Circuit Court for Talbot County
Case No. C-20-CR-18-000251

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 467

September Term, 2019

JOHN PATRICK BRENNAN

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: November 5, 2020

A jury sitting in the Circuit Court for Talbot County convicted John Patrick Brennan, the appellant, of conspiracy to distribute amphetamines. Mr. Brennan contends that the trial court erred in admitting (1) a statement he made to the police at the time of his arrest and (2) hearsay statements made by an alleged co-conspirator. Mr. Brennan also challenges the sufficiency of the evidence on which the jury convicted him. We hold that the trial court did not err in admitting the statements at issue and that the evidence was sufficient to sustain his conviction. Accordingly, we will affirm.

BACKGROUND

The Underlying Incident

In February 2018, Talbot County Police Detective William Dwyer began a months-long investigation of Kevin Curry, whom Det. Dwyer believed was involved in the trafficking of various narcotics, including the prescription drug Adderall. During his investigation, Det. Dwyer obtained a wiretap to monitor Mr. Curry's calls and text messages. In September 2018, police intercepted several text messages between Mr. Curry's cell phone and a cell phone number that was later identified as belonging to Mr. Brennan. Talbot County prosecutors charged Mr. Brennan with conspiracy to distribute amphetamines, a controlled dangerous substance.

The Motion to Suppress

Before trial, Mr. Brennan moved to suppress a statement he made at the time of his arrest, before being advised of his *Miranda* rights, in which he provided his telephone number to the arresting officer. At the ensuing suppression hearing, Corporal Cummings of the Maryland State Police testified that Mr. Brennan was one of several suspects who

had been indicted after being identified in a wiretap investigation. Cpl. Cummings and another officer arrested Mr. Brennan at his residence. After placing Mr. Brennan in handcuffs, and while waiting for "road units" to arrive and transport Mr. Brennan to the police barracks, Cpl. Cummings completed an "arrest record report." To obtain the information for the report, Cpl. Cummings asked Mr. Brennan for his "name, date of birth, address, phone number, [and] place of birth." At the suppression hearing, Cpl. Cummings acknowledged that he had not "Mirandized" Mr. Brennan before asking for this information, but stated that he was not "questioning [Mr. Brennan] pertaining to the case" at that time. Cpl. Cummings also testified that the whole process of completing the arrest record report took him "[a] couple minutes," that Mr. Brennan "was extremely polite and cooperative," and that at no time did he threaten Mr. Brennan or pressure him to answer. Cpl. Cummings testified that Mr. Brennan was subsequently transported to the police barracks, where officers "finished the arrest process."

The trial court denied Mr. Brennan's motion to suppress. The court concluded that Mr. Brennan's statements were for the purpose of obtaining booking information and thus were not obtained during "a custodial interrogation as contemplated by Miranda."

Mr. Brennan's Challenge to the Admission of Hearsay Statements

At trial, the State sought to introduce into evidence audio recordings that police had obtained during the wiretap. The recordings consisted of three telephone conversations between Mr. Curry, the primary target of the investigation, and several third parties. In the recordings, Mr. Curry made several statements reflecting his involvement in the buying

and selling of Adderall and other drugs. Although Mr. Brennan was not involved or mentioned in the calls, the State argued that the recordings were admissible as "statements by a co-conspirator of Mr. Brennan's in furtherance of that conspiracy."

Defense counsel objected on hearsay grounds and argued that the hearsay exception for statements of a co-conspirator in furtherance of the conspiracy did not apply because the State had not shown any conspiracy between Mr. Curry and Mr. Brennan. The trial court overruled the objection on the ground that the State's proffer was sufficient to admit the recordings under the co-conspirator hearsay exception. The court further remarked that defense counsel's argument regarding the existence of a conspiracy was "something you can argue to the jury." The State then played the recordings for the jury.

Trial Evidence

At trial, Det. Dwyer testified that in February 2018 he began what became a wide scale investigation into Mr. Curry's involvement in selling cocaine, marijuana, and prescription medications, including Adderall. During the investigation, Det. Dwyer learned that Mr. Curry "had an operation of several individuals selling for him, holding CDS." Det. Dwyer thereafter obtained a wiretap to monitor calls and text messages sent to and from a cell phone number associated with Mr. Curry. Det. Dwyer intercepted "a lot of phone calls" and "hundreds if not thousands of text messages and Facebook messages" involving Mr. Curry's cell phone number.

Cpl. Cummings testified that among the various text messages intercepted during the investigation was a series of messages exchanged between Mr. Curry's cell phone and

a phone number that matched the number Mr. Brennan had provided to Cpl. Cummings at the time of his arrest. Those text messages, which were admitted into evidence and read to the jury, included:

- On September 14, 2018, Mr. Curry texted: "Double L my Adderall still there that's supposed to be there." Mr. Brennan responded: "I will let you know where I put it when I get home. And yes, Adderall are still there. I will text you once the house is empty."

- Several hours later, Mr. Brennan texted: "I'm still around. Don't think I have anywhere to stay in Frederick so it looks like I got to wait til tomorrow." Mr. Curry responded: "[W]ell leave the money in your car for me. Can you do that at least or you rather wait?"

- The following day, Mr. Brennan stated: "[G]ee . . . I am sorry this dragging on, but I can't control what she does."

- That evening, Mr. Curry responded: "No way. You can walk to the bar. Bring me part of the money bro."

- The next day, Mr. Brennan stated: "No, she isn't there. I will tell you and you can go by." Immediately after, Mr. Curry responded: "Did you leave any money there somewhere for me?" Mr. Curry then added: "And where did you hide the Ads at?"

- Finally, on October 19, Mr. Brennan stated: "Hey man anyway if I give you 150 towards my bill I can buy something tonight?"

Det. Dwyer, who had been recalled to the stand following the introduction of the text messages, testified that, based on those text messages and other evidence, he was able to determine that Mr. Curry stored Adderall at Mr. Brennan's residence. Det. Dwyer also testified that on at least two occasions in September or October 2018, police had witnessed Mr. Curry visiting Mr. Brennan's residence and staying "for probably five minutes." Det. Dwyer could not say whether Mr. Brennan was home either time.

The jury convicted Mr. Brennan of conspiracy to distribute amphetamines. This timely appeal followed.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN DENYING MR. BRENNAN'S MOTION TO SUPPRESS.

Mr. Brennan argues that the statement he gave to Cpl. Cummings in which he provided his phone number was made during a custodial interrogation before he received *Miranda* warnings and, therefore, should have been suppressed. We disagree.

"Our review of a circuit court's denial of a motion to suppress evidence is 'limited to the record developed at the suppression hearing.'" *Pacheco v. State*, 465 Md. 311, 319 (2019) (quoting *Moats v. State*, 455 Md. 682, 694 (2017)). "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). Moreover, "[w]e extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels v. State*, 172 Md. App. 75, 87 (2006). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that the police must "advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Lee v. State*, 418 Md. 136, 149 (2011)

(citations and quotation marks omitted). "These well-known *Miranda* warnings require an individual to be informed that 'he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Reynolds v. State*, 461 Md. 159, 178 (2018) (quoting *Miranda*, 384 U.S. at 479). "The obligation to give *Miranda* warnings arises whenever an individual is subjected to 'custodial interrogation.'" *Hughes v. State*, 346 Md. 80, 87 (1997). "If the warnings are not given or the police officers fail to respect the person's proper invocation of their rights, 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from [the] custodial interrogation of the defendant[.]'" *Vargas-Salguero v. State*, 237 Md. App. 317, 336 (2018) (citing *Miranda*, 384 U.S. at 474).

"In the years since this landmark decision, however, a number of exceptions to *Miranda*'s requirements have been recognized." *Hughes*, 346 Md. at 87. One such exception, recognized in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), is that "questions . . . reasonably related to the police's administrative concerns . . . fall outside the protections of *Miranda* [ ] and the answers thereto need not be suppressed." *Maryland v. King*, 569 U.S. 435, 456 (2013) (quoting *Muniz*, 496 U.S. at 601-02). This exception applies to "certain routine questions asked during the booking process," including "the suspect's name, address, telephone number, age, date of birth, and similar such pedigree information." *Hughes*, 346 Md. at 87, 94-95.

For the routine booking question "exception to apply, . . . the questions must be directed toward securing 'simple identification information of the most basic sort;' that is to say, . . . 'basic identifying data required for booking and arraignment[.]'" *Id.* at 94-95 (quoting *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1113 & n.2 (2d Cir. 1975)). "Conversely, questions that are 'designed to elicit incriminatory admissions' do not fall within the narrow routine booking question exception." *Hughes*, 346 Md. at 95 (quoting *Muniz*, 496 U.S. at 602 n.14). "Even if a question appears innocuous on its face, . . . it may be beyond the scope of the routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response." *Hughes*, 346 Md. at 95. Whether "an otherwise routine question will evoke an incriminating response requires consideration of the totality of the circumstances in each case, with consideration given to the context in which the question is asked." *Id.* "Therefore, 'courts should carefully scrutinize the factual setting of each encounter of this type,' keeping in mind that the critical inquiry is whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." *Id.* at 95-96 (quoting *United States v. Avery*, 717 F.2d 1020, 1024 (6th Cir. 1983)). Although not dispositive, "[t]he intent of the police officer in posing the question may be relevant to a determination of the applicability of the exception[.]" *Hughes*, 346 Md. at 100.

Here, the evidence before the suppression court supports its conclusion that Mr. Brennan's statement to Cpl. Cummings fell within the routine booking question

exception. The court heard testimony including, among other things, that Cpl. Cummings asked Mr. Brennan questions only for the purpose of completing the "arrest record report," while waiting for other officers to transport Mr. Brennan to the police barracks, and that the questions he asked were limited to Mr. Brennan's name, date of birth, current address, phone number, and place of birth. Other officers then "finished the arrest process" at the police barracks. We discern no error in the suppression court's conclusion that Cpl. Cummings's questions were directed toward securing simple identifying information as part of the arrest process. Nothing in the record suggests that the request for Mr. Brennan's phone number was designed to elicit incriminating information.

Mr. Brennan argues that Cpl. Cummings's request for his phone number nonetheless fell outside of the scope of the routine booking question exception because the questioning "was not performed by an intake officer as part of the booking process," but rather was "performed by a law enforcement officer in the field investigating a crime as part of a known wiretap investigation." We are not convinced. Although the location of the questioning "has some bearing on whether a particular question constitutes interrogation, for which *Miranda* warnings are a prerequisite," *Hughes*, 346 Md. at 97, here, Cpl. Cummings asked only routine administrative questions for the purpose of completing an arrest record report while waiting for Mr. Brennan to be picked up by other officers. Moreover, the questions he asked were limited to those expressly identified by the Court of Appeals as examples of questions to which the "routine booking question exception will ordinarily extend." *Id.* at 95.

Mr. Brennan's argument that Cpl. Cummings knew or should have known that his request for Mr. Brennan's phone number was likely to elicit an incriminating response because he was identified through a wiretap investigation is closer to the mark. Under the circumstances of this case, however, we are not persuaded. Although Mr. Brennan's response to that question ultimately became an important piece of evidence at trial, that was only because the State's other evidence tying Mr. Brennan to that phone number was excluded when the State did not timely disclose it before trial. At the time of his arrest, however, Mr. Brennan had already been identified as connected to that phone number, and the record contains no suggestion that Cpl. Cummings could have been aware that the evidence would later be excluded. *See id.* ("The fact that the *answer* to a booking question assists the prosecution in proving its case is not determinative of whether a standard booking *question*, when posed, was *likely* to elicit an incriminating response."). We will, therefore, affirm the denial of Mr. Brennan's motion to suppress.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING AUDIO RECORDINGS OF THREE TELEPHONE CALLS UNDER THE CO-CONSPIRATOR EXCEPTION TO THE RULE AGAINST HEARSAY.

Mr. Brennan contends that the trial court erred in admitting audio recordings of three telephone calls in which Mr. Curry made statements to third parties indicating that he was engaged in the sale of Adderall. Mr. Brennan argues that the court was required to make an express finding as to the existence of a conspiracy between him and Mr. Curry before the recordings could be admitted under the co-conspirator exception to the rule against hearsay, and that the court failed to do so. Mr. Brennan also argues that even if an express

finding was not required, the court erred because there was insufficient evidence in the record to support the existence of a conspiracy.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Although hearsay is generally inadmissible, *see* Md. Rule 5-802, "[a]n out-of-court-statement is admissible, . . . 'if it is not being offered for the truth of the matter asserted or if it falls within one of the recognized exceptions to the hearsay rule,'" *In re Matthew S.*, 199 Md. App. 436, 463 (2011) (quoting *Conyers v. State*, 354 Md. 132, 158 (1999)). "[A]ppellate review of whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible, is *de novo*." *Hallowell v. State*, 235 Md. App. 484, 522 (2018).

One exception to the hearsay rule permits the admission of "[a] statement by a coconspirator of the party during the course and in furtherance of the conspiracy." Md. Rule 5-803(a)(5). "As a prerequisite for the admission of such statements, however, the prosecution must first establish, through evidence *aliunde* [i.e., from another source], the existence of the conspiracy allegedly furthered by the statements." *State v. Baxter*, 92 Md. App. 213, 225 (1992), *rev'd on other grounds*, 329 Md. 290 (1993). The proof of the conspiracy must be established by a preponderance of the evidence. *Ezenwa v. State*, 82 Md. App. 489, 513 (1990).

That said, "[t]he Court of Appeals has made clear that 'it is not necessary that a conspiracy be conclusively established *before* the declarations are admissible. Flexibility

in the order of proof is allowed.'" *Id.* (quoting *Grandison v. State*, 305 Md. 685, 733 (1986)). Moreover, case law does not require that the trial court make an express, on-the-record finding as to the existence of a conspiracy before a declaration may be admitted, rather than an implicit finding. In *Grandison*, for instance, the Court relied on the record as a whole, and not any particular finding by the trial court, in holding that "there was ample evidence presented, independent of the challenged hearsay statements, of the existence of a conspiracy to justify the trial court's application of this hearsay exception." 305 Md. at 734. Similarly, in *Ezenwa*, this Court held that a trial court had satisfied its responsibility of determining whether a conspiracy had been established by a preponderance of the evidence in admitting a co-conspirator's hearsay statements. 82 Md. App. at 512-13. In so doing, we did not mention any particular finding by the trial court; rather, we highlighted the evidence submitted to the trial court when it made its ruling. *Id.* at 513-14.

Here, we hold that the trial court did not err in admitting the recordings pursuant to Rule 5-803(a)(5).[1] Before the admission of the recordings, the State had introduced into evidence the text messages between Mr. Curry and Mr. Brennan concerning Adderall and money, and Det. Dwyer's testimony regarding Mr. Curry's involvement in the distribution of various drugs. That evidence was sufficient for the court to infer the existence of a

[1] The State argues that Mr. Brennan failed to preserve his argument because "he did not raise the specific argument he now pursues on appeal." We disagree. At trial, when defense counsel objected to the admission of the recordings, he argued that the co-conspirator exception to the hearsay rule did not apply because there was no established connection between "Mr. Curry and any conspiracy with Mr. Brennan." That argument is effectively the same argument he now raises.

conspiracy between Mr. Curry and Mr. Brennan to distribute Adderall. And the recordings themselves contained statements supporting Mr. Curry's participation in the sale of Adderall. Thus, at the time the State sought to admit the recordings, the trial court had before it ample evidence from which to find, by a preponderance, the existence of a conspiracy between Mr. Curry and Mr. Brennan and that Mr. Curry's recorded statements furthered that conspiracy. The court's conclusion to that effect was implicit in its admission of the evidence based on the co-conspirator exception to the hearsay rule. *See Bellard v. State*, 229 Md. App. 312, 346 (2016) ("Judges are presumed to know and apply the law correctly[.]").

III. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUSTAIN MR. BRENNAN'S CONVICTION FOR CONSPIRACY TO DISTRIBUTE ADDERALL.

Mr. Brennan contends that the evidence adduced at trial was insufficient to convict him of conspiracy to distribute amphetamines. He asserts that, at most, the evidence established a "buyer-seller" relationship between him and Mr. Curry. We disagree.

"The test of 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). "The same review 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 eyewitnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "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." *Darling v. State*, 232 Md. App. 430, 465 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004)). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (quoting *Cox v. State*, 421 Md. 630, 657 (2011)). Further, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314 (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)).

"To establish a conspiracy, the State must prove that two or more persons combined or agreed to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Savage v. State*, 226 Md. App. 166, 174 (2015). "When the object of the conspiracy is the commission of another crime, . . . the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed." *Mitchell v. State*, 363 Md. 130, 146 (2001). "The essence of a criminal conspiracy is an unlawful agreement," and "[t]he crime of conspiracy is complete when the agreement to undertake the illegal act is formed." *Savage*, 226 Md. App. at 174; *see Townes v. State*, 314 Md. 71, 75 (1988) ("[T]he crime [of conspiracy] is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.").

"The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Townes*, 314 Md. at 75. "A conspiracy may be shown through circumstantial evidence, from which a common scheme may be inferred." *Hall v. State*, 233 Md. App. 118, 138 (2017); *see also Carroll v. State*, 202 Md. App. 487, 505 (2011) ("[I]t is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose[.]" (quoting *Armstead v. State*, 195 Md. App. 599, 646 (2010))).

Here, the State was "only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." *Carroll*, 202 Md. App. at 505 (quoting *Armstead*, 195 Md. App. at 646). The State met this burden by adducing sufficient evidence from which a rational juror could conclude beyond a reasonable doubt that Mr. Brennan conspired with Mr. Curry to distribute Adderall. Among other things, that evidence included: (1) Det. Dwyer's testimony that his investigation revealed that Mr. Curry had been involved in selling various drugs, including Adderall; (2) the text messages between Mr. Brennan and Mr. Curry, in which they both mentioned "Adderall," referenced Mr. Brennan being in possession of Mr. Curry's Adderall, and specified places where Mr. Brennan should "leave the money" for Mr. Curry; (3) recordings between Mr. Curry and other individuals related to the sale of Adderall; and (4) testimony that on two occasions, Mr. Curry had been seen going into Mr. Brennan's residence for brief periods.

From that evidence, a reasonable jury could infer that Mr. Curry illicitly sold Adderall and that Mr. Brennan agreed to participate in that endeavor by holding Adderall

and money for Mr. Curry to use as part of his drug distribution network. We therefore conclude that there was sufficient evidence before the jury to convict Mr. Brennan of conspiracy to distribute amphetamines.

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