UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2209

September Term, 2013

JAMES ROSS

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: June 8, 2015

During a one-hour period in the afternoon of February 4, 2013, three men attempted to rob three separate individuals at different locations within close proximity in Anne Arundel County. Appellant James Ross was charged in connection with the case on the theory that he drove the getaway vehicle. After a trial in the Circuit Court for Anne Arundel County, a jury convicted Appellant of attempted robbery and lesser-included crimes as to only one of the three victims, as well as three counts of conspiracy to commit robbery as to each victim. The court imposed a sentence of ten years for attempted robbery, with the lesser-included offenses merged for sentencing, and three separate sentences for the conspiracy convictions. In his timely appeal, Appellant presents the following three questions for review, which we have slightly rephrased:

I. Did the trial court err in sentencing Appellant on more than one count of conspiracy to commit robbery?

II. Did the trial court err when it permitted the prosecution to call a rebuttal witness?

III. Was the evidence sufficient to support Appellant's convictions?

We remand to the circuit court to vacate two of the convictions for conspiracy to commit robbery because the State failed to prove three separate conspiracies. We affirm in all other respects.

BACKGROUND

Appellant was charged in the Circuit Court for Anne Arundel County with committing a series of robberies with Richard Phelps and Carroll Fullwood. On

October 8-11, 2013, Appellant stood trial before a jury.[1] The testimony in evidence reflected the following.

The Attempted Robbery at Sam's Club

The first attempted robbery occurred on February 4, 2013, at the Sam's Club in Severn, Maryland. Reina Gill testified that at approximately 4:12 p.m., she arrived at Sam's Club and parked her car about five or six parking spaces away from the store. She exited her vehicle and noticed a teal four-door Sedan parked nearby with three people inside: one in the driver's seat, one in the front passenger seat, and one in the backseat behind the front passenger. She then locked her door and began to walk toward the store. When she got close to the teal vehicle, she heard someone say "get her." Suddenly, the person sitting in the backseat jumped out of the car, grabbed her left arm, and then grabbed the strap of her purse and pulled it down. Ms. Gill fell onto the ground, and the man pulled on the purse strap, dragging her toward the vehicle. Ms. Gill then heard the driver of the teal vehicle start the car, and then the man let go of her purse, got back in the car, and the car drove away.

According to Ms. Gill, all three individuals in the car were males in their thirties. She described the man sitting in the front passenger seat as a "white guy with a red face" who was "a little heavier than the driver." The man who grabbed her purse was heavy, "had a light complexion[,]" "look[ed] like a white guy[,]" and was wearing a "dark

[1] The State initially planned to try Appellant and Richard Phelps jointly, but did not seek to join Carroll Fullwood because he made a statement to the police implicating Appellant and Mr. Phelps. Mr. Phelps entered a guilty plea before trial.

hoodie." She described the driver as a skinny man with short hair and a goatee who had a "lighter complexion" and wore "a regular dark t-shirt." She was not shown any photo arrays and did not make any pre-trial identifications. During cross-examination, she recalled telling a police officer that she thought the men were "all white because they ha[d] lighter complexion[s]."[2] At trial, however, she asserted that the driver as African American:

> [DEFENSE COUNSEL]: . . . What race was the driver?
>
> [MS. GILL]: So, I guess African American.
>
> [DEFENSE COUNSEL]: Are you saying that because this gentleman is sitting next to me right now?
>
> [MS. GILL]: Yes.

On re-direct, Ms. Gill clarified:

> [STATE]: Ms. Gill, do you even know who that gentlemen is?
>
> [MS. GILL]: Yes.
>
> [STATE]: How do you know him?
>
> [MS. GILL]: Well, I actually recognized him on the bench when I walked in this afternoon.
>
> [STATE]: You recognize him to be who?
>
> [MS. GILL]: He's the driver.

[2] In closing argument, the State argued that Ms. Gill's description of Appellant as having a light complexion was accurate based on the booking photo of Appellant that was admitted into evidence:

> This is James Ross. You all have seen him for the last couple of days. Here's James Ross on the day of this offense. There's some similarities. And there's some differences between now and then. He's a skinny guy, is what she said to you. He's light complected. [sic] I would say based on that photo you can determine that's true.

[STATE]: Is that why it's a little hard to say that . . . the race and testify?

[MS. GILL]: Yes.

Corporal Ryan Saunders of the Anne Arundel Police was dispatched to respond to the Sam's Club incident. When he arrived, he found Ms. Gill standing inside the front door of the store. He testified that before Ms. Gill was transported to the hospital, she gave the following description of the men who attempted to rob her:

> The male that approached her in the parking lot and attempted to take her purse she described as a white or Hispanic male in his 20s wearing a blue hooded sweatshirt. She also described the driver of the vehicle as same white or Hispanic male with possible facial hair and the front right passenger as a white male with a reddish face . . . .

Corporal Saunders also interviewed Jacqueline Campbell-Hardy, who witnessed the incident. While Corporal Saunders was investigating the robbery at the Sam's Club, he heard from the dispatcher that two additional robberies occurred near Arundel Mills Mall, less than ten miles away. Corporal Saunders further testified that at some time thereafter, he retrieved the surveillance video from the Sam's Club. The video was admitted into evidence and exhibits what appears to be a blue four-door vehicle in the parking lot.

Jacqueline Campbell-Hardy testified that she and her daughters had just arrived at Sam's Club when she saw a man grab Ms. Gill and drag her across the parking lot. She told her daughters to stay where they were while she began running toward Ms. Gill screaming "Stop." She then heard the man who was dragging Ms. Gill say "let's go" and he jumped into a turquoise four-door Nissan. Ms. Campbell-Hardy described the man grabbing Ms. Gill as a "Hispanic" or "light-skinned black person" in his "late twenties to mid thirties" who had a tattoo that "looked like a star" by his left eye and more tattoos on

his neck. She admitted during cross-examination that she had told the police that he was white or Hispanic. She described the individual sitting in the front passenger seat as African American, but remembered telling the police at the scene that the front passenger was a male and that she could not remember any other details. Finally, she testified that the driver was "the same as the assailant[,]" that she "wasn't sure if he was black or Hispanic[,]" and that she "couldn't judge the race." Ms. Campbell-Hardy viewed three photo arrays and recalled making identifications, but officers had no record of her identifications.

The Attempted Robbery at Arundel Mills Mall

The second incident occurred around 4:30 p.m. when Meredith Channell arrived at Arundel Mills Mall with her then-husband. Ms. Channell testified that as they walked toward the mall, a man wearing a blue hoodie suddenly approached Ms. Channell from behind, grabbed her right arm, and said "I have a gun. Give me all your money." She felt a hard circular object, which she thought was a gun, jab into her back. When her husband realized what was happening, he succeeded in grabbing what was a tire iron out of the man's hand. The man took off, and Ms. Channell called 911. She also saw a tall man with tattoos standing close by who she believed was also involved, but she did take particular notice of any vehicle.

Stephan Staniulis testified that he was working in that parking lot around the same time when he noticed a tall skinny white man with "lots of tattoos" and black rubber gloves walking around cars and trying "to lift some door handles on multiple vehicles." Shortly thereafter, he saw a short and stocky man wearing glasses and a hoodie conversing with the first man. He watched as the men followed a man and a woman. The shorter man

walked behind the couple, and the taller man walked on the left-hand side. The shorter man then jabbed the woman in the back with an object that looked like "something to take off lug nuts on a car[.]" The male victim swatted the object away, and then the couple walked faster until they entered the mall. Mr. Staniulis observed the two get into a blue compact car, but neither man got into the driver's seat. Mr. Staniulis took a picture of the vehicle's license plate bearing the number 5AH8950 and dialed 911.[3]

The Robbery Across from Arundel Mills Mall

A third incident occurred at 5:13 p.m. in a parking lot across the street from Arundel Mills Mall. Nathan Bruno, a witness, observed "an African-American gentleman on the hood of a sort of a teal blue type of car." Mr. Bruno watched the victim, later identified as Anthony Patterson, roll off of the front of the vehicle. He drove over to Mr. Patterson and asked if he was okay. He responded that his phone was stolen, and Mr. Bruno offered to follow the car to get his phone back. Together they searched and less than one minute later, when they spotted the teal car in a Safeway parking lot, Mr. Patterson called 911. They followed the car for 10 to 15 minutes to obtain the license plate number and provided that information to the police. Mr. Bruno testified that he observed three people in the vehicle, but did not get a good look at the driver. He characterized the passenger in the backseat as a white man in his late thirties with a tattoo on his head-neck area.

The 911 call was entered into evidence and played for the jury. Mr. Patterson stated: "I was walking around my neighborhood, right. Three white people just jumped me. They

[3] He testified that the picture, which was admitted into evidence, could have depicted an "H" in the license number rather than a "W."

stole my iPhone. I'm in a car and following. They got license plate number 5AW8950." On the 911 call, Mr. Patterson described the car as a blue Nissan Sentra and explained that one of the men tried to hit him with a tire iron, took his phone, and then drove away. He also explained that "[t]hey had [him] on the roof of their car and they drove – slammed on the brakes." Mr. Patterson did not testify at trial.

Detective Jonathan Hardesty of the Anne Arundel Police testified that he received a call at around 5 p.m. regarding the robberies and, based on the description provided to him, was able to locate the registration for the teal 2004 Nissan Sentra, which listed Appellant, James Ross, and Trisha Marie Ross, as co-owners.

At 8:26 p.m. that evening, Detective Holliday and another officer responded to the Yellowfin Restaurant in Edgewater in response to information received from Eric Phelps, the brother of Richard Phelps, who was subsequently arrested along with Appellant in connection the robberies.[4] There, the officers located a "greenish-teal Nissan Sentra" with three people inside. Detective Holliday identified the front-seat passenger as Richard Phelps, the back-seat passenger as Carroll Fullwood, and the driver as Appellant. He further testified that the license plate number of that vehicle was 5AW8950, which the number was provided to police by Mr. Bruno. A subsequent search of the vehicle revealed

[4] Detective Holliday testified that the Yellowfin Restaurant was approximately 25 minutes away from the Arundel Mills Mall area.

a tire iron located on the floor of the front passenger seat and black latex gloves, among other items.[5]

At the close of the State's case, defense counsel made a motion for judgment of acquittal, which the circuit court denied. The defense then called two witnesses: a private investigator, who testified that Ms. Campbell-Hardy advised him that she had reviewed photo arrays and identified a suspect; and a fingerprint expert, who testified that she could not identify Appellant as one of the individuals whose fingerprints were found on the vehicle. Over defense counsel's objection, the State called a rebuttal witness, which will be discussed in greater detail *infra*. At the close of all the evidence, defense counsel renewed her motion for judgment of acquittal without further argument, which the court denied.

On October 11, 2013, the jury convicted Appellant of all charges relating to Ms. Gill—including attempted robbery, second-degree assault, reckless endangerment, and attempted theft of property valuing less than $1,000—and three counts of conspiracy to commit robbery of Ms. Gill, Meredith Channell, and Anthony Patterson, respectively. The jury acquitted Appellant of all other charges relating to Ms. Channell and Mr. Patterson and of openly carrying a weapon (tire iron) with the intent to injure. On November 22, 2013, the court imposed a mandatory minimum sentence of ten years for the attempted

[5] The police also confiscated and searched Richard Phelps's cell phone, which had a text message to an unidentified person asking "how much he would get for an iPhone."

robbery of Ms. Gill,[6] merging all lesser-included offenses for sentencing, and a concurrent sentence of the mandatory minimum of ten years for conspiracy to commit robbery of Ms. Gill. The court also imposed a consecutive sentence of seven years, with all but two years suspended, for conspiracy to commit robbery of Ms. Channell, and another consecutive sentence of seven years, with all but two years suspended, for conspiracy to commit robbery of Mr. Patterson.

Additional facts will be provided below as they pertain to each question presented.

DISCUSSION

I.

Appellant argues that the circuit court erred in sentencing him to more than one count of conspiracy to commit robbery because the State only proved that there was one conspiracy to commit the three robberies. As a result, Appellant requests this Court to vacate his convictions and sentences for conspiracy to rob Ms. Channell and Mr. Patterson. The State agrees that two of Appellant's conspiracy convictions should merge and the sentences should be vacated; however, the State contends that the underlying convictions should remain intact.

As a threshold matter, we note that it does not appear that Appellant objected on this ground below. In *Jordan v. State*, 323 Md. 151, 160 (1991), the Court of Appeals faced a similar factual scenario wherein the defendant claimed on appeal that the separate

[6] On October 11, 2013, the State filed a notice pursuant to Maryland Rule 4-245(c) that it would seek the mandatory minimum sentence without possibility of suspension for attempted robbery. At the sentencing hearing held on November 22, 2013, Appellant agreed that he was convicted of the predicate crime of armed robbery in 1999.

sentences for two conspiracies when the evidence supported only one was unlawful, but failed to object in any manner below. The Court concluded, however, that the defendant did not waive his right to object because if the evidence demonstrated the existence of only one conspiracy, the resultant sentences for two conspiracies would be unlawful. *Id.* at 161. The Court invoked *Walczak v. State*, for the proposition that "when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court[,]" and noted that such error would also constitute plain error. 302 Md. 422, 427 (1985). Therefore, although Appellant failed to object at trial, his first contention is not waived.

"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)). "The 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives.'" *Id.* at 13 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)) (footnote omitted). Accordingly, "'[a] single agreement . . . constitutes one conspiracy,' and 'multiple agreements . . . constitute multiple conspiracies.'" *Id.* (quoting *United States v. Broce*, 488 U.S. 563, 570-71 (1989)).

The burden rests on the State "to prove the agreement or agreements underlying a conspiracy prosecution." *Id.* at 14 (citation omitted). Therefore, "[i]f the prosecution fails to present proof sufficient to establish a second conspiracy, it follows that there [is] merely one continuous conspiratorial relationship, or one ongoing criminal enterprise, that is evidenced by the multiple acts or agreements done in furtherance of it." *Id.* at 17 (internal

citations and quotation marks omitted). "If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id.* at 26.

The State justly concedes that it did not meet its burden of establishing three distinct conspiracies, and, based on our independent review of the record,[7] we agree. The record reflects that three men participated in three attempted robberies at different locations during a one-hour period. The State did not present evidence to establish that the men entered into multiple agreements during this timeframe, nor did the State advance the argument during opening or closing. Moreover, the court did not instruct the jury that it could only find Appellant guilty of multiple conspiracies if it found that he entered into multiple separate agreements to break the law.[8] *See Savage*, 212 Md. App. at 27 ("Without an instruction that the jury could not find appellant guilty of more than one count of conspiracy unless [it] was convinced beyond a reasonable doubt that he entered into two separate agreements to violate the law, the State was not put to the test of proving separate conspiracies, and

[7] "Confession of error does not abrogate our duty to conduct an independent review." *Martin v. State*, 165 Md. App. 189, 209 n.9 (2005) (citations omitted).

[8] Instead, the court delivered the following instruction, which only referenced a single agreement:

> The Defendant is also charged with the crime of conspiracy to commit robbery. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the Defendant of conspiracy, the State must prove, number 1, that the Defendant agreed with at least one other person to commit the crime of robbery; 2, that the Defendant entered into the agreement with the intent to commit the crime of robbery.

therefore it cannot be allowed to obtain a sentencing advantage from having failed at trial to do so." (internal citations and quotation marks omitted)).

Although the parties agree that an error occurred, they dispute the remedy for that error. According to Appellant, we must vacate two of the conspiracy *convictions*. According to the State, we must merge the convictions, which would effectively vacate the *sentences*. Our review of the case law on this point mandates that we generally *vacate* the *conviction* in this context. *See, e.g.*, *Jordan*, *supra*, 323 Md. at 161-62 (concluding that the evidence did not support the determination that two separate conspiracies—one to commit murder and the other to commit robbery—existed and remanding for the court to vacate the judgment of conviction for conspiracy to commit robbery); *Tracy*, *supra*, 319 Md. at 460 (same); *Savage*, *supra*, 212 Md. App. at 31, 42 (concluding that the evidence did not support a finding of two separate conspiracies to commit burglary with two different individuals and remanding for the court to vacate "one of the conspiracy sentences and convictions"); *Martin v. State*, 165 Md. App. 189, 210 (2005) (concluding that the record showed one conspiracy to commit murder and robbery and vacating the "conviction and sentence for conspiracy to commit robbery"); *Somers v. State*, 156 Md. App. 279, 317-19 (2004) (concluding that the record reflected a single conspiracy to commit armed robbery and felony theft and vacating the "judgment of conviction for conspiracy to commit felony theft"); *Berry v. State*, 155 Md. App. 144, 174 (2004) (concluding that the record reflected only one conspiracy and directing that the lesser-included conspiracy charges be vacated as opposed to simply merged); *Holt v. State*, 129 Md. App. 194, 209 (1999) (concluding that the record supported a finding of only one conspiracy and vacating the convictions for

conspiracy to distribute heroin (citation omitted)).[9] It is only logical that the conviction should be vacated here, given that the usual remedy when there is insufficient evidence to support a conviction is to reverse that conviction. Accordingly, two of Appellant's conspiracy convictions must be vacated.[10]

The final matter left to decide is which two of the three conspiracy convictions must be vacated. Classically, we vacate the conviction carrying the least serious penalty, *i.e.*, conspiracy to commit murder would survive conspiracy to commit robbery. *See, e.g.*, *Jordan*, *supra*, 323 Md. at 161-62. The difficulty presented in this case is that each conspiracy charge was for conspiracy to commit robbery, and each carries the same potential maximum sentence.

The circuit court issued the mandatory minimum sentence of ten years for first conspiracy conviction and then seven years (with all but two years suspended) for the two

[9] *But see Henry v. State*, 324 Md. 204, 240 (1991) (vacating sentence, but not the conviction, of conspiracy to commit robbery where both parties agreed and where the evidence demonstrated one conspiracy to commit murder and robbery); *Carroll v. State*, 202 Md. App. 487, 518-19 (2011) (vacating only the sentences of conspiracy where "the parties agree that the sentences should merge, and so do we"); *Simpson v. State*, 121 Md. App. 263, 291 (1998) (vacating only the sentences for conspiracy when evidence only established that one conspiracy existed); *Allen v. State*, 89 Md. App. 25, 53-54 (1991) (same). *Cf. Wilson v. State*, 148 Md. App. 601, 641, 670 (2002) (vacating only the sentences for conspiracy when evidence only established that one conspiracy existed, but issuing a mandate vacating the "judgment" as to conspiracy).

[10] It would appear that we should only correct the illegal sentence by merging the sentences, instead of vacating the convictions, based on Appellant's failure to preserve the issue below. As noted above, the Court of Appeals in *Jordan v. State* reviewed a similar issue despite the defendant's failure to object below and issued a mandate vacating the judgment of *conviction* as well. *Jordan*, 323 Md. at 161-62. We are bound by this precedent and shall issue a similar mandate.

remaining conspiracy convictions. The court noted that the reason it was imposing additional time for the two conspiracy convictions was because, "[e]ach victim, and I think a grave injustice occurs on a lot of cases where subsequent counts involving subsequent victims are just - - seems automatically concurrent sentences. The victims in Court XIX deserve their justice also."[11]

Appellant avers that the convictions for the second and third conspiracies, carrying the lighter sentences, should be vacated. The State, on the other hand, asks us to remand to the circuit court for a re-sentencing hearing. In *Savage v. State*, we decided to remand to the trial court to decide which one of the two convictions for conspiracy to commit first-degree burglary (subject to the same maximum penalty) should be vacated, although, unlike the instant case, each conspiracy conviction carried a sentence of eight years. 212 Md. App. at 12, 31, 42. We will track our decision in *Savage* and remand to the circuit court to decide which convictions should be vacated.

II.

Next, Appellant argues that the circuit court erred by permitting the State to call Randy Scarbro as a rebuttal witness because his testimony "did not address a new issue inserted in the case by the defense" and was admissible in the State's case-in-chief. The State responds that the court properly exercised its discretion to permit the testimony, and

[11] We note that the court's stated grounds for imposing the two additional conspiracy sentences demonstrate the Court's improper focus on the individual crimes rather than the conspiracy to commit the crimes.

even if did not, the evidence was cumulative and Appellant "was not substantially injured by the timing of [the] testimony."

In Maryland, there are two exceptions to the general rule that the State must introduce all relevant evidence during its case-in-chief: the first is straightforwardly a request to reopen the State's case; and the second is the introduction of rebuttal evidence after the defense rests. *Wright v. State*, 349 Md. 334, 341-42 (1998). In the present case, the State did not request to re-open its case, but instead sought admission of Mr. Scarbro's testimony as rebuttal. "It is well settled that '[a]ny competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence *introduced by the accused* may be produced by the prosecution in rebuttal.'" *Johnson v. State*, 408 Md. 204, 226 (2009) (alteration in original) (quoting *Lane v. State*, 226 Md. 81, 90 (1961)). "[W]hat constitutes rebuttal testimony rests within the sound discretion of the trial court, whose ruling may be reversed only when it constitutes an abuse of discretion, *i.e.*, it has been shown to be both manifestly and substantially injurious." *State v. Booze*, 334 Md. 64, 68 (1994) (internal citations and quotation marks omitted). Once the court qualifies the evidence as proper rebuttal material, the State ordinarily has a right to introduce it. *Wright*, 349 Md. at 343. Therefore, we must determine whether the court abused its discretion in concluding that Mr. Scarbro's testimony constituted proper rebuttal. *Id.* at 344.

During the State's case-in-chief, Eric Phelps—the brother of Richard Phelps, one of the three men arrested in this case—testified that he was working at Liberty Yacht Club with his boss, Randy Scarbro, on the day in question. That evening, the police called Eric,

assuming he was with his brother Richard.[12] Eric then spoke to Richard on the phone, found out that he was going to Yellowfin Restaurant, and then shared that information with the police. Eric also testified that he and Appellant grew up together and that he had been to Appellant's house with Richard a few days before February 4, 2013. While there, they had been "hanging around the car and smoking cigarettes and talking and reminiscing." He was "pretty sure" that he may have touched the outside of Appellant's car.

After the State rested, the defense called Patricia Rogers, who was admitted as an expert witness in fingerprint identification and analysis. Ms. Rogers testified that Eric's fingerprints were found on the "passenger side rear door exterior" of Appellant's car and that Richard's fingerprints were found on the "driver's side rear door exterior." She further testified that the prints on the lift cards did not match Appellant or Carroll Fullwood (the other suspect arrested). During cross-examination, Ms. Rogers affirmed that the fingerprints could have been left on the car weeks or days before police processed the car.

The State then sought to call Mr. Scarbro as a rebuttal witness, and defense counsel objected because it was not responsive to a new matter raised by the defense. The State countered that Mr. Scarbro's testimony was proper rebuttal because defense counsel "produced the fingerprint expert" and "[t]here was no evidence up until that point that Eric Phelps's fingerprint was actually on the car." The evidence was also intended to rehabilitate Eric's credibility, which defense counsel vigorously attacked during cross-

[12] It is unclear from the record how Eric Phelps was implicated. It appears that the officers learned, perhaps from a man claiming to be the father of Eric Phelps, that Eric might be a suspect in the robberies. Based on that information, Detective Eric Love of the Anne Arundel Police called Mr. Phelps on the telephone.

examination. The court overruled the objection, stating: "the jury could believe those prints were there that day or they could have believed that his prints were there a week ago. [The prosecutor] has a right to put on evidence to rebut when those prints may have been put there."

Mr. Scarbro then testified that he was the captain of a yacht docked in Edgewater, Maryland, and that on February 4, 2013, Eric was with him working the entire day and that he did not lose sight of him for more than 30 minutes. Around 8:00 or 9:00 p.m., Mr. Scarbro recalled that he drove Eric to Yellowfin Steakhouse where they made contact with the police. During cross-examination, Mr. Scarbro conceded that he was Eric's childhood friend and that he had no documentation to prove that Eric actually worked for him.

Based on the foregoing, Appellant analogizes the instant case to *Wright v. State*, 349 Md. 334 (1998). In that case, the defendant confessed to his cellmate that he had raped the victim, but the State did not raise the confession in its case-in-chief; it waited until cross-examination of the defendant. *Id.* at 338-39. Thereafter, over objection, the circuit court permitted the State to call the cellmate to testify as a rebuttal witness. *Id.* at 340. The Court of Appeals held that the circuit court abused its discretion in permitting the rebuttal testimony because the confession "was predominantly substantive evidence of guilt that should have been presented by the State during its case-in-chief, and its admission as rebuttal . . . was manifestly wrong and substantially injurious." *Id.* at 354. "The advantage to the State in withholding the admissible confession for rebuttal was purely a tactical one designed for maximum prejudicial effect . . . to have the confession dramatically admitted afterward – just prior to jury deliberation." *Id.* at 348. The Court, therefore, emphasized

that the offensive use of a defendant's confession that was admissible in the State's case-in-chief, is not proper rebuttal evidence and is "fundamentally unfair[.]" *Id.* at 349.

We consider this case to be distinguishable. Unlike the dramatic bookend admission of a confession, Mr. Scarbro's testimony about working with Eric Phelps on the date in question was not the "most damaging piece" of evidence tending to establish Appellant's guilt. Moreover, its admission after the closure of the State's case-in-chief was not an evident tactical decision to maximize its effect. It served to rebut the possibility that Eric's fingerprint, lifted from Appellant's vehicle, was placed on the vehicle on the day of the robberies, a point made during Eric's testimony.

We recognize that it is debatable whether Mr. Scarbro's testimony was proper rebuttal evidence, namely, whether the testimony responded to a "new matter" raised by the defense. On one hand, the State elicited testimony from Eric during direct examination that he was "pretty sure" that he may have touched the outside of Appellant's vehicle before February 4, 2013. This testimony was, at minimum, suggestive that Eric's fingerprint or DNA had been found on Appellant's vehicle. In addition, Eric also testified that he had been working on the day of the robberies. This tends to establish an alibi. On the other hand, at no point up until the expert's testimony did either party specifically state that Eric's fingerprint was lifted from Appellant's vehicle when processed by the police. Although Appellant's counsel focused on identity in his opening statement and emphasized that Eric was initially a suspect, the State arguably had no necessity to rebut the existence of an actual fingerprint lifted from the vehicle and corroborate Eric's alibi until the expert

testified. Nevertheless, to the extent that it is fairly disputable whether the evidence was proper for rebuttal, we cannot conclude that the circuit court abused its discretion.

Even if it had, reversal would not be appropriate in this case. In *Thomas v. State*, 301 Md. 294 (1984), the Court of Appeals held that even though the rebuttal testimony did not directly respond to a new matter raised by the defense, reversal was not warranted when the evidence was cumulative, "duplicated evidence already introduced at trial at the request of the appellant [and] it did not add 'an additional, different, and independent fact or circumstance upon which the jury could premise a finding of guilt.'" *Id.* at 309 (quoting *Huffington v. State*, 295 Md. 1, 16 (1982)). The Court further noted that the witness "merely repeated [a] report's findings[,]" "[t]here was no element of unfair surprise[,] and "the impact of the agent's testimony was so insignificant in light of the mass of direct and circumstantial evidence against the appellant[.]" *Id.* at 309-10. Accordingly, the Court concluded, beyond a reasonable doubt, that the error in no way influenced the verdict. *Id.* at 310.

Here, Mr. Scarbro's testimony was essentially cumulative to Eric Phelps's testimony during the State's case-in-chief that he had been working with Mr. Scarbro all day on February 4, 2013. Mr. Scarbro did not have any documentation to prove that Eric worked for him and admitted that he was good friends with Eric. In addition, Appellant was not caught by surprise, as he had notice that Mr. Scarbro might be called as a witness. The testimony alone did not introduce any new facts or evidence "upon which the jury could premise a finding of guilt." *Id.* at 309. Moreover, when the police stopped the teal Nissan—in which the tire pipe and black rubber gloves were discovered—in the parking

lot of the Yellowfin Restaurant, it is undisputed that Eric was not in the vehicle. Finally, the fingerprints connecting Eric to the vehicle were recovered from the right rear passenger door, not the driver's side; therefore, even if Mr. Scarbro did not corroborate Eric's testimony, there was still no evidence to substantiate the defense's theory that Eric, not Appellant, was the driver of the vehicle. Under the circumstances, the impact of Mr. Scarbro's testimony was insignificant in light of Eric's testimony on direct and the testimony of the police officers who responded to the Yellowfin Restaurant. Based on the record before us, we are confident that even if the court erred in allowing the rebuttal witness to testify, Mr. Scarbro's testimony in no way influenced the jury's verdict.

III.

Finally, Appellant argues that the evidence was insufficient to support his conviction of attempted robbery of Reina Gill and conspiracy to commit robbery. The State responds that Appellant's argument was not preserved, and even if it was, there was sufficient evidence to support his convictions.

Maryland Rule 4-324(a) requires a defendant to "state with particularity all reasons why the motion [for judgment of acquittal] should be granted." "This means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. 293, 303 (2008)). "Accordingly, a defendant 'is not entitled to appellate review of reasons stated for the first time on appeal.'" *Id.* at 523 (quoting *Starr*, 405 Md. at 302).

At the close of the State's case, defense counsel made a motion for judgment of acquittal and, in pertinent part, argued: "You heard that the identification was of white males for all the suspects, all three. And you can clearly see my client is not a white male. You can judge the witnesses' credibility and whether they changed their statements[.]"The court denied the motion:

> And again, that's a fair argument to the jury, but something happened with Ms. Gill that I think took us all back. She made an in-court identification. Now you know, that is what it is, and maybe one or too many questions were asked of her. But she, in her initial questioning, did not have your client at the scene, did not have an identification. And but for cross-examination, it materialized into an in-court identification. So I question the trial tactics there, but that's your case. You got to do what you got to do.
>
> But we have an in-court identification now that your client was there. And we also have circumstantial evidence that if he was there with Ms. Gill in the same car, and clothing was recovered at a later time, it could be argued that he was present at all three of these crime scenes.

Although Appellant raises this argument again on appeal, he also raises new arguments: that Ms. Gill's in-court identification was unreliable and that there was no concrete or physical evidence linking him to the crimes. Because Appellant did not articulate these latter arguments before the circuit court below, those additional arguments are not preserved.

Even if all of Appellant's arguments were raised at trial, the evidence was sufficient to support his convictions. To determine the sufficiency of the evidence, we consider "'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.'" *Tracy v. State*, 423 Md. 1, 11 (2011) (quoting *Jackson v. Virginia*, 433

U.S. 307, 318-19 (1979)). Thus, "[t]he question is not whether we *might* have reached a different conclusion from that of the trial court, but whether the trial court had before it sufficient evidence upon which it could fairly be convinced beyond a reasonable doubt of the defendant's guilt[.]" *Cooper v. State*, 220 Md. 183, 192 (1959) (emphasis in original). "It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citations omitted).

Appellant's arguments are unavailing. Appellant maintains that the witnesses' descriptions of the suspects in general—but particularly Ms. Gills's and Ms. Campell-Hardy's—were unreliable, but "it is the responsibility of the jury to determine the credibility of witnesses and to resolve conflicting testimony." *Reeves v. State*, 192 Md. App. 277, 307 (2010) (citing *Johnson v. State*, 156 Md. App. 694, 714 (2004)). The jury had the opportunity to observe the witnesses on the stand, and it was the jury's role to settle inconsistencies in their testimony, especially conflicting perceptions of race, as they were in view of Appellant. It was also within the jury's province to decide what, if any, weight to give Gill's in-court identification of Appellant given her varying statements.

Moreover, that no concrete evidence physical evidence linked Appellant to the crime is inconsequential, as "[a] valid conviction may be based solely on circumstantial evidence[,]" *Handy v. State*, 201 Md. App. 521, 558 (2011) (quoting *Smith v. State*, 374 Md. 527, 534 (2003)), and "[i]t is well settled that the evidence of a single eyewitness is

sufficient to sustain a conviction." *Id.* at 559 (citing *Branch v. State*, 305 Md. 177, 184 (1986)); *accord Hebron v. State*, 331 Md. 219, 226 (1993) ("[T]here is no difference between direct and circumstantial evidence."). In addition to the witnesses' descriptions of the suspects, including Appellant, the circumstantial evidence included that Appellant was the registered owner of the teal vehicle used in the attempted robberies; that he was arrested after being found in the driver's seat of the car three hours after the incidents occurred; that he was arrested with two other individuals matching the descriptions provided by the witnesses (particularly Richard Phelps's tattoos and Carroll Fullwood's red face); and that items like the tire iron and black latex gloves used in the robberies were present in his vehicle. We conclude that Gill's in-court identification, if credited, combined with the other circumstantial evidence introduced at trial constituted sufficient evidence to support Appellant's convictions for attempted robbery, second-degree assault, reckless endangerment, attempted theft of property valuing less than $1,000—and a single conviction for conspiracy to commit robbery.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REMANDED IN PART WITH INSTRUCTIONS TO VACATE TWO OF THE CONSPIRACY SENTENCES AND CONVICTIONS. COSTS DIVIDED EQUALLY.