UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0346

September Term, 2016

THADDEUS CASIMIR SHORTZ

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 3, 2017

Thaddeus Casimir Shortz, appellant, was charged with thirty-nine counts[1] in the Circuit Court for Allegany County stemming from his alleged attempted use of a drone to deliver contraband to inmates at the Western Correctional Institution ("WCI").

Shortz was tried by jury on January 14-15, 2016. The jury acquitted Shortz of the two counts of conspiracy to possess with intent to distribute within 1000 feet of the Allegany County Career Center and the two counts of engaging in financial transactions involving proceeds derived from controlled dangerous substances offenses. The jury, however, found Shortz guilty of two counts of possession of a controlled dangerous substance, two counts of possession with intent to distribute, two counts of attempted distribution, two counts of conspiracy to distribute, possessing a firearm during and in relation to a drug trafficking offense, illegal possession of a firearm, wearing, carrying,

[1] The counts were as follows: two counts of possession of a controlled dangerous substance, two counts of possession with intent to distribute, two counts of attempted possession with intent to distribute, solicitation for the purpose of committing the crime of possession with intent to distribute, two counts of attempted distribution, two counts of conspiracy to distribute, two counts of conspiracy to possess with intent to distribute within 1000 feet of the Allegany County Career Center, two counts of engaging in financial transactions involving proceeds derived from controlled dangerous substance offenses, possessing a firearm during and in relation to a drug trafficking offense, illegal possession of a firearm, wearing, carrying, transporting a handgun, attempt to possess contraband in a place of confinement, and seventeen counts of attempting to deliver contraband into a place of confinement.

The State entered a *nolle prosequi* with respect to the following counts: two counts of attempted possession with intent to distribute, solicitation for the purpose of committing the crime of possession with intent to distribute, and attempt to possess contraband in a place of confinement.

transporting a handgun, and seventeen counts of attempting to deliver contraband into a place of confinement.

On April 12, 2016, Shortz was sentenced to prison for a total term of thirteen years. The circuit court imposed the following sentences: four years for each of the two counts of possession of a controlled dangerous substance; four years for each of the two counts of possession with intent to distribute; four years for each of the two counts of attempted distribution; four years for each of the two counts of conspiracy to distribute; thirteen years for possessing a firearm during and in relation to a drug trafficking offense; thirteen years for illegal possession of a firearm; thirteen years for wearing, carrying, transporting a handgun; and three years for each of the seventeen counts of attempting to deliver contraband into a place of confinement. This appeal followed.

QUESTIONS PRESENTED

1. Did the circuit court err by failing to comply with Md. Rule 4-215(e) or, alternatively, abuse its discretion in denying appellant's motion for continuance?

2. Did the circuit court err in denying appellant's motion to suppress?

3. Was the evidence insufficient to sustain appellant's handgun/firearm convictions?

4. Did the circuit court err in refusing to address appellant's complaints regarding the jury instructions?

5. Did the circuit court err by imposing separate sentences for multiple offenses?

STATEMENT OF FACTS

Suppression Hearing

On January 14, 2016, a hearing for Shortz's motion to suppress was held. Det. Pennie Kyle, Maryland State Police, testified regarding the arrest and resulting search.

On August 12, 2015, Det. Kyle participated in an investigation at WCI. At that time, Det. Kyle was assigned to the C3I Narcotics Unit in Allegany County. Det. Kyle was told by the Department of Corrections ("DOC") that an inmate at WCI by the name of Charles Brooks was receiving contraband through an "outside suspect" identified as Thaddeus Shortz. She was further advised that recorded phone calls between Brooks and Shortz indicated that Shortz "would be using a drone flying device to send in specific contraband, including, but not limited to, Suboxone, pornographic materials, CDs, synthetic marijuana or K2, a cell phone, and tobacco."

Acting on this information, Det. Kyle obtained a photograph of Shortz, MVA records of the vehicles registered to Shortz, and a photograph of a black 2015 Ford F-250 pickup truck, which Shortz co-owned according to the MVA record. She also learned that Shortz had been an inmate at WCI and, prior to his release in April 2015, had worked in the "same tier" as Brooks.

On August 22, 2015, Det. Kyle and Sergeant Andrew Farrell conducted a surveillance operation in parking lot areas outside of WCI. Det. Kyle was positioned in a parking lot behind WCI, from which she could observe vehicles turning onto Arnel Avenue, which turns into Hazmat Drive, and proceeds around the back of WCI. Sgt.

Farrell was positioned in the parking lot of a waste management business, from which he could see the rear of WCI.

At around 8:00 p.m., Det. Kyle observed a new-looking black Ford pickup truck turn onto Arnel Avenue. She advised Sgt. Farrell that the truck was headed in his direction. Sgt. Farrell advised that the truck stopped in a nearby parking lot. He further advised that the driver of the truck, whom he recognized from a photograph to be Shortz, exited the truck and appeared to be dressed in camouflage. A black male got out of the passenger side of the truck. Sgt. Farrell reported that the two men were passing binoculars back and forth in Sgt. Farrell's direction. Shortz then walked away from the black male in the direction of a building near Sgt. Farrell. Shortz looked in the windows of the building and proceeded to walk toward Sgt. Farrell's truck.

Det. Kyle testified that "Sgt. Farrell came out of the truck with his police vest and badge and placed [Shortz] in a prone position for officer safety purposes." Det. Kyle called for other units to assist. Sgt. Farrell stated that the black male dropped the binoculars and ran away. Another officer placed Shortz in the back of the officer's car "to be detained." Det. Kyle and the other officers pursued the black male.

As she passed the truck, Det. Kyle "peeked in the truck [and] [ ] observed a drone flying device that was on the rear seat, behind the passenger seat." She did not see anybody else in the truck. The officers caught up to the black male "who was standing on top of the ledge of a dumpster." They directed the male to drop the cellphone that was in his hands, and, in doing so, he dropped it in the dumpster. When he was apprehended,

he was identified as Keith Russell, also known as "K.K."[2] The officers retrieved the cellphone from the dumpster, along with a "two-way Motorola radio, the same kind that [ ] [Shortz] had."

While Sgt. Farrell spoke to Shortz, Det. Kyle searched the truck, based on a belief that she had probable cause. In addition to the drone, Det. Kyle found packages containing suspected synthetic marijuana and tobacco. She also found a Beretta PX Storm handgun loaded with thirteen .40 caliber bullets underneath the rear passenger seat. Upon this discovery, Det. Kyle informed Shortz that he was under arrest. Det. Kyle testified that it was impossible Shortz could have gone back to the truck and driven it away throughout the course of the events because he was "detained" in the officer's car. Russell was "detained" at the dumpster, which was "maybe ten yards away" from the truck.

Shortz moved to suppress the evidence found in the truck, arguing that it was obtained from an improper, warrantless search. In light of Det. Kyle's testimony, the circuit court found that there was sufficient probable cause to search the truck. The court denied the motion to suppress on the grounds that the contraband was in plain view and, although Det. Kyle testified that the search was not exigent, the totality of the circumstances made the warrantless search justified.

[2] According to the statements given to police, Shortz's nickname for Keith Russell is "K.K."

Trial

The jury two-day trial took place on January 14-15, 2016. The State's first witness was Lieutenant Jeff Shimko, a DOC investigator assigned to WCI. Lt. Shimko became involved in the investigation at WCI because his office "had received some actual intelligence to suggest that there was an operation to enter contraband into [WCI] via the use of a drone . . . from several sources . . . ."

Lt. Shimko developed a suspect in Brooks. Brooks was assigned to Housing Unit One, C Tier, which houses inmates selected for a program to train dogs for disabled veterans.[3] As a participant in the program, Brooks had access to an outside area where dogs were trained and allowed to relieve themselves. The area was accessed through a back door that inmates, often unescorted, used to move the dogs in and out. The door was typically left open or unlocked until 11:00 p.m. The door was about 15-20 yards from the rear of the prison.

Lt. Shimko testified that the phone system at WCI allows inmates to make calls to a list of preauthorized and determined numbers. The system records every outgoing phone call. On August 16, 2015, Brooks made three calls to a "240 number."[4] Although there was no name associated with this number on Brooks's call list, Lt. Shimko testified that the number belonged to Shortz based on information he received from supervisors in

[3] Brooks was a participant in the program during Shortz's incarceration. Lt. Shimko was unsure whether Shortz was an "actual puppy trainer," but he testified that Shortz "worked closely with all of those individuals and he knew the ins and outs of [the] program."

[4] Recordings of these calls were admitted into evidence.

a "compiled report." Lt. Shimko testified that the statement made by Shortz to Brooks during the first phone call that he was "going to my girl's home" was code, and actually meant that Shortz was going to the prison. Lt. Shimko believed that Shortz planned to come to WCI on Saturday, August 22, 2015, as the dogs would be at the facility on that day.

Det. Kyle, the state's second witness, recounted her testimony from the suppression hearing.[5] Sgt. Farrell testified next. His testimony corroborated that of Det. Kyle regarding the events of August 22, 2015. Sgt. Farrell testified that he advised Shortz of his Miranda rights. According to Sgt. Farrell, Shortz stated "that he was up there because K.K. [Russell] was attempting to fly stuff ['contraband, tobacco, DVDs'] across the wall." Shortz was transported to Maryland State Police Barracks, where he was again advised of his Miranda rights. Sgt. Farrell testified that Shortz understood his rights and gave a statement, which was not recorded.[6]

According to Sgt. Farrell, Shortz stated that he began receiving phone calls from inmates on the afternoon of August 22, 2015. The inmates were calling on cellphones that Shortz had previously delivered via drone. That same day, he picked up [Russell] at

[5] As noted in Shortz's brief, much of Det. Kyle's testimony overlaps with her testimony given at the suppression hearing regarding the events leading up to the search of the truck on August 22, 2015. The evidence discovered in the truck, including the handgun, controlled dangerous substances, and contraband, will be included in our discussion regarding the motion to suppress issue.

[6] During his testimony, Sgt. Farrell stated that he did not have Shortz put his statement in writing and he did not record the interview. He stated that he destroyed his notes of the interview after he completed his report.

a store. Russell entered Shortz's truck with a handgun, which Russell placed under the rear passenger seat. Shortz knew that the handgun was in the truck. After making calls to inmates, Shortz and Russell drove to the area behind WCI. Shortz stated that he and Russell looked around with binoculars. He approached the vehicle that Sgt. Farrell was in because he did not remember it being there during other drops.

According to Sgt. Farrell, Shortz identified himself as "one of the top people on the outside" with respect to the deliveries of contraband. Shortz stated that he made "five to six" previous drops or deliveries, all involving contraband, beginning in May 2015. Shortz stated that he would receive the contraband in a P.O. Box in Frederick County, package it at his residence, and then transport it to the prison. For the delivery to be made on August 22, 2015, to "an inmate named Charlie," Shortz would be paid $6,000.00. Shortz stated that he used money earned from the deliveries to make a $20,000.00 down payment on the 2015 Ford F-250 truck and to purchase a new drone.

The State's next witness was James Leer, Forensic Scientist Supervisor, Maryland State Police. Leer was admitted as an expert in the analysis of controlled dangerous substances. He testified that one of the items submitted as evidence contained a "substance called Five Fluro PB22," otherwise known as synthetic marijuana, which is a Schedule I controlled dangerous substance. Two other items contained a substance called Buprenorphine or Suboxone, a Schedule III controlled dangerous substance. A final item submitted contained "a synthetic cannabinoid called AB chiminaca," also a Schedule I controlled dangerous substance.

The State's final witness was Lieutenant Rodney Liken, Internal Investigation Division, Maryland State Police. Lt. Liken had been involved in an investigation related to Brooks in August 2015, having been advised by Lt. Shimko "that there was going to be introduction of contraband into the facility." The intelligence included information that Brooks had disassembled a drone that had crashed in WCI. Lt. Liken further testified that he was present with Sgt. Farrell for the interview of Shortz. He was able to identify both Shortz's voice and Brooks's voice as those in the three recorded phone calls from August 16, 2015.

Lt. Liken testified that the total value of the contraband seized on August 22, 2015, "if it were to be traded on an open marking within [WCI]," was approximately $35,000.00 to $40,000.00. He stated that the cellphone recovered from Brooks's cell was analyzed but "no specific data [was] recovered." No phone numbers were found on the cellphone, and no one from the outside could call and talk to someone on a cellphone in Brooks's unit. Lt. Liken did not have any information regarding previous deliveries of contraband or whether Shortz was linked to them.

DISCUSSION

I. Motion for Continuance

A. Waiver of Counsel

Shortz was initially represented by Sean Gallagher, an Assistant Public Defender, who entered his appearance on September 24, 2015. Private counsel, Robin Ficker, entered his appearance "as Counsel for defense in the [ ] matter" by Line of Appearance

dated December 23, 2015, and filed January 4, 2016. Ficker filed an unopposed motion for continuance based on scheduling conflicts. The motion was dated December 24, 2015, and filed January 4, 2016. In addition to the motion for continuance, Ficker filed a motion to suppress and other motions that he signed, representing that he was "Attorney for the Defendant."

A status conference, which is euphemistically called a cattle call, was held on January 12, 2015. Shortz's case was called, and the circuit court addressed Ficker's motion for continuance:

> BY THE COURT: Well, my inclination is to keep this on for Thursday, because I see all of the discovery has been out there forever and this case is, it is getting old. Is the State ready to try this case?
>
> BY THE STATE: Your Honor, the State can try the case Thursday.
>
> BY MR. FICKER: We . . . .
>
> BY THE COURT: Mr. Ficker?
>
> BY MR. FICKER: Your Honor, we, I just got in the case, Judge.
>
> BY THE COURT: Well, that's my concern. I mean you filed this less, less than a week ago. You just filed this, your appearance, so I don't think you file your appearance and request for continuance and expect a continuance of a case that had been scheduled for a long, long time. So that's my concern. What trial dates do you have available before, how about, let me ask you this. If I can find a date, I will consider continuing it. February 4th?
>
> BY THE STATE: The other issue, Your Honor, there are co-Defendants. One is set for, I believe, February 8th; the other just got set for March.
>
> BY THE COURT: All right, let's just keep this on. We are going to try this case Thursday. Mr. Gallagher can certainly do it, if you choose not to be here. Okay. Request for continuance is denied.

Thereafter, Gallagher, who apparently was in the courtroom on another matter, made his presence known and the circuit court accepted his in-court withdrawal of his appearance. Ficker did not object.

Shortz first argues that the circuit court erred in failing to comply with Md. Rule 4-215(e).[7] The Rule states, in pertinent part: "If the court finds that there is a meritorious reason for the defendant's request [for permission to discharge an attorney whose appearance has been entered], the court shall permit the discharge of counsel [and] continue the action if necessary . . . ." Md. Rule 4-215(e). A failure to comply with Md. Rule 4-215, governing waiver of counsel in a criminal case, constitutes reversible error because it would violate a "basic, fundamental and substantive right." *Broadwater v. State*, 401 Md. 175, 182 (2007) (quoting *Taylor v. State*, 20 Md. App. 404, 409 (1974)). We review the court's treatment of waiver of counsel for abuse of discretion. *Id.* at 204.

[7] Md. Rule 4-215(e) provides in full:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Shortz relies on *Gambrill v. State*, 437 Md. 292 (2014), in which the Court of Appeals addressed the issue of what constitutes a request to discharge counsel sufficient to trigger Md. Rule 4-215(e). In *Gambrill*, the defense counsel requested a postponement because the defendant had indicated that "he would like to hire private counsel in this matter." 437 Md. at 294. The circuit court denied the postponement without permitting the defendant to explain reasons for requesting discharge of counsel. *Id.* at 296. In reversing this Court's decision, the Court of Appeals held:

> Gambrill's request, perhaps ambiguous, was a statement from which the trial judge could have reasonably concluded that Gambrill wanted to discharge his public defender, triggering the inquiry and determination by the court under [Md.] Rule 4-215(e). When an ambiguous statement by a defendant or his or her counsel is made under [Md.] Rule 4-215(e), the fulcrum tips to the side of requiring a colloquy with the defendant.

Id. at 306-07. Shortz contends that Ficker's entry of appearance was a statement of his present desire to substitute counsel, and thereby should have triggered the inquiry and determination by the court under Md. Rule 4-215(e). *See id.*

The State, however, avers that a waiver of counsel was not implicated by Ficker's request, and that the holding in *Gambrill* is limited to instances where defendant sought to hire or obtain private counsel in the future. We agree. In the present case, the record shows that Shortz was already represented by private counsel at the time of the request for continuance on January 12, 2016. Ficker repeatedly represented to the circuit court that he was counsel for Shortz. Unlike *Gambrill*, this is not a case in which a defendant who is represented by a public defender seeks a continuance in order to "obtain" or "hire" private counsel.

There were no "red flags" of which the circuit court should have taken notice because Shortz never made any indication that he was dissatisfied with Gallagher, or that he had a *present* desire to substitute counsel. *See State v. Taylor*, 431 Md. 615, 633 (2013) ("Pre-trial statements indicating reasonably the defendant's present dissatisfaction with his or her attorney or the defendant's present desire to substitute counsel are 'red flags' for a trial court").

The circuit court properly denied the motion for continuance because Shortz's voluntary antecedent change from the assigned Public Defender to private counsel did not implicate Md. Rule 4-215(e).

B. Good Cause

Shortz next argues that, even if waiver of counsel was not implicated, the circuit court abused its discretion in denying the motion for continuance because good cause was shown, pursuant to Md. Rule 4-271(a). Shortz's argument, in essence, is that a postponement within 180 days should be automatic. We disagree.

The date for trial in the circuit court:

> [S]hall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to [Md.] Rule 4-213, and shall be not later than 180 days after the earlier of those events.

Md. Rule 4-271(a)(1). A change of the trial date may be granted on motion of a party and a showing of good cause. *Id.* However, where the State fails to bring the case to trial within the 180-day period and good cause has not been established, dismissal is the appropriate remedy. *State v. Hicks,* 285 Md. 310, 318 (1979) (now known as the *Hicks*

rule). We review the circuit court's decision regarding the continuance request for abuse of discretion. *State v. Frazier*, 298 Md. 422, 450 (1984).

Shortz claims that there was a showing of good cause due to the following: allowing Ficker an additional two and a half weeks to prepare for trial would have been within the 180-day Hicks date; there had been no prior postponement requests; there was no suggestion that Shortz's request was for the purpose of delay; and, there was no evidence that Shortz did not act diligently in retaining the services of Ficker. Shortz avers that given these facts, the circuit court acted arbitrarily when it denied the request to continue the case. Shortz also argues that the court could not have reasonably expected Ficker to be prepared in the time allowed due to the complexity of the case. Therefore, Shortz asserts that his Sixth Amendment right was violated.

The State responds that the plain language of the rule makes it clear that even if a defendant's reasons for requesting a change in trial date are meritorious, the trial court "*may* grant a change of a circuit court trial date" if it deems it necessary. *See* Md. Rule 4-271(a)(1) (emphasis added). "[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11 (1983) (citation omitted); *see Frazier,* 298 Md. at 450 ("The determination that there was or was not good cause for the postponement of a criminal trial has traditionally been viewed as a discretionary matter, rarely subject to reversal upon review.").

The circuit court received the motion eight days before trial. Ficker never indicated in the motion that he needed more time to prepare, only that he had a scheduling conflict. Furthermore, although this case contains unusual facts, *i.e.*, attempting to smuggle contraband into a prison by way of a drone, we agree with the State in that we cannot assume that it would make preparation for trial any more difficult or time-consuming for what we know is an extremely experienced defense counsel. While there were a large number of counts, there was a "commonality of time, location, purpose, recipient, and place of confinement . . . ." Further, there are only five State witnesses, all police officers, to be called by the State.

The circuit court properly exercised its discretion in denying the request for a continuance.

II. Motion to Suppress

Appellate review of a grant or denial of a motion to suppress is limited to the record of the suppression hearing. *Thomas v. State,* 429 Md. 246, 259 (2012). This Court will accept the factual findings of the suppression court and the circuit court's conclusions regarding the credibility of testimony unless they are clearly erroneous. *Id.* This Court reviews the court's denial of appellant's motion to suppress under "an independent *de novo* standard," as "appellate courts make their own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Longshore v. State,* 399 Md. 486, 499 (2007) (citations and quotations omitted).

The Fourth Amendment protects the right of all "to be secure in their persons, . . . against unreasonable searches and seizures." U.S. Const., amend IV. Article 26 of the Maryland Declaration of Rights also prohibits unreasonable searches and seizures. *See also Williams v. Prince George's Cnty.*, 112 Md. App. 526, 547 (1996) ("Article 26 of the Maryland Constitution is in *pari materia* with the Fourth Amendment of the federal constitution.").

Although a warrant is not absolutely required for a search, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). Under the automobile exception to the warrant requirement, a warrantless search of a vehicle is permitted if there is probably cause to believe that the vehicle contains contraband. *United States v. Ross*, 456 U.S. 798, 799 (1982). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Maryland v. Dyson*¸ 527 U.S. 465, 467 (1999) (citation omitted).

Shortz avers that, here, the automobile exception does not apply, arguing that (1) the police did not have probable cause to search the vehicle; (2) the circuit court erroneously found exigent circumstances; and (3) that inasmuch as the circuit court denied the motion on the basis of an inventory search exception, coupled implicitly with the inevitable discovery doctrine, the court erred. We interpret Shortz's argument as an

attempted assault upon the *Carroll* doctrine, but we will not take the bait and overrule over 90 years of jurisprudence as to this exception to the warrant requirement.

Unlike a dwelling, a vehicle can be searched without a search warrant if there is probable cause to believe that evidence is present in the vehicle, coupled with circumstances to believe that the vehicle could be removed from the area before a warrant is obtained. *Carroll v. United States,* 267 U.S. 132, 153 (1925). "Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles was concerned" the Supreme Court has identified that the constitutional difference "stems both from the ambulatory character of the [automobiles] and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." *Cady v. Dombrowski,* 413 U.S. 433, 442 (1973) (citations omitted).

As to probable cause, Shortz failed to preserve this claim. Shortz's suppression motion reads:

> In the present case, what the officer call a "probable cause" search was conducted on a parked vehicle that had no persons in it. Troopers observed it parked and watched the driver and passenger exit the vehicle. Those subjects were then arrested.
>
> Here a parked vehicle is being searched after the subjects of an investigation left the vehicle and were placed under arrest. There is absolutely no danger that the vehicle could be moved by the suspects or that any alleged contraband inside the vehicle could be tampered with.
>
> In the absence of exigent circumstances, an application for a search warrant of a vehicle is required.

> The facts indicate that this vehicle was already secure. This is not a vehicle on a highway, and there is no risk that any evidence within could be harmed while the Troopers obtain a warrant.
>
> The articles of evidence taken from Defendant by police authorities were seized as an illegal search and seizure.

Additionally, in the suppression hearing, defense counsel argued that no exigent circumstances existed but again failed to raise the issue of probable cause. Although the motion mentions probable cause, the bottom line of the motion is what happened after probable cause had been established. There was nothing in the motion or arguments of counsel that attempted to undermine the existence of probable cause. Thus, Shortz did not preserve the claim that "law enforcement lacked probable cause to search Appellant's truck" as argued in his brief. Md. Rule 8-131(a); *Brashear v. State,* 90 Md. App. 709, 720 (1992) (failure to argue a particular theory in support of suppression is waiver of that argument on appeal). As such, we do not address the merits of this argument.

We now turn to the assertion that the circuit court erroneously found exigent circumstances. On this issue, Shortz's counsel states only that the:

> trial court also erroneously found exigent circumstances based on the finding that there were no other officers present "to secure the vehicle." That finding is inconsistent with the testimony of Kyle and clearly erroneous. [Shortz] and Russell were no more able to gain access to the vehicle in question than were Coolidge and his wife in *Coolidge* [*v. New Hampshire*], 403 U.S. [443,] 464 [(1971)].

In *Coolidge,* the Court, in suppressing the search of the vehicle, stated that there was no suggestion that at the time of Coolidge's arrest "the car was being used for any illegal purpose," that the "objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous[,]" and that "was

no way in which he could conceivably have gained access to the automobile after the police arrived[,]" and concluded that the "opportunity for search was thus hardly 'fleeting.'" *Id.* at 460. Shortz invokes *Coolidge* to support his argument that because the drivers themselves could not access the Ford pickup truck, the Ford pickup truck was secure and, therefore, a warrant was required. However, here, unlike in *Coolidge,* the Ford pickup truck was being actively used in the commission of the illegal activity, the police suspected that dangerous and illegal items were in the Ford pickup truck, of which the presence of a drone was a key indication, and the hearing testimony includes that it was unknown who else may have had a key to the Ford pickup truck, including Shortz's mother. These differences distinguish *Coolidge* multiple times over. Rather, the facts here more suitably raise this Court's invocation of *Arizona v. Gant,* 556 U.S. 332 (2009), that "where there is a drug or gun charge, 'the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.'" *Thompson v. State,* 192 Md. App. 653, 677 (2010) (quoting *Gant,* 556 U.S. at 344). We conclude that the circuit court's finding of exigent circumstances was not clearly erroneous.

To complete our discussion on this issue, to any extent that the motion was denied based on the warrant exception for an inventory search, Shortz avers that there is no record to support an exception to the warrant requirement on the basis of an inventory search coupled with inevitable discovery doctrine. To support this claim, Shortz offers up only *Briscoe v. State*, 422 Md. 384, 400 (2011), where the Court of Appeals held that because the record was devoid of evidence demonstrating that "the vehicle's locked glove

compartment would have been inventoried according to departmental policy . . . we are unable to conclude that the [evidence] would have been discovered inevitably, in a later inventory search[.]"

Shortz fails to note the significant difference between *Briscoe* and the present case – the location of the evidence in a locked compartment, as opposed to in plain sight in the backseat of the vehicle. Although Shortz correctly asserts that there is no record of evidence as to departmental policy regarding inventory searches, the difference in a lack of evidence of policy related to inventory generally, compared to a lack of evidence of policy related to locked compartments, is certainly distinguishable. Further, in *Briscoe,* the issue of departmental policy was raised at trial, with lengthy testimony as to the department's policy regarding when and how vehicle searches occurred. *Id.* at 393-94. Here, the record is silent as to departmental policy regarding inventory searches. However, following arrests, when vehicles are impounded, and "local police departments generally follow a routine practice of securing and inventorying the automobiles' contents." *Duncan v. State,* 281 Md. 247, 256-57 (1977) (quoting *South Dakota v. Opperman,* 428 U.S. 364, 369 (1976)). Given the prevalence and standard nature of inventory searches, the lack of discussion regarding the search cannot be read to mean that an inventory search would not have occurred. The fact of subsequent inventory search of what was in plain view on the backseat of the vehicle was practically a foregone conclusion. If defense counsel had any reason to believe that the evidence would not have been seized in an inventory search, the issue should have been raised in the hearing, as it was in *Briscoe.*

The finding of the circuit court was not in error.

III. Sufficiency of the Evidence

Next, Shortz avers that the evidence was insufficient to sustain his conviction for wearing, carrying, and transporting a handgun (the "wear/carry charge") pursuant to Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 4-203; illegally possessing a regulated firearm pursuant to Md. Code (2003, 2011 Repl. Vol.), Public Safety Article ("PS") § 5-133; and firearm offenses related to drug trafficking pursuant to CL § 5-621. Specifically, Shortz contends that the evidence did not show "operability" or that it was a "firearm" as required.

The standard of review for a sufficiency challenge is whether, 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. Suddith,* 379 Md. 425, 429 (2004) (quoting *Jackson v. Virginia,* 443 U.S. 307, 313 (1979)). This Court gives due deference to the trier of fact's findings of facts, resolution of conflicting evidence, and its opportunity to observe and assess the credibility of witnesses. *Id.* at 430. On appeal, we review "not only the evidence in a light most favorable to the State, but also all reasonable inferences deducible from the evidence in a light most favorable to the State." *Smith v. State,* 415 Md. 174, 185-86 (2010) (citation omitted).

At trial, Det. Kyle testified that the item in question was "a handgun, a Beretta PX Storm .40 caliber handgun and it was loaded with thirteen bullets." A photograph of what Det. Kyle described was admitted into evidence, but the gun itself was not.

Although all handgun related offenses were discussed together at trial, it is important to note and distinguish the different statutes under which Shortz was charged and the specific evidence question, operability or firearm, was raised under each.

A. Sufficiency of the Evidence as to Operability

We first address the sufficiency of the evidence as to operability for the conviction for wearing, carrying, and transporting a handgun.[8]

CL § 4-203(a) provides in relevant part:

> (1) Except as provided in subsection (b) of this section, a person may not:
>
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;

"Handgun" means, "a pistol, revolver, or other firearm capable of being concealed on the person." CL § 4-201(c)(1).[9]

Shortz moved for judgment of acquittal at the close of the State's case, arguing:

> I would make an omnibus motion for judgment of acquittal at this point arguing that the State has not met its burden. Specifically on the gun charge, there is no evidence whatsoever that this gun is operable, so I would move to exclude the gun from evidence, and to dismiss the charges related to this gun, which has not been shown to be operable.

[8] Shortz only raises the issue of operability as to the charge for violation of CL § 4-203.

[9] "Handgun" also "includes a short-barreled shotgun and a short-barreled rifle" but "does not include a shotgun, rifle, or antique firearm." CL § 4-201(c).

Defense further stated, "I won't make argument as to the other counts simply because you have been here and you have heard all of the evidence recently."

The State responded that "at this point that [the State] has certainly met its burden relating to all of the charges, and specifically the gun charges. These gun charges do not require proof of operability. Simple possession." The circuit court denied the motion and stated, "I think under this statute I would agree. I don't think that is an element of the offense, that it be in good working order." On appeal, both parties agree that proof of operability is required for a charge under CL § 4-203.

Shortz attempts to persuade us that the motion should have been granted because no reasonable jury could infer that the handgun was operable from Det. Kyle's testimony. In *Pharr v. State*, 36 Md. App. 615, 632-33 (1977), this Court reversed a handgun conviction for lack of sufficient evidence where the assailant stated the gun used during the crime was a "silver blank gun" that was not loaded, and the gun was not produced during the investigation or trial. However, in the case at bar, the gun was recovered during the search, and Det. Kyle testified that it was a loaded handgun, making the facts of the case significantly different than those in *Pharr*.

Shortz further avers that there are no circumstances in Shortz's possession of the handgun that could establish operability and points to the lack of evidence in the record that he was familiar with firearms. *See Mangum v. State*, 342 Md. 392, 400-01 (1996) (where testimony that shortly before his arrest Petitioner had discharged a shotgun was evidence of operability). We disagree. The fact that the weapon was loaded is a circumstance which leads to an inference that it was operable. *York v. State*, 56 Md. App.

222, 230 n.2 (1983) ("One would not ordinarily load an inoperable firearm for use in a [crime]. Since it was loaded, it is apparent that [Shortz], at least, thought he could fire the weapon. This permits an inference that the gun could, indeed, have been fired."). *See also Brooks v. State,* 314 Md. 585, 589 n.3 (1989) (citing *York* as holding that a loaded gun permits an inference of operability).

The inference that a loaded gun was operable was particularly reasonable where, as here, the gun was found in close proximity to valuable contraband, worth between $35,000.00 and $40,000.00, "if it were to be traded on an open market within the Western Correctional Institution." When transporting contraband worth that much, including controlled substances, it is unlikely that someone seeking to protect the contraband would carry an inoperable weapon. We disagree with Shortz's conclusion that no reasonable jury could infer that the handgun was operable based on the trial testimony. Therefore, we find no error in the circuit court's denial of the motion for judgment of acquittal on the charge for violation of CL § 4-203, based on the unavoidable conclusion that there was sufficient evidence that the handgun was operable. The court came to the right conclusion but for the wrong reason.

B. Sufficiency of Evidence as to the Item as a "Firearm"

Next, we turn to Shortz's challenge of the sufficiency of the evidence as to whether the State met its burden on proving that the handgun was a "firearm" as it related to the charges for illegally possessing a regulated firearm.

In order to convict Shortz of violating PS § 5-133(c) and CL § 5-621(b), the State must prove that the item in question was a firearm. "Firearm" means "a weapon that

expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or the frame or receiver of such a weapon." PS § 5-101(h). A "handgun" is defined as "a firearm with a barrel less than 16 inches in length." PS § 5-101(n)(1).

This issue was not raised in the motion for judgment of acquittal. Under Md. Rule 4-324(a), a defendant is required to argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient. *See State v. Lyles*, 308 Md. 129, 135 (1986) (discussing the requirement of raising particular arguments for sufficiency of the evidence in a motion for judgment of acquittal in order to preserve the specific issue for appeal). The issue is therefore not preserved, and we need not address it on its merits.

Assuming *arguendo* that it had been raised, Det. Kyle's testimony would also be sufficient to establish that the item in question was indeed a "firearm." Det. Kyle's testimony shows that the item was a firearm in three ways: by indicating that it was a "handgun;" by using the name of a manufacturer that is widely known to be a firearm manufacturer (Beretta); and by using a term that is widely known to refer to a firearm (".40 caliber"). This testimony was further supported by the photograph of the gun that was admitted as an exhibit. Thus, even if preserved, we disagree that no reasonable person could find sufficient evidence that the item in question was a firearm.

IV. Jury instruction

Next, Shortz seeks review of several aspects of the jury instruction. Shortz states that the circuit court "refused to instruct the jury that the State must prove the operability

of the . . . handgun," propounded an erroneous instruction on the State's burden of proving reasonable doubt by failing to instruct that the State was required to prove beyond a reasonable doubt "each element" of the offenses charged, and the court propounded other erroneous and confusing instructions. Shortz asserts that defense counsel objected to the court's failure to give the instruction on operability, but he requests that this Court review the other challenges for plain error.

Jury instructions "are reviewed in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State,* 373 Md. 426, 433 (2002) (citing *Bruce v. State,* 318 Md. 706, 731-32 (1990)). This Court reviews a trial court's refusal to give a jury instruction under the abuse of discretion standard. *Bazzle v. State,* 426 Md. 541, 548 (2012). Whether "the evidence is sufficient to generate the requested instruction in the first instance is a question of law," subject to *de novo* review. *Fleming*, 373 Md. at 433 (citation omitted). Further, an appellate court, on its own initiative or on the suggestion of a party, may take cognizance of any plain error in the instructions, material to the rights of the defendant, even where no objection was made at trial. Md. Rule 4-325(e).

We first look to the question of the instruction requiring proof of operability. Before addressing the merits of the question, we look to the State's assertions that this issue was: (a) waived, because defense counsel affirmatively represented that he was not requesting any other instruction; (b) not preserved, because he did not comply with Md.

Rule 4-325(c); and (c) that Shortz acquiesced to the circuit court's action by not disputing the prosecutor's characterization.

The jury instruction for all three gun related offenses was, in relevant part, as follows:

> The Defendant is charged with the crime of possessing a firearm during an in relation to a drug trafficking crime.
>
> ***
>
> If your verdict is guilty on the drug trafficking crime, you will continue to consider whether the Defendant possessed a firearm in connection with a drug trafficking crime. In order to convict the Defendant the State must prove in addition to the drug trafficking crime that the Defendant possessed a firearm during the crime and that there was a connection between the Defendant's possession of the firearm and the crime of possession with the intent to distribute and/or distribution.
>
> ***
>
> A firearm is a weapon that fires, is designed to fire, or may readily be converted into fire to fire a projectile . . . .
>
> ***
>
> The State does not have to prove that the weapon was operable. The Defendant is charged with the crime of using a firearm during and in relation to or wearing or carrying or transporting a firearm during and in relation to a drug trafficking crime.

At the conclusion of the instructions, the trial judge asked if there were "any additional requests or instructions or exceptions[.]" Defense counsel responded in the affirmative. The following bench conference ensued:

> Defense Counsel: When we were up here a few minutes ago, we talked about the gun and you said that the State does not have to prove the weapon is operable, and that's the instruction for controlled dangerous substances, possession of firearm (inaudible). There are two of the functions dealing with handguns or firearms. Counts eighteen and nineteen,[10] isn't it necessary, in the instructions, umm . . .

[10] Count nineteen is the wear/carry charge.

State: Your Honor, the statue and the law speaks clearly, you have to prove that it is used in a murder or a crime of violence or something like that, but where it is a transport, clearly you do not. And possession of a regulated firearm, you do not (inaudible), you do not have to prove it is operable.

Court: Any other exceptions?

Defense Counsel: So, so it is true that they do not have to prove that the, that the handgun is operable for both, what is listed in the instructions as Count eighteen and Count nineteen?

Court: Anything else?

State: That's the State's position; we don't have to prove operable.

Court: Any other exceptions?

Defense Counsel: No.

Although defense counsel did not state an explicit objection, he again raised the issue of operability during the bench conference following jury instructions, stating his position regarding the requirement of proof of operability. By raising the issue again in the conference, "counsel did not retreat from the position that he had taken earlier" – that operability was indeed a required element for a conviction of the wear/carry charge. *Sharp v. State,* 446 Md. 669, 684 (2016) (where continuing to raise the same issue, without stating an explicit objection, was seen as sufficient to preserve an issue for appeal). However, both parties agree that operability is a required element of the wear/carry charge and the issue itself is not disputed here. Rather, what is disputed here is the lack of *instruction* as to the requirement of proof of operability.

At this point in the trial, it appears that Shortz did not acquiesce to the circuit court's actions. However, Shortz failed to explicitly request an affirmative instruction

regarding operability for the wear/carry charge. Although he vaguely raised the issue, at no time did Shortz request a jury instruction regarding operability for the wear/carry charge. Hearing no request from defense counsel, the court gave the pattern jury instruction for the wear/carry charge which was a verbatim quotation of CL § 4-203(a).[11] Further, Md. Rule 4-325(e) states that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." *See also Sydor v. State,* 133 Md. App. 173, 181-82 (2000) (applying the rule before addressing the merits of a jury instruction question on appeal). The Rule requires that the offended party object to the given jury instruction before the jury retires to deliberate. When we get to the end of what was a somewhat confusing discussion between counsel and the court, we conclude that Shortz failed to take

[11] That section provides that a person may not:

> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;
>
> (iii) violate item (i) or (ii) of this paragraph while on public school property in the State; or
>
> (iv) violate item (i) or (ii) of this paragraph with the deliberate purpose of injuring or killing another person.

CL § 4-203(a).

exception to the language of the pattern jury instruction. Accordingly, we conclude that Shortz failed to preserve the issue for review.

Although Shortz raises two additional questions before us now, requesting review for plain error, we find no merit in the argument and decline to review the jury instruction in its entirety.

V. Sentencing

Finally, Shortz avers that the circuit court erred by imposing separate sentences for multiple offenses, asserting that the sentences should have merged under the Double Jeopardy Clause and Maryland common law. "Both the Federal Constitution, through the Fifth and Fourteenth Amendments, and Maryland common law prohibit the State from placing a person twice in jeopardy for the same offense." *Anderson v. State,* 385 Md. 123, 130 (2005). These protections prohibit imposing multiple punishments for the "same offense." *Id.* (citing *Brown v. Ohio*, 432 U.S. 161 (1977); *Purnell v. State*, 375 Md. 678 (2003)). This includes cases like Shortz's, "where a single statute may be read as creating multiple units of prosecution . . . ." *Id.* at 131.

Specifically, Shortz asks this Court to review the multiples sentences for his convictions under CL § 5-621(b), multiple sentences for his drug-related convictions, and multiple sentences for attempting to possess contraband with the intent to deliver in a place of confinement.

A. Sentences for CL § 5-621(b)

CL § 5-621(b) provides:

During and in relation to a drug trafficking crime, a person may not:

> (1) Possess a firearm under sufficient circumstances to constitute a nexus to the drug trafficking crime; or
>
> (2) Use, wear, carry, or transport a firearm.

Shortz was sentenced to thirteen years' incarceration under CL § 5-621(b)(1) and a similar thirteen-year sentence under CL § 5-621(b)(2). He now attempts to persuade us that the charges should have merged and argues that the "use, wear, carry" element of (b)(1) requires proof of the "possess" element of (b)(2), and proof of the "nexus" element of (b)(1) requires proof of the "[d]uring and in relation to" element of (b), incorporated within (b)(2), requiring merger under the required evidence test. Alternatively, Shortz argues that the rule of lenity requires merger.

The standard to be used in resolving the sameness in law issue for purposes of the Constitutional prohibition on double jeopardy is the "required evidence" test. *Anderson,* 385 Md. at 131 (citing *Blockburger v. United States,* 284 U.S. 299 (1932)). The required evidence test provides that "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former mergers into the latter." *Moore v. State,* 163 Md. App. 305, 314 (2005) (citation omitted).

We agree with Shortz that the required evidence test requires merger. The State attempts to persuade us that Shortz possessed the firearm because it was sitting in the truck, implicating subsection (b)(1), but that he also transported it because the police saw him drive to the location near the prison, implicating subsection (b)(2). This argument

fails to identify how the gun's presence in the truck, which is required for possession, is a distinct element from the gun being in the truck while being transported.

The two charges under CL § 5-621(b) should have merged for the purposes of sentencing.

B. Sentences for drug-related offenses

Shortz avers that the circuit court erred in imposing separate sentences for conspiracy. The court imposed four-year sentences for the following: conspiracy to possess Suboxone with intent to distribute, conspiracy to distribute Suboxone, conspiracy to possess synthetic marijuana with the intent to distribute, and conspiracy to distribute synthetic marijuana. The Court of Appeals has held that 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. The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990); *accord Somers v. State*, 156 Md. App. 279, 317 (2004). The State agrees with this error, as do we.

The four conspiracy related charges should have merged for the purposes of sentencing.

C. Sentences for attempted distribution and possession with intent to distribute

Next, Shortz avers that the circuit court erred in imposing separate sentences for attempted distribution and possession with intent to distribute, arguing that the sentences

for attempted distribution of Suboxone and synthetic marijuana merge into possession with intent to distribute Suboxone and synthetic marijuana, respectively.

We again look first to the required evidence test. Shortz asserts that the proof of possession suffices as proof of attempt. *See Young v. State,* 303 Md. 298, 312 (1985) ("the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law to constitute a substantial step: . . . (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances[.]"

In *Hankins v. State,* 80 Md. App. 647, 657-59 (1989), this Court concluded that "intent to distribute [] is a lesser-included offense in the crime of distribution" and the "intent to distribute is implied in the transfer from one person to another[.]" The State attempts to distinguish *Hankins* by noting that, here, we have an *attempted* distribution, rather than distribution itself. However, it seems obvious that since attempted distribution is a lesser-included offense that would merge into distribution upon completion, the sentiment and logic behind the conclusion in *Hankins* will obviously apply here as well.

The State fails to make any argument, much less a sufficient one, as to how the charges would fail to merge under the required element test. As such, we hold that the charge for possession with intent to distribute Suboxone should have merged with the charge for attempted distribution of Suboxone, and the charge for possession with intent

to distribute synthetic marijuana should have merged with the charge for attempted distribution of synthetic marijuana.

D. Sentences for attempting to possess contraband with the intent to deliver to a place of confinement

Finally, Shortz avers that the circuit court erred in imposing separate sentences under CL § 9-412 for various convictions of attempting to possess contraband with the intent to deliver to a place of confinement. The court imposed three-year sentences for four counts with respect to tobacco,[12] and also three-year sentences for nine counts with respect to pornographic DVDs. CL § 9-412 provides in relevant part:

> (a) A person may not:
>
> (2) possess any contraband with intent to deliver it to a person detained or confined in a place of confinement . . . .

Shortz argues that the imposition of thirteen separate sentences violates the double-jeopardy clause and attempts to persuade us that, based on the commonality of time, location, purpose, recipient, and place of confinement, the unit of prosecution is a single act of possession with intent to deliver, and therefore, a single offense. Alternatively, Shortz asks that we conclude that there were two offenses – one based on the tobacco and the other based on the pornographic DVDs. We agree with the latter conclusion.

[12] These charges resulted from four individual baggies of tobacco. Two were plastic baggies with approximately five ounces of tobacco, and two were plastic baggies with tobacco that also included 200 premium rolling papers.

In *Anderson*, 385 Md. at 135-39, the Court of Appeals discussed the units of prosecution for possession of contraband including drugs and handguns in several different hypothetical situations, evaluating the situations for "commonality of time, location, and purpose." Here, there is no doubt that the items share a common time and location. The question revolves around their purpose, and whether each item served an individual purpose, if their purposes are grouped by their overarching identifiers of tobacco or pornography, or if they all share a common purpose as contraband for sale on the prison market.

The different types of contraband – tobacco and pornographic DVDs – infer a different purpose on the part of the suspect and different purposes in banning the different types of contraband on the part of the prison. However, the differences between the baggies of tobacco themselves and the differences between the individual pornographic DVDs cannot be distinguished. Accordingly, we conclude that the four charges for possession with intent to distribute related to tobacco should have merged, and the nine charges for possession with intent to distribute related to pornographic DVDs should have merged, leaving two three-year sentences for charges under CL § 9-412.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR THE PURPOSE OF MERGING SENTENCES, CONSISTENT WITH THIS OPINION.

COSTS ASSESSED AS FOLLOWS:
80% TO BE PAID BY APPELLANT AND 20% TO BE PAID BY ALLEGANY COUNTY.