Circuit Court for Baltimore County
Case No. 03-K-12-004853

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2766

September Term, 2018

CLIFFORD BUTLER

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R.

Filed: July 14, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following the reversal of his convictions on appeal,[1] Clifford Butler, appellant, was re-tried and convicted by a jury sitting in the Circuit Court for Baltimore County of first-degree murder, conspiracy to commit first-degree murder, witness intimidation, and use of a firearm in the commission of a crime of violence.[2] Appellant raises two questions on appeal, which we have slightly rephrased:

I. Did the trial court err in not granting appellant's: A) motion to dismiss because a proffer agreement between he and the State granted him prosecutorial immunity, and/or B) motion to exclude the testimony of Keyon Beads, a co-conspirator, because the proffer agreement granted appellant derivative use immunity?

II. Did the trial court abuse its discretion in denying appellant's motion for judgment of acquittal because the State failed to prove criminal agency?

For the following reasons, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that Derius Duncan asked appellant to arrange for the killing of Ronald Givens because Givens was to testify as a witness against Duncan in an upcoming criminal case. The State's testimonial evidence came primarily from Detective Brian Wolf, with the Baltimore County Police Department Homicide Division, and from co-conspirator, Keyon Beads. The State also introduced Duncan's recorded telephone calls, made or received while he was in jail. The theory of defense was lack of

[1] *See Butler v. State*, 231 Md. App. 533 (2017).

[2] The court subsequently sentenced appellant to life imprisonment, all but 90 years suspended, for murder; a concurrent sentence of 15 years for conspiracy; and consecutive sentences of 15 years for witness intimidation and ten years for use of a firearm.

criminal agency. Appellant presented no witnesses. The evidence, viewed in the light most favorable to the State, established the following.

On the evening of March 22, 2011, Baltimore City Police Officer John Potter and his partner were patrolling a residential, high drug area in Southwest Baltimore in a marked patrol car when they observed a stopped PT Cruiser. As the officers drove closer, a man "jumped out" of the passenger side door and ran out of sight. Because the officers smelled the odor of marijuana and saw a small bag of marijuana in the car, they removed Givens, the driver and sole occupant of the car, and searched it. The officers found nothing of substance and, relevant to events that transpired later that evening, the police found nothing of note in the glove box. The police seized the bag of marijuana and concluded the traffic stop by telling Givens to leave the area. Givens agreed to leave, saying he was "done hacking for the evening."[3]

Roughly 30 minutes later, the officers again observed the PT Cruiser parked in the same neighborhood where the earlier encounter had occurred. The officers then saw the man who had jumped out of the vehicle earlier enter the front passenger seat while "holding his front waistband." The car began driving away, and the officers initiated a stop of the car. As the officers approached the car on foot, Officer Scott heard the "very distinct sound of a glove compartment closing." The police instructed Givens and the front passenger, later identified as Derius Duncan, to exit the car. During a subsequent search of the car,

[3] "Hack" refers to an unlicensed taxi cab driver.

the police recovered a fully loaded 9 mm handgun from the glovebox. Both Givens and Duncan were arrested and charged with illegal possession of a handgun.

Duncan, who remained incarcerated following his arrest, had a trial date set for June 20, 2011, which was postponed to August 29 and then October 26. Givens' case was ultimately dismissed, but he was subpoenaed by the Circuit Court for Baltimore City to appear as a witness in the criminal case against Duncan.

Around 8:00 a.m. on October 4, 2011, about three weeks before Duncan's trial date, Givens was found dead on his front lawn in Baltimore County. He had been shot four times, including once to the back of his head. Lead investigator Detective Wolf responded to the crime scene. He spoke to Givens's mother, who gave the detective her son's subpoena.

Detective Wolf learned that when Duncan was arrested for illegal possession of a handgun, he was on probation for drug possession, and if Duncan were convicted of the handgun charge, he would face an additional 20 years of incarceration for violating the conditions of his probation. Detective Wolf requested a search of Duncan's cell, during which the police seized a piece of paper containing "a lot of phone numbers" and the name of appellant and his nephew, David Johnson. Detective Wolf also requested the certified telephone call log and a DVD of the calls Duncan initiated from jail. Detective Wolf listened to over 100 calls and determined that 19 were relevant to Givens' murder. The calls, admitted during the direct examination of Detective Wolf, were played for the jury, which was also provided with a transcript of the calls. Because many of the calls were important to the State's case, we shall relate their content in some detail.

On March 26, 2011, four days after Duncan's arrest and imprisonment on the handgun charge, Duncan spoke to appellant's father. The detective identified each of their voices. Duncan told appellant's father that he was in jail because the police found a "tone" inside "a hack n****' car." Appellant's father said, "You gonna beat that[,]" and Duncan responded, "Yeah that's why I ain't tripping[.]"

On April 20, 2011, Duncan spoke to Keyon Beads and said, "I need you to holler at yo, see what the fuck (inaudible) right mind[.] . . . Tell him I got a stack or something for his bad ass[.]" Beads responds, "[H]e told me, he said he wasn't gonna say he seen nothing, but he heard that, uh, glove box, I told him not even to say nothing, I'm like yo, you ain't seen nothin' yo, just say you ain't see or hear nothing[.]" Duncan says, "That mother fucker, he about to fuck me over." Beads responds again, "[H]e say he ain't gonna say nothing . . . he like, I didn't see nothing Key, he like all I know . . . I heard the drop, like yo, that right there though, don't even say that yo, I'm like just say you didn't see nothing[.]" Beads then asks Duncan, "[W]hat else you want me to tell him []?" and Duncan responds, "[T]ell him (inaudible) got some bread for his badass or . . . whatever candy that he like for real." Beads tells Duncan, "I'm gonna ask the n**** like yo . . . how you feel about takin the charge, yo you won't even get probation yo." Duncan responds, "Tell him he ain't, he ain't got to take none of that drug shit, or none of that shit, that shit will get thrown out[.] Beads tells Duncan that he will talk to Givens, and Duncan responds, "[A]lright man, just try and take care of that shit for me[.]"

On June 2, 2011, Duncan tells a woman that he needs to contact his "homeboy so he can tell that n****, man . . . that it wasn't me that jumped out that motherfuckin car for

real, what he want a couple dollars just to say that for real?" When the woman asks if he and the man's court dates are the same or separate, Duncan responds that they are separate but "who knows though how that shit may turn out . . . they might try to scare him like if I'm telling on him or something for real, and he try to flip the script on me for real."

On September 1, 2011, Duncan tells a woman, "[A]ll I need is for the dude who, who car I was in to either come to court to testify on my behalf, or come down [to my lawyer's] office to write an affidavit and shit just saying that he never seen me with no gun[.]" In a second call an hour later, Beads tells Duncan that "we" tried calling Duncan's lawyer; that Beads was with "him" when they called; that "he" said the charges against him were dropped; and that "they want him to testify against you[.]" Beads reiterated to Duncan that "we" will call Duncan's attorney again tomorrow.

On September 11, 2011, Duncan tells a woman that "my lawyer, he talked to the dude for real and all this shit, but he can't use him as a witness though." Duncan then reads the letter his lawyer sent to him: "I'm letting you know that I had talked to the driver of the vehicle[, and] . . . he advised that the gun was not his, . . . that my client had opened the glove, . . . he heard two clicks, one to open the glove box and one to close it. And my client was the one that opened it. . . . I can't use him as a witness." Duncan repeatedly tells the woman that he needs to talk to Beads.

On September 12, 2011, Duncan tells Beads, "I know you heard yo ain't even do right[.]" When Duncan explains that his lawyer cannot use "him" as a witness because "he" told the lawyer that he heard Duncan open and close the glove box when Duncan got in the car, Beads responds, "So now that's basically like a n**** told on you[.]" Duncan

agrees and says he is "to the point . . . to write you some shit, like yo and direct you to the peoples" because "I don't know if this n**** getting ready to . . . come to court on me or what[.]" Duncan further states, "I'm trying motherfucker like, look yo, before it really gets further then what I really want it to go . . .. take this yo and don't, don't, don't come, you feel me, that day[.]" Duncan explains to Beads that he is "on probation, still got 15 to back up[,]"[4] that the gun charge is "the only thing that's holding me up[,]" but if he gets convicted "they gonna throw my little ass to the wolves for real."

On September 13, 2011, Duncan can be heard repeatedly telling appellant to call Beads, who can "explain it, yo, n**** ain't even do right[.]" Duncan adds that he spoke to appellant's father and told him to get in touch with "Dave." Duncan also repeatedly tells appellant that he will write him to "let you know what's going on[,]" and he asks appellant to "write me and let me know if n**** . . . gonna get that shit done or what[.]" Appellant assures Duncan that "n****s was already doing some homework[.]" The call ends with Duncan telling appellant, "[G]et Dave and them on top, tell them I gonna send the info[,]" and appellant responding, "I already told Dave what I do for real[.]"

On September 17, 2011, Duncan asks appellant if he got the letter he wrote him. Appellant responds that he did and adds, "[N]***** on it . . . so you ain't even got to worry about that shit no more[.]" Duncan says, "Like I gave you everything y'all need, the other info . . . far as the wheels and all that . . . I ain't gonna say too much for real, you feel me." Appellant responds that he understands. Duncan tells appellant, "[Y]'all take care of y'all

[4] In fact, Duncan was "backing up" 20 years of imprisonment.

part[,]" and appellant assures him, "[Y]eah it's done for[.]" Duncan asks appellant to "write me back [to] let me know how, like how that shit supposed to flow." Duncan tells appellant, "I described the bitch to you and all that shit for real in there . . . told you she like your father age . . . told you what car she was driving and shit[.]" Appellant affirms, "I got it. I understood the whole shit for real, ain't no flaws or nothing." Duncan then makes a call to Beads. He tells Beads that he just spoke to appellant and asks Beads to "call him for real, and . . . talk to him . . . he knows what's up for real."

Duncan places three calls to appellant a week or so before Givens's murder. On September 23, 2011, Duncan asks appellant, "[Y]ou still ain't hollered at Dave and them or nothing?" and appellant responds that he has. Duncan then says, "[Y]o just stay on top of shit for me[,]" and appellant replies, "I gotcha[.]" During a telephone conversation a couple of days later, appellant asks Duncan, "Dave wanted me to ask you" where "the air holes at for real?" Duncan responds, "[S]till in the house put up." Duncan suggests that he could tell his mother "where it's at" but "she ain't going to touch the motherfucker" so "[h]e have to grab that shit for real." Duncan continues, "[T]ell him it still in there for real, but I know he got something else, if he got, if he needs something to use, for real." Appellant responds, "[N]****s supposed to handle it real soon for real, he just doing, trying to see if he can do a little bit of research for real." Duncan ends the call by saying, "[J]ust make sure that shit gets tooken care of[.]" During a telephone conversation a couple of days later, appellant tells Duncan, "[N]****s was on it last night, for real . . . say he just missed his ass for real." Appellant adds, "[N]****s on it every night now . . . shit might be ready tonight for real."

On October 3, 2011 at 7:17 p.m., the night before Givens's body was found, appellant tells Duncan, "I ain't even talk to Dave's ass today, I'm ready to, um, to probably call his ass when we get off the phone." Duncan asks appellant whether "they came and got that shit from you" to which appellant responds, "[Y]eah that night, that night I talked to you, n****s came[.]"

Duncan talks to appellant three times on October 5, the day after Givens's body was found. In the morning, Duncan asks appellant, "Is shit cool with Dave and them?" and appellant responds in the affirmative. Duncan tells appellant that "Baltimore County came and took all my paperwork and shit" out of his cell. When Duncan continues to express anger and confusion about the search of his cell, appellant asks him, "It wasn't nothing in that shit though, was it?" Duncan responds, "Naw, you feel me, I don't have nothing in that motherfucker[.]" Duncan then asks, "What'd you say yo, did – man, you, um, say yo didn't holler at, uh, shorty and get her number though?" Appellant responds, "He definitely hollered at her . . . he got her for real."

An hour later, the two converse again during which Duncan asks appellant if he "talk[ed] to his nephew[.]" When appellant says he has not been able to reach him, Duncan asks him "to see if he can find out anything himself[.]" In the final call that evening, Duncan asked appellant to "call Key" and "tell him [to] . . . make sure he don't [have] . . . no mail sitting around" and that appellant should do the same. When Duncan asks about appellant's nephew, appellant replies that he spoke to him and "told him what the score was, told him, lay all way back for real." When Duncan asks if everything is okay, appellant responds, "Everything, everything chill for real. . . . Everything good for real

you feel me?" Appellant cryptically adds, "[S]horty he all, he up, they can't, you feel me, cause shorty he all way, he deep somewhere . . . [h]e all, he all the way off the, off the radar so, they can't say nothing to me or you, you feel . . . shorty off the radar for real." Duncan responds, "[Y]ou ain't got to say no more yo."

The State called Keyon Beads as a witness, but he invoked his Fifth Amendment Right and refused to answer any questions. An assistant State's Attorney then read to the jury portions of Beads's testimony from appellant's first trial.[5]

Beads admitted to pleading guilty to conspiracy to commit murder, witness intimidation, and obstruction of justice, and in exchange for his cooperation in testifying against appellant, the State agreed to recommend a sentence of 30 years of imprisonment. As to his relationship with Givens, Duncan, and Butler, Beads testified that he was good friends with Duncan and knew appellant through Duncan. Beads testified that he saw Givens almost every day because he used Givens as a "hack service" and sold drugs out of his car. Beads also testified that he introduced Givens to Duncan, who likewise used Givens as a "hack service" and sold drugs out of his car.

Beads explained the recorded jail calls. He explained several of the nicknames used during their conversations, including that "Key" referred to himself, "Little D" was Duncan, and "Cleezy" was appellant. In the March 26th jail call, Beads explained that the

[5] *See* Md. Rule 5-804 (permitting the admission of a witness's former testimony as an exception to the hearsay rule).

word "tone" meant a gun. In the April 20th jail call, Beads explained that the word "stack" meant $1,000 and "candy" meant drugs.

Beads testified that after the September 12th jail call he received a letter from Duncan, asking him to meet appellant. Beads testified that he met appellant once, during which he told him "whatever was going on, I told him I ain't want nothing to do with it. ... [W]hatever they was getting ready to do, whatever was going on, I didn't want nothing [to] do with it from that point on." Beads explained, "I felt like it was going – it was getting out of hand, to the point where somebody was going to end up getting hurt[.]" Beads testified that he received a total of two letters from Duncan, which he destroyed at appellant's direction.

Around 8:00 p.m. the night before Givens was found, Beads received a call from Duncan's sister asking whether he had seen Givens recently. Beads told her that Givens had said he planned on watching football on television that night. Beads testified he was interviewed by the police three times, and he cooperated once they showed him Duncan's jail calls.

DISCUSSION

I.

Appellant argues that the trial court erred in denying his motion to dismiss the charges against him because the proffer agreement he entered into with the State on December 5, 2011, granted him prosecutorial immunity. Appellant alternatively argues that the proffer agreement granted him derivative use immunity, and therefore, the trial court erred in allowing the State to introduce Beads' prior testimony. The State responds

that appellant has waived his immunity arguments under "the law of the case doctrine" because appellant "could have raised the same contentions in his first appeal but did not." The State further argues that even if the doctrine does not apply, appellant's arguments are meritless because the State never promised him prosecutorial or derivative use immunity and, in any event, the State did not learn of Beads' connection to Butler, Duncan, and Givens from the proffer. Therefore, the State was not barred from prosecuting appellant for the murder of Givens nor barred from using Beads' testimony against appellant at trial.

A. Background: Proffer Agreement

A couple of months after Givens' murder, on December 1, appellant entered into a proffer agreement with the State. The written proffer agreement provided:

> PROFFER AGREEMENT
>
> In Re: Special Investigation
>
> You and your attorney have indicated a desire to meet with law enforcement officials for the purpose of making an "off-the record" proffer in connection with the above matter. We are willing to meet with you and your attorney upon the following terms and conditions.
>
> 1. Except as other provided in paragraphs two and three, no statements made or other information provided by you or your attorney during the proffer will be used against you in any criminal case.
>
> 2. You agree that the State may make derivative use of, and may pursue, any investigative leads suggested by any statements made or other information provided by you or your attorney during the proffer.
>
> 3. Your complete truthfulness and candor are express material conditions to the undertaking of the State set forth in this letter. Therefore, the State may use statements made or other information provided by you or your attorney during the proffer under the following circumstances:

> a. In the event that you are a witness in any proceeding related to this matter and offer testimony different from any statements made or other information provided by you or your attorney during the proffer, the attorney for the State or other opposing party may cross-examine you concerning statements made or other information provided by you or your attorney during the proffer.
>
> b. If the State should ever conclude that you have knowingly withheld material information from the State or otherwise have not been completely truthful and candid with the State, the State may use any statements made or other information provided by you or your attorney during the proffer against you for any purpose. If the State does ever so conclude, it will notify you prior to making any such use of any such statements or other information.

(Emphasis added). Both appellant, his attorney, and the Assistant State's Attorney signed and dated the agreement on December 1, prior to the proffer session on that date.

Appellant made several statements during the December 1 proffer session. When the police attempted to corroborate the information provided by appellant, however, the police concluded that appellant had made several false statements. At appellant's request, a second proffer session was held on December 5. The parties re-signed and re-dated the first proffer agreement.[6] At the December 5 proffer session, appellant again made several statements. At appellant's subsequent trial, the trial court allowed, over objection, the State to introduce statements appellant made at both proffer sessions through the testimony of Detective Anderson based on the State's argument that because appellant had given false information at the December 1 meeting, he had breached both proffer agreements.

[6] The December 5 proffer agreement includes each party's initials to the right of the signature lines that they had signed on December 1, and the date "12/5/11" next to their initials. In all other respects the agreements are identical.

On appeal, we reversed appellant's convictions and remanded for a new trial. *See Butler v. State*, 231 Md. App. 533 (2017), which we shall refer to as "*Butler I*." We held that the December 1 proffer agreement was orally modified on December 5, when appellant was told by Detective Anderson, without objection by the State prosecutor, that the parties were going to "start over" but that "if he continued to lie" the proffer would be used against him. *Id*. at 557. Therefore, contrary to the State's argument, there were two separate proffer agreements. Because the State failed to present evidence that appellant committed a material breach of the second proffer agreement, we held that the "the circuit court erred in granting the prosecution permission to introduce evidence of the statements [appellant] made[,]" and that the error was not harmless beyond a reasonable doubt. *Id.* at 571-72.

Before the start of appellant's second trial, he moved to dismiss the charges against him on grounds that the December 5 proffer agreement granted him "equitable immunity" from prosecution. He alternatively argued that the proffer agreement granted him derivative use immunity and therefore barred the State from introducing the testimony of Beads because the State only identified Beads as a witness through the proffer sessions with appellant. The trial court rejected both arguments. Appellant raises the same arguments on appeal, citing *Butler v. State*, 55 Md. App. 409 (1983) (no relationship to appellant) in support.

Before we address the substance of appellant's arguments, however, we must first address the State's "law of the case" argument.

B. Law of the Case Doctrine

"The law of the case doctrine provides that, 'once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.'" *Holloway v. State*, 232 Md. App. 272, 279 (2017) (quoting *Scott v. State*, 379 Md. 170, 183 (2004)). The doctrine prevents the revisiting of not only an issue that has been properly raised on appeal but also, "if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record . . . [then] neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal." *Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, 143 Md. App. 462, 474 (quotation marks, citation, and emphasis omitted), *cert. denied*, 369 Md. 660 (2002). *See Schisler v. State*, 177 Md. App. 731, 745 (2007) ("[U]nder the law of the case doctrine, litigants cannot raise new defenses once an appellate court has finally decided a case if these new defenses could have been raised based on the facts as they existed prior to the first appeal.") (citations omitted). *See also Holloway*, 232 Md. App. at 284 (affirming the circuit court's denial of petitioner's second coram nobis petition because the issue he raised in his first petition, that the trial court failed to advise him of the nature of the charges against him, and the issue he raised in his second petition, that the trial court failed to advise him of the presumption of innocence, both challenged the validity of his guilty plea, and even if the two petitions did not relitigate the same issue, the argument raised in his second petition could have been raised in his first appeal).

The purpose of the law of the case doctrine "is to prevent piecemeal litigation." *Nace v. Miller*, 201 Md. App. 54, 68 (citation omitted), *cert. denied*, 424 Md. 56 (2011). As the Court of Appeals has made clear:

> It is the well-established law of this state that litigants cannot try their cases piecemeal. They cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a former appeal of that same case; and, furthermore, they cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction. If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate.

Haskins v. State, 171 Md. App. 182, 190 (2006) (quotation marks and citation omitted).

The State argues that because appellant did not argue in his first appeal that the proffer agreement conferred prosecutorial or derivative use immunity on him, and because he could have made those arguments in his first appeal, he has waived those arguments under the law of the case doctrine in this second appeal. Appellant responds that because he did not raise his immunity arguments during his first trial, he could not have raised them in his first appeal. Appellant argues that "the only law of the case" issues are whether there were two separate agreements and whether there was a material breach.

We agree that appellant did not raise his immunity arguments in his first appeal but the narrow question before us under the law of the case doctrine is whether he could have. It very doubtful whether the law of the case doctrine applies, but we need not answer that question, because, assuming appellant's immunity arguments are not barred by the law of the case doctrine, they have no merit.

C. Prosecutorial or Derivative Use Immunity?

We generally review a trial court's ruling on a motion to dismiss an indictment under an abuse of discretion standard. *Kimble v. State*, 242 Md. App. 73, 78 (2019) (citation omitted). In *Butler, supra*, cited by appellant, we discussed at length the distinction between formal prosecutorial immunity, plea bargains, and miscellaneous bargains between the State and criminal defendants, such as "exchange[s] for cooperation, information, or testimony[.]" *Butler*, 55 Md. App. at 422. In that case, county police officers, having first obtained the approval of the Maryland prosecutor's office, promised Charles Butler, a suspect in a robbery, that if he gave them a truthful account of all he knew about the crime, they would not charge him with the offense. He gave a statement but because later investigation revealed that his statement was "significantly false and massively incomplete," he was charged with the robbery. *Id.* at 414-16. Butler appealed his subsequent conviction, arguing that his motion to dismiss his indictment, which was based on the police officers' promise, should have been granted. We held that the agreement between the State and Butler was not an agreement of formal immunity, which is exclusively "a creation of statute," nor a plea bargain. *Id*. at 418. Rather, the agreement was a "quasi-contract" and because the promises related to a criminal charge, our jurisdiction to review the contract was "rooted in the due process clause[.]" *Id*. at 428, 432. Because the trial court failed to review the terms of the agreement under principles of contract law, we ultimately remanded the case to the circuit court to make further factual findings about the nature of the agreement entered into by the parties.

In *Butler I*, we laid out the law by which we interpret proffer agreements:

> As a general proposition, pre-trial agreements such as cooperation and proffer agreements are interpreted according to principles of contract law. Given the lack of case law in Maryland concerning proffer agreements, and the similarities between proffer agreements and plea agreements, we view cases addressing construction and breaches of plea agreements as instructive.
>
> * * *
>
> Our prime directive for statutory construction, for contract construction, and now for the construction of a plea agreement is simply to read the words themselves that call for construction. If their meaning is clear and distinct and undisputed, the interpretive exercise is over. This is the core principle for construing the meaning of any contract. We also note that any ambiguity in a plea agreement is resolved against the government because of the Government's advantage in bargaining power. In [cited case], we endeavored to determine objectively what a reasonable non-lawyer's version of the deal would have been under circumstances similar to those of the defendant[.]

Butler I, 231 Md. App. at 557, 559 (quotation marks, citations, ellipses, and brackets omitted). We further stated that "the best evidence of what the contract . . . is or what the contract says is indisputably the original contractual document itself. But evidence of what the defendant reasonably understood may also be considered." *Id*. at 565 (quotation marks, citations, and brackets omitted). We recognized "that due process concerns for fairness and the adequacy of procedural safeguards guide any interpretation of a proffer agreement, and that any ambiguity is resolved against the government[.]" *Id*. at 566 (quotation marks, citations, and brackets omitted).

Applying the above law to the proffer agreement before us, appellant has failed to show that the State breached either the letter or the spirit of the agreement. The language of the proffer agreement is clear and it contains no suggestion or promise of prosecutorial immunity for appellant. Additionally, nothing in the agreement prevents the State from

using Beads's testimony at appellant's trial. First, the agreement specifically provides that the State can use any derivative information from the proffer session, providing that the State "may make derivative use of, and may pursue, any investigative leads suggested by any statements made or other information provided by you or your attorney during the proffer." Contrary to appellant's argument, the clear terms of the agreement authorized the State to pursue "investigative leads" and make "derivative use" of the information gained from those investigations. Second, Beads' testimony was independently obtained. The State advised the court at the motions hearing, without objection, that the police obtained Duncan's jail calls, which included his calls with Beads, after Givens was found dead on October 4, and before Butler entered into the proffer agreement two months later, on December 5. Additionally, the State further advised the court, without objection, that Detective Wolf had independently interviewed Beads before the State entered into the proffer agreement with appellant. Accordingly, the trial court did not err in denying appellant's motion to dismiss his indictment because of prosecutorial immunity and in denying his motion to preclude the State from using Beads's testimony.

II.

Appellant argues that the trial court erred in denying his motion for judgment of acquittal because the State failed to prove his criminal agency. Appellant argues that the State's evidence consisted only of "prior testimony from Keyon Beads with unspecified assertions about [appellant] and the recorded jail telephone calls which amounted to nothing more than indecipherable and otherwise vague conversations involving [appellant]." The State disagrees, as do we.

The standard for appellate review of evidentiary sufficiency is "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. Thomas*, 464 Md. 133, 152 (2019) (quotation marks and citations omitted). *See also Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted) (brackets in *Suddith*). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

Several cases have recited the litany that "a conviction upon circumstantial evidence alone will not be sustained unless the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." *Hebron v. State*, 331 Md. 219, 224 (1993)

(citations omitted). We have stated that these cases "have been understandably vague about what would constitute a case based solely on circumstantial evidence and what would amount to inconsistency with any reasonable hypothesis of innocence." *Hagez v. State*, 110 Md. App. 194, 204 (1996). *See State v. Smith*, 374 Md. 527, 560-61 (2003) (Harrell, J., concurring) (characterizing "reasonable hypothesis" language as difficult to comprehend). We stated that the better test is "whether the evidence, circumstantial or otherwise, and the inferences that can reasonably be drawn from the evidence, would be sufficient to convince a rational trier of fact, beyond a reasonable doubt, of the guilt of the accused." *Hagez*, 110 Md. App. at 204 (citations omitted).

Appellant was charged and convicted of first-degree murder, conspiracy to commit first-degree murder, witness intimidation, and use of a firearm in the commission of a crime of violence. To secure a conviction, the State must prove not only the elements of a crime beyond a reasonable doubt, but criminal agency by the same standard as well. *State v. Simms*, 420 Md. 705, 722 (2011).

First-degree murder is defined as "a deliberate, premeditated, and willful killing[.]" Md. Code Ann., Crim. Law Art., § 2-201(a)(1). *See also Thornton v. State*, 397 Md. 704, 721 (2007) (discussing first-degree murder). The section further provides that "[a] person who . . . conspires with another to commit murder in the first degree is guilty of murder in the first degree if the death of another occurs as a result of the . . . conspiracy." Crim. Law § 2-201(c). Crim. Law § 9-305(a) provides that a "person may not, by threat, force, or corrupt means, try to influence, intimidate, or impede a juror, a witness, or an officer of a court of the State or of the United States in the performance of the person's official duties."

Crim. Law § 4-204(b) prohibits a person from "us[ing] a firearm in the commission of a crime of violence[.]"

Conspiracy, a common law crime, is defined as the "combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement." *Mitchell v. State*, 363 Md. 130, 145 (2001) (quotation marks and citations omitted). "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Khalifa v. State*, 382 Md. 400, 436 (2004) (quotation marks and citation omitted). 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.

Jones v. State, 132 Md. App. 657, 660, *cert. denied*, 360 Md. 487 (2000). *See also Alston v. State*, 177 Md. App. 1, 42 (2007) ("Conspiracy may be proven through circumstantial evidence, from which an inference of a common design may be shown.") (citation omitted), *aff'd*, 414 Md. 92 (2010). As to the State's burden of proof, we have explained: "It is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose." *Dionas v. State*, 199 Md. App. 483, 532 (2011) (quotation marks and citation omitted), *rev'd on other grounds*, 436 Md. 97 (2013). We are mindful that the State is "only required

to present facts that would allow [a] jury to infer that the parties entered into an unlawful agreement." *Acquah v. State*, 113 Md. App. 29, 50 (1996) (citation omitted).

The trial court instructed the jury on accomplice liability as follows:

> The [d]efendant may be guilty of first-degree murder and/or intimidating a witness and/or use of a weapon in a crime of violence as an accomplice even though the [d]efendant did not personally commit the acts that constitute that crime.
>
> In order to convict the [d]efendant of the murder and/or intimidating a witness and/or use of a weapon as an accomplice, the State must prove that the crimes occurred and that the [d]efendant, with the intent to make the crime happened –make the crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime, or communicated to a primary actor in the crime that he was ready, willing and able to lend support, if needed. A person need not be physically present at the time and place and commission of the crime in order to act as an accomplice.

In a single paragraph in his brief, appellant argues that the evidence was insufficient to establish agency. We have reviewed the evidence presented by the State and are persuaded that there was sufficient evidence from which a rational juror could find that appellant was guilty of the crimes charged. Contrary to appellant's argument, Duncan's jail calls, with appellant and others, were not "indecipherable and otherwise vague conversations[.]" Rather, the jury could hear Duncan and appellant facilitate and plan Givens's murder so as to stop Givens from testifying against Duncan. Appellant's criminal agency was demonstrated through proof of the conspiracy and his actions as an accomplice. Accordingly, we shall affirm appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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