Circuit Court for Montgomery County
Case No. 137753C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1269

September Term, 2021

GASPAR RIVO DELA CRUZ

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 29, 2022

A jury in the Circuit Court for Montgomery County convicted appellant, Gaspar Rivo Dela Cruz, of first-degree burglary, conspiracy to commit first-degree burglary, theft of property valued between $25,000 and $100,000, and conspiracy to commit theft of property valued between $25,000 and $100,000. The trial court sentenced Dela Cruz to a total prison term of 20 years, suspending all but three years. On appeal, Dela Cruz asks us to consider whether the trial court erred by (1) not informing him of a note from the jury during deliberations, and the court's response to that note, until after the jury was excused; (2) permitting several State's witnesses to identify him from a surveillance video; and (3) imposing multiple sentences for one conspiracy. The State concedes, and we agree, that the separate sentences for conspiracy to commit first-degree burglary and conspiracy to commit theft of property valued between $25,000 and $100,000 are improper. We therefore vacate the sentence imposed for the charge of conspiracy to commit theft of property valued between $25,000 and $100,000. For the reasons that follow, we will otherwise affirm the trial court's judgments.

FACTS AND LEGAL PROCEEDINGS

Dela Cruz and Camille Ortaliza were involved in a relationship for approximately seven years and share two children together. During their relationship, Dela Cruz, Camille, and the children spent a great deal of time, including numerous overnight visits, at the Montgomery County condominium owned by Camille's parents, Raymundo and Arceli

Ortaliza.[1] The Ortalizas, including Camille's brother Christian, who lived in his parents' condominium, treated Dela Cruz like family.

After Dela Cruz and Camille's relationship ended in 2019, Dela Cruz told Camille that he blamed her parents for preventing them from getting back together. Despite the lingering tension between Dela Cruz and the Ortalizas, however, Dela Cruz and Camille successfully co-parented their children, and in July 2020, Camille asked Dela Cruz if he would watch the children while she worked. When he asked why Raymundo and Arceli, the children's usual babysitters, could not watch them, Camille told Dela Cruz they would be out of town on vacation. Dela Cruz agreed and picked the children up at the home he once shared with Camille. Upon his arrival, the spare key to Raymundo and Arceli's condo was in its usual place in a basket with Camille's other keys.

When Raymundo and Arceli returned home from their vacation, nothing initially appeared amiss—the front door was locked and the condo was neat. When Christian returned home, however, he realized that the collectible toys that he had intended to sell were missing from his bedroom, along with approximately $5000 in cash. An inspection of Raymundo and Arceli's bedroom revealed that a lockbox containing cash, credit cards, jewelry, and other valuables was missing from underneath their bed, along with rolls of coins, and purses and watches that Arceli had intended to sell. Shortly thereafter, Camille realized that the extra key to her parents' condo was missing from her home.

[1] Because several members of the Ortaliza family were witnesses at trial, we will refer to them by their first names, for clarity.

After the Ortalizas reported the burglary, they reviewed video footage from a security camera positioned directly across the parking lot in front of their condo. The video, taken the day before the Ortalizas returned from their vacation, showed two men drive up to the condo building in broad daylight and park in front of the door to the Ortalizas' building. The Ortalizas identified the car as belonging to Dela Cruz. The two men remained in the car for about 25 minutes. They then made seven trips into the building, returning to the car with numerous items packaged in bags and trunks that the Ortalizas recognized as storing the items that they had determined to be missing. The Ortalizas all identified Dela Cruz as one of the men, even though his face was not visible in the video. Despite the execution of search warrants at Dela Cruz's vehicle and his mother's residence, none of the stolen items were recovered. The other man seen on the video with Dela Cruz was never identified.

DISCUSSION

I. JURY NOTE

Dela Cruz first argues that the trial court erred by not informing the defense until after the verdict had been read and the jury excused that the jury had sent the court a note during deliberations and that the court had responded to the note. Dela Cruz asserts that the court's actions violated Maryland Rule 4-326 and denied him the right to participate in all meaningful aspects of the trial.[2] The State responds that: (1) the court's action in relation

[2] Maryland Rule 4-326(d) mandates that, whenever a "court official or employee ... receives any written or oral communication from the jury or a juror[,]" the trial court must be notified, and if the communication "pertains to the action," the court

to the note cannot be characterized as a response to the jury's question; (2) if it were a response, Dela Cruz waived his right to appeal by failing to object or otherwise express concern over the court's action; and (3) even if the court had erred and the issue were preserved, any error to Dela Cruz was harmless.

After the trial court received the verdict and polled the jury, the court advised the jurors that their "jury service is complete" and excused them to retrieve their cell phones from the court clerk. Thereafter, the court spoke to the prosecutor and defense counsel:

> Okay. And for the record, we actually received a note from the jury, but they returned a verdict before we got a chance to even call you and tell you we had the note and respond to it. So the note says, "We need MPJI-CR-4.07." I don't know what that is. So we gave them burglary and theft, which is 406 and something else. So I don't know why they requested that one or what it is.[3] But they said, "We need MPJI-CR-4.07," and then beneath that it says, "Conspiracy for burglary and explanation of theft." So that's what the note says.
>
> So my clerk handed me the note, and she said that when the foreperson handed her the note, the foreperson also handed her the jury instructions. So I just told my clerk to tell them to read the jury instructions because it happened almost like that. They hadn't even had time to read them. So I said just tell them to read the instructions. So before I could even call you all and tell you that we had the note, they returned the verdict. So I'll give this to the clerk. So here's the verdict sheet.
>
> So is either party asking for a presentence investigation in this case?

Without further discussion about the jury note, defense counsel answered about the presentence investigation, and the court set a date for sentencing.

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must, before responding to the communication, "direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response." MD. R. 4-326(d)(2)(B)-(C).

[3] As we will discuss below, MPJI 4.07 is and was unrelated to the facts of this case.

We first address the State's argument that because Dela Cruz neither "objected to or expressed any concern with the way the jury note was handled," he has waived his right to raise this issue on appeal. In response, Dela Cruz contends that the trial court's delay in disclosing the jury's communication deprived him of "a meaningful opportunity to raise the issue, when it would have been practicable for the court to address the jury communication." Dela Cruz further argues that because the trial court did not reveal the communication until after the jury had been polled and excused, the court would not have been able to correct the error and any objection would have been futile at that point. *See* MD. R. 4-323(c) ("If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.").

Under Rule 8-131(a), an appellate court "[o]rdinarily … will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." "The word 'ordinarily' gives us discretion to consider issues not raised or decided below." *Stewart v. State*, 334 Md. 213, 221 (1994). Here, the State suffered no prejudice from Dela Cruz's failure to argue Rules 4-326(d) and 4-231 when the trial court did not disclose its receipt of a jury note until after the jury had been excused because there was no practical option available to cure the error at that late point in the proceedings. We, therefore, will exercise our discretion and consider Dela Cruz's argument based upon Rule 4-326(d), even though he did not argue the applicability of the Rule before the trial court. *See Denicolis v. State*, 378 Md. 646, 657-58

(2003) (reversing for violation of Rule 4-326 even though that rule was not argued in the circuit court because "neither [Denicolis] nor his attorney were informed about the [jury's] note until after the verdict was returned, the jury was discharged, and sentence was imposed"); *Stewart*, 334 Md. at 222 (choosing to exercise "discretion here to determine the propriety of the denial of the motion for a mistrial on the basis of Rules 4-326([d]) and 4-231 even though those Rules were not relied on by—or argued before—the trial court").

The requirements of Rule 4-326(d) originate from the right of a criminal defendant to be present at all critical stages of his trial. *Perez v. State*, 420 Md. 57, 64 (2011) (quoting *Bunch v. State*, 281 Md. 680, 883-84 (1978)). Rule 4-231(b) provides, with limited exceptions, that a "defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial." Importantly, "[a]ny communication pertaining to the action between the jury and the trial judge during the course of the jury's deliberations is a stage of the trial entitling the defendant to be present." *Stewart*, 334 Md. at 224-25. Because the "right is deemed 'absolute,' … a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right." *Id.* at 225.

Rule 4-326(d) provides "explicit guidance to a trial court in dealing with communications from the jury." *Perez*, 420 Md. at 63. It mandates that, whenever a "court official or employee ... receives any written or oral communication from the jury or a juror[,]" the trial court must be notified, and if the communication "pertains to the action," the court must, before responding to the communication, "direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response." MD. R. 4-326(d)(2)(B)-(C).

Compliance with these procedures is evaluated under the "harmless error" standard of review. *Gupta v. State*, 452 Md. 103, 124 (2017). The trial court's failure to properly disclose a communication "will not be considered harmless 'unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.'" *Id.* (quoting *Ogundipe v. State*, 424 Md. 58, 74 (2011)). *See also Gross v. State*, __ Md. __, No. 32, Sept. Term 2021, Slip Op. at 13 (August 26, 2022) ("[T]o establish that an error was harmless, the State must show beyond a reasonable doubt that the 'evidence admitted in error in no way influenced the verdict.'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Moreover, "'[a]s the beneficiary of the error, the State has the burden of establishing that it was not prejudicial,' and 'a reversal of the conviction is required unless the record demonstrates that the trial court's error in communicating with the jury *ex parte* did not prejudice the defendant.'" *State v. Harris*, 428 Md. 700, 721 (2012) (quoting *Taylor v. State*, 352 Md. 338, 354 (1998)) (cleaned up). We "must look to the record of what transpired in the circuit court to determine whether it 'affirmatively shows that the communication (or response or lack of response) was not prejudicial.'" *Gupta*, 452 Md. at 125 (quoting *Denicolis*, 378 Md. at 659) (cleaned up).

Here, the trial court did not comply with the mandates of Rule 4-326(d). It failed to: (1) notify the parties of the jury's communication before responding to it; (2) respond to the jury's communication in writing or orally in open court; and (3) notify the parties of the communication until after the jury rendered its verdict and was excused from service. We emphasize that the dictates of the Rule must be observed, even when a jury's note appears frivolous or misguided. The trial court's error here was, however, harmless.

The record reflects that the jury sent the note—"We need MPJI-CR.4:07 Conspiracy for Burglary & Explanation of Theft"—to the trial court almost immediately after being dismissed to deliberate. The trial court, unsure exactly what the jury was asking—MPJI-CR. 4:07 pertains to second-degree child abuse, not burglary or theft—advised the clerk to tell the jurors to read the jury instructions that had just been read in open court and given to them in printed form. In the trial court's opinion, the jurors had not yet had time to even read the instructions before presenting their note to the clerk. Then, before the court could notify Dela Cruz and the attorneys that the jury had sent a note and explain how the court had responded or would further respond, the jury notified the clerk it had reached a verdict.

The timing and sequence of events in this case—the jury's apparent failure to read the jury instructions (which included instructions on conspiracy, burglary, and theft), its request for an instruction unrelated to the charges at issue in the case, and its almost immediate rendering of a verdict after sending the note to the court—supports a finding that the jury's concern about the instruction dissipated once it reviewed the written instructions that it already been provided by the court. Thus, this is not a situation in which Dela Cruz and his counsel were "not provided with the opportunity to evaluate" the jury's emotional state or "to provide input on how to proceed." *Harris*, 428 Md. at 722. Moreover, the trial court's subsequent disclosure to the parties suggests that the court intended to notify them of the jury's note and consult about how to further respond, but simply had no time to do so because the jury returned its verdict almost immediately after sending the note to the court.

We conclude that the communications at issue here "'were not prejudicial [and] had no tendency to influence the verdict of the jury."' *Denicolis*, 378 Md. at 656 (quoting *Midgett v. State*, 216 Md. 26, 36 (1958)). Based on the particular facts of this case, we are persuaded that the trial court's error did not prejudice Dela Cruz, and the State therefore met its burden of establishing that the violation of Rule 4-326(d)(2)(C) was "harmless beyond a reasonable doubt."

II. IDENTIFICATION

Dela Cruz next asserts that the trial court erred in permitting members of the Ortaliza family to identify him as one of the burglars from the condo complex's security video. Dela Cruz argues that the poor quality of the video, along with the fact that the burglar's face could not be seen, failed to meet the requisite foundation for the admission of the identification testimony pursuant to MD. R. 5-701, usurped the function of the jury, was not relevant, and unduly prejudiced him. We disagree.

The parties stipulated to the admissibility of the security video that captured two men appearing to burglarize the Ortalizas' condo on July 30, 2020. Thereafter, Camille, over defense objection based on "the poor quality when it comes to facial recognition," identified Dela Cruz as one of the two men seen in the video. After viewing the video, the trial court ruled:

> Okay, so I just wanted to come up so we can put on record what we just saw. [T]he video … started at 3:30 in the afternoon on July 30th. It's a clear day. There's no lighting issue. The subject car is sort of dead in the center of the brightest part of the picture.
>
> And I agree with [defense counsel] that there's no way that you could … see the face of the person. But I would also say that if I knew that person

> I could pick that person out because of physical characteristics. That person is so short, very small, and has a certain frame and a certain size, walked a certain way, carried a backpack, driving his car and parking in front of I guess the victims' building. If I knew that person I would be able to (unintelligible) physicality of that person in the car, despite the fact that … if I was a stranger to that person I wouldn't be able to pick him out of a line-up, because I can't really see the face.
>
> So I agree this is not … like a photo array where a stranger is looking at a photograph of a face, but … obviously this is a good quality … video and it's very clear and bright, to see what there is to be seen.
>
> So [Camille] described her ability to identify this person, and it's not based upon seeing the person's face, but everything about what she's seeing in the video. So[,] based upon that, I'll overrule the objection.

The court added that "this particular witness was the defendant's fiancée for six years, known him for seven. They lived together, and so I think she has more than a sufficient basis of knowledge to know about the car he drives, about his physical appearance and the clothing that he wears, and the bag that he carries," even though she could not "see his face clearly enough to identify a stranger."

Again over objection, the other three members of the Ortaliza family identified Dela Cruz as one of the men in the security video. Raymundo testified that he was able to identify the man as Dela Cruz by his height, the way he dressed, and the way he walked. Arceli recognized Dela Cruz's shirt and pants, which she had often laundered for him during the seven years she had known him, with the trial court finding that she had "a sufficient basis of knowledge … to know what the defendant looks like." After Christian stated that he recognized "[e]verything" about Dela Cruz because "he is close to me," the trial court ruled that Christian, who considered Dela Cruz like a brother and saw him numerous times per week, was able to identify him from the video.

Maryland Rule 5-701 governs the admissibility of testimony by a lay witness. It provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Within the sound exercise of its discretion, a trial court should "admit lay opinion testimony if such testimony is derived from first-hand knowledge; is rationally connected to the underlying facts; is helpful to the trier of fact; and is not barred by any other rule of evidence." *Robinson v. State*, 348 Md. 104, 118 (1997).

Lay witness testimony identifying an individual in a photograph or video is permitted "'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than the jury.'" *Moreland v. State*, 207 Md. App. 563, 572 (2012) (quoting *Robinson v. Colorado*, 927 P.2d 381, 382 (Colo. 1996)). "'[A] lay witness who has substantial familiarity with the defendant, such as a family member or a person who has had numerous contacts with the defendant, may properly testify as to the identity of the defendant in a surveillance photograph [or video].'" *Id.* (quoting *Robinson*, 927 P.2d at 383). The "'intimacy level of the witness' familiarity with the defendant goes to the weight to be given the witness' testimony, not the admissibility of such testimony.'" *Id*. (quoting *Robinson*, 927 P.2d at 384).

Here, as the trial court carefully noted, the four members of the Ortaliza family who identified Dela Cruz as one of the burglars in the security video were all intimately familiar with him through their first-hand interactions with him. As a result of their intimate

familiarity with Dela Cruz, each member of Ortaliza family immediately recognized him from the security video—even though his face was not visible—by his short stature, gait, clothing, and vehicle. There was, therefore, a rational connection between the Ortalizas' perception that Dela Cruz was the person in the security video and their testimony identifying Dela Cruz. Their lay opinion testimony was "not based on speculation or conjecture, and did not amount to a mere conclusion or inference that the jury was capable of making on its own." *Id*. at 573.

The Ortalizas' familiarity with Dela Cruz provided, at the very least, "some basis" for the trial court to conclude that they were more likely to be able to identify Dela Cruz from the security video than was the jury, and their opinion was therefore helpful to the jury. Moreover, their opinion testimony identifying Dela Cruz was plainly relevant because it tended to show that Dela Cruz was one of the burglars, the central issue in the case. As a result, we conclude the trial court did not err or abuse its discretion in admitting into evidence Camille, Arceli, Raymundo, and Christian's testimony as to the identification.

III. SENTENCING

Finally, Dela Cruz contends that the trial court erred in imposing separate sentences for each of the two conspiracy convictions because Maryland law provides that only one sentence may be imposed for a single conspiracy, no matter how many criminal acts the conspirators have agreed to commit. The State acknowledges that the trial court erroneously imposed two separate sentences on the conspiracy charges, and we agree.

The trial court sentenced Dela Cruz to 20 years, suspending all but three years, for the conviction of conspiracy to commit first-degree burglary and to a separate, concurrent,

ten years, suspending all but three years, for the conviction of conspiracy to commit theft.[4] Dela Cruz and the State agree that there was but one conspiracy—to burglarize the Ortalizas' condo and steal the valuable items Dela Cruz knew to be inside.

"A criminal conspiracy is 'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444, (1985)). "The 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives.'" *Id.* at 13 (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)) (footnote omitted). "Ordinarily, a single agreement to engage in criminal activity does not become several conspiracies because it has as its purpose the commission of several offenses." *Mason*, 302 Md. at 445. A conspiracy "remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy." *Id.* The Double Jeopardy Clause of the 5th Amendment to the U.S.

[4] During the sentencing proceeding, the trial court orally announced its sentence—20 years for the burglary conviction, a concurrent 20 years for the conspiracy to commit burglary conviction, a concurrent ten years for the theft conviction, and a concurrent ten years for the conspiracy to commit theft conviction. The commitment record, however, reflects separate, concurrent, 20-year sentences for each of the four convictions.

"'When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails.'" *Lawson v. State*, 187 Md. App. 101, 108 (2009) (quoting *Douglas v. State*, 130 Md. App. 666, 673 (2000)). There has been no showing or allegation that the transcript of the sentencing proceeding in this matter is in error. Thus, we conclude that the correct sentences on the charges of theft of property valued between $25,000 and $100,000 and conspiracy to commit theft of property valued between $25,000 and $100,000 are ten years in prison. Accordingly, we will remand the matter to the trial court for correction of the commitment record to reflect the sentence that was announced in court. *See Potts v. State*, 231 Md. App. 398, 411 (2016) (remand is proper to correct commitment record to reflect the sentence that was announced in court).

Constitution prohibits the conviction and sentencing of a defendant for multiple counts of conspiracy unless the State proves the existence of multiple conspiracies. *Savage*, 212 Md. App. at 26.

The State properly concedes that the record contains evidence of only "a single conspiracy, with the goal to commit both burglary and theft[.]" Under these circumstances, the proper remedy is to vacate the lesser conviction and sentence. *See, e.g.*, *Jordan v. State*, 323 Md. 151, 161-62 (1991) (remanding for the court to vacate the lesser conspiracy conviction); *McClurkin v. State*, 222 Md. App. 461, 491 (2015) ("we shall leave standing the conviction and sentence for conspiracy to commit the crime with the greatest maximum penalty"). Because the greatest maximum penalty for conspiracy to commit first-degree burglary is 20 years in prison, *see* MD. CODE, CRIMINAL LAW ("CR") § 6-202(c), and the greatest maximum penalty for conspiracy to commit theft of property valued between $25,000 and $100,000 is ten years in prison, *see* CR § 7-104(g)(1)(ii), we will vacate Dela Cruz's conviction and sentence for conspiracy to commit theft of property valued between $25,000 and $100,000.

Ordinarily, when the sentences for the conspiracy convictions are imposed concurrent to the related non-conspiracy offenses, vacating all but one of the conspiracy convictions would not change the appellant's active period of incarceration and, therefore, a remand for sentencing would not be warranted. In this case, however, we will remand to the trial court to amend the commitment record in accordance with the transcript of the sentencing proceeding and with this opinion. *See supra* n. 4.

CASE REMANDED TO CIRCUIT COURT FOR MONTGOMERY COUNTY WITH INSTRUCTIONS TO VACATE CONVICTION AND SENTENCE FOR CONSPIRACY TO COMMIT THEFT OF PROPERTY VALUED BETWEEN $25,000 AND $100,000 AND TO AMEND THE COMMITMENT RECORD IN ACCORDANCE WITH THE TRANSCRIPT OF THE SENTENCING PROCEEDING AND THIS OPINION; JUDGMENTS OTHERWISE AFFIRMED; COSTS ASSESSED 2/3 TO APPELLANT AND 1/3 TO MONTGOMERY COUNTY.