Circuit Court for Montgomery County
Case No. 131576C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2540

September Term, 2017

SHILOH YOUNG

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 3, 2019

Appellant Shiloh Young was convicted by a jury in the Circuit Court for Montgomery County of five counts of armed robbery, five counts of conspiracy to commit armed robbery, one count of use of a firearm in the commission of a crime of violence, and one count of possession of a firearm after a disqualifying crime. The court sentenced him to a term of incarceration of twenty-four years: three years and six months for each of the armed robbery counts; three years and six months, concurrent, for each of the conspiracy counts; five years, consecutive, for use of a firearm; and one year and six months, consecutive, for possession of a firearm. He presents the following questions for our review:

1. Did the trial court err in refusing to instruct the jury on the lesser included offense of theft by possessing personal stolen property?

2. Did the trial court err in admitting evidence of rap lyrics attributed to appellant?

3. Did the trial court err in admitting evidence regarding a handgun seized from a vehicle in which appellant was a passenger and pictures purporting to show appellant holding a handgun?

4. Is appellant's sentence illegal?

We shall hold that the court erred in convicting and sentencing appellant for multiple conspiracies and shall vacate all but one conspiracy conviction. On appellant's first three issues, we shall affirm.

I.

On March 1, 2017, appellant and Timario Gregg robbed five students from Watkins Mill High School in Gaithersburg, Maryland. The five victims were R.C., C.L., E.M., F.C., and J.T. At the time of the robbery, at least four of the victims were high on marijuana they smoked during their lunch break. As the victims returned from lunch on a path which cut through a forest, the two men approached them. The victims' varied descriptions disagreed as to some features, but they agreed that one robber was thin, of light skin and mixed race, and wore a black jacket. He was armed with a black semiautomatic handgun, and one victim noticed that he wore blue and white basketball shoes. The victims agreed generally that the second robber had dark skin and wore a green jacket and a hoodie sweatshirt cinched tight over most of his face. One testified that the second robber had a tattoo on his hand (Gregg has a tattoo on his hand), and another testified that appellant and Gregg had skin tones that matched the skin tones of the robbers.

The robber with the gun asked for the victims' money and drugs, and he ejected the magazine from his handgun to show them that it was loaded. The second robber collected the victims' possessions, including two Apple iPhones. After the robbers left, the victims contacted the police. Police officers tracked the location of R.C.'s cell phone using the "Find My iPhone" app. A few hours later, an officer went to the cell phone's location and took pictures of appellant wearing a black jacket and blue and white basketball shoes, holding what the officer believed was a cell phone.

Two days after the robbery, Officer Timothy Hollis, using the "Find My iPhone" app, tracked R.C.'s cell phone to a green Ford Mustang. Other officers stopped the vehicle. At the time of the stop, Gregg was in the passenger-side rear seat and appellant was in the driver-side rear seat. Corporal Ray Bennett testified that he noticed the front seat passenger handing R.C.'s cell phone to appellant at the time of the stop and that he confiscated it; his body camera footage showed him seizing the phone. Sergeant Robert Perkins testified that he used the "Find My iPhone" app to set off an alarm on R.C.'s cell phone. Sergeant Perkins testified that he discovered the cell phone inside or underneath a green jacket on the middle seat between appellant and Gregg.[1] On the night of the arrest, one of the officers observed him wearing the green jacket.

The officers searched the vehicle and found a black 9mm Hi-Point semiautomatic handgun in appellant's jacket and a black 9mm Smith and Wesson semiautomatic handgun in the glove compartment. Both handguns matched the vague descriptions provided by the victims. The 9mm Hi-Point was linked to appellant at trial through a chat message he sent which read "It's a hi point 9." The State also introduced at trial two photos appellant had sent from the victim's phone that depicted him holding two handguns.

Sergeant Michael Yu, a police expert in the forensic analysis of cell phones, removed the data from one of the victims' cell phones, which contained information linking

[1] It is unclear from the trial transcripts and the parties' briefs whose phone Corporal Ray Bennett seized before removing appellant and Gregg from the Ford Mustang.

it to appellant and Young.[2] Sergeant Yu noted that someone attempted to reset the phone's password an hour and a half after the robbery. He found on the phone a video of appellant rapping, which he testified was created on the day of the robbery at 9:55 p.m. He testified that it was "highly likely . . . that it was created on [the victim's] phone" because it was created on the same iPhone model with the same version of the iPhone operating system and in a chronological series of other media files. Gregg appeared in the background of that video.

Between the time of the robbery and appellant's arrest, someone used the phone to access an account with the username "Simba" (appellant's nickname), to send a message which read "This [is] Simba," and to access shilohv21@gmail.com and onlysimbabookings@gmail.com. Someone also logged into the Twitter account "only_simba" at 7:07 p.m. the night of the robbery. This caused the Twitter app on the cell phone to synchronize the user's previous messages, which included a message sent before the robbery explaining that the user did not have a cell phone but was "about to."

Appellant and Gregg were tried together. The State introduced two photographs appellant had sent via social media that depicted him holding two handguns. When the State offered the first photograph, appellant's trial counsel began speaking at the same time

[2] The trial transcripts and the parties' briefs refer to both R.C.'s and F.C.'s cell phones as "State's Exhibit 7." The exhibit was a single iPhone. R.C. identified State's Exhibit 7 as his cell phone. Sergeant Michael Yu testified that he examined State's Exhibit 7 and copied the data at issue. Detective Marisol Orlina contradicted Sergeant Yu and testified that R.C.'s iPhone contained no data and that the information recovered by Sergeant Yu came from F.C.'s phone.

as Gregg's trial counsel. Appellant contends that his trial counsel objected, but the transcript reflects him stating "No objection." He then objected to the second photograph, raising the "[s]ame objection as before." The State also played for the jury the video of appellant rapping, muting the audio and thus limiting the jury's exposure to the profane and largely irrelevant lyrics. The court admitted the silent video, two still photographs from the video, and the text of two inculpatory lyrics: "Had to rob a few n—s ain't have no patience," and "Where is my semi[automatic handgun] it's right on my hip."

As noted, the jury convicted appellant of robbery, conspiracy to rob, use of a firearm in a crime of violence, and possession of a firearm after a disqualifying crime. The court sentenced appellant, and this timely appeal followed. Appellant and Gregg's appeals before this Court were consolidated for argument.

II.

Before this Court, appellant argues that the circuit court erred in refusing to instruct the jury on the offense of theft by possessing stolen property. In his brief before this Court, he sends mixed messages. He argues at the outset that theft by possession of stolen property is a lesser included offense of robbery. He argues that because the court instructed the jury that from the possession of recently stolen property, the jury may draw the inference that the possessor is the thief (and in this case, the robber), "fundamental fairness" requires the instruction. He concedes (as he must) that under the traditional, accepted Maryland jurisprudence in determining whether one offense is a lesser included

offense of another—known as the "elements" test or "required evidence" test—his argument fails. Recognizing that in *Hagans v. State*, 316 Md. 429, 450 (1989), the Court of Appeals rejected the alternative "cognate approach" or "inherent relationship" adopted by some of our sister states, he nonetheless asks us to "revisit the Court's adoption in *Hagans* of the elements test over the 'cognate approach' or 'inherent relationship' test."

Appellant raises also several evidentiary arguments. First, he argues that the circuit court erred in admitting into evidence rap lyrics written by appellant and recorded on one of the stolen cell phones. The court admitted only two lyrics from the rap songs: "Had to rob a few n—s ain't have no patience," and "Where is my semi its right on my hip." Appellant argues that generic and ahistorical lyrics like those admitted against him are a form of artistic expression rather than autobiography. Because the lyrics do not refer specifically to the criminal acts committed against the victims in this case, he concludes that the lyrics were irrelevant. He argues also that their probative value was substantially outweighed by the danger of unfair prejudice.

Second, appellant argues that the circuit court erred in admitting into evidence a handgun seized at the time of appellant's arrest and photographs of him holding two handguns. Appellant contends that the State did not admit sufficient evidence to establish a "reasonable probability" that the handgun admitted was the one used in the robbery. The court admitted a chat message sent after the robbery from a victim's phone which read "It's a hi point 9." The handgun admitted at trial was a 9mm Hi-Point. Appellant dismisses the evidentiary value of the chat message, arguing that it links the weapon to him "only if one

begins with the assumption that he was the robber." He concludes that without more evidence linking the handgun to the robbery, it was irrelevant to proving the facts of the crimes at issue. He argues in the alternative that any minimal probative value from a gun in the vehicle at the time of his arrest was substantially outweighed by the danger of unfair prejudice which could arise from his proximity to a handgun—the jury might conclude that he had a propensity for crime.

Appellant makes the same arguments as to the admission of photos of him holding a pair of handguns. He argues that the issue is preserved for our review. The trial transcript reflects that his counsel had "No objection" to the first photograph and "[s]ame objection as before" to the second photograph. Appellant argues that the transcript is inaccurate as to the first objection. He contends that the court reporter did not transcribe trial counsel's objection because multiple people spoke at the same time. He adds that raising the "[s]ame objection as before" to the second photograph implies an objection to the first. He therefore concludes that his arguments against the admission of each photograph were preserved by trial counsel. If they were not, he argues that this record is sufficient for this Court to address the failure to object as ineffective assistance of counsel.

Finally, appellant argues that his sentence is illegal because he was convicted and sentenced for five conspiracies, and under Maryland law, a defendant may receive only one sentence for a single common law conspiracy. As the State presented evidence of only one conspiracy to rob the victims, all but one of his convictions for conspiracy must be vacated.

The State concedes that the circuit court erred in convicting and sentencing appellant multiple times for the same conspiracy. The proper remedy, the State suggests, is to vacate all but one conspiracy conviction and all but one sentence.

Addressing appellant's alleged instructional error, the State argues that theft by possession of stolen property is not a lesser included offense of robbery with a dangerous weapon. As to the test for determining which offenses are included in others, the State points out that this Court "is bound by the elements test adopted in *Hagans* and reaffirmed in *Bowers*." Finally, according to the State, the evidence in this case does not support under any test an instruction on the offense of theft by possession of stolen property.

As to appellant's evidentiary arguments, the State maintains that the circuit court did not err in admitting the two rap lyrics at issue. The State argues that the "[h]ad to rob a few n—s ain't have no patience" lyric was admissible and specific enough to distinguish it from cases in which Maryland courts held that rap lyrics were admitted improperly against criminal defendants. The State points to the plurality of the victims and the fact that appellant wrote the lyric, phrased in past tense, only hours after the robbery at issue. "[A]in't have no patience" referred to appellant's eagerness to acquire a cell phone, evidenced further by his earlier chat message that he was "about to" have a cell phone. As to the second lyric, "Where is my semi its right on my hip," the State argues that the lyric referred to his possession of and familiarity with a semiautomatic handgun, the type of weapon used in the robbery. The State points again to the fact that appellant wrote the lyric shortly after the robbery. Alternatively, assuming error *arguendo*, the State argues

harmless error because the robbery lyric was relatively unimportant in the State's case and the handgun lyric was cumulative of other evidence that appellant possessed a handgun.

The State argues that the circuit court did not err in admitting the handgun the police seized from the back seat of the Ford Mustang and the photographs of appellant holding semiautomatic handguns. The evidence, according to the State, was relevant because the police found the handgun in appellant's possession and because it matched the description provided by the victims. The State emphasizes that the Hi-Point handgun was linked to appellant by its location at the time of his arrest, his chat message referencing "a hi point 9," and the fact that appellant appears to be holding the same handgun in the photographs.

Turning to the photographs, the State argues that appellant failed to preserve the issue for our review by not objecting to the admission of the photographs in Exhibit 39: Sergeant Yu's report regarding the contents of the victim's cell phone he examined. The State notes also that the transcript reflects counsel's response to the admission of the first photograph as "[n]o objection" and that the court audio recording does not include an audible statement of any kind from appellant's counsel at the time of the evidence's admission. If we address the issue on its merits, the State argues that the photographs were admissible for the same reasons the handgun was admissible and notes that the photographs were on one of the stolen phones.

III.

We begin with appellant's first issue: whether he was entitled to a jury instruction on the offense of theft by possession of stolen property. Judge John C. Eldridge laid out the history of the right of a defendant to a lesser included uncharged offense in *Hagans*, 316 Md. at 445. After explaining the common law development of the doctrine, the Court of Appeals noted that "[t]he principle that a defendant, charged with a greater offense, can be convicted of an uncharged lesser included offense, has been adopted by virtually every jurisdiction in the United States which has passed upon the issue."[3] *Id.* at 447. The *Hagans* court went on to explain the doctrine, its limitations, and the test used to determine what is a lesser included offense.

Noting that courts have applied different tests to determine what is a "lesser included" or "necessarily included" offense, the Court of Appeals made clear that

[3] Although the lesser included offense doctrine developed at common law largely for the benefit of the prosecution, it may now be invoked by the defendant. *Hagans v. State*, 316 Md. 429, 453 (1989). For the rationale underlying the lesser included offense doctrine, see Note, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 Dick. L. Rev. 125, 126 (1979), stating as follows:

> "The doctrine is a valuable tool for defendant, prosecutor, and society. From a defendant's point of view, it provides the jury with an alternative to a guilty verdict on the greater offense. From the prosecutor's viewpoint, a defendant may not go free if the evidence fails to prove an element essential to a finding of guilt on the greater offense. Society may receive a benefit because, in the latter situation, courts may release fewer defendants acquitted of the greater offense. In addition, the punishment society inflicts on a criminal may conform more accurately to the crime actually committed if a verdict on a lesser included offense is permissible."

Maryland applies the "required evidence" test or "elements test." *Id*. at 450. The elements test is the same as that articulated in *Morey v. Commonwealth,* 108 Mass. 433, 434 (1871), and adopted by *Blockburger v. United States,* 284 U.S. 299, 304 (1932), to determine whether two offenses should be deemed the same for purposes of double jeopardy. Under the test, two offenses are not the same if each "requires proof of an additional fact which the other does not." *Morey*, 108 Mass. at 434. All of the elements of the lesser included offense must be included in the greater offense. It follows, therefore, that it must be impossible to commit the greater without also having committed the lesser. The Court of Appeals rejected the alternative, more flexible test, sometimes referred to as the "cognate approach" or the "inherent relationship approach"—the approach that appellant would have us adopt and apply today. [4] Under that approach, an offense may be regarded as an included offense if it meets the elements test *or* if it is suggested by the language of the

[4] In *Hagans*, 316 Md. at 450, the Court of Appeals explained why it rejected the cognate test, quoting *Schmuck v. United States*, 489 U.S. 705, 720 (1989), as follows:

> "The elements test is far more certain and predictable in its application than the inherent relationship approach. Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference."

indictment. *See*, *e.g.*, *Welch v. State*, 331 S.E.2d 573, 605–06 (Ga. 1985); *Johnson v. State*, 464 N.E.2d 1309, 1310–11 (Ind. 1984).

The Court of Appeals noted, as appellant does, that the *Blockburger* test provides superior notice to defendants. *Hagans*, 316 Md. at 449. In addition to notice, however, the Court based its decision on the clarity the *Blockburger* test provides to practitioners and judges, the ease of its application by appellate courts, and the overall fairness and efficiency provided by a predictable, textual rule rather than individualized determinations based primarily on the evidence offered at trial. *Hagans*, 316 Md. at 449–50.

Maryland courts perform a two-step analysis to determine whether a defendant is entitled to an instruction on a lesser included offense. *State v. Bowers*, 349 Md. 710, 721 (1998). We apply first the "elements test" to determine whether one offense is a lesser included of another offense, *i.e.*, whether all of the elements of the lesser included offense are included in the greater offense. *Id.* at 721–22. Once that threshold determination is made, the court turns to the facts of the particular case and assesses "whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense." *Id.* at 722. If both steps of the test are satisfied, the court must instruct the jury on the lesser included offense, as it would be fundamentally unfair to the defendant to effectively force the jury to convict him of the greater offense. *Id.* at 723.

This Court, as an intermediate appellate court, is bound by the authority of the Court of Appeals of Maryland. The law in Maryland is the application of the elements test. Even

if we had the discretion to change the applicable test for lesser included offenses in Maryland, we would not be inclined to do so for the reasons set out in *Hagans* and its progeny.

We turn, then, to whether theft by possession is a lesser included offense of robbery under the elements test. In Maryland, robbery retains its common law meaning. *West v. State*, 312 Md. 197, 202 (1988). Under common law, robbery is "felonious taking and carrying away of the personal property of another, from his person or presence, by violence or putting in fear." *Id.* Armed robbery is robbery aggravated by the use of a dangerous or deadly weapon. *Fetrow v. State*, 156 Md. App. 675, 687 (2004); Md. Code, Crim. Law Art., § 3-403(a).

Theft by possession is possession of "stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person intends to deprive the owner of the property." Section 7-104(c)(1). Theft by possession is now part of Maryland's consolidated theft statute, but previously it was a separate crime known as "receiving stolen goods." *Grant v. State*, 318 Md. 672, 677 (1990) (noting the change and applying the law of "receiving" to the new statutory crime). A defendant cannot be both the thief and the possessor of stolen goods. *Id.* at 678. That is because the crime of theft by possession requires evidence that the stolen goods "have been transferred to the person accused of being the [possessor]." *Jordan v. State*, 219 Md. 36, 44 (1959); *West*, 312 Md. at 211.

Comparing robbery and theft by possession under the *Blockburger* test, armed robbery requires proof of facts that theft by possession does not—the threat or use of force, taking from the victim's person or presence, and the use of a dangerous weapon. Theft by possession requires proof of a fact that robbery does not—receipt of the stolen property from another person. Thus, theft by possession of stolen property is not a lesser included offense of robbery, and appellant was not entitled to a jury instruction on that offense. *See also Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002).

Appellant acknowledges reluctantly[5] that theft by possession of stolen property is not a lesser included offense of robbery under the traditional "elements test" but argues that fundamental fairness demands that possessing personal stolen property be treated as a lesser included offense in this case and that our fundamental fairness case law obligated the circuit court to instruct the jury on the lesser *related* offense.

Appellant relies upon *Smith v. State*, 223 Md. App. 16 (2015), as support for his fundamental fairness argument. Smith does not help appellant for several reasons. In

[5] Appellant argues that "a strict and logical reading of the relevant texts [robbery and possessing stolen property] would seem to lead to the conclusion that possessing personal stolen property is a lesser included offense under the elements test." He then acknowledges that Maryland case law is clear that one cannot be both the possessor and the thief of stolen goods. He therefore assumes, *arguendo*, that possessing stolen property is not a lesser included offense under the required elements test, and he moves on to whether it is fundamentally unfair to strictly adhere to the elements test. He cites the principle that the unexplained possession of recently stolen goods may give rise to either the inference that the possessor is the thief or the inference that he is a possessor of stolen goods. Because possession can serve as a basis for either offense, he concludes that the two offenses are so interrelated that principles of fundamental fairness demand that possessing stolen property be treated as a lesser included offense.

Smith, the court was dealing with the notion, announced in *Roary v. State*, 385 Md. 217 (2005), that first degree assault can serve as a predicate for common law second degree felony murder. *Id*. at 225. *Jones v. State*, 451 Md. 680, 704 (2017), overruled *Roary*, and first degree assault no longer can be a predicate for second degree felony murder. Moreover, in *Jackson*, 322 Md. at 127–28, the Court of Appeals made clear that there must be evidence to support the lesser included offense:

> "[e]ven when there is evidence that would support a finding of guilt of the lesser included offense, the State is not precluded from entering a *nolle prosequi* of that offense if, under the particular facts of the case, there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense."

All of these cases stand for the proposition that the evidence presented at trial must establish a rational basis for a conviction of the lesser crime. In the instant case, as the State points out correctly, there was no evidence presented at trial to support appellant's "alternate theory" that he was not a participant in the robbery but that he was merely the possessor of stolen property. For the finder of fact to draw that inference of fact (and rationally conclude that he was guilty of possession), there had to be evidence to support it. *West*, 312 Md. at 210–11 (citing *People v. Galbo*, 112 N.E. 1041 (N.Y. 1916) (Cardozo, J.)). We hold that the circuit court denied properly appellant's request for a jury instruction on theft.

Appellant argues that the two written rap lyrics attributed to him were irrelevant and highly prejudicial. We review the trial court's decision to admit the evidence by first

determining whether the evidence is legally relevant, a conclusion of law which we review *de novo*. *Smith v. State*, 218 Md. App. 689, 704 (2014). To qualify as relevant, evidence must tend to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Evidence that is relevant is admissible, but the trial court does have not discretion to admit evidence that is not relevant." *Smith*, 218 Md. App. at 704; Rule 5-402.

If relevant, we then determine whether the court abused its discretion in admitting relevant evidence which was unfairly prejudicial and therefore should have been excluded. *Smith*, 218 Md. App. at 704–05. Under Rule 5-403, the trial court should exclude relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Carter v. State*, 374 Md. 693, 705 (2003). "Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Hannah v. State*, 420 Md. 339, 347 (2011).

In *Hannah*, the Court of Appeals reviewed the admissibility of a defendant's self-written rap lyrics. The defendant was accused of crimes that stemmed from a drive-by shooting. *Id.* at 340–42. To disprove his testimony that he had no interest in guns, the prosecutor offered and the trial court admitted the State's evidence of rap lyrics the defendant wrote. *Id.* at 345. The lyrics included "I ain't got guns, got a d[ozen] under the seat," "Ya see da tinted [window] cum down n out come da [G]lock," "Ya just got jacked, we leave da scene in da lime green [car]," and others consistent with a drive-by shooting. *Id.* at 345–46.

Surveying case law and academic writing on the issue of self-written rap lyrics, the Court drew a distinction between two types of lyrics. The first, lyrics that refer generally to criminal acts, tend to be "inadmissible works of fiction" "probative of no issue other than the issue of whether [the defendant] has a propensity for violence." *Id.* at 348, 355. The Court cited with approval a law review article that cautioned against the admission of "abstract representations of events or ubiquitous storylines frequently employed in rap music." Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1 (2007). The Court noted that this first category of statements may nevertheless be admissible to prove identity or knowledge. *Hannah*, 420 Md. at 351–52. The second category, "statements of historical fact," may be admissible as direct evidence of a defendant's guilt. *Id.* at 348. The Court of Appeals reversed the trial court, holding that there was "no evidence that [defendant]'s lyrics are autobiographical statements of historical fact" and that they were "probative of no issue other than the [impermissible] issue of whether he has a propensity for violence." *Id.* at 349, 355.

In the instant case, the trial court did not err or abuse its discretion in admitting the lyric "had to rob a few n—s, ain't have no patience" as a "statement of autobiographical fact." Though the lyric was less specific than the lyrics in *Hannah*, the circuit court admitted evidence that tied the lyric to the robbery at issue. Unlike the undated lyrics in *Hannah*, the State produced evidence that appellant wrote the lyric just hours after the robbery on a phone stolen from one of the victims. The lyric speaks in past tense about robbing multiple people out of impatience. The State admitted a message, sent by appellant

shortly before the robbery, which stated that he was "about to" have a cell phone. Because it appears that the lyric was a literal statement of fact, it was relevant and admissible as evidence of appellant's identity as the robber and his motive for the robbery.

The admissibility of the lyric relating to the gun is a closer question. Arguably, it was an irrelevant lyric written about handgun possession, a common theme in rap music. On the other hand, arguably it was relevant to show that appellant possessed a handgun, the instrument used in the robbery. We need not decide whether the lyric's admission was error in the first instance because we shall assume error and find that any error was harmless beyond a reasonable doubt.

When the trial court errs, we must reverse unless the State can "demonstrate, beyond a reasonable doubt, that the error did not contribute to the conviction." *Dorsey v. State*, 276 Md. 638, 658–59 (1976). In that analysis, we consider whether the evidence at issue was cumulative evidence which tended "to prove the same point as other evidence presented during the trial." *Dove v. State*, 415 Md. 727, 743–44 (2010).

The State argues that the admission of the lyric was harmless because the State presented other evidence that appellant and Gregg possessed one or more semiautomatic handguns—the court admitted photographs of appellant holding a pair of semiautomatic handguns and a handgun found inside Gregg's jacket. We agree with the State that the admission of the handgun lyric was cumulative of the other evidence admitted and hold that any error was therefore harmless.

The third issue before us is the admission of the handgun found next to appellant at the time of his arrest. Appellant argues that because the handgun matched only a generic description and was indistinguishable, based on that description, from another handgun found in the vehicle at the time of the arrest, the handgun was inadmissible. We disagree.

Physical evidence is relevant "where there is a reasonable probability of its connection with the accused or the crime; the lack of positive identification affects only the weight of the evidence." *Aiken v. State*, 101 Md. App. 557, 573 (1994). All relevant evidence is in some way prejudicial, but *unfairly* prejudicial evidence "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Smith*, 218 Md. App. at 705. Rule 5-403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We review the relevance of the evidence *de novo* and the circuit court's balancing of Rule 5-403 for abuse of discretion. *Smith*, 218 Md. App. at 704.

The gun evidence in this case was relevant. Even if the victims' descriptions of the handgun appellant used were not specific, appellant was arrested only two days after the robbery with the handgun next to him and alongside a cell phone taken in the robbery. Plainly, this created a reasonable probability of its connection with the accused or the crime, making the evidence relevant. The evidence was surely prejudicial, but not unfairly

so. The weapon was connected to appellant and to the robbery—the court did not abuse its discretion in admitting the evidence.

Appellant argues that the circuit court erred in admitting photographs of him holding "a handgun or handguns." We hold that he failed to preserve the issue for our review. Rule 4-323 provides that an objection is waived unless "[a]n objection to the admission of evidence [is] made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent." "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008).

At the outset, we note that the parties disagree as to whether appellant objected to the evidence at trial. The parties argue over appellant's objection to the first of the two photographs of him holding the handguns. The transcript states that he offered "[n]o objection," and the audio recording is unclear because both he and trial counsel for his co-defendant spoke at the same time when the State offered the evidence for admission. Appellant then raised the "same objection as before" to the admission of the second photograph of him holding the handguns. Before this Court, appellant suggests that the transcript must have been incorrect because "the same objection before" implies that he objected to the first photograph, preserving the issue for our review. The State disagrees, contending that appellant's lack of a clear objection on the record waived our review.

We need not resolve the issue of the unclear record because at the time the court admitted the photographs as State's Exhibits 46 and 47, it had admitted the same

photographs in Sergeant Yu's report. When the court admitted the report, appellant objected to the rap lyrics contained in the report but not to the photographs. Because the evidence was admitted without objection, appellant failed to preserve for our review the admissibility of the photographs of him holding the guns.

Finally, as to appellant's convictions and sentences for multiple conspiracy charges, the State concedes, and we agree, that only one conviction and sentence may be imposed for a single common law conspiracy. *Jordan v. State*, 323 Md. 151, 161 (1991). We shall vacate four of the five convictions and sentences for conspiracy.

JUDGMENTS AND SENTENCES FOR COUNTS SIX THROUGH NINE, FOR CONSPIRACY TO COMMIT ARMED ROBBERY, VACATED. ALL REMAINING JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID HALF BY APPELLANT, HALF BY MONTGOMERY COUNTY.