Circuit Court for Howard County
Case No. 13-K-18-058610

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2378

September Term, 2018

ERIC RICARDO EXUM

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: November 8, 2019

Eric Exum was convicted of first-degree assault and conspiracy to commit first-degree assault by a jury in the Circuit Court for Howard County.[1] Exum was sentenced to two consecutive terms of twenty-five years' imprisonment. Before us now, Exum appeals his convictions, arguing: (1) that the evidence before the trial court was insufficient to support his convictions; (2) that the trial court erred in overruling his objection to the State's comment regarding motive during closing argument; and (3) that the principle of fundamental fairness requires his sentences to merge. We hold that Exum's convictions were supported by sufficient evidence; that while the State's comment in closing was improper, Exum was not prejudiced by it; and that the principle of fundamental fairness does not require the merger of Exum's sentences. We, therefore, affirm.

BACKGROUND

Paul Albritton worked as a foreman for the construction company where Exum was employed as a laborer. Albritton drove Exum and Malik Rodriguez, another laborer, to the construction site most days and usually stopped at a BP gas station on the way. On one such morning, Albritton was assaulted by Malcolm Littlejohn in the parking lot of the gas station. Rodriguez was inside Albritton's car and Exum was standing next to it at the time of the assault. Exum was not initially a suspect. Telephone records later obtained by the Howard County Police, however, connected Exum, Littlejohn, and Antwan Mayhew, another alleged co-conspirator, to one another and to the assault.

[1] Exum was also acquitted of attempted first-degree murder and conspiracy to commit first-degree murder.

DISCUSSION

I. SUFFICIENCY OF EVIDENCE

Exum first argues that the evidence offered by the State was insufficient to sustain his convictions. Exum centers his argument on the theory that there was no direct evidence to support the convictions and, as such, the jury was forced to improperly infer that Exum had the requisite intent for first-degree assault and conspiracy to commit first-degree assault. When a conviction is challenged on sufficiency of the evidence grounds, the appellate court must 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." *Breakfield v. State*, 195 Md. App. 377, 392 (2010). In doing so, this Court does not "measure the weight of the evidence; rather we concern ourselves only with whether the verdict was supported with sufficient evidence, direct or circumstantial." *Id*. Upon review of the evidence, as discussed below, we are satisfied that the evidence was more than sufficient to support Exum's convictions and, furthermore, to prove Exum had the requisite criminal intent.

Exum was convicted of two crimes: (1) first-degree assault pursuant to MD. CODE, CRIMINAL LAW ("CR") § 3-202(a)(1) ("A person may not intentionally cause or attempt to cause serious physical injury to another."); and (2) conspiracy to commit first-degree assault, which is a common law crime. *Carroll v. State*, 428 Md. 679, 694, 696-97 (2012) (conspiracy consists of "combination of two or more persons to accomplish some unlawful

purpose" and is evidenced by a "meeting of the minds reflecting a unity of purpose and design").

The State's theory at trial was that Exum hired Littlejohn and Mayhew to attack Albritton. In support of that theory, the State offered the following evidence:

- Telephone records of text messages and telephone calls between Exum and Littlejohn, as well as Exum and Mayhew, the day before the assault.

- Text messages that indicated that Exum, Mayhew, and Littlejohn met at Camelot Liquors the night before the assault.

- Text messages and surveillance footage that indicated that on the morning of the assault, Mayhew drove Littlejohn to the BP gas station where Exum and Albritton were.

- Telephone records that showed that Littlejohn and Exum exchanged five telephone calls between 5:47 a.m. and 6:25 a.m. on the morning of the assault.

- The temporal relationship between the assault, which occurred around 6:41 a.m., and three phone calls made between Exum and Littlejohn at 6:41 a.m., 6:43 a.m., and 6:45 a.m.

- Surveillance camera footage from the BP gas station that showed Littlejohn hiding behind a gas pump, with a board of wood in his hand, talking on the telephone moments before the assault. This was matched to telephone records that indicated that Littlejohn was talking to Exum, who was standing a few feet away from him.

- Bank records that showed that Exum withdrew $500 from an ATM at 10:21 a.m. following the assault and telephone records that showed that Littlejohn was in the same area at that time. Moreover, telephone records showed that Exum called

> Mayhew and Littlejohn immediately after withdrawing the money.[2]

A. Evidence to Support Exum's Conspiracy Conviction

Exum argues that the State's evidence was insufficient because it could not produce evidence of the content of the telephone calls. Moreover, Exum adds, people make telephone calls all the time—there is nothing inherently illegal about making a telephone call. As such, without the content of the calls, Exum argues that the jury could not have found that the men acted in concert with the conspiratorial purpose of seriously injuring Albritton. We disagree. As we have stated:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Darling v. State, 232 Md. App. 430, 466-67 (2017) (cleaned up). It is not just that Exum and his partners made telephone calls. Rather, it is the fact that these three men were all

[2] At trial, the State also played for the jury a recording of a telephone call from Exum to his wife, while Exum was in jail, in which Exum can be heard having a conversation with Littlejohn in the background. The State argues that some of Exum's statements in this telephone call are self-incriminating. The court reporter did not transcribe the call when it was played for the jury and Exum has challenged the accuracy of the transcription made by the State. Although we have listened to the audio recording, we are not well-positioned to determine whether the State's transcription is accurate. Because the other evidence was sufficient, we have determined that those self-incriminating statements, if that is what they are, are not necessary to our analysis.

together the night before the assault. Then, the next morning, Exum made telephone calls to the same men he was with the night before, who were lying in wait at the exact gas station where Albritton stopped. Calls between Exum and Littlejohn, who at this point were mere feet from each other, were made up until the moment of the attack on Albritton and in the time immediately following the attack. Later, after withdrawing $500 from an ATM, Exum immediately called Littlejohn, who was waiting in the area. The evidence presented was more than sufficient to allow a jury to infer that Exum, Littlejohn, and Mayhew entered into an unlawful agreement with the intention of harming Albritton. *See Dionas v. State*, 199 Md. App. 483, 532 (2011) (discussing the State's burden of proof), *rev'd on other grounds*, 436 Md. 97 (2013).

B. Evidence of Exum's Criminal Intent

Exum also insists that the State failed to provide any evidence of his intent to commit first-degree assault and conspiracy to commit first-degree assault because there was "no direct evidence" presented. Intent is "subjective, such that, without the cooperation of the accused, it cannot be directly and objectively proven." *Breakfield*, 195 Md. App. at 393; *see also Chilcoat v. State*, 155 Md. App. 394, 403 (2004) (noting that intent to cause serious physical injury to another can be inferred by the individual's conduct and the surrounding circumstances).

Under an accomplice theory of liability, Exum's specific intent to seriously injure Albritton, as required by CR § 3-202(a)(1), can be proven by evidence that Exum "entertained such an intent" or that Exum knew Littlejohn "entertained such intent." *State*

v. Williams, 397 Md. 172, 194-95 (2007) (requiring an accomplice to share common criminal intent with the principal offender) (citing *State v. Raines*, 326 Md. 582, 594-95 (1992)). Further, the evidence must have reasonably shown Exum's intent to "assist in some way in causing" the assault on Albritton. *Alston v. State*, 414 Md. 92, 115 (2010).

Based on the circumstantial evidence presented, we hold that there was sufficient evidence for a jury to infer Exum's intent. In addition to the evidence described above, Exum apparently brought Littlejohn and Mayhew together the night before the assault to discuss a plan as a group. Exum was the only individual with a connection to Albritton, and therefore, the only one in the group who knew which gas station Albritton would be at that morning. All three men were at the same gas station the morning of the assault. Littlejohn talked with Exum up until the moment he hit Albritton and in the time following the assault. This evidence sufficiently demonstrates that Exum planned the assault with Littlejohn and Mayhew. From this knowledge of the plan, a jury could reasonably infer that Exum was aware that Albritton would be seriously injured.

II. IMPROPER STATEMENT IN CLOSING ARGUMENT

During rebuttal closing arguments, the State told the jury that it "can't consider motive" in deciding Exum's guilt. Exum argues that this is an improper statement of the law and that the trial court erred in overruling his objection to the statement. Additionally, Exum argues that this statement was prejudicial to his defense.

When there are allegations of improper statements made in closing arguments, we engage in a two-step inquiry, *first* determining if the statement was, in fact, improper, and

second, if improper, whether it resulted in prejudice. *Whack v. State*, 433 Md. 728, 742 (2013). As to the first step, we are mindful, that the State is given a "great deal of leeway" in closing arguments and that "not every ill-considered remark" warrants reversal. *Id*. In considering potential prejudice to the defendant we look at a variety of factors, including the "severity of the remarks, [any curative] measures, and the weight of the evidence." *Spain v. State*, 386 Md. 145, 159 (2005). Finally, we are deferential to the trial judge who is in the "best position to determine whether counsel has stepped outside the bounds of propriety." *Whack*, 433 Md. at 742.

As to the first step, there is little doubt that the prosecutor's statement was improper. The jury can and should consider the defendant's motive. The Maryland Criminal Pattern Jury Instructions explain it well:

> Motive is not an element of the crime charged and need not be proven. However, you may consider the motive or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. Absence of motive may suggest innocence. You should give the presence or absence of motive the weight you believe it deserves.

MPJI-Cr 3:32, citing *Meyerson v. State*, 181 Md. 105, 109 (1942). Even though motive is not an element of the crime, the presence or absence of motive is a relevant fact for the jury to consider. *Meyerson*, 181 Md. at 109. As such, we hold that Exum has satisfied the first step of the *Whack* analysis.

Exum's claim falters, however, on the second *Whack* step, the determination of whether Exum was prejudiced by the State's improper comment. In the context of the trial

as a whole, the State's improper statement of the law was preceded by several proper recitations about the role of motive. First, before the State gave its closing argument, the trial judge delivered the Maryland Criminal Pattern Jury Instructions to the jury verbatim. Specifically, the trial court read MPJI-Cr 3:32, quoted above, which explains the proper role of motive in jury deliberation. Minutes later, in its closing argument, the State correctly explained the role of motive: "[W]hatever the motivation [Exum] possessed is of no consequence. [The trial court] has just instructed you: motive is not necessary to prove any of these crimes. It is not an element of any offense." Exum's counsel responded: "[U]nlike the State, I'm going to tell you motive's a big deal. It's a big deal. And you'll see the jury instructions: 'Presence of motive may be evidence of guilt. Absence of motive may suggest innocence.'" Finally, in its rebuttal closing, the State made the improper statement, which in context provided:

> So, don't let motive be an issue. And I will read you the first line of motive in the jury instructions: "Motive is not an element of the crime charged, and need not be proven." [] Motive doesn't matter. The events on October 4th matter. The assault matters. The events on October 3rd matter … the conspiracy. **Motive? Out. You can't consider it.** Motive is not an element of the crime.

(Emphasis added). Exum objected immediately and the following occurred at the bench:

> The State: You can't consider it … That's fine.
>
> Exum: Yes. Would Your Honor like to instruct?
>
> The Court: You know, I think you're…

Exum: I am objecting to the "you can't consider it." The State said, "you can't consider it," in terms of motive.

The Court: I think it's fair argument that the absence of motive doesn't matter. That's fair argument.

Exum: I would disagree that that's what the – that the jury instruction doesn't say it's something that you can't consider. Something that you can't consider is whether or not the Defendant testifies. Motive is not something you can't consider.

The Court: I'm going to overrule your objection.

While we agree with Exum that the statement itself was an improper statement of law (and came, unfortunately, as the last word on motive heard by the jury), we hold that it was not so severe, especially in the context of so many proper expositions of the law governing motive, as to have caused prejudice to Exum's defense. More importantly, we don't think that the trial judge, who is in the best position to evaluate the potential prejudice caused by the remark, abused his discretion by overruling Exum's objection and failing to provide any other relief to Exum for the improper statement.

III. MERGER UNDER FUNDAMENTAL FAIRNESS

Exum lastly argues that his sentences for first-degree assault and conspiracy to commit first-degree assault, for which he was sentenced to two consecutive terms of twenty-five years' imprisonment, must merge under the principle of fundamental fairness. Exum was convicted under a theory of accomplice liability, and as such, he insists there is "no separate wrongdoing" to punish which requires his sentences to merge. We disagree.

Maryland recognizes three avenues for merger of sentences: (1) the required evidence test; (2) the rule of lenity; and (3) "the principle of fundamental fairness." *Carroll*, 428 Md. at 693-94. We, however, do not address merger under the other two grounds as Exum did not raise them for our review and acknowledged their inapplicability. Despite its name, fundamental fairness is not about the reasonableness of a sentence. Rather, it is used to protect individuals from being punished twice for the *same* wrongdoing. *See id*. at 697 ("One of the principal reasons for rejecting a claim that fundamental fairness requires merger in a given case is that the crimes punish separate wrongdoing."). Merger of sentences under the principle of fundamental fairness is "rare." *Carroll*, 428 Md. at 695. As such, there are only two Maryland cases in which merger was required based solely on the principle of fundamental fairness: *Monoker v. State*, 321 Md. 214 (1990) and *Marquardt v. State*, 164 Md. App. 95 (2005). In *Monoker*, the Court of Appeals concluded that the crimes of solicitation to conspire and conspiracy merged because solicitation was "part and parcel of the ultimate conspiracy and thereby an integral component of it." 321 Md. at 223. The Court, therefore, held it would be "fundamentally unfair" to make Monoker "suffer twice, once for the greater crime and once for the lesser crime." *Id.* at 223-24. Fifteen years later, in *Marquardt*, this Court held that under the particular facts of the case, malicious destruction of property should have merged into a burglary conviction because the malicious destruction was "clearly incidental to the breaking and entering of" the residence. *Marquardt*, 164 Md. App. at 152-53; *see also Carroll*, 428 Md. at 695 (discussing how the merger inquiry is "fact-driven" and the circumstances surrounding

convictions must be considered, not just the elements of the crimes charged). Exum's case is clearly distinguishable from *Monoker* and *Marquardt* because Exum committed two different crimes, warranting two different punishments.

Fundamental fairness requires merger when two crimes are "part and parcel of one another, such that one crime is an integral component of another." *Carroll*, 428 Md. at 695. Conspiracy and an underlying substantive crime do not merge under fundamental fairness because they are "entirely separate" crimes. *Bishop v. State*, 218 Md. App. 472, 507 (2014); *see Kelly v. State*, 195 Md. App. 403, 442 (2010) ("[C]onspiracy is not 'part and parcel' of or 'incidental to' the substantive offense; it is a separate offense."). Thus, when two crimes are separate, fundamental fairness does not prevent separate sentences from being imposed. *Bishop*, 218 Md. App. at 507. Exum's convictions for conspiracy to commit first-degree assault and first-degree assault are separate and, therefore, do not necessitate merger.

Exum further maintains that because he was convicted under an accomplice theory of liability, his sentences should merge. We, again, disagree. Maryland law treats accomplices as "equally culpable with the one who does the act." *Owens v. State*, 161 Md. App. 91, 100 (2005). Had Exum committed the act himself, his sentences would not merge. *See, e.g.*, *Bishop*, 218 Md. App. at 503-508 (holding that sentences for conspiracy to commit murder and murder do not merge under fundamental fairness). The accomplice theory of liability, therefore, does not change the outcome and Exum's sentences do not merge. Accordingly, we affirm the trial court's decision.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.