlin group, but was not the target. Connally related that members of the Berlin group had been threatening him and that he would soon have no protection because Stokes and Ennis were about to go away to college. Connally knew that Stokes had a gun, and he admitted that Stokes said that they were going to end the beef, but he claimed that he did not expect Stokes actually to fire the gun.

The jury acquitted Connally of first-degree murder and conspiracy to commit first-degree murder, but convicted him of all of the other offenses that were presented to it, including second-degree murder, first-degree assault, two counts of conspiracy to commit first-degree assault, and a variety of firearms offenses.

We shall discuss additional facts as they become relevant to the issues on appeal.

QUESTIONS PRESENTED

Connally presents four questions for review, which we have reworded for concision:

1. Did the trial court err in allowing the State to introduce a prior inconsistent statement of Terrell Ervin after making a finding that he feigned memory loss during his testimony?

2. Did the trial court abuse its discretion in refusing to declare a mistrial following a fight that occurred in the hallway during the trial?

3. Was there sufficient evidence to support Connally's convictions of first-degree assault, second-degree assault, and use of a firearm?

4. Did the trial court err in failing to vacate one of Connally's two convictions for conspiracy to commit first-degree assault?[2]

[2] Connally phrased the questions as:

1. Did the trial court commit reversible error in permitting as an exception to the hearsay rule a third party's transcription reading of the key witness's prior statements?

2. Did the trial court abuse its discretion in refusing to declare a mistrial when there were emotional outbursts in the courtroom, a fight erupted in the hallway, no inquiry was made of the jury, and no curative instruction was given to the jury?

3. Did the trial court err in denying the motion for judgment of acquittal for first degree assault, second degree assault, and use of a firearm in a crime of violence?

4. Did the trial court err in failing to vacate one of the two convictions for conspiracy to commit first degree assault where, at most, the State presented evidence of one unlawful agreement?

DISCUSSION

I. Terrell Ervin's Prior Inconsistent Statements

On the first day of trial, the State called Terrell Ervin to testify. He recounted going to the hotel party, the identities of the persons he was with, and the altercation at the party. He also testified that in the car, after the altercation, Connally and Ennis were, in his words, "heated." He claimed, however, not to remember any discussion of getting a gun and returning to the party. It was "a silent ride," he said.

The State attempted to refresh Ervin's recollection by showing him a transcript of a recorded statement in which he had told the police that there was a discussion in the car about getting a gun, that Connally, Ennis, and Reid talked about getting a "baby nine," and that Connally said that he was going to get a "burner." After reviewing the relevant pages from the transcript, Ervin responded that he did not recall what he had told the police. A moment later, he said that he did not remember telling the police of the discussion about getting a gun. He also said that he did not remember a discussion about returning to the party.

At that point, the State showed Ervin a portion of the transcript in which he recounted a discussion about returning to the party and attempted to ask whether it refreshed his recollection. Without waiting for the prosecutor to finish the question, Ervin interrupted and responded that it did not:

Q. . . . Does that refresh your recollection about –

A. No.

Q. – let me finish – whether there was a conversation in the car about returning to America's Best Value?

A. No. I don't remember that conversation.

Later that same day, the State called Detective Jason Caputo of the Salisbury City Police Department. The State asked Detective Caputo to read from a portion of the transcript of Ervin's recorded interview. Connally objected on hearsay grounds.[3] The State responded that the transcript contained prior inconsistent statements, because Ervin had feigned a lack of memory. Defense counsel responded that Ervin "simply [did not] remember" what had occurred, and thus his trial testimony was not inconsistent with his statements in the recorded interview.

The trial court agreed with the State that Ervin had feigned a lack of memory of the interview. Based on Ervin's "overall demeanor," the court found that he was "clearly a hostile witness" and that his putative failure of recollection was "the equivalent of

[3] Connally also objected on the ground that the testimony would violate the Confrontation Clause of the Sixth Amendment, but he does not pursue that ground on appeal. A Confrontation Clause challenge would have no merit, because Connally had the opportunity to confront and cross-examine Ervin, the declarant. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements") (citation omitted); *see also California v. Green*, 399 U.S. 149, 164 (1970) (holding that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories").

denying that he made the statements." The court concluded that Ervin's recorded statements were admissible under the exception to the hearsay rule for prior inconsistent statements that were "(1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and . . . signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Md. Rule 5-802.1(a).[4]

The court permitted Detective Caputo to read from the transcript, limiting the scope of what he could read to the conversations that occurred in the car after Connally, Ervin, and the others had left the hotel party. Detective Caputo read an excerpt of the transcript in which Ervin stated that after the altercation he heard an argument about whether the group should go back to the hotel party, that Connally stated he was going to get a "burner," and that someone said something about a "baby nine."

On appeal, Connally contends that Detective Caputo's testimony about Ervin's statements was not properly admissible under Md. Rule 5-802.1(a), because, he says, Ervin's trial testimony was not inconsistent with his recorded statement to the police. Although he claims that an appellate court should conduct a plenary, de novo review of the circuit court's decision, he really argues, in essence, that the circuit court was clearly erroneous in making its factual finding that Ervin was feigning a loss of memory.

[4] The court referred to Md. Rule 5-801.1, which does not exist. The court, however, undeniably meant to refer to Md. Rule 5-802.1(a), because it quoted the literal language of that rule.

There is no serious question that Ervin's recorded statement met the definition of hearsay: it was "a statement, other than one made by the declarant" – Ervin – "while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). The question is whether a portion of the recorded statement was admissible under the exception to the general prohibition against hearsay for certain types of prior inconsistent statements.

Rule 5-802.1(a) states that if a witness testifies and is subject to cross-examination, the general prohibition against hearsay does not exclude "[a] statement that is inconsistent with the declarant's testimony, if the statement was . . . (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Ervin's statement was certainly "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Hence, the question becomes whether his trial testimony was "inconsistent" with the statement.

When a witness falsely claims not to remember an event in order to avoid testifying about it, "inconsistency may be implied in that testimony because by claiming that he [or she] does not remember an event that he [or she] does remember, the witness is denying, albeit indirectly, that the event occurred." *Corbett v. State*, 130 Md. App. 408, 425 (2000); *accord Nance v. State*, 331 Md. 549, 564 n.5 (1993) ("[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied"). Hence, if a court finds that a witness is feigning memory loss in order to avoid

testifying at trial, the court may admit the witness's prior statement as substantive evidence under Rule 5-802.1(a) on the theory that it is inconsistent with the trial testimony. *See Corbett v. State*, 130 Md. App. at 426-27. The decision about "whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make." *Id.* at 426.

Even on a cold, paper record, Ervin's claims of memory loss do not ring true. He was a reluctant witness even before he experienced the sudden onset of amnesia. Although he remembered some parts of the recorded interview, his memory began to escape him just as the prosecutor got to his more damaging statements, such as his statements about the "burner" and the "baby nine." He claimed to remember nothing about the car ride from the party back to Delmar, but in the same sentence he somehow remembered that it was a "silent ride." Most notably, when the prosecutor started to ask whether one part of his recorded statement refreshed his recollection, he interrupted and answered "no" even before the prosecutor was able to identify the specific recollection that she was trying to refresh. In short, we cannot conclude that the circuit court abused its discretion or was clearly erroneous in finding that Ervin was feigning a lack of memory.[5]

[5] Connally argues that Ervin's claims of memory loss must have been true, because he repeated them on multiple occasions. But if Connally's argument were correct, the persistent repetition of even a palpably false claim of memory loss would preclude a court from finding that a witness was feigning a lack of memory. Connally's position is untenable.

II. Denial of Connally's Motion for Mistrial

Marquel Pinder, the driver of the white Impala in which Connally and the others drove to and from the hotel, pleaded guilty to conspiracy to commit first-degree murder and testified against Connally.[6] During the State's examination of Pinder, the court interrupted to reprimand some of the observers in the courtroom:

> I'm sorry, so I'm going to remind observers that they're not to indicate any agreement or disagreement with the testimony. I understand it might not be intentional but please do not react to the testimony of the witnesses. The jury's going to make a determination about this case and they are entitled to do so without participation from the audience. Thank you so much.

Pinder's testimony continued. While Pinder recounted the events at the IHOP and described Stokes cocking the gun so that it would be ready to shoot, the court again interrupted:

> All right, wait a minute, let's stop for a second. Probably the observers should remain in the courtroom if there's a disruption. See if we can clear out whatever this problem is.

The court conferred with the courtroom deputy and announced that it would "take a brief recess" to "resolve an issue." The jury left the courtroom.

At an ensuing bench conference, the trial judge said that she had learned that one of the observers, Stokes's mother, had been provoking the victim's mother by expressing

[6] Pinder testified that he pleaded guilty because he could not live with himself anymore and because he "needed to make sure that [his] family was safe and that the family of Rakeem [sic] got closure."

agreement or disagreement with the testimony. The judge explained that she halted the proceedings because she had heard yelling in the hallway, saw people leaving the courtroom, and was concerned that a group of people were assembling in the hallway. The judge wanted to ensure that all available security personnel could address whatever disruption might be occurring. The judge informed counsel that Stokes's mother had left the courthouse and that the judge would speak to her about permissible conduct before she would be allowed to return. In addition, the judge expressed concern about ensuring the safety of all involved and of avoiding any disruption that might influence the jury. Finally, the judge observed that she herself had not seen or heard any of the exchanges that occurred in the courtroom.

Connally moved for a mistrial "to protect the record." The court responded as follows:

> I don't know that the disruption was enough to do anything with the jury, they don't even know it involves this case. We have four courtrooms in this building, we have court going on in more than one courtroom so I'm not in any way convinced that they know what the nature of the disruption was, just that I don't want it to continue. Sometimes we have people in the back, in lockup go crazy, there's all kind of things that can happen during the course of a case. So I'm not inclined to give a mistrial because I don't have any reason to believe the jury is going to think anything against you or for that matter in favor of the State. It's not clear to me even from what my observations were who all was involved so I can't imagine that the jury knew. Only know this because security informed me that that was what happened in the hallway.

After defense counsel acknowledged the court's ruling, the trial judge added, "[I]f I can't perceive it, being as attentive as I am, I can't believe the jury would be able to overhear or see anything." Connally made no further argument regarding the decision to

deny his motion for a mistrial. Nor did he request a curative instruction or ask that the court question the jurors about what they may have observed.

When the jury returned, the court stated, "Everything is in order for us to proceed. Thank you for your patience and we will go ahead and continue with the examination of this witness." The court made no mention of the disturbance in the hallway.

On appeal, Connally makes a superficial challenge to the court's denial of his motion for a mistrial. In addition, he faults the court for not issuing a curative instruction and for not questioning the jurors about what they might have observed. We see no basis to upset the court's ruling.

The extreme nature of a mistrial as a remedy at trial is well known. "A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Rather, it is "'an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)); *accord Rutherford v. State*, 160 Md. App. 311, 323 (2004) (stating that mistrial is "an extreme sanction that courts generally resort to only when no other remedy will suffice to cure the prejudice" to the defendant) (internal quotation marks and citations omitted). Put another way, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

The amount of deference given the trial court to determine the need for a mistrial is also well known. "'[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court[.]'" *Cooley v. State*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "[T]he trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm v. State*, 272 Md. at 429.

> "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial."

Simmons v. State, 436 Md. 202, 212 (2013) (alteration in original) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

An appellate court will not reverse the denial of a mistrial motion absent an abuse of discretion, *see Simmons v. State*, 436 Md. at 212; *Browne v. State*, 215 Md. App. 51, 57 (2013); and certainly will not reverse simply because it might have ruled differently. *Nash v. State*, 439 Md. 53, 67 (2014) (citations omitted). A trial court abuses its discretion when its ruling is "'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,' when the ruling is 'violative of fact and logic,' or when it constitutes an 'untenable judicial act that defies reason and works an injustice.'" *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). To amount to an abuse of discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing

court and beyond the fringe of what that court deems minimally acceptable." *Id.* (quoting *North v. North*, 102 Md. App. at 14).

"Emotional responses in a courtroom are not unusual, especially in criminal trials, and manifestly the defendant is not entitled to a mistrial every time someone becomes upset in the course of the trial." *Hunt v. State*, 312 Md. 494, 501 (1988). Here, the court handled the emotional responses in an exemplary manner: it halted the proceedings; it reiterated its earlier admonition that observers should not react to the testimony; it ascertained what had caused the disruption; it determined that the in-court disruption was so minimal that the jury probably had not noticed it; and it took steps to ensure that the causes of the disruption would not recur. The court did not abuse its discretion.

Unsurprisingly, Connally devotes little effort to a challenge of the denial of the motion for a mistrial in itself. Instead, he points to *Parham v. State*, 79 Md. App. 152 (1989), and *Griffin v. State*, 192 Md. App. 518 (2010), *rev'd on other grounds*, 419 Md. 343 (2011), in support of the contention that the trial court abused its discretion by failing to inquire about whether a disruption in the courtroom had some effect on the jury. At trial, however, Connally did not ask the court to undertake any such inquiry, so he has not preserved his current argument for appellate review. *See Peterson v. State*, 444 Md. 105, 126 (2015); *Robinson v. State*, 410 Md. 91, 103 (2009). We cannot fault the circuit court for failing to do something that Connally never asked it to do.

But even if Connally's concerns were preserved, we would find them unpersuasive. In both *Parham* and *Griffin*, the disruptions were significant enough to be

captured on the record. In *Parham*, 79 Md. App. at 157, the victim's mother yelled at the defendant while he testified, accusing him of assaulting the victim (his wife) on multiple occasions. In *Griffin*, 192 Md. App. at 549-50, a witness's mother disrupted the proceedings by loudly criticizing defense counsel for implying that her daughter had been coached by the prosecutor. In both cases, this Court held that the trial court did not abuse its discretion by denying motions for mistrial and instead giving curative instructions. *Griffin v. State*, 192 Md. App. at 552; *Parham v. State*, 79 Md. App. at 158.

Connally argues that because the court did not take steps similar to those taken in *Parham* and *Griffin*, the court *ipso facto* failed to exercise *any* discretion, thereby abusing its discretion. Connally does not recognize that neither *Parham* nor *Griffin* stands for the proposition that a court must issue a curative instructions in case of a disruption in the courtroom.

In any event, had Connally requested that the court undertake further remedial measures, it would not have abused its discretion in denying his request. In *Bruce v. State*, 351 Md. 387, 390-92 (1998), the defendant moved for a mistrial after informing the court that an electronic bulletin board in the courthouse may have indicated to jurors in his current trial that he had other, unrelated criminal cases pending that day. The court denied the motion for mistrial, reasoning that the jurors had no reason to seek information from the board, because they had received express directions about where they needed to meet that morning. *Id.* at 392. The trial court also refused to *voir dire* the members of the jury, because there was no suggestion that any of the jurors had seen the board. *Id.* at

394. On appeal, the Court of Appeals held that the trial judge "exercised the discretion vested in him" when denying the motion for mistrial. *Id.* at 393.

In this case as well, the trial judge properly exercised the discretion that was vested in her. The judge pointed out that she herself did not observe the in-court disturbance – and, hence, that the jurors probably did not observe it either. The judge also pointed out that the disturbance in the hallway might have resulted from something that had occurred in one of the other courtrooms. If the court had questioned the jurors about what they had seen or issued some sort of "curative" instruction, it might have done more harm than good, by directing the jurors' attention to something that they had not noticed. The harm might have been compounded had the court taken it upon itself to question the jurors or issue an instruction in the absence of any request from Connally. In short, far from abusing its discretion, the court exercised its discretion in this instance in an exemplary manner.

III. Denial of Connally's Motion for Judgment of Acquittal

At the close of the State's case, Connally moved for a judgment of acquittal as to all counts. The circuit court granted the motion on several counts, but expressly or tacitly denied it on the counts on which Connally was eventually convicted, including first-degree assault, second-degree assault, and use of a firearm in the commission of a crime of violence. Connally asserts that the court erred in denying his motion for judgment of acquittal on those counts.

In appellate review of the denial of a motion for judgment of acquittal, we ask "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." *Benton v. State*, 224 Md. App. 612, 629 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In attacking the court's decision to submit several of the counts to the jury, Connally argues that he was not a principal in the first degree – *i.e.*, that he was not "the actual perpetrator of the crime" (*Owens v. State*, 161 Md. App. 91, 99 (2005)) – but was a mere accomplice. Proceeding from that premise, Connally advances the dubious proposition that Maryland does not allow for accomplice or "accessoryship" liability for misdemeanors. Because second-degree assault and use of a firearm in the commission of a crime of violence are misdemeanors under Maryland law, Connally concludes that the evidence was insufficient to convict him of either of those offenses.

Connally's argument fails because he is incorrect in asserting that Maryland does not allow for accomplice or "accessoryship" liability for misdemeanors. While the common-law distinction between principals and accessories applies only to felonies (*State v. Williams*, 397 Md. 172, 193 (2007), *abrogated on other grounds by Price v. State*, 405 Md. 10 (2008)), all participants in a misdemeanor are treated as principals. *Id.* "'When a person embraces a misdemeanor, that person is a principal as to that crime, no matter what the nature of the involvement.'" *Id.* (quoting *State v. Hawkins*, 326 Md. at 280); *see also Roddy v. Finnegan*, 43 Md. 490, 504 (1876) ("[a]nything in the conduct of

a mere bystander, evincing a design to encourage, incite, approve of, or in some manner affording aid or consent to the act, will render him liable as a principal, in a misdemeanor, and it is not necessary to prove the party actually aided in the commission of the offen[s]e"); *Ellison v. State*, 56 Md. App. 567, 581 (1983) ("[a]ssault is a misdemeanor; all participants are chargeable as principals"); *Broadway v. State*, 23 Md. App. 68, 78 (1974) ("[a]t common law all participants in misdemeanors are princip[al]s"). "In misdemeanors: (a) Perpetrators, abettors and inciters are all principals, because the law 'does not descend to distinguish the different shades of guilt in petty misdemeanors.'" *Broadway v. State*, 23 Md. App. at 78 n.13 (quoting *Perkins on Criminal Law* 647 (2d ed. 1969)). The jury, therefore, was not prohibited from convicting Connally for his role in the misdemeanors of second-degree assault and use of a firearm in the commission of a crime of violence.

Connally goes on to argue that, in granting his motion for judgment of acquittal on the charges of a charge of wearing, carrying, or transporting a handgun, the circuit court stated that there was no evidence that he intended to use the gun. Connally deploys that statement to argue that there must similarly have been no evidence that he used a firearm in the commission of a crime of violence. Connally, again, is incorrect.

In granting a motion for judgment of acquittal on the counts[7] for wearing, carrying, or transporting a handgun, the circuit court was operating under the mistaken

[7] Connally faced two such counts – one for wearing, carrying, and transporting a handgun upon the person and a second for wearing, carrying, and transporting a handgun in a vehicle or upon the public roads.

supposition that a jury could convict Connally of that crime only if he was a first-degree principal – *i.e.*, only if he himself had worn, carried, or transported a firearm, with the intent to use it as a weapon. The court was mistaken, because wearing, carrying, or transporting a firearm is a misdemeanor, of which the jury could have convicted Connally even if he would not qualify as a principal in the first degree. As the State observes, Connally got a windfall when the court mistakenly granted his motion for judgment of acquittal on the misdemeanor charges of wearing, carrying, or transporting a handgun. The court's mistake, however, affords no basis for the grant of a judgment of acquittal of the other misdemeanor charge of use of a firearm in the commission of a crime of violence.

Connally also argues that the circuit court erred in submitting the charge of first-degree assault to the jury. He cites the circuit court's statements, made while discussing whether he acted as a first-degree principal in committing a second-degree assault, about the absence of evidence that he himself battered or attempted to batter the actual victim. He concludes that the State adduced "zero evidence" that he "intended to assault the actual victim." Because Connally did not present this specific argument at trial, he has not preserved it for appeal. *See*, *e.g.*, *Whitting v. State*, 160 Md. App. 285, 308 (2004) (citations omitted) ("review of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal"). But even if he had preserved the argument, it would have no merit. As the State argues, "[t]here was sufficient evidence that Connally, *acting as an accomplice*, was guilty of committing a

battery with a firearm (first-degree assault), and Connally does not argue otherwise." (Emphasis added.)

Finally, Connally argues that the court erred in submitting the charges of first- and second-degree assault to the jury, because, he says, they were based on a theory of transferred intent, which applies only to murder, and not to assault. Because Connally did not present this argument at trial, he has failed to preserve it for appeal. *See*, *e.g.*, *Byrd v. State*, 140 Md. App. 488, 494 (2001) (holding that sufficiency challenge was not preserved where defense counsel failed to state with particularity why motions for judgment of acquittal at close of State's evidence and at close of all evidence should be granted). Even if he had preserved it, however, it would have no merit, as the court correctly instructed the jury that the doctrine of transferred intent applied only to the charges of first- and second-degree murder.

IV. Multiple Convictions for Conspiracy to Commit First-Degree Assault

The jury convicted Connally of separate counts of conspiring with Ennis to commit first-degree assault (Count 6) and of conspiring with Stokes to commit first-degree assault (Count 7). The court imposed separate sentences for the two conspiracy convictions, though it merged the sentence for conspiring with Stokes into the sentence for conspiring with Ennis.

Connally contends that the State adduced evidence of only a single agreement to commit first-degree assault, so the conviction for conspiring with Stokes to commit first-degree assault should have been vacated rather than merged. The State agrees, as do we.

See Savage v. State, 212 Md. App. 1, 13 (2013). Accordingly, we vacate the conviction on Count 7, for conspiring with Stokes.

CONVICTION FOR CONSPIRACY TO COMMIT FIRST-DEGREE ASSAULT WITH JARRET STOKES VACATED; ALL OTHER CONVICTIONS AND SENTENCES AFFIRMED; COSTS TO BE PAID ONE-QUARTER BY WICOMICO COUNTY AND THREE-QUARTERS BY APPELLANT.