Circuit Court for Prince George's County
Case No. CT16-0293B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2242

September Term, 2016

JOSHUA TYLER STEWART

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 23, 2018

INTRODUCTION

Appellant was found guilty by a jury in the Circuit Court for Prince George's County of theft less than $1,000 and sentenced to eighteen months of incarceration. He filed this timely appeal and presents the following questions for our review:

> 1. Did the addition of statements by the interrogating officer with respect to the availability of counsel and control of the interrogation undermine the constitutionally required *Miranda* warnings?
>
> 2. Did the trial court err by refusing to give a "mistake of fact" jury instruction when supported by defendant's testimony as to his understanding of the transaction underlying the charge of Theft of a Value of Less Than $1,000?
>
> 3. Did the trial court impermissibly consider (a) geographic residence and (b) untried or acquitted criminal activity when imposing the statutory maximum sentence for a non-violent misdemeanor based on accomplice liability?

For reasons to follow, we shall answer these questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

The Crime

On January 29, 2016, Josue Cruz Reyes ("Cruz") responded to an advertisement, posted by Kirk Wilson on the "Offer Up" app, for the sale of a cell phone for $250. Cruz submitted a counteroffer of $200 and the pair agreed to meet at the residence of Cruz's uncle, William Reyes, to complete the transaction. That afternoon, at approximately 1:00 p.m., Joshua Tyler Stewart ("Appellant") drove Wilson to the address provided by Cruz. When they arrived, Cruz and his uncle approached the vehicle and gave $200 to Wilson, who was sitting in the passenger seat of the car. He, in turn, passed Cruz the cell phone.

Wilson then pointed a handgun at Cruz and demanded that he hand over an additional $50, along with the cell phone. Cruz and his uncle complied with the demand, surrendering the cell phone and additional cash to Wilson.[1] Appellant and Wilson fled in the vehicle.

Arrest and Interrogation

A warrant was issued for appellant's arrest and executed on the evening of February 2, 2016. Detective James Carpenter of the Prince George's County Police Department transported him to the District I police station, where he was placed in an interview room. Prior to questioning appellant, Detective Carpenter read him his *Miranda* rights[2] from a card.[3] The following dialogue occurred:

> **[Detective Carpenter]**: All right, man. You know how earlier like I told you, I couldn't talk to you about why as you was coming here until we got here, all right? I know you're wondering why you're here, so we're about to talk about it now. Before I talk about it, I got to read your rights to you. All right?
>
> **[Appellant]**: (No audible response).

[1] Trial testimony indicated that between $280.00 and $320.00 was taken from Cruz and Reyes. The Statement of Charges listed an amount of $290.00.

[2] *See Miranda v. Arizona,* 384 U.S. 436, 478–79 (1966) (An individual taken into custody and subjected to questioning "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").

[3] Detective Carpenter's interview of Appellant was videotaped and the recording was admitted as State's Exhibit 3, without objection. The portion played includes the *Miranda* rights advisements.

[Detective Carpenter[4]]: Hmm, (indiscernible). All right. First, have you been drinking anything?

[Appellant]: (No audible response).

[Detective Carpenter]: Are you under the influence of any alcohol or weed?

[Appellant]: (No audible response).

[Detective Carpenter]: So you know where you at?

[Appellant]: (No audible response).

[Detective Carpenter]: You know what today's date is?

[Appellant]: Uh-huh.

[Detective Carpenter]: What's today?

[Appellant]: Today is February the 2nd.

[Detective Carpenter]: All right, bet. Did I promise you anything? Did I threaten you to come in here and talk to me?

[Appellant]: Uh-huh.

[Detective Carpenter]: You know--all right. I'm going to read you your rights to you. All right? My name is detective Carpenter with the Prince George's County Police Department. You have the right to remain silent. Anything you say can and will be used against you in the court of law. You have the right to speak to a lawyer and have him present with you during questioning. Unfortunately it's 11 o'clock at night. You ain't going to get nobody here tonight. All right?

If you can't afford a lawyer, one will be appointed for you before a statement is taken if you wish. If you decide to give a statement, you have the right to stop at any time to speak to lawyer. So, pretty much, you control what we talk about. At any given point you can say, "yo, I don't feel like talking no more," we ain't got to talk no more. We can talk about sports, we can talk

[4] The transcript of the interview erroneously identifies "Mr. Stewart" as the person speaking. However, the video of the interview clearly shows that Detective Carpenter was speaking in this instance.

> about the Super Bowl, we can talk about your last girlfriend. It is what it is. You control whatever we talk about, all right? Do you understand your rights?
>
> **[Appellant]**: (No audible response).
>
> **[Detective Carpenter]**: Now, do you want to talk and find out why you're here?
>
> **[Appellant]**: (No audible response).
>
> **[Detective Carpenter]**: All right. You go to say "yes" or "no".
>
> **[Appellant]**: Uh-huh, yeah.

***

Detective Carpenter proceeded to question appellant, who subsequently admitted he drove Wilson to the scene of the robbery.

Suppression Hearing and Trial

Appellant moved to suppress the statement given to the police, arguing it was given in violation of *Miranda*. He contended that Detective Carpenter's additional statements, particularly that an attorney would not be available to appellant that evening, rendered the warning ineffective. At a hearing in the Circuit Court for Prince George's County on June 9, 2016, following testimony, the motion was denied.

On November 30, 2016, appellant's trial was held. During opening statements, his attorney made certain proffers to the jury, in delineating an alternative version of events from that of the State's. After the prosecution rested their case, appellant invoked his right to remain silent, and the defense rested his case without presenting any evidence. The State moved for a mistrial, arguing that defense's opening statements were not supported by the evidence heard before the court. Prior to a ruling on the motion, defense counsel requested

to put his client on the stand, indicating that his client had changed his mind and wanted to testify. After *voir dire* of the appellant, the court found he "knowingly and voluntarily waived his right to remain silent and testify." Thereafter, the court denied the State's motion for a mistrial, the defense presented testimony and, subsequently, rested their case.

While discussing jury instructions with the parties, the defense requested that the court give "Maryland Criminal Pattern Jury Instruction 5:06, Mistake of Fact."[5] Counsel asserted that appellant's mistake of fact was that he "did not know of any plan Kirk Wilson may have had or any intention he may have had to commit a robbery or an assault. [Appellant] thought he was just giving Kirk Wilson a ride to sell a cell phone." He argued appellant had testified consistently with this position. The court denied the request, stating that even if the jury believed the requested mistake of fact was true, "that wouldn't make him not guilty of the crime of robbery or assault." However, the court indicated that appellant's counsel could make that point during his closing argument.

Following deliberations, the jury found appellant guilty of theft less than $1,000, and acquitted him of all other charges. The parties immediately moved to sentencing.

[5] MD Criminal Pattern Jury Instruction 5:06 reads as follows: "You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if: (1) defendant actually believed (alleged mistake); (2) the defendant's belief and actions were reasonable under the circumstances; and (3) the defendant did not intend to commit the crime of (crime) and the defendant's conduct would not have amounted to the crime of (crime) if mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have been criminal][defendant would have a defense of (defense)]. In order to convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent."

After reviewing the juvenile record of appellant and noting the ineffectiveness of alternatives to incarceration, the court imposed the maximum sentence of 18 months' incarceration. Appellant requested that the sentence be served on home detention. The court, after assessing his home environment, denied the request.

Appellant, thereafter, brought this timely appeal.

ANALYSIS

I. Did the addition of statements by the interrogating officer with respect to the availability of counsel and control of the interrogation undermine the constitutionally required *Miranda* warnings?

When deciding whether a trial court erred in admitting a post-*Miranda* warned statement, we "rely solely on the record developed at the suppression hearing." *Cooper v. State*, 163 Md. App. 70, 84 (2005). We "view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion," which in this case was the State of Maryland, and "reverse a court's factual findings only when they are clearly erroneous." *State v. Rucker*, 374 Md. 199, 207 (2003). "Although we extend great deference to the motion court's findings of fact, determinations regarding witness credibility, and weighing of the evidence, we make our own independent constitutional appraisal of the law as it applies to the facts of the case." *Cooper*, 163 Md. App. at 84–85.

The Fifth Amendment to the United States Constitution states that "No person shall…be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, the U.S. Supreme Court held that "[i]n order to combat [police] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused

must be adequately and effectively apprised of his rights[.]" 384 U.S. at 467. Thus, "before embarking on any custodial interrogation," law enforcement must convey to a suspect the following warning:

> [That a suspect] has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

A "verbatim recital of [these words]," however, is "not required." *California v. Prysock*, 453 U.S. 355, 360 (1981). Rather, "the inquiry is simply whether the warnings reasonable convey to a suspect his rights as required by *Miranda*." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). Additional statements incorporated into the *Miranda* warnings are considered part of the totality of the advisement, along with any other statements that relate to *Miranda* rights and their effect during the course of an interrogation. *See Duckworth*, 492 U.S. at 203; *Rush v. State*, 403 Md. 68, 86-88 (2008) (internal citations omitted). In determining the adequacy of a *Miranda* warning, appellate courts consider the totality of the advisement. As the Court of Appeals explained in *Luckett*:

> "[I]f the warnings, viewed in the totality, in any way misstate the suspect's rights to silence and counsel, or mislead or confuse the suspect with respect to those rights, then the warnings are constitutionally infirm, rendering any purported waiver of those rights constitutionally defective and requiring suppression of any subsequent statement."

413 Md. 360, 380 (2010).

Appellant argues that the "additional statements" of Detective Carpenter, particularly the language stating "you ain't going to get [an attorney] here tonight," "misled [appellant] regarding (1) his access to counsel and (2) his ability to halt the interrogation by invoking his right to counsel, thereby undermining and ultimately invalidating his *Miranda* warnings." Therefore, he avers, the circuit court's admission of his statements to the police constituted reversible error.

Appellee responds, initially, that appellant waived his rights to appeal this issue, "by his election to testify at trial admitting his presence at the crime scene consistent with the interview." They contend that "by voluntarily producing additional defense evidence to explain the contents of the interview," he waived "his appellate challenge to the admission of the interview at trial." Appellee further avers that appellant did not object to the portion of the videotaped statement on the basis of improper *Miranda* warning, "nor did [he] provide any indication that he would not have testified at trial if his statement had not been ruled to be admissible at trial."

Appellee also asserts that, even if we find the issue was properly preserved, "there is no support for [appellant's] claims that *Miranda* advisements" were "misleading" or otherwise "compromised [his] constitutional rights." They argue the additional statements made by Detective Carpenter "merely explained the procedure involved in the event [appellant] invoked his right to counsel, clarifying that although [he] had the right to counsel, it was unlikely that counsel would be instantly available to consult with him at the police station at 11:00 p.m."

The scope of our review is set forth in Maryland Rule 8-131(a), which provides in relevant part: "Ordinarily, the appellate court will not decide any…issue unless it plainly appears by the record to have been raised in or decided by the trial court." Further, a party may waive objection to testimony, during trial, by "subsequently offering [his own] testimony on the same matter." *Peisner v. State,* 236 Md. 137, 144 (1964) (*citing Connor v. State,* 225 Md. 543 (1961) (*cert denied,* 368 U.S. 906)).

In the present matter, a review of the record reveals that appellant filed a motion, arguing his statement was unconstitutionally obtained, on March 23, 2016, and was heard by the circuit court on June 10, 2016. This properly preserved the *Miranda* issue under Maryland Rule 8-131(a). However, we agree with appellee that, pursuant to *Peisner*, appellant waived his objection to the admission of his statement by testifying. On direct examination, appellant testified to the same facts he sought to suppress: he was with Kirk Wilson on the day of the crime, knew about the planned transaction, drove Wilson to the scene, was present at the scene of the crime, and drove off with Wilson.

Even if appellant's objection was properly preserved, Detective Carpenter's advisement was proper and appellant's statement was voluntary. Statements added to the traditional *Miranda* warning may invalidate it, if they "reference [the] right to appointed counsel [as] *linked with some future point in time* after the police interrogation." *Prysock*, 453 U.S. at 360. In *Duckworth v. Eagan*, the U.S. Supreme Court examined this issue, reviewing a police officer's warning, which included the phrase "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." 492 U.S. at 198. The Court held the statement did not constitute an improper

addition or modification, because: 1) the instruction "accurately described the procedure for the appointment of counsel [under the applicable Indiana law]; and 2) "*Miranda* does not require that attorneys be producible on call, but only that the suspect informed…that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." 492 U.S. at 204. Moreover, the Court noted that "it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The 'if and when you go to court' advice simply anticipates that question." *Id.*

The Maryland Court of Appeals came to a similar conclusion in *Rush v. State*, where it held a police officer properly advised a defendant of his *Miranda* rights, despite modifying the standard advisement regarding the appointment of counsel by adding the phrase "at some time at no cost" to indicate that "[a lawyer] is not going to magically appear" and "[i]t's going to take a little time for a lawyer to be provided to her[.]" 403 Md. at 78.

Appellant argues that the case *sub judice* should be distinguished from *Duckworth* and *Rush* because Detective Carpenter's additional statements "emphasize a lack of access to counsel," thus invalidating the overall warning, because it links the right to appointed counsel with some future point in time after the police interrogation.

Looking at the totality of the advisement, we find Detective Carpenter properly advised appellant of his right to an attorney when providing the following warning:

> **[Det. Carpenter]**: You know – all right. I'm going to read you your rights to you. All right? My name is Detective Carpenter with the Prince George's County Police Department. You have the right to remain silent. Anything

> you say can and will be used against you in the court of law. You have the right to speak to a lawyer and have him present with you during questioning. Unfortunately, it's 11 o'clock at night. You ain't going to get nobody here tonight. All right?
>
> If you can't afford a lawyer, one will be appointed for you before a statement is taken if you wish. If you decide to give a statement, you have the right to stop at any time to speak to lawyer. So, pretty much, you control what we talk about. At any given point you can say, "Yo, I don't feel like talking no more," we ain't got to talk no more. We can talk about sports, we can talk about the Super Bowl, we can talk about your last girlfriend. It is what it is. You control whatever we talk about, all right? Do you understand your rights?

As the Court of Appeals stated in *Rush*, the "gravamen of inadequacy of a modification" is in the "omission of one or more of the warnings required by *Miranda*." 403 Md. at 88. Carpenter's advisement clearly covers the four warnings required by *Miranda*: the right to remain silent; that anything you say can and will be used against you in the court of law; the right to speak to a lawyer and have him present with you during questioning; and if you can't afford a lawyer, one will be appointed for you before a statement is taken. Appellant's contention that the additional statements undermined his "ability to halt the interrogation by invoking his right to counsel" is without merit. In our view, Detective Carpenter's statements fell within the mandate of *Miranda*, informing appellant that "if you decide to give a statement, you have the right to stop at any time to speak to [a] lawyer" and "at any given point you can say, 'Yo, I don't feel like talking no more.'"

Appellant's argument that Carpenter's additional statements rendered the overall *Miranda* warning ineffective is also without merit. The statements did not link appellant's right to an attorney to some future point in time after the police interrogation. Carpenter specifically informed appellant that he had the right to an attorney "present with [him]

during questioning" and that if he could not afford one, one would be appointed for him *"before* a statement is taken." Instead, we view the additional statements in a similar vein to the additional statements in *Duckworth*; they simply anticipate the question often asked by criminal defendants of *when* they may obtain counsel.

For these reasons, we hold that the circuit court's factual findings were not clearly erroneous and Detective Carpenter's *Miranda* advisement was constitutionally adequate.

II. Did the trial court err by refusing to give a "mistake of fact" jury instruction when supported by defendant's testimony as to his understanding of the transaction underlying the charge of Theft of a Value of Less Than $1,000?

Appellant argues the circuit court committed reversible error in denying his request for a Mistake of Fact jury instruction as to theft less than $1,000. He maintains that, while appellant "did drive Wilson to the Reyes residence," he "mistakenly believed that a valid cell phone sale would and did take place." Such a mistaken belief, he asserts, "would undermine both the elements of 'unauthorized' control over Cruz's money and the intent necessary for a theft conviction."

Appellee contends, initially, that appellant waived his right to appeal the matter by "[limiting] his request for a mistake of fact instruction to the robbery and assault charges." Even if appellant properly preserved the issue for appeal, he further contends the requested instruction was "not warranted by the evidence" and did not meet the elements of a mistake of fact instruction.

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review a court's decision whether or not to give a particular jury instruction under an abuse of discretion standard. *Appraicio*

v. State, 431 Md. 42, 51 (2013). In evaluating whether an abuse of discretion occurred, we consider:

> (1) Whether the requested instruction was a correct statement of law;
>
> (2) Whether it was applicable under the facts of the case; and
>
> (3) Whether it was fairly covered in the instructions actually given.

Bazzle v. State, 426 Md. 541, 549 (2012) (internal citation omitted).

The jury instruction in question, Maryland Pattern Jury Instruction -- Criminal 5:06, reads:

> You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if:
>
> (1) the defendant actually believed (alleged mistake);
>
> (2) the defendant's belief and actions were reasonable under the circumstances; and
>
> (3) the defendant did not intend to commit the crime of (crime) and the defendant's conduct would not have amounted to the crime of (crime) if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have been criminal] [defendant would have the defense of (defense)].
>
> In order to convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent.

A mistake of fact "exists when the actor does not know what the actual facts are or believes them to be other than as they are. In essence, a mistake of fact is a defense when it negates the existence of the mental state essential to the crime charged." *General v. State,* 367 Md. 475, 484 (2002) (internal citation omitted).

In addition, Maryland Rule 4-325(e), which governs preservation of objections to jury instructions, states:

> No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Appellant, in the present case, failed to request a mistake of fact instruction for the crime of theft less than $1,000 and, thus, waived his rights to appeal that issue. A review of the record reveals that the following exchange occurred, after the close of evidence, while discussing which instructions would be given to the jury:

> **The Court:** Mistake of fact you want me to give. What would that be?
>
> **[Appellant's Counsel]:** That [Appellant] had no knowledge that there was to be a robbery.
>
> **The Court:** Well, that's not – what fact did he allegedly mistake?
>
> **[Appellant's Counsel]:** He thought he was just giving Kirk Wilson a ride to sell –
>
> **The Court:** I understand that's your argument, but you're asking me to give that person the section of 5:0 on it –
>
> **[Appellant's Counsel]:** That's correct.
>
> **The Court:** It says, you're required to find the defendant not guilty if the defendant actually believed – then insert the alleged mistake.
>
> What was the alleged mistake? That's what I'm asking you.
>
> **[Appellant's Counsel]:** He – that he was taking –
>
> **The Court:** What is it you want me to tell them?

[Appellant's Counsel]: Tell them that [Appellant] did not know of any plan Kirk Wilson may have had or any intention he may have had to commit a robbery or an assault.

He thought he was just giving Kirk Wilson a ride to sell a cell phone.

I think it would be appropriate if that mistake of fact instruction would be given right after the conspiracy instruction, because the State is saying that [Appellant] conspired with Kirk Wilson to commit an armed robbery.

The Court: Well, probably where I'm going to give it is right after the accomplice liability instruction.

[Appellant's Counsel]: Okay. That's fine.

[The State]: So, I'm clear, Your Honor, what language are you intending – [Appellant's counsel] said a lot. I'm not sure –

The Court: I'm writing down that I'm thinking about that. Now, you're required to find the defendant not guilty if the defendant actually believed Kirk Wilson was going to sell a cell phone.

[The State]: What number is that?

The Court: What pattern instruction? 5:06.

[The State]: Okay.

The Court: I'm not sure, frankly, that this is applicable. It says required to find the defendant not guilty if first the defendant actually believed Kirk Wilson was going to sell a cell phone. Second, the defendant believed it was reasonable under the circumstances, and third, the defendant [did not] intend to commit the crime of assault or robbery. And the defendant's conduct would not have amounted to the crime of assault and was a mistaken belief had been correct.

Meaning, that is two facts that the defendant thought to be – the defendant's conduct wouldn't have been criminal or he would have had a defense of X.

[Appellant's Counsel]: Yes.

The Court: But I don't think none of those really – that there is a discrete fact, you know, like, if he thought that – he thought Kirk Wilson – it was Kirk Wilson's money or it was not – you can certainly argue what you intend to argue, but I'm not sure that this instruction covers this circumstance that we're talking about here.

Your argument is – your position is [Appellant] didn't know anything about Mr. Wilson's intention to rob and assault the victim.

[Appellant's Counsel]: That's correct.

The Court: [But] that's not quite the same as what this instruction talks about.

[Appellant's Counsel]: We believe that it is, but we'll defer to the Court.

The Court: Okay. I mean, I just read you –

[Appellant's Counsel]: I think the court's juxtaposition –

The Court: -- you're free to argue that. I'm just not sure that this instruction is the circumstance you're talking about. It's, you know, more addressed to the kind of thing that he thought the gun wasn't loaded, or, you know, thought there was nobody in the house or thought it was his car.

[Appellant's Counsel]: Thought Kirk Wilson didn't have a gun.

The Court: Right, but that's not – that wouldn't make him not guilty of the crime or robbery or assault.

[Appellant's Counsel]: If he didn't know –

The Court: He would still be guilty of a robbery and assault even though there wasn't a gun. So, that doesn't address all the issues. See what I'm saying? You are free to argue it.

[Appellant's Counsel]: That he didn't know – [Appellant] did not know about any of the plan or intention Mr. Wilson may have had or may have developed during his conversation with the victims?

The Court: Right.

[Appellant's Counsel]: Okay. That's fine, Your Honor.

On the record before us, appellant only requested a mistake of fact instruction for the crimes of robbery and assault. As such, the court's decision not to give a mistake of fact instruction regarding theft is not error.

Even if, assuming *arguendo*, we considered appellant's objection properly preserved, we hold the court was not required to provide a mistake of fact instruction as to theft. Appellant argues that if the jury found credible his alleged belief "that a valid cell phone sale would and did take place," then the elements of '"unauthorized control' over Cruz's money and the intent necessary for a theft conviction" would be undermined, and, therefore, the jury would have to acquit him of theft under $1,000. We disagree.

The elements of theft, as pertinent to the case *sub judice*, are:

> A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> > (1) intends to deprive the owner of the property;
> >
> > (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
> >
> > (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

See Maryland Code, Criminal Law Article, § 7-104(a).

To be convicted under the theory of accomplice liability for a specific intent crime, such as theft, "a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some

way advocate or encourage the commission of the crime." *Silva v. State,* 422 Md. 17, 28 (2011) (internal quotations and citations omitted).

Appellant further asserts that if the jury found he actually believed that "a valid cell phone sale would and did take place," then they would have been required to find him not guilty of theft. We disagree because the requested instruction was not "a correct statement of law." *See Bazzle,* 426 Md. at 549. While a valid cell phone sale transaction may have taken place, it is undisputed that Kirk Wilson committed a theft and armed robbery of Cruz. A reasonable juror could infer that appellant participated in that theft and, at some point between picking up Mr. Wilson and the commission of the crime, developed the requisite intent necessary for a theft conviction, even if he initially believed that the transaction was legal. Further, the State elicited testimony tending to show that appellant did, in fact, advocate or encourage the commission of the theft. Mr. Cruz testified:

> **[Mr. Cruz]:** I mean, I was telling my uncle, you know, they wanted two hundred and fifty dollars, and I was not going to pay two hundred and fifty dollars for that phone.
>
> I just said to give me back my money, the two hundred, and I – and I would return the phone in turn.
>
> All of this happened in a matter of seconds. The one who was driving and him looked at each other in the eyes, and then, the passenger pulled out the gun.

For these reasons, we hold the court did not abuse its discretion in denying appellant's request for a mistake of fact instruction.

3. Did the trial court impermissibly consider (a) geographic residence and (b) untried or acquitted criminal activity when imposing the statutory maximum sentence for a non-violent misdemeanor based on accomplice liability?

Appellant argues the court, at sentencing, impermissibly considered his "home and neighborhood and other offenses for which [he] had been acquitted or not yet convicted." He avers the court, in deciding not to consider house arrest as an alternative incarceration because "there are all kinds of people in and out of that house, and his mother is not there often," improperly "based the severity of [his] sentence at least in part on beliefs about the quality of [his] neighborhood." He, further, contends that the State's unsubstantiated references to his "pending and untried robbery charges," "allegations of crimes of violence," and the State's advocacy for the maximum sentence based on his "escalating conduct in the community" were impermissible.

Appellee responds that appellant failed to properly preserve the issue for review, "in light of his failure to object at the sentencing proceeding to either the trial court's specific considerations or to the court's sentence in this case." Even if properly preserved, they contend the trial court "properly exercised its discretion in sentencing [appellant]" and appellant "fails to demonstrate that the trial court was motivated by impermissible considerations in imposing its sentence."

In Maryland, judges are "vested with very broad discretion in sentencing criminal defendants." *Jackson v. State,* 364 Md. 192, 199 (2001) (internal citations and quotations omitted). Courts may consider "the background of the defendant[,] including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Poe v. State,* 341 Md. 523, 532 (1996) (internal citations omitted). Defendants may challenge a sentence if "the sentencing judge was motivated by ill-will, prejudice, or other impermissible considerations." *Jackson,* 364 Md. at 200 (internal

quotation, citation, and emphasis omitted). In *Jackson*, the Court of Appeals examined a judge's statements during sentencing, in determining whether the decision was based on "impermissible considerations." *Id.* at 275–76. The judge remarked that communities in Columbia, MD had "attracted a large number of rotten apples" and that "most of them came from [Baltimore] city." *Id.* The Court held these comments exceeded the limits of a court's broad discretion and that "[s]imply stated, it is not permissible to base the severity of sentencing on where people live, have lived, or where they were raised." *Id.* at 201.

In addition, "even though [a judge] may consider subsequent misconduct, a judge may sentence only for the offenses which the defendants have been convicted and may not penalize them for other offenses of which they have not been convicted," including acquittals. *See Curry v. State,* 60 Md. App. 171, 181 (1984) (*citing United States v. Eberhardt*, 417 F.2d 1009, 1015 (4th Cir. 1969)).

Moreover, in order to preserve an appellate claim regarding impermissible sentencing considerations, "an objection is required to prevent waiver[.]" *Reiger v. State,* 170 Md. App. 693, 700 (2006). On review, we must determine "if a judge's comments during sentencing could cause a reasonable jury to question the impartiality of the judge," and, if so, then "the defendant has been deprived of due process and the judge has abused his or her discretion." *Ellis v. State,* 185 Md. App. 522, 551 (2009) (internal citations omitted).

During sentencing, in the case *sub judice*, the State requested the maximum period of incarceration, stating:

> **[The State]:** Okay. I would ask for a period of a full active period of incarceration. [Appellant] has been in the community for several months. He has other – like, a couple open crimes of violence. So, I think that an active period of incarceration is necessary to protect the public and also believe that the incarceration is necessary to avoid depreciating the serious nature of the offense and to promote respect for the law.
>
> **The Court:** Okay.
>
> **[The Deputy Bailiff]:** Ready?
>
> **The Court:** Yes. Just does anybody object to me looking at that?
>
> **[Appellant's Counsel]:** No, Your Honor.

The State went on to mention that appellant "has a number of matters that are pending that all involve committing crime against persons" and that he is "home alone quite a bit" where criminal activity is committed inside the home. The court then reviewed a report denying appellant's motion to waive the matter to juvenile court, which listed his criminal background and pending criminal cases. Appellant's counsel requested that "the Court place him on probation" until the pending cases are resolved. The court responded that "I am certainly not going to consider pending charges. They are what they are which is just allegations." Then, the court sentenced appellant to 18 months' incarceration. Afterwards, the following exchange took place:

> **[Appellant's Counsel]:** Would Your Honor consider house arrests for the period of active incarceration that the Court might impose?
>
> **The Court:** No, absolutely not. Under the circumstances even by his testimony, there are all kinds of people in and out of that house, and his mother is not there often.
>
> And even with a prior which I wasn't aware of until I looked at this, with a prior driving without a license, driving an unregistered vehicle. He [has] got free access to a vehicle and everything else.

I don't think home arrest is going to be the appropriate thing for him.

Appellant's counsel had an opportunity to object to the consideration of appellant's pending criminal charges and he did not do so. Neither did appellant's counsel object to the court's consideration of appellant's "geographic residence." In fact, a review of the record shows that appellant's counsel failed to object at all during sentencing. Thus, we hold that appellant failed to preserve his claims of impermissible sentencing considerations and, therefore, has waived any appellate rights in the matter.

Even if we found appellant's contentions were properly preserved, we are not persuaded that the court abused its discretion. Unlike *Jackson*, in which the court improperly considered the fact that the defendant was from another jurisdiction in sentencing, the court in the present case did not base its decision on "where [appellant lives], has lived, or where [he] was raised." Rather, the court considered characteristics of his home (i.e. appellant is often home alone without his mother and the house has previously been used to conduct criminal activity) in determining that house arrest was not an appropriate alternative sentence. In addition, the court made clear that it was not considering any of appellant's pending charges, and only considered past convictions of the defendant. We find no reason to question the impartiality of the judgment.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.