Circuit Court for Baltimore City
Case No. 117047029 (State of Maryland v. Malcolm Coleman) and
Case No. 117047030 (State of Maryland v. Shareef Armstead)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

ON MOTION FOR RECONSIDERATION

No. 2504
September Term, 2017

SHAREEF ARMSTEAD

v.

STATE OF MARYLAND

No. 2556
September Term, 2017

MALCOLM COLEMAN

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Friedman,
JJ.

Opinion by Meredith, J.

Filed: March 25, 2020

These are consolidated appeals of Shareef Armstead and Malcolm Coleman, appellants, who were tried jointly by a jury in the Circuit Court for Baltimore City and each convicted of a variety of charges arising from the near-fatal shooting of Delaney McCloud. Each appellant challenges a jury instruction regarding concealment or destruction of evidence. Additionally, Coleman contends that the court erred in failing to grant his motion for judgment of acquittal at the conclusion of the evidence, and in imposing two separate sentences for one conspiracy.

QUESTIONS PRESENTED

By Appellant Armstead:

1. Did the circuit court err in instructing the jury on destruction/concealment of evidence?[1]

By Appellant Coleman:

1. Did the Circuit Court abuse its discretion by instructing the jury that it could infer consciousness of guilt from the fact that [ ] Armstead attempted to conceal or destroy evidence because (1) the evidence was not sufficient to generate that instruction with respect to either defendant, and (2) the court failed to inform the jury that it could not infer consciousness of guilt on the part of Coleman from [ ] Armstead's post-shooting conduct because the two men [had] gone their separate ways?

2. Did the Circuit Court err when it denied the Appellant's Motion for Judgment of Acquittal at the close of the evidence on the basis that

[1] Although Armstead did not raise a question in his opening brief similar to Coleman's Question 3 with respect to his two convictions for conspiracy, Armstead has asked, by way of a reply brief and motion for reconsideration that we provide him the same relief that we provide to Coleman. Pursuant to Maryland Rule 4-345(a), we agree that he is entitled to have one of his convictions for conspiracy vacated.

the State had presented sufficient evidence for a reasonable jury to find guilt on all counts?

3. Did the Circuit Court err when it imposed two separate sentences for the conspiracy?

Taking the last question first, we will hold that the circuit court erred by imposing separate sentences for appellants' two conspiracy convictions (Counts 2 and 14 for each appellant), and we remand the cases pursuant to Maryland Rule 8-604(d)(2), with instructions for the circuit court to vacate one (but not both) of the conspiracy convictions for each appellant. As to the balance of the claims, for the reasons explained below, we will otherwise affirm all judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

Shortly after noon on January 22, 2017, Officer Nathaniel McCullough, Jr., of the Baltimore City Police Department was on patrol, driving eastbound in the 700 block of East Eager Street, when he heard gunshots. Continuing eastbound in his patrol car, Officer McCullough saw, in the 900 block of East Eager, "a blue vehicle in the middle of the street, facing eastbound[.]" Officer McCullough saw a man lying in the street. "It looked like he was suffering from gunshot wounds." The officer saw two men standing over the victim, and he observed those two men get into the blue car and drive off. The man who held the gun sat in the passenger seat. Officer McCullough immediately called dispatch to report that there was a man down in the street, and that the assailants had fled in a blue Subaru with a license plate number McCullough provided his dispatcher. Officer McCullough pursued the Subaru for seven blocks as it disregarded red lights and

stop signs and moved "at a fast pace" before it finally crashed into a building in the 1600 block of East Eager Street. The car's occupants then jumped out and ran.

Officer McCullough chased the driver. Other police who had responded to his call to dispatch joined in and aided in apprehending the driver. Officer McCullough identified the driver as Malcolm Coleman (one of the appellants).

Officer Luis Higueras testified that he had heard over the police radio that other officers were nearby chasing two individuals who had bailed out of a crashed car. Officer Higueras was only a couple of blocks away at the time, and he responded immediately to the area of East Chase Street and North Broadway, where he saw another officer, Officer Korso, chasing someone. Officers Higueras and Korso apprehended and handcuffed the fleeing suspect, who they later learned was Coleman, and recovered money, drugs, and an ID from his person.

Officer Kiam Preston, a seventeen-year veteran patrolman, was working overtime nearby, at the intersection of Bond Street and East Chase Street, when he heard Officer McCullough's call on the radio about the fleeing blue Subaru. Officer Preston realized it was coming toward him. Almost immediately, the Subaru drove past him "at a high rate of speed," and he gave chase. He testified: "[A]s soon as I made the turn the [Subaru] had already [ ] crashed into this --- it hit --- it hit a parked car and ran into the side of a house." Officer Preston parked his car and chased the fleeing passenger (Armstead) on foot. He observed that the passenger "was running with a handgun in his right hand." He saw the passenger drop the gun, and then pick it up and throw it under a car. The

passenger then tried unsuccessfully to enter a locked building, and was immediately apprehended by Officer Preston. As soon as the passenger was in handcuffs, Officer Preston walked a few houses back down the street and retrieved the gun the passenger had discarded. The passenger was later identified as Shareef Armstead (the other appellant).

Officer Rafiu Makamjuora testified that he was the transport officer on the day of the shooting. He was called to the scene to transport Armstead. Officer Makamjuora testified that he cuffed Armstead, put him in the transport van, drove around the corner, and then stopped so he could put bags on Armstead's hands to preserve any possible gun shot residue ("GSR"). Armstead was at that time wearing black winter gloves. Officer Makamjuora put the GSR bags on Armstead's hands, over Armstead's gloves. But, when Officer Makamjuora arrived at headquarters, Armstead had taken the GSR bags off. Consequently, police did not test his hands or gloves for GSR because they could not rule out contamination. As a result, the State requested, and received, a jury instruction on concealment or destruction of evidence. That instruction is the focus of Armstead's appeal, and of the first issue presented by Coleman.

Hannah Weiss testified that, at the time of trial, she was a graduate student in the Midwest, but she had been living in Baltimore when the shooting occurred. Her father had allowed her to use his blue 2013 Subaru, and it had been stolen from her house on the night of January 19, 2017.

Although Delaney McCloud had been shot twelve times and his intestines were, according to the medical records, "eviscerated" in the middle of the street, he did not die. But McCloud did not cooperate with the police investigation, and he did not testify at trial.

Aisjah Peterkin, McCloud's girlfriend, who was with him when he was shot, was marginally more cooperative, if not particularly enthusiastic about it. On January 22, Peterkin was taken to be interviewed by police and was asked to identify suspects in a photo array. But, according to Detective Steven Fraser, who had attempted to present the photo array, Peterkin was uncooperative. Detective Durel Hairston, the lead detective, interviewed Peterkin on January 22, but reported that "[s]he was very scared. She didn't want to talk much. She tried to divert from having an interview with us."

On January 31, 2017, Peterkin was arrested for assaulting the still-hospitalized McCloud, and she asked to speak to Detective Hairston. Detective Hairston testified that Peterkin asked if he could help her with her case, but he told her that he could not help her, and she was taken to Central Booking. Peterkin reached out to Detective Hairston again, and was interviewed by him on February 8, 2017. At that time, she gave a recorded statement during which she positively identified both Armstead and Coleman from photo arrays. Peterkin's identification of appellants was the subject of a motion to suppress, which was argued and denied on the first day of trial.[2]

[2] Armstead and Coleman each were charged with committing the following 19 charges: Count 1, attempted first-degree murder; Count 2, conspiracy to commit murder; continued…

At trial, however, Peterkin claimed not to remember giving police a recorded statement on February 8. The court found that Peterkin's memory loss was feigned, and the court permitted the State to play the video recording of the interview in which she identified Armstead and Coleman as McCloud's assailants. The Peterkin interview was in evidence as State's Exhibit 20.

At the conclusion of the State's evidence, Coleman made a motion for judgment of acquittal. The court granted the motion as to Counts 4, 6, 8, 9,10, 11, 16, 18, 21, and 23. Armstead's motion for judgment of acquittal incorporated Coleman's arguments. As to

---

continued…
Count 3, first-degree assault; Count 4, conspiracy to commit first-degree assault; Count 5, second-degree assault; Count 6, conspiracy to commit second-degree assault; Count 7, reckless endangerment; Count 8, theft of property with a value between $1,000 and $10,000; Count 9, motor vehicle theft; Count 10, conspiracy to commit motor vehicle theft; Count 11, unauthorized removal of property; Count 12, conspiracy to commit unauthorized removal of property; Count 13, use of a handgun in a crime of violence; Count 14, conspiracy to commit the offense of use of a handgun in a crime of violence; Count 15, wearing, carrying, or transporting a handgun; Count 16, conspiracy to commit the offense of wearing, carrying, or transporting a handgun; Count 17, wearing, carrying, or transporting a handgun in a vehicle upon the public roads; Count 18, conspiracy to commit the offense of wearing, carrying, or transporting a handgun in a vehicle on the public roads; and Count 19, unlawfully discharging a firearm within City limits.

Armstead's indictment included a twentieth count, for possessing a regulated firearm while being under 21 years of age. Coleman was also charged with four drug offenses: Count 20, possession with intent to distribute cocaine; Count 21, possession with intent to distribute Xanax; Count 22, simple possession of cocaine; and Count 23, simple possession of Xanax.

Count 19 (unlawfully discharging a firearm within City limits), and Armstead's Count 20 (possession of a firearm while being under 21 years old) were entered *nolle prosequi* before trial began.

Armstead, the court granted the motion for judgment of acquittal on Counts 4, 6, 8, 9, 10, 11, 12, 16, and 18.

The court and counsel then went over jury instructions. The State asked that the jury be instructed on Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 3:24 (Flight or Concealment of Defendant) and 3:26 (Concealment or Destruction of Evidence as Consciousness of Guilt). The State argued that the MPJI-Cr 3:24 (the flight instruction) applied to both defendants, but that MPJI-Cr 3:26 (concealment of evidence) applied only to Armstead and was related to his removal of the GSR bags from his hands. The State then asked "to be heard as [to] [MPJI-Cr] 4:32.3 which is an inference from exclusive unexplained possession of recently stolen goods." Coleman objected specifically to the MPJI-Cr 4:32.3:

> BY THE COURT]: . . . Let's go to defense 1 [Coleman]. Is there anything that I didn't say that you're asking for, sir?
>
> [BY COUNSEL FOR COLEMAN]: No, Your Honor. I have an exception to one of the recent ones ---
>
> [THE COURT]: Okay. Let me hear it.
>
> [COUNSEL FOR COLEMAN]: ----- that the State brought up. 4:32.3, Your Honor ---
>
> [THE COURT]: No, they said 3[:]24, which is flight.
>
> [COUNSEL FOR COLEMAN]: No, there was a ---- I thought there was a theft being inference [sic].
>
> [THE COURT]: That's 4:32.3, is that what you said?
>
> [COUNSEL FOR COLEMAN]: That's --- I forgot the point, Your Honor. I said 4:32.3.

[THE COURT]: Okay. And it threw me completely off. Okay. Go ahead.

[COUNSEL FOR COLEMAN]: 4:32.3, Your Honor.

[THE COURT]: Yes.

[COUNSEL FOR COLEMAN]: The theft --- this is a theft instruction, Your Honor.

After a long discussion between the court and Coleman's counsel regarding Coleman's objection to MPJI-Cr 4:32.3, the court said that it would "note your exception about it." The court then asked:

[THE COURT]: Is there anything else that you wanted to talk about?

[COUNSEL FOR COLEMAN]: I believe [Counsel for Armstead] will address the other 3:26.

[BY COUNSEL FOR ARMSTEAD]: 3[:]26.

[THE COURT]: All right.

[COUNSEL FOR ARMSTEAD]: The concealment or destruction (indiscernible) consciousness of guilt. Your Honor, we would take exception to that instruction.

[THE COURT]: Okay.

[COUNSEL FOR ARMSTEAD]: The evidence that's been shown that he took off a bag.

[THE COURT]: He took what?

[COUNSEL FOR ARMSTEAD]: A bag.

[THE COURT]: The evidence bags?

[COUNSEL FOR ARMSTEAD]: The topic [sic] bags, yes, ma'am.

[THE COURT]: Well, it also could show conscious[ness] of guilt that he knew why they were being put on there.

[COUNSEL FOR ARMSTEAD]: If he knew why they were put on there.

[THE COURT]: Well, there's an inference that the jury ---

[COUNSEL FOR ARMSTEAD]: There's been no evidence shown whatsoever.

[THE COURT]: It's a clear inference, though. He didn't testify so no one can ask him why did you take [off] the bags. I think in the bag, I'm not even going to --- I mean, [Officer Makamjuora] . . . asked him why did you take the bags off, quite frankly the Court couldn't understand what he said. He said something in response. Do you know what he said? Do you know what he said, Mr. [Counsel for Armstead]?

[COUNSEL FOR ARMSTEAD]: I'm sorry, I ---

[THE COURT]: I don't know what he said.

[BY THE STATE]: He said that ["]they were fucking bothering me.["]

[THE COURT]: Oh, they were bothering him.

[COUNSEL FOR ARMSTEAD]: Which means he's cuffed behind his hands, you know, that's ---

[THE COURT]: Well, he wasn't uncomfortable.

[COUNSEL FOR ARMSTEAD]: You know, that's inherently uncomfortable.

[THE COURT]: I hear you, Mr. [Counsel for Armstead], but I'll note your exception.

[COUNSEL FOR ARMSTEAD]: Yes, ma'am.

[THE COURT]: Anything else?

[COUNSEL FOR ARMSTEAD]: No, ma'am.

[THE COURT]: Okay.

[COUNSEL FOR ARMSTEAD]: Just that one exception.

The court and counsel continued reviewing the proposed instructions and verdict sheet. When the discussion returned to MPJI-Cr 3:26—concealment or destruction of evidence as consciousness of guilt—Armstead's counsel stood and noted again that he was "excepting to that." Coleman's counsel said nothing. Coleman's counsel did object a short time later when the court said it was going to read MPJI-Cr 4:32.3, "which is unexplained possession of recently stole[n] goods." And the court noted Coleman's objection to 4:32.3. But the transcript reflects that Coleman did not object to MPJI-Cr 3:26.

Both defendants rested without calling any witnesses, and their respective counsel renewed and submitted on their original motions for judgment of acquittal, which were again denied as to the remaining counts.

As part of the instructions given after the close of evidence, the court instructed the jury:

> There are two defendants in this case. Some evidence was admitted only against Defendant Malcolm Coleman and not against Defendant Shareef Armstead. The only difference in the evidence I will tell you are the narcotics charges which are only as to Mr. Coleman.
>
> You must consider each evidence only as it relates to the defendant against whom it was admitted. As I told you during the trial, each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.
>
> * * *

> You have heard that the Defendant Armstead concealed or attempted to destroy evidence in this case. Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the Defendant Shareef Armstead attempted to or excuse me, attempted to conceal or destroy evidence in this case. If you find that the defendant concealed or attempted to destroy evidence in this case, you must decide whether that conduct shows a consciousness of guilt.

After the court finished instructing the jury, the court inquired of counsel:

> [BY THE COURT]: Okay. I believe I got through all of it. Any exceptions from the State?
>
> [BY THE STATE]: No, Your Honor.
>
> [THE COURT]: And [Coleman]?
>
> [BY COUNSEL FOR COLEMAN]: No, Your Honor.
>
> [THE COURT]: [Armstead]?
>
> [COUNSEL FOR ARMSTEAD]: Other than the two (indiscernible)
>
> [THE COURT]: Your original exception, so just incorporated at this time, okay. . . .

After a day of deliberations, the jury returned a verdict convicting each defendant of all charges still pending against him. Armstead was convicted of attempted first-degree murder, conspiracy to commit murder, first-degree assault, reckless endangerment, use of a handgun in a crime of violence, and conspiracy to commit that offense. Coleman was convicted of attempted first-degree murder, conspiracy to commit murder, first-degree assault, reckless endangerment, use of a handgun in a crime of

violence, and conspiracy to commit that offense, plus unauthorized use of a motor vehicle, possession with intent to distribute cocaine, and simple possession of cocaine.[3]

Each defendant was sentenced to 40 years of executed time. For his conviction on Count I, Armstead was sentenced to life, with all but 20 years suspended, followed by 5 years' supervised probation; and the same sentence, concurrent, for his conviction on Count 2. His sentence on Count 3 merged with Count 1, and Count 7 merged with Count 3. He was sentenced to 20 years' imprisonment consecutive to Count 1 for his conviction on Count 13, and another 20 years concurrent on Count 14.

Coleman was sentenced for his conviction on Count 1 to life, with all but 20 years suspended, followed by 5 years supervised probation; and the same sentence, concurrent, on Count 2; 20 years, consecutive to Count 1, on Count 13; and 20 years, concurrent, on Count 14. His sentences on Counts 3 and 7 merged; Count 3 merged into Count 1, and Count 7 merged into Count 3. He was sentenced to 4 years, concurrent, on Count 12; 10 years, concurrent, on Count 20; and Count 22 merged into Count 20.

Coleman complains on appeal that the court erred in sentencing him separately on each of the two conspiracy charges, Counts 2 and 14, where there was no evidence that the conspiracy to commit murder was distinct from the conspiracy to commit a violent crime with a handgun.

[3] With the dismissal of certain charges, either by *nolle prosequi* or grant of MJOA, the original counts were renumbered on the verdict sheet. Using the original numbers of the counts from the indictment, Armstead was convicted of Counts 1, 2, 3, 7, 13, and 14. Coleman was convicted of originally numbered Counts 1, 2, 3, 7, 12, 13, 14, 20, and 22.

Both appellants challenge the circuit court's decision to instruct the jury on MPJI-Cr 3:26 (destruction or concealment of evidence). Only Armstead, however, preserved that issue. Coleman additionally argues that the court erred in denying his motion for judgment of acquittal on all counts on the basis of insufficiency of evidence.

STANDARD OF REVIEW

I. Jury Instructions

Maryland Rule 4-325 provides, in pertinent part:

> (c) The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
>
> * * *
>
> (e) No party may assign as error the giving or the 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.

In *Abbott v. State*, 190 Md. App. 595, 642-43 (2010), we discussed appellate review of jury instructions as follows:

> Generally, on review, we "'must determine whether the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case [*i.e.*, whether the evidence was sufficient to generate the desired instruction]; and whether it was fairly covered in the instructions actually given.'" *Janey v. State*, 166 Md. App. 645, 654, 891 A.2d 355 (emphasis and brackets in original) (quoting *Gunning v. State*, 347 Md. 332, 348, 701 A.2d 374 (1997)), *cert. denied*, 392 Md. 725, 898 A.2d 1005 (2006). *See also McMillan v. State*, 181 Md. App. 298, 329, 956 A.2d 716, *cert. granted*, 406 Md. 744, 962 A.2d 370 (2008). In *Smith v. State*, 403 Md. 659, 944 A.2d 505 (2008) (citations omitted), the Court of Appeals explained, *id.* at 663-64, 944 A.2d 505 (citations omitted):

> "We have held that the standard of review for jury instructions is that so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." . . . If, however, the instructions are "ambiguous, misleading or confusing" to jurors, those instructions will result in reversal and a remand for a new trial. . . . On the other hand, the instructions must be read in context. "The charge to the jury must be considered as a whole and the Court will not condemn a charge because of the way in which it is expressed or because an isolated part of it does not seem to do justice to one side or the other."

Fleming v. State, 373 Md. 426, 433, 818 A.2d 1117 (2003), is also pertinent. There, the Court explained: "The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *See also Roary v. State*, 385 Md. 217, 237, 867 A.2d 1095 (2005).

II. Motion for Judgment of Acquittal

We review the denial of a motion for judgment of acquittal on sufficiency grounds as follows:

> The appellate standard for reviewing challenges to the sufficiency of the evidence is well established. In *State v. Albrecht*, 336 Md. 475, 478, 649 A.2d 336, 337 (1994), we stated that "it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case." When reviewing a challenge to the sufficiency of the evidence, the reviewing court "view[s] the evidence, and all inferences fairly deducible from the evidence, in a light most favorable to the State." *Hackley v. State*, 389 Md. 387, 389, 885 A.2d 816, 817 (2005) (Citations omitted). We determine "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." *State v. Smith*, 374 Md. 527, 533, 823 A.2d 664, 668 (2003) (Citations omitted).

* * *

> We also have emphasized repeatedly that
>
> > [a] valid conviction may be based solely on circumstantial evidence. *Wilson v. State*, 319 Md. 530, 537, 573 A.2d 831, 834 (1990). The same standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts. *See Eiland v. State*, 92 Md. App. 56, 607 A.2d 42 (1992), *rev'd on other grounds*, 330 Md. 261, 623 A.2d 648 (1993).
>
> *Smith*, 374 Md. at 534, 823 A.2d at 668.

Rivers v. State, 393 Md. 569, 580-82 (2006).

III. Sentencing

In *McClurkin v. State*, 222 Md. App. 461, 490 (2015), we said:

> "It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Jordan v. State*, 323 Md. 151, 161, 591 A.2d 875 (1991) (quoting *Tracy v. State*, 319 Md. 452, 459, 573 A.2d 38 (1990)). "The unit of prosecution," the Court of Appeals has said, "is the agreement or combination rather than each of its criminal objectives." *Id.*

DISCUSSION

1. Instruction based on MPJI-Cr 3:26

Armstead complains that the court "erred in instructing the jury on destruction/concealment of evidence," because, in the absence of some evidence that Armstead knew why the GSR bags had been placed on his hands, the instruction was not generated. Armstead relies primarily on *Thomas v. State*, 397 Md. 557 (2007), in support of his claim, and also cites cases analyzing the flight instruction (MPJI-Cr 3:24), contending those cases are analogous to cases interpreting the propriety of MPJI-Cr 3:26.

We conclude that the trial court did not err in giving the jury an instruction based on MPJI-Cr 3:26. Armstead's complaints are without merit.

We reached a similar conclusion on this issue in *Jarrett v. State*, 220 Md. App. 571 (2014), where we held that the evidence supported the State's request for an instruction, based upon MPJI-Cr 3:26, regarding the concealment or destruction of evidence. Jarrett contended that "the concealment instruction was not generated by the evidence" in his case. *Id.* at 590. We disagreed. We observed that an instruction is sufficiently generated if there is "some evidence" that supports the requested instruction:

> A particular instruction is generated "when a defendant can point to 'some evidence . . . [that] supports the requested instruction. Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage.'" *Malaska v. State*, 216 Md. App. 492, 517, 88 A.3d 805 (2014), *reconsideration denied* (May 7, 2014), *cert. denied*, 439 Md. 696, 98 A.3d 234 (August 28, 2014) (quoting *Bazzle*, *supra*, 426 Md. at 551, 45 A.3d 166).

Id. at 586.

Further, although the quoted passage from *Malaska* specifically referred to a *defendant's* request for an instruction, our holding in *Jarrett* applied the standard of requiring "some evidence" to support granting *the State's request* for an instruction based upon MPJI-Cr 3:26. 220 Md. App. at 590.

Applying the "some evidence" standard in this case, we conclude that there was evidence from which the jury could have reasonably inferred that Armstead knew that the GSR bags that the police had placed on Armstead's hands—when he was arrested minutes after he had fled from the shooting—were there for the purpose of aiding the

police in investigating his involvement in the shooting. And therefore, the jury could reasonably infer from the fact that Armstead somehow removed the bags from his hands during the ride to the police station that he did so in an attempt to conceal or destroy evidence of his participation. And the jury therefore could also reasonably infer that Armstead's effort to tamper with potential evidence and inhibit the investigation of the shooting was indicative of his consciousness of guilt.

In its brief, the State summarized the circumstantial evidence in this case that supported inferences that Armstead was aware that the GSR bags were related to the police investigation of the shooting from which he and Coleman had fled, and that it would somehow be to his benefit to remove the bags the police had placed on his hands:

> Peterkin identified Armstead as the person who shot McCloud. Shortly after those shots rang out, Officer McCullough saw Armstead and Coleman standing near McCloud's injured body. Officer McCullough, who was dressed in uniform and driving a patrol car, pursued Coleman and Armstead as the duo fled in a Subaru. Coleman crashed the Subaru, prompting him and Armstead to flee on foot. A chase ensued. Officer Kiam Preston observed Armstead holding a gun in his hand as he fled from Officer McCullough. Officer Preston also saw Armstead discard the gun under a car. Armstead's flight taken together with his attempt to distance himself from the gun, suggests that Armstead knew that the police were investigating him in connection with the shooting.
>
> The State also presented proof that, shortly after the shooting, the police placed a plastic bag over each of Armstead's hands, leaving the gloves he was wearing intact and on his hands, and secured each with a drawstring tie. Given the close proximity in time between the shooting and the placement of the bags on Armstead's gloved hands, the connection between the two was obvious. The jury could reasonably infer from Armstead's removal of the bags from his hands that he understood that his hands were bagged to preserve evidence related to the shooting. Whether Armstead knew the specific manner in which his removal of the bags might destroy evidence or interrupt the police investigation was entirely

> inconsequential. What mattered for purposes of [deciding whether the instruction was generated by the evidence] was whether Armstead could have reasonably known that the bags served some evidentiary purpose in the shooting investigation, which he sought to conceal or destroy.

(References to record omitted.) We agree with the State's argument that this evidence was sufficient to support giving MPJI-Cr 3:26.

The Court of Appeals recently considered the propriety of the admission of evidence of post-crime conduct as consciousness of guilt in *Ford v. State*, 462 Md. 3 (2018). In Ford's trial for murder, he sought to exclude testimony from his ex-girlfriend that he had reacted badly when she told him the morning after the murder that he had to leave her house. The State argued that Ford's reaction to being ousted from his hiding place was evidence of his consciousness of guilt. The Court of Appeals held that the court did not err in admitting the ex-girlfriend's testimony. Citing its opinion in *Thomas*, *supra*, 397 Md. at 577, the Court noted that "'[I]t is not necessary that evidence of this nature conclusively establish guilt. The proper inquiry is whether the evidence could support an inference that the defendant's conduct demonstrates a consciousness of guilt. If so, the evidence is relevant and generally admissible.'" *Ford*, 462 Md. at 50.

In this case, we conclude that the evidence was sufficient to support an inference that Armstead removed the GSR bags in an attempt to destroy or conceal evidence. From removal of the GSR bags, the jury could reasonably infer a desire to conceal or destroy evidence; from a desire to conceal or destroy evidence, the jury could reasonably infer a consciousness of guilt; from a consciousness of guilt, the jury could infer that it was a consciousness of guilt relative to the shooting of McCloud; from a consciousness of guilt

relative to the shooting of McCloud, the jury could infer actual guilt relative to the shooting of McCloud. Accordingly, Armstead's complaint that the court erred in giving the instruction based upon MPJI-Cr 3:26 is without merit.

Coleman similarly argues on appeal that the evidence did not generate the jury instruction on destruction/concealment. Even if he had preserved the argument at trial—and, based on the colloquies quoted above, we agree with the State that he did not preserve this argument—we would reject his argument for the same reasons.[4]

Finally, even if we were to overlook Coleman's non-preservation, ignore our holding as to Armstead's preserved objection on the merits, and analyze the court's instruction on MPJI-Cr 3:26 only as it pertains to Coleman, we would not find prejudice. The court plainly instructed the jury that the instruction on concealment/destruction applied only to Armstead's conduct:

> You have heard that the **Defendant Armstead concealed or attempted to destroy evidence** in this case. Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> **You must first decide whether the Defendant Shareef Armstead attempted to or excuse me, attempted to conceal or destroy evidence** in this case. If you find that the defendant concealed or attempted to destroy

[4] An additional issue raised by Coleman as a subpart of his complaint about the concealment/destruction instruction issue was that the court abused its discretion by "fail[ing] to inform the jury that it could not infer consciousness of guilt on the part of Coleman from Defendant Armstead's post-shooting conduct because the two men gone [sic] their separate ways." This sub-contention was never raised at trial by either party, and is not preserved. And Coleman never asked for a limiting instruction regarding the jury's consideration of Armstead's post-shooting conduct.

> evidence in this case, you must decide whether that conduct shows a consciousness of guilt.

(Emphasis added.)

In sum, there was sufficient evidence to generate the instruction pursuant to MPJI-Cr 3:26. Armstead's preserved claim is without merit, and Coleman's arguments regarding the instruction are not preserved.

2. Sufficiency of the evidence.

Coleman also complains that the court erred in failing to grant his motion for judgment of acquittal. In his brief, Coleman asserts that "[t]he evidence presented by the State against Coleman was not legally sufficient to support a finding of guilty on any of the murder or conspiracy charges," because "there was zero evidence that Armstead and Coleman reached an agreement to commit murder or to use a firearm in the commission of a felony." We disagree.

In *Raines v. State*, 142 Md. App. 206, 216 (2002), we discussed the standard of appellate review for sufficiency of the evidence in a criminal case:

> The standard for review of the sufficiency of the evidence in a criminal case is whether, "after viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original), *see also Bayne v. State*, 98 Md. App. 149, 154, 632 A.2d 476 (1993), *Brackins v. State*, 84 Md. App. 157, 164, 578 A.2d 300 (1990); *Wildberger v. State*, 74 Md. App. 107, 110, 536 A.2d 718 (1988). The reviewing court is not concerned with "whether the trial court's verdict is in accord with the weight of the evidence, but only with whether the verdict was supported by sufficient evidence . . . ." *State v. Pagotto*, 361 Md. 528, 534, 762 A.2d 97 (2000) (citations omitted).

Coleman argues that the evidence against him in this case ran afoul of "the accomplice corroboration rule," which, he contends, requires that a conviction rest on more than just the uncorroborated evidence of an accomplice. This argument is frivolous; neither defendant in this case gave any evidence. The "accomplice corroboration rule" was not implicated.

Furthermore, the evidence was sufficient to support Coleman's convictions. Officer McCullough responded so quickly that he was able to observe appellants standing over the gravely-injured McCloud. Officer McCullough gave chase immediately and called for backup as he saw Coleman enter the driver's seat and flee with Armstead in the Subaru. Other officers responded and they too gave chase immediately. Police officers identified appellants as the perpetrators. Peterkin identified appellants as the perpetrators. Contrary to Coleman's argument, the State did not need to prove that appellants had formal discussions regarding entering into a conspiracy to kill McCloud, drew up an elaborate blueprint, "or that they prepared in any joint or synchronized manner from which a reasonable jury could infer an agreement had been formed between the two at any time." All that was necessary was that the State put on evidence sufficient to permit the jury to draw the reasonable inference that appellants entered into a conspiracy to act in combination:

> The crime of conspiracy requires "a combination of two or more persons, (who) by some concerted action (seek) to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Lanasa v. State*, 109 Md. 602, 607, 71 A. 1058, 1060 (1909); *State v. Buchanan*, 5 H. & J. 259 (1821). Concerted action in conspiracy means that there can be no crime without

> the consent of two or more minds forming a criminal intent. **The crime is complete without any overt act and may be proved by circumstances giving rise to an inference of common design.** The gravamen of the crime is the illegal scheme or design harbored by at least two persons.

Gardner v. State, 286 Md. 520, 523–24 (1979). (Emphasis added.) "The gist of conspiracy is the unlawful agreement, which need not be spoken or formal so long as there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the unlawful agreement is made; no overt act in furtherance of the agreement is necessary." *Monoker v. State*, 321 Md. 214, 221 (1990).

Viewing the evidence in a light most favorable to the State, we hold that there was sufficient evidence from which the jury could have concluded, beyond a reasonable doubt, that Coleman and Armstead acted in combination with respect to shooting of McCloud.

3. Sentences for two conspiracy convictions.

a. Coleman.

Coleman complains that the court erred in imposing two separate sentences when the jury found him guilty of only one conspiracy; stated differently, Coleman contends that his convictions for conspiracy to commit first-degree murder (Count 2) and conspiracy to commit a violent offense with a handgun (Count 14) must have been based factually on a single conspiracy, and he should have received only one sentence. The State agrees, conceding that the record is too ambiguous to know whether the jury found Coleman guilty of two separate conspiracies rather than a single combination to commit two criminal acts. The State points out that the court did not instruct the jury that it had

to find the existence of two distinct agreements to find Coleman guilty of both Count 2 and Count 14, as distinct offenses entitled to distinct sentences.

We discussed this issue in *Savage v. State*, 212 Md. App. 1, 13 (2013):

> The "unit of prosecution" for conspiracy is "the agreement or combination, rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459, 573 A.2d 38 (1990). "A single agreement . . . constitutes one conspiracy," and "multiple agreements . . . constitute multiple conspiracies." *United States v. Broce*, 488 U.S. 563, 570-71, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). In other words, the conviction of "'a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement.'" *United States v. Nyhuis*, 8 F.3d 731, 734 (11th Cir.1993) (quoting *United States v. Cochran*, 883 F.2d 1012, 1016 (11th Cir.1989)).

(Footnote omitted.)

Here, the jury was not instructed that it had to find separate agreements as to each charged conspiracy. And the State's closing argument mentioned that there were multiple conspiracy charges almost in passing:

> [BY THE STATE]: [Appellants] have a couple of charges of conspiracy and you're going to get these in the back, but conspiracy, I just want to highlight, does not --- it doesn't ---- the State doesn't have to show that there's like a contract, like two people sitting at a bar, writing down a contract about something. That's not what the State has to show and the law is clear on that.
>
> You can look at the evidence that's telling you the circumstances in this case and come to the conclusion, and you should come to the conclusion that there was a conspiracy. They come to the scene together. They both get out of the same stolen car, they're both standing over the victim, they both bolt and get back into the car, they both drive away in the same car. They both bolt and crash the car, and bolt and run.
>
> This is a conspiracy to commit attempted first degree murder, and also a conspiracy to commit [use of a] handgun, in the commission of a crime of violence.

Under the circumstances, the State confesses that one of the conspiracy convictions should be vacated, and we agree. "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." *Savage, supra*, 212 Md. App. at 26. "Therefore, one of appellant's conspiracy convictions must be vacated." *Id.* at 31. *Accord Molina v. State*, 244 Md. App. 67, 171 (2019). Pursuant to Maryland Rule 8-604(d)(2), we shall remand this case to the circuit court with instructions to vacate one of Coleman's two conspiracy convictions. Other than the one vacated conviction for one of Coleman's two conspiracy counts, we affirm all judgments of the circuit court.

b. Armstead.

In Armstead's opening brief, he did not raise a question or argument similar to the one Coleman raised regarding multiple convictions for a single conspiracy. But, in his reply brief, he included a section in which he stated: "Under Maryland Rule 8-503(f), Appellant incorporates by reference Argument III in co-appellant Malcolm Coleman's brief." (Footnote omitted.) He further represents that the Assistant Attorney General who represents the State in these consolidated appeals "has indicated that the State does not oppose [Armstead's] raising of this issue for the first time in a reply brief."

Ordinarily, appellants are required, pursuant to Maryland Rule 8-504(a)(3) and (6), to set forth all questions presented, and argument in support thereof, in their opening brief, and they may not raise an issue on appeal for the first time in a reply brief. *Robinson v. State*, 404 Md. 208, 215 n.3 (2008) ("An appellate court will not ordinarily

consider an issue raised for the first time in a reply brief."); *Gazunis v. Foster*, 400 Md. 541, 554 (2007) ("[A]ppellate courts ordinarily do not consider issues that are raised for a first time in a party's reply brief."); *State v. Jones*, 138 Md. App. 178, 230 (2001) ("The cases are legion, in Maryland and elsewhere, that an appellate court generally will not address an argument that an appellant raises for the first time in a reply brief."), *aff'd*, 379 Md. 704 (2004); *Federal Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446, 457 (1979) ("[I]t is necessary for the appellant to present and argue all points of appeal in his initial brief."). And ordinarily, neither incorporation by reference of a portion of another party's brief pursuant to Rule 8-503(f) nor consent of other parties would permit an appellant to raise an issue for the first time in a reply brief.

But Maryland Rule 4-345(a) provides: "The court may correct an illegal sentence at any time." This provision has been interpreted to apply to issues raised for the first time in the appellate courts. *See, e.g., Waker v. State*, 431 Md. 1, 8 (2013) ("This Court has gone so far as to vacate, *sua sponte*, a sentence which was, according to the Court, 'illegal' within the meaning of Rule 4–345(a) even though no party, at any time, complained about the particular sentence. *See State v. Griffith*s, 338 Md. 485, 496–497, 659 A.2d 876, 882 (1995)."). We shall treat Armstead's request that we consider Coleman's arguments regarding the improper convictions for multiple conspiracy counts as the equivalent of a motion to correct an illegal sentence. We agree with Armstead, for the reasons set forth with respect to Coleman, that the circuit court erred in imposing sentences on two counts of conspiracy. Pursuant to Maryland Rule 8-604(d)(2), we shall

remand his case to the circuit court with instructions to vacate one of Armstead's two conspiracy convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY IN CASE NO. 117047030, *STATE OF MARYLAND VS. SHAREEF ARMSTEAD*, ARE ALL AFFIRMED WITH THE EXCEPTION THAT THE TWO CONVICTIONS FOR CONSPIRACY (*I.E.*, COUNTS 2 AND 14) ARE REMANDED TO THE CIRCUIT COURT PURSUANT TO MD. RULE 8-604(d)(2) WITH INSTRUCTIONS TO VACATE ONE (BUT NOT BOTH) OF THOSE CONVICTIONS; OTHERWISE, ALL JUDGMENTS ARE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY MAYOR AND CITY COUNCIL OF BALTIMORE.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY IN CASE NO. 117047029, *STATE OF MARYLAND VS. MALCOLM COLEMAN*, ARE ALL AFFIRMED WITH THE EXCEPTION THAT THE TWO CONVICTIONS FOR CONSPIRACY (*I.E.*, COUNTS 2 AND 14) ARE REMANDED TO THE CIRCUIT COURT PURSUANT TO MD. RULE 8-604(d)(2) WITH INSTRUCTIONS TO VACATE ONE (BUT NOT BOTH) OF THOSE CONVICTIONS; OTHERWISE, ALL JUDGMENTS ARE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY MAYOR AND CITY COUNCIL OF BALTIMORE.