UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1535

September Term, 2013

TON THOMAS

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: March 23, 2015

Appellant, Ton Thomas, was convicted in the Circuit Court for Baltimore City of one count of conspiracy to write, sign or possess a counterfeit liquor license; three counts of continuing scheme to steal goods valued over $500, two counts of writing fraudulent checks, and one count of conspiracy to commit a continuing scheme to steal goods valued over $500. Appellant was sentenced to eight years' incarceration for conspiracy to write, sign or possess a counterfeit liquor license, and to fifteen years' incarceration to be served consecutively for theft of goods valued over $500. The remaining sentences, a combination of consecutive and concurrent ten-year sentences, were suspended in favor of five years of supervised probation.

This case originally involved two indictments, the first containing twenty-five counts involving multiple victims, the second containing seven counts. Prior to trial, appellant moved to sever the two indictments and also to sever the twenty-five count indictment by victim. The court granted the motion to sever the two indictments, but denied appellant the opportunity to sever the twenty-five count indictment into separate cases by victim.

Appellant presents two questions for our review, which we have re-cast:[1]

1. Did the trial court err in denying the motion to sever?

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[1]Appellant presented the following questions:

1. Did the trial court err in denying the motion to sever?

2. Did the trial court err in allowing more than one conviction for conspiracy and/or in failing to merge the conviction and/or sentence for count 2 of the indictment (conspiracy to write, sign, possess a counterfeit liquor license) into the conviction and/or sentence for count 21 (conspiracy to commit theft scheme of victim Winner Distributing)?

2. Did the trial court err in sentencing appellant on two different counts of conspiracy?

For the reasons below, we shall affirm.

BACKGROUND

This case involves a theft scheme perpetrated by appellant in which he utilized a counterfeit liquor license and a counterfeit sales and use tax certificate to purchase quantities of liquor from distributors Reliable Churchill, Frederick P. Winner, Winner Distributing (a separate entity), and Republic National. These purchases were then paid for by using bad checks. In addition, appellant used bad checks to pay for orders from Sysco Foods. In each case, appellant set up new accounts with the victim businesses and faxed to them the counterfeit liquor license and counterfeit sales and use tax certificate. Each account listed the delivery address as 1701 West Baltimore Street, the business as T&J Lounge and Liquor, LLC, and the telephone number of 443-813-4273. The only exception to this account information was that Sysco Foods had the account under "New World Ministries" rather than T&J Lounge and Liquor, LLC. Each of the five victim companies received checks written from Ton and Dora Auto Sales, LLC, which were not honored for various reasons.

Detective David Greene of the Baltimore City Police Department conducted an investigation that led to appellant, his brother, Gilbert, and his step-son, Alvin Henry. Police initiated a sting operation in connection with a delivery from Reliable Churchill. In combination with the sting, police served a search and seizure warrant on 1701 West Baltimore Street where six or seven people were awaiting the delivery from Reliable

Churchill, including appellant, Gilbert, and Obo Ovienriakhi. A search warrant was also executed on appellant's residence. There police recovered computers, printers, blank checks, and digital cameras. Jerome Wiggs, a driver for Reliable Churchill, identified appellant in court as someone he had dealt with in making deliveries to 1701 West Baltimore Street.

Appellant was found to have stolen, via a theft scheme, $73,020.57 from the victim companies. Appellant provided a written *Mirandized* [2] statement to police in which he admitted creating bad checks exchange for food and alcohol. He also admitted to creating a counterfeit liquor license.

Additional facts will be presented as necessary for the discussion of the particular issues presented.

DISCUSSION

I.

Appellant first contends that the trial court erred when it did not sever the twenty-five count indictment by victim. Specifically, he asserts that under *McKnight v. State*, 280 Md. 604, 609-10 (1977), because there were multiple victims of separate crimes of a similar nature, a jury might infer a criminal disposition to appellant, causing prejudice. The State responds that the court did not err in refusing to sever the cases by victim. Relying on the two-part test announced in *Conyers v. State*, 345 Md. 525, 553 (1997), the State asserts that

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

the evidence in each case was mutually admissible and joinder was supported a judicial economy, thus permitting joinder.

After taking evidence and hearing argument on appellant's motion to sever, the court ruled:

> The *McKnight* [*v.*] *State* case 280 Md. 604 is a landmark case and it is a case that – Defense counsel makes a very persuasive argument; however, I do not believe that the precise holding in *McKnight* fits into the alleged flow of evidence that would proceed in this case. In part and at page 612 of *McKnight* which involved four robbery charges, and I quote 'in the record before us we conclude that the evidence offered to prove defendant's guilt on each of the four robbery charges would not have been mutually admissible against him had he been prosecuted in separate trials.'
>
> Based on the proffer and representation of the [Prosecutor], I believe that evidence of this scheme would be admissible.
>
> Now turning to page 613 of *McKnight* is a quotation from a book on evidence which I think is the best. And I quote, 'the signature exception has been described in this manner in see *McCormick* evidence, Section 190 at 449, Second Edition, 1972. To prove other like crimes by the accused so merely identical in method as to earmark them as the handy work of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class such as repeated burglaries or theft. The device used must be so unusual and distinctive as to be like a signature, based on the representation.'
>
> Based on the representation here there seems to be a common pattern here. Therefore, I am denying the motion in part, but granting it by separating the two indictments.

Maryland Rule 4-253(c) governs issues of prejudicial joinder and provides:

> (c) **Prejudicial joinder.** If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or

> defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

The Court of Appeals has set forth a two-part test to examine jury trial joinder issues:[3]

> (1) is evidence concerning the offenses or defendants mutually admissible; and (2) does the interest in judicial economy outweigh any other arguments favoring severance? If the answer to both questions is yes, then joinder of offenses or defendants is appropriate. In order to resolve question number one, a court must apply the first step of the "other crimes" analysis announced in [*State v.*] *Faulkner*[, 314 Md. 630 (1989)]. If question number one is answered in the negative, then there is no need to address question number two....

Lee v. State, 186 Md. App. 631, 670-71 (2009) (citation omitted), *rev'd on other grounds*, 418 Md. 136 (2011). If the evidence is held to be mutually admissible, then the circuit court exercises discretion to join or sever the charges, and its decision will be disturbed only where it has abused its discretion. *Id.* at 671. "The admissibility of other crimes or bad acts evidence, other than for impeachment purposes, is governed by longstanding evidentiary principles that are currently embodied in Md. Rule 5-404(b)." *Streater v. State*, 352 Md. 800, 806 (1999). Maryland Rule 5-404 provides:

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[3]Maryland Rule 4-203(a) governs the joinder of offenses and states:

> (a) **Multiple offenses.** Two or more offenses, whether felonies or misdemeanors or any combination thereof, may be charged in separate counts of the same charging document if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

In other words, "where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be improperly prejudiced by a joinder of the charges, there is no entitlement to severance." *Carter v. State*, 374 Md. 693, 705 (2003) (citations omitted).

We are persuaded that the facts presented to the motions court satisfied the strictures of Rule 5-404. The State's proffer demonstrated that the crimes charged were part of a common scheme or plan. Appellant created a counterfeit liquor license and sales and use tax certificate. He presented those documents to each company, usually via fax, so that he could purchase alcohol and food that was paid for on delivery with a bad check. The items were all delivered to 1701 West Baltimore Street. The same telephone number and business name was associated with each account, except for the business name on the account with Sysco. We are convinced that these similarities are sufficient to support a finding of a common scheme or plan.

Appellant's reliance on the *McKnight* case is misplaced. There, the Court of Appeals held that the evidence offered to prove appellant's guilt "would not have been mutually

admissible against him had he been prosecuted in separate trials." *McKnight*, 280 Md. at 612. In *McKnight*, the evidence of a common scheme was far weaker than in this case. In *McKnight*, the defendant was on trial for four separate robberies where the victims were solitary males who lived in the same neighborhood with the defendant, and where in three of the four instances, the victim's pants were ripped during the robberies. *Id.* at 613-14.

Because we are persuaded that the evidence in each one of these cases would be admissible in the others, we must now decide whether the court abused its discretion in joining the cases. We hold that it did not. "[O]nce a determination of mutual admissibility has been made, any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Conyers*, 345 Md. at 556. Judicial economy was served by having one trial instead of five separate trials. This suffices to permit joinder.

II.

Moving to his second contention, appellant asserts that the trial court erred in sentencing him for both the conspiracy to write, sign or possess a counterfeit liquor license and conspiracy to commit a continuing scheme to steal goods valued over $500 from Frederick P. Winner. Specifically, appellant contends that, because the conspiracy to counterfeit the liquor license was integral to the conspiracy to steal from Frederick P. Winner, sentencing him separately on each count violated the prohibition against double jeopardy and amounts to an illegal sentence. Appellant further claims that "the conviction

and/or sentence for count 2 must either be vacated or must merge with count 21." The State responds that if preserved, the court properly sentenced appellant separately on the two counts of conspiracy.

It is well settled in Maryland that "only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Jordan v. State*, 323 Md. 151 (1991). "Merger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test" and is mandated only where the convictions "'are based on the same act or acts.'" *Nicolas v. State*, 426 Md. 385, 408 (2012) (quoting *Holbrook v. State*, 364 Md. 354, 370 (2001)).

In *Khalifa v. State*, 382 Md. 400, 436 (2004), the Court of Appeals noted that "'[a] criminal conspiracy consists of 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.'" (quoting *Townes v. State*, 314 Md. 71, 75 (1988)); *Mason v. State*, 302 Md. 434, 444 (1985); *see also Tracy v. State*, 319 Md. 452, 459 (1990) (stating that "[t]he unit of prosecution is the agreement or combination rather than each of its criminal objectives"). Thus the "essence or gist of criminal conspiracy is an unlawful agreement." *Mason*, 302 Md. at 444.

We recently explained in *Savage v. State*, 212 Md. App. 1 (2013):

> In the multiple conspiracy context, the agreements are distinct, and independent from each other, in that each agreement has its own end, and each constitutes an end in itself. If the prosecution fails to present proof sufficient to establish a second conspiracy, it follows

> that there [is] merely one continuous conspiratorial relationship, or one ongoing criminal enterprise, that is evidenced by the multiple acts or agreements done in furtherance of it.

Id. at 17 (citations and quotations marks omitted).

In the case *sub judice*, the two conspiracy convictions did not merge because each conspiracy offense had distinct elements, and the trial court properly sentenced appellant on two separate counts of conspiracy. Appellant was charged with conspiring with two separate and distinct groups of individuals, and there was a continuing course of conduct or theft scheme committed by appellant in conspiracy with others. In count two, appellant was charged with conspiracy to write, sign, and possess a counterfeit document with Ovienriakhi, and other unknown individuals. In count twenty-one, appellant was charged with conspiracy to commit a theft scheme of goods valued at $500 or greater with Henry, Gilbert, Ovienriakhi and other unknown individuals. Thus appellant was charged with two conspiracies that had distinct agreements and each agreement had its own end. *See Savage*, 212 Md. App. at 17.

In *Savage*, the defendant was convicted, among other things, of two convictions of conspiracy to commit first degree burglary. *Id.* at 6. We considered whether the trial court's instructions adequately instructed the jury on separate counts of conspiracy, whether the State informed the jury during closing argument that there were multiple conspiracies, and whether the jury was asked to consider each charge individually and separately and likewise render a separate finding as to separate conspiracies. *Id.* at 26-31. We concluded that the court's instruction was not adequate to properly instruct the jury on separate conspiracy counts, the

State failed to prove separate conspiracies, and it was not until the jury raised the issue was the verdict sheet amended to show separate conspiracies. *Id.*

In the instant case, the jury was properly instructed by the trial judge regarding the elements of conspiracy and returned a verdict as to separate counts of conspiracy. The trial court instructed the jury as follows:

> [Appellant] is charged with the crime of conspiracy to carry out a theft scheme and counterfeit checks. Conspiracy is an agreement between two or more persons to commit a crime. In order to convict the defendant of conspiracy the State must prove one – the defendant agreed with at least one other person to commit the crimes of theft scheme and counterfeit check and two – the defendant entered into the agreement with the intent that the crimes to which [] he conspired be committed.

Although the trial judge referenced in its instruction to conspiracy to counterfeit checks, it is clear from the record that the trial judge was commenting on conspiracy to counterfeit a public document in count two. Immediately after the conspiracy instruction, the trial judge instructed the jury on the elements of counterfeiting a public document under § 8-605(a)(2). According to the record, appellant was not charged with conspiracy to counterfeit a check, but with conspiracy to counterfeit a public document.

We also note that the prosecutor argued that the two conspiracies were distinct. During closing argument the prosecutor stated that the trial judge "has given you full instructions on counterfeiting and theft" and the "first two charges that are charged against

[appellant] is count one[4] of counterfeiting a public document, the liquor license[s] and count two; conspiring to counterfeit the liquor license." The prosecutor further stated:

> And the evidence we have of this is the AIG Lounge [sic] license that goes to the bar that Mr. Obo was operating. We had certified evidence of State's Exhibit No. 16 that was submitted after being authenticated by Agent Fitzgerald from the Liquor Board. We also have the counterfeit liquor license that Agent Fitzgerald took a look at and in his expert opinion that it was counterfeit.
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> * * *
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> Now the question is, did [appellant] himself do it? Did he cut and paste? Did he have someone else cut and paste it? Well, really who took – was taking action as long as they were acting in concert[.]
>
> * * *
>
> Count 21. This one is a little different. This charge is that the [appellant] conspired with others to carry out a theft scheme during the period of December 12, 2008 through January 6, 2009 to steal goods from Frederick P. Winter valued over $500. And the State once again is referring to the [appellant's] confession[.]

The prosecutor's remarks suggested that appellant conspired with Obo to counterfeit the liquor license and "with others" to carry out a theft scheme regarding F. P. Winner. The State thus advanced the argument that conspiracies in count two and twenty-one were distinct – meaning that the jury had to find the existence of more than one agreement.

[4] Appellant was found not guilty of count one.

In contrast to *Savage*, the jury was asked to consider each charge individually and separately and render separate findings as to each conspiracy. The verdict sheet submitted to the jury showed in detail two separate conspiracies as follows:

VERDICT SHEET

> Did you find that the defendant Ton J. Thomas, committed the following on or about from November 24, 2008 to January 21, 2009 in Baltimore City, Maryland:
>
> * * *
>
> Count Two - Conspire with Ebhoria Obo Ovienriakhi and other persons to write, sign or possess a counterfeit document:; a liquor license.
>
> Not Guilty ____ Guilty ✓
>
> * * *
>
> Count Twenty One - Conspire with Alvin Henry, Gilbert Thomas, Ebhoria Obo Ovienriakhi and other unknown persons in a continuing scheme and course of conduct steal goods valued over $500 ($9,968.95) from Frederick P. Winner.
>
> Not Guilty ___ Guilty ✓

Thus the jury was called upon to return a verdict as to conspiracy to counterfeit a public document, and a separate verdict as to the conspiracy to commit a theft scheme for one victim only.

Finally, the State is correct in maintaining that appellant did not argue during trial that the evidence was insufficient to support two conspiracy convictions, nor did he take exception to the trial court's jury instruction on conspiracy. Moreover, appellant failed to

object to the verdict by the jury on the two counts of conspiracy, and to the court's sentencing on those counts. The State concedes, however, that no objection was required if the sentence imposed was illegal. *See Jordan*, 323 Md. at 161 (stating that the court imposed an illegal sentence under Rule 4-345(a) by imposing two conspiracy sentences although the defendant did not object to the two counts of conspiracy being submitted to the jury, did not object to the court's instructions on conspiracy, and also did not object to the jury's verdict).

In sum, we find that the trial court did not impose an illegal sentence when it imposed separate sentences on the convictions for two counts of conspiracy.

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