

Circuit Court for Baltimore County
Case No. C-03-CR-21-003621

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0188

September Term, 2023

KYREE NASIR GREGORY

v.

STATE OF MARYLAND

Leahy,
Reed,
Ripken,

JJ.

Opinion by Leahy, J.

Filed: March 11, 2025

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On August 18, 2022, Baltimore County Police were surveilling appellant, Kyree Nasir Gregory (“Gregory”), because they had developed probable cause to arrest Gregory and had obtained a search-and-seizure warrant for Gregory’s DNA. That afternoon, they observed Gregory leave his home, carrying a black backpack, and get into the back seat of a Toyota Camry. Police stopped the vehicle, operated by a Lyft driver, and with the Lyft driver’s consent, they searched the vehicle and found a loaded semi-automatic handgun on the floor in the back of the car partially under the driver’s seat.

Following a jury trial in the Circuit Court for Baltimore County, Gregory was convicted of the following:

Count 1: illegal possession of regulated firearm, Maryland Code (2003, 2022 Repl. Vol.), Public Safety Article (“PS”) § 5–133(b);

Count 2: possession of a regulated firearm while being under the age of 21, PS § 5–133(d); and

Count 3: wearing, carrying, and knowingly transporting a loaded handgun in a vehicle upon the public road, Maryland Code (2002, 2021 Repl. Vol.) Criminal Law Article (“CR”) § 4–203(a)(1)(v).¹

¹ Gregory was initially charged by criminal information with the following offenses: illegal possession of a regulated firearm (Count 1); possession of a regulated firearm while being under age of 21 (Count 2); wearing, carrying, and knowingly transporting a loaded handgun in a vehicle upon the public road (Count 3); wearing and carrying, and transporting a loaded handgun on person (Count 4); and illegal possession of ammunition (Count 5). The State entered *nolle prosequi* on Counts 4 and 5 before submitting the case to the jury.

The court merged Count 3 into Count 2 and sentenced Gregory to a total of seven years: five years for Count 1 and two years for Count 2. In this timely appeal, Gregory presents two questions, which we have slightly reworded for clarity as follows:²

- I. Was the evidence sufficient to convict Gregory?
- II. Did the circuit court err by imposing separate sentences for Counts 1 and 2?

For the reasons explained in our discussion below, we hold that the evidence was sufficient to support all of Gregory’s convictions. However, we hold that Gregory could not be sentenced for both Counts 1 and 2 because the handgun found inside the Lyft vehicle constituted only one unit of prosecution under PS § 5–133. Accordingly, we remand the matter to the circuit court to reverse one of Gregory’s convictions under PS § 5–133 (either Count 1 or 2) and vacate that sentence.

BACKGROUND

Trial

Evidence Presented

The following factual account is drawn from the evidence presented at Gregory’s jury trial on February 27 and 28, 2023.

On August 18, 2022, Corporal (“Cpl.”) Jason Sutton of the Baltimore County Police Department’s Criminal Apprehension and Support Team (“CAST”) was

² Gregory’s questions presented are:

1. Whether the evidence was sufficient to convict Gregory?
2. Whether the trial court erred by failing to merge the sentences in Count One and Count Two?

“contacted” by Detective (“Det.,”) Craig Schrott, a member of the Homicide Unit, who informed Cpl. Sutton that police had probable cause to arrest Gregory. Cpl. Sutton testified that Det. Schrott asked him to execute a search-and-seizure warrant for Gregory’s DNA. He told the jury that executing such a warrant involves locating the “target” individual and transporting that person to the police headquarters to obtain a DNA sample. Det. Schrott provided Cpl. Sutton with a signed copy of the warrant, along with Gregory’s photograph, description, and home address. Cpl. Sutton then began surveillance at Gregory’s residence in Owings Mills.

Around 4:30 p.m., Cpl. Sutton saw Gregory leave his home wearing “a mask that was covering a majority of his face, eyes and nose were visible,” and carrying a black backpack.³ Gregory entered the back seat of a Toyota that arrived in front of his home. Cpl. Sutton followed the Toyota in his own vehicle. He explained that he did not want to stop the Toyota in the residential area because of officer safety concerns. About five minutes later, Cpl. Sutton activated his emergency light and siren, and the Toyota pulled over to a curb. Only Babatumde Mabadeje—the Lyft driver—and Gregory were inside the car.

While the Toyota was pulling over, Gregory’s movement caught Cpl. Sutton’s attention. Gregory, who was sitting in the rear passenger side of the back seat, looked over his left shoulder and glanced out the back window. Once Gregory saw Cpl. Sutton’s car

³ Cpl. Sutton acknowledged that “August of 2021 was still during COVID.”

and the emergency light on the front of the vehicle, he leaned over toward the driver's side of the back seat and disappeared from view. Cpl. Sutton noted that Gregory's head was "totally lean[ing] over . . . for a few seconds" before he "sat back up." He later clarified that Gregory leaned over "probably 30 to 45 seconds." Cpl. Sutton also saw that Gregory put a backpack between his legs and "zipp[ed] something up, like the top of the backpack."

Cpl. Sutton approached the vehicle and informed Mabadeje that the stop was due to a broken taillight, although he later testified that he would have stopped the car regardless, as the police had a search-and-seizure warrant for Gregory.⁴ While Cpl. Sutton was speaking with Mabadeje, Gregory pulled down his mask, revealing his face. Cpl. Sutton confirmed Gregory's identity and ordered Gregory to step out of the vehicle.

As Gregory exited the vehicle, Cpl. Sutton saw the handle of a semi-automatic handgun underneath the driver's seat of the vehicle. According to Cpl. Sutton:

The handgun was laying on its side. So the handle was to the left and it was laying on the rear floor area underneath -- partially underneath the drivers seat. Just right at the front of the rear floor mat where the handle and portion of the handgun was still exposed to the rear. Underneath the seat there were the air vents that would blow the AC or heat to the rear of the vehicle underneath the seat that stood up a few inches and above that the vehicle was equipped with like automatic seats, where the electronics were underneath the seat. **So there was no access for the handgun to the front or to the driver of the vehicle.** The handgun was laying there.

(Emphasis added). A photograph of the firearm, depicting the weapon at the time of its discovery, was admitted into evidence without objection. Cpl. Sutton believed that the

⁴ No citation was issued for the broken taillight.

firearm did not belong to Mabadeje because “[h]e could not reach that firearm from his seat.”

Gregory was arrested and handcuffed immediately upon exiting the vehicle. Cpl. Sutton told Mabadeje to step out of the vehicle and informed him that the firearm was found under the driver’s seat. Upon hearing this, Mabadeje “became very visibly shaken.” He also asked to call his wife. Cpl. Sutton repeatedly asked him “just to relax,” while requesting other detectives to respond. Mabadeje explained at trial that he was scared because, while he had had “quite a few Lyft experiences,” he had never encountered a situation involving a gun. Nonetheless, Mabadeje told the jury that he was “straightforward” with the police because he “had nothing to do with the gun.” Cpl. Sutton did not ask Mabadeje about the “lean-over” movements by Gregory that Cpl. Sutton had observed.

Det. Scott Young testified that when he arrived to search Mabadeje’s vehicle, he found Mabadeje’s demeanor calm and cooperative. Mabadeje consented to the search and signed a “consent-to-search” form.⁵ Det. Young then retrieved the firearm from underneath the driver’s seat. Det. Young explained that the firearm had no serial number, and that such a firearm is commonly referred to as “a ghost gun” because “without the serial number, law enforcement doesn’t have the ability to track the firearm[.]” As Det.

⁵ Det. Young explained that the form gave him “permission . . . to search the vehicle that was stopped by the police officers that day.” Both Mabadeje and Det. Young testified that there was no promise, coercion, or threat to obtain Mabadeje’s consent.

Young cleared the weapon, he found that it was loaded and, with a round in the chamber, ready to be fired. Forensic testing revealed no latent finger prints or “any type of biological material” on the firearm. Young also searched Gregory’s backpack left inside the Toyota, but it contained nothing other than a cellphone and a wallet with Gregory’s ID. No gloves were found during the search.

Mabadeje testified that earlier in the day, he had completed several rides for Lyft when he received a pick-up request from Gregory. Mabadeje had been driving for Lyft for three or four years and had completed thousands of rides. The Toyota was registered in his name. While his wife, also a Lyft driver, occasionally drove the vehicle, Mabadeje testified that he drove it most of the time. Mabadeje further stated that no one else, besides himself and his wife, drove the vehicle. He explained that he routinely conducted a “round check” before and after each Lyft ride to ensure his passengers didn’t leave any belongings behind. Sometimes he would exit the vehicle and look under each seat, while other times he would just look behind to ensure no items were left inside the vehicle. He testified that he could not remember whether he performed a round check before picking up Gregory, but said that he routinely performs the checks and that he would have noticed a gun in the car and reported it immediately if it had been there. Mabadeje denied having ever owned a firearm, explaining he had “no reason to own one.”

At trial, the parties stipulated that Gregory had been adjudicated delinquent as a juvenile for an offense that would have been disqualifying for an adult and thus was prohibited from possessing a regulated firearm or regulated ammunition in Maryland.

They also stipulated that the semi-automatic handgun recovered by Det. Young was a regulated handgun under Maryland law. The parties further stipulated that Jonathan Thorn, a ballistics expert from the Federal Bureau of Alcohol, Tobacco, Firearms (“ATF”) examined the firearm and confirmed that it was operable.

Motion for Judgment of Acquittal

After the State’s case, Gregory moved for judgment of acquittal. Gregory’s counsel argued that the State failed to establish the elements of knowing or constructive possession of the handgun in this case. Counsel highlighted that while Cpl. Sutton testified about seeing Gregory bending over and reaching under the driver’s seat, he never verified this observation with Mabadeje. Counsel also noted that Mabadeje did not testify about seeing Gregory reaching under the seat or putting something there before the stop. The circuit court denied the motion, stating, “I think we have reached the point where this is a jury question.” Following the denial of his motion for acquittal, Gregory was advised of his right to testify and waived that right knowingly and voluntarily. Gregory did not call any witnesses.

Deliberation and Verdict

The court submitted three charges to the jury: illegal possession of a regulated firearm (Count 1); possession of a regulated firearm while being under the age of 21 (Count 2); and wearing, carrying, and knowingly transporting a loaded handgun in a vehicle upon the public road (Count 3). After deliberation, the jury found Gregory guilty on all counts. Gregory was sentenced about a week later, on March 7, 2023. Gregory filed this timely

appeal on April 4, 2023.

We supplement these facts in our discussion of the issues.

DISCUSSION

I.

Sufficiency of Evidence

A. Parties' Contentions

Gregory contends that the evidence was insufficient to support any of his convictions, claiming that the State failed to prove actual or constructive possession of the loaded handgun found partially under the driver's seat of the Toyota. He claims that the evidence was speculative and did not support a reasonable inference of possession, noting that the absence of fingerprints or any other biological evidence on the handgun is "direct evidence that [he] did *not* possess the gun." Gregory further suggests that the sufficiency of evidence should be reviewed *de novo*.

The State counters that the evidence was sufficient to support his convictions. The State claims that while there was no direct evidence of Gregory's actual possession of the firearm, ample evidence supports his constructive possession. For example, the State points out that, after he pulled the Toyota over on the side of the road, Cpl. Sutton observed Gregory "lean[] over towards the rear driver's side of the vehicle, with his body disappearing out of view for a few seconds." Moreover, the State asserts, "[b]ased on where it was placed, the gun was accessible only to Gregory and not the driver."

Contrary to Gregory's claim that our standard of review is without deference, the

State presses that the reviewing court must give deference to the jury’s ability to choose from among the different inferences that can be drawn from the evidence presented. Quoting *State v. Manion*, 442 Md. 419, 431 (2015), the State urges that we consider only whether “the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant’s guilt of the offenses charged beyond a reasonable doubt.”

B. Legal Framework

Standard of Review

We agree with the State that, in reviewing the evidentiary sufficiency of a criminal conviction, our inquiry is not whether we believe the defendant was guilty beyond a reasonable doubt, but “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also State v. Rusk*, 289 Md. 230, 240 (1981). We give great deference to the jury’s “finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.” *McDonald v. State*, 347 Md. 452, 474 (1997). Thus, our review “does not involve a re-weighing of the evidence[.]” *Moye v. State*, 369 Md. 2, 12 (2002). Instead, our task is to determine whether the verdict was supported by “evidence by which any rational trier of fact could find [Gregory] guilty beyond a reasonable doubt” of the crimes charged. *Id.* at 12–13 (citations omitted). Given the jury’s “unique opportunity to view the evidence and to observe first-hand the demeanor and to

assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.” *Smith v. State*, 415 Md. 174, 185 (2010).

“Possession” Defined

As noted, Gregory was convicted under two separate statutes: Section 5–133 of Maryland Code, Public Safety Article, and Section 4–203 of Maryland Code, Criminal Law Article.⁶ Both statutes require that the State prove, beyond a reasonable doubt,

⁶ As pertinent, PS § 5–133 provides:

(b) [A] person may not possess a regulated firearm if the person:

* * *

(13) if under the age of 30 years at the time of possession, has been adjudicated delinquent by a juvenile court for an act that would be a disqualifying crime if committed by an adult.

* * *

(d)(1) [A] person who is under the age of 21 years may not possess a regulated firearm.

In relevant part, CR § 4–203 provides,

(a)(1) [A] person may not:

* * *

(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;

(Continued)

Gregory’s possession of a handgun. *See Parker v. State*, 402 Md. 372, 407 (2007) (discussing “possession” requirement for possession of firearm conviction under former Maryland Code (1957, 1996 Repl. Vol, 2001 Supp.), Article 27, § 445(d)(1), recodified at PS § 5–133); *Jefferson v. State*, 194 Md. App. 190, 213 (2010) (discussing the “possession” requirement for wearing, carrying and transporting a handgun conviction). Gregory disputes only the evidentiary sufficiency of the possession element in his convictions.

Possession may be either actual or constructive. *Taylor v. State*, 346 Md. 452, 458 (1997). Actual possession is “direct physical possession or control of contraband[.]” *Nutt v. State*, 16 Md. App. 695, 706 (1973). Constructive possession is the exercise of “dominion or control over the contraband itself or over the premise or vehicle in which it was concealed.” *Neal v. State*, 191 Md. App. 297, 316 (2010). Generally, knowledge of the presence of the contraband is a prerequisite to possession. *See Mills v. State*, 239 Md. App. 258, 275 (2018) (citation omitted); *see also Brice v. State*, 225 Md. App. 666, 694 (2015) (“[T]o satisfy the *mens rea* requirement for a violation of [PS §] 5–133, the State was required to prove only that defendant knew that he was in possession of a handgun.”). Such knowledge can be “proven by inferences from the totality of the evidence, circumstantial or direct, presented to the trier of fact.” *Suddith*, 379 Md. at 432.

* * *

(v) violate item . . . (ii) of this paragraph with a handgun loaded with ammunition.

CR § 4–203(a).

Circumstantial Evidence

Our courts have long held that circumstantial evidence alone may be sufficient to sustain a conviction. *See, e.g., Veney v. State*, 251 Md. 182, 201 (1968); *Wilson v. State*, 319 Md. 530, 536 (1990); *Smith*, 415 Md. at 185–86; *see also Sewell v. State*, 239 Md. App. 571, 607 (2018) (noting that the State may prove intent “through reasonable inferences.”). “When proof of a fact is based on circumstantial evidence, the trier of fact need not be satisfied ‘beyond a reasonable doubt of each link in the chain of circumstances relied upon.’” *Wilson*, 319 Md. at 536 (quoting *Pressley v. State*, 295 Md. 143, 148–49 (1983) (citation omitted)). Rather, circumstantial evidence is to be viewed as a whole, “with the final analysis affording the basis of an inference of guilt beyond a reasonable doubt.” *Id.*; *see also Presley*, 295 Md. at 150 (“Circumstantial evidence is not like a chain which falls when its weakest link is broken, but is like a cable.”).

The inference of guilt drawn from circumstantial evidence must be reasonable and possible, but “it need not be necessary or inescapable.” *Neal*, 191 Md. App. at 318 (citations and internal quotations omitted). To distinguish between reasonable inference and speculation, we have endorsed the following test:

[W]here from the facts most favorable to the party with the burden of proof **the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence)**, the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.

Dukes v. State, 178 Md. App. 38, 47–48 (2008) (citing *Bell v. Heitkamp*, 126 Md. App. 211, 224 (1999) (internal brackets omitted) (emphasis added); *see also Neal*, 191 Md. App.

at 317 (“[A]n inference is valid if the inferred fact is more likely than not to be true if the basic fact is true[.]”) (quoting L. McLain, *Maryland Evidence*, § 301.4 at 427 (2d Ed. 2001)).

Folk Factors

When determining whether circumstantial evidence supports an inference of possession, we typically consider the following four factors from *Folk v. State*, 11 Md. App. 508 (1971):

1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Id. at 518.⁷ To be sure, “these factors are not entirely discrete because they can implicate each other—for example, mutual use and enjoyment naturally lends itself to proximity, so that the latter implies the former to a certain extent.” *Belote v. State*, 199 Md. App. 46, 55 (2011). Moreover, “[n]one of these factors are, in and of themselves, conclusive evidence of possession[.]” and our inquiry is fact-specific to each case. *Smith*, 415 Md. at 198.

Applying the *Folk* factors, we held in *Mills v. State* that, based on the circumstantial evidence presented at trial, a rational jury could have found that Mills had constructive

⁷ Although the underlying case in *Folk* concerned constructive possession of illegal drugs and drug paraphernalia, courts have adopted the same analysis in cases involving constructive possession of other contraband, including firearms. *Handy*, 175 Md. App. at 564.

possession of cocaine, which was “recovered from the passenger-side door pocket of the vehicle in which he had been riding.” 239 Md. App. 258, 274 (2018). We noted that Mills had been sitting in the seat “closest to the passenger-side door[,]” where the cocaine was discovered. *Id.* at 276. The photographic evidence admitted at trial also supported an inference that the cocaine was within Mills’s view. *Id.* Although Mills had no ownership or possessory interest in the vehicle, we gave “that factor . . . only slight significance, as otherwise we would be forced to conclude that a passenger in a vehicle does not typically possess items found in close proximity to him.” *Id.* at 276–77. We then considered the final factor—the “presence of circumstances from which a reasonable inference could be drawn that Mills was participating in the mutual use of the contraband,”—which, in addition to the cocaine, included a handgun also found in the car. *Id.* at 277. We noted that the State adduced evidence that Mills fled from the scene “upon hearing a police officer call out, ‘Gun[,]’” and that Mills’s “flight and ensuing concealment could properly be considered by the jury as evidence of consciousness of guilt.” *Id.* We concluded, therefore, that “[u]nder all the circumstances, there was sufficient circumstantial evidence of Mills’s knowledge of the presence and nature of the contraband, including the cocaine.” *Id.*

C. Analysis

Based on our review of the trial record, we hold that the evidence was sufficient to support the jury’s verdicts on Count 1 for possession of a regulated firearm by a prohibited person under PS § 5–133(b), and Count 2 for possession of a regulated firearm while being under the age of 21 under PS § 5–133(d). Three of the *Folk* factors are particularly relevant

here: Gregory’s proximity to the contraband; the contraband’s presence “within the view or otherwise within the knowledge of” Gregory; and the circumstances reasonably suggesting that Gregory was participating in the “use and enjoyment of the contraband.” *Folk*, 11 Md. App. at 518.

We begin with the first factor—Gregory’s proximity to the handgun. When Cpl. Sutton found the handgun, it was lying “on the rear floor . . . partially underneath the driver[’s] seat” of a Toyota sedan. The handle of the gun was exposed towards the rear passenger’s seat, and Gregory was the only person in the rear of the car. As such, there was sufficient evidence for the jurors to “apply their common sense, powers of logic, and accumulated experience in life” to infer that Gregory was within reach of the firearm. *Robinson v. State*, 315 Md. 309, 318 (1989).

Turning to the second *Folk* factor, we again find sufficient evidence for the jury to conclude that the handgun was within Gregory’s plain view. At the time Cpl. Sutton first saw the handgun, it was lying on the floor of the Toyota vehicle, partially exposed. His testimony indicates that he could see the firearm from the outside without entering or searching the vehicle.

I approached the passenger side of the vehicle to have [Gregory] exit the vehicle for the execution of the search and seizure warrant. As he moved his bag from his feet and twisted to set it on the seat to get out of the vehicle, I observed the handle of a handgun underneath the drivers seat of the vehicle, at which time we had him exit the vehicle and he was placed under arrest.

Multiple photos of the Toyota vehicle’s interior, including the handgun, were also admitted into evidence and shown to the jury. The handgun was also found inside the rear passenger

compartment of a sedan, within a relatively narrow space. *See Suddith*, 379 Md. at 436 (noting that “items within the ‘relatively narrow compass of the passenger compartment of an automobile’ are easily accessible to an occupant of the vehicle.”) (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

In addition to the handgun’s presence within Gregory’s view, the evidence allows for a reasonable inference that he had engaged in the “use and enjoyment” of the firearm under the fourth *Folk* factor as it has been construed by our caselaw. *Folk*, 11 Md. App. at 518. Pictures of the vehicle’s interior show the handgun’s handle facing the backseat. Cpl. Sutton also testified that the handgun’s location made it inaccessible to the driver, making it even more likely that the gun had been placed by Gregory, who was sitting in the rear. Further, Cpl. Sutton testified that Gregory glanced out the back window, leaned over towards the driver’s seat for about 30 to 45 seconds, and then zipped up his backpack.

When presented with facts similar to the present case in *Burns v. State*, 149 Md. App. 526 (2003), we concluded that the evidence was sufficient to establish Burns’s constructive possession of a handgun. In *Burns*, the police found a loaded handgun under the front passenger seat of a vehicle occupied by three individuals: the driver, the front seat passenger, and Burns, who was seated directly behind the front passenger seat. *Id.* at 543. The handle of the gun was facing towards the backseat, making it inaccessible to the driver. *Id.* at 544. The front seat passenger denied having any knowledge of the handgun. *Id.* at 546. A police officer who approached the vehicle testified that Burns was “1) repeatedly looking back in his direction, 2) reaching around in the car, and 3) then bending down in

front of him.” *Id.* at 540. Discovery of contraband (bags of crack cocaine and a handgun) inside the car also gave context to Burns’s gestures. *Id.* at 547. Likewise, in the instant case, a rational jury could infer that Gregory had pulled out the handgun from his backpack and attempted to hide it under the driver’s seat based on the location and accessibility of the handgun found inside the car, as well as Cpl. Sutton’s testimony regarding Gregory’s movements.

Although Gregory emphasizes that he had no possessory interest in the Toyota vehicle, we conclude that the lack of a possessory interest in the vehicle, under the circumstances presented, is not dispositive. *See Mills*, 239 Md. App. at 276–77 (giving the “ownership or possessory interest” factor “only slight significance[,]” noting that “otherwise [courts] would be forced to conclude that a passenger in a vehicle does not typically possess items found in close proximity to him.”).

We disagree with Gregory’s claim that the evidence supporting his constructive possession was merely “speculative.” As noted earlier, speculation arises where the evidence, viewed in the light most favorable to the State, suggests that “the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence).” *Dukes*, 178 Md. App. at 47–48. Although Gregory claims that a prior passenger of the vehicle might have placed the handgun underneath the driver’s seat, this inference rests upon multiple unlikely premises: *first*, that a passenger happened to have an illegal “ghost gun” and left it inside the vehicle with no apparent ability to return and retrieve the weapon; *second*, Gregory rode in the vehicle before anyone noticed (and

reported) the plainly visible handgun; and, *third*, that after the police stopped the vehicle, Gregory reached in the direction where the firearm was found moments later. Similarly, there is no evidence supporting the inference that the handgun belonged to the driver, who testified that he had never owned a gun and had never encountered a firearm issue during his time as a Lyft driver. It is not logical that the driver would carry an illegal ghost gun and store it in a location that he could not reach—indeed, *only* a Lyft passenger in the back seat could have reached the handgun. Therefore, by eliminating speculative or unsupported alternatives, a rational jury could reach the conclusion that the handgun was in Gregory’s possession.

Finally, we observe that the absence of fingerprint or biological evidence on the handgun does not undermine the sufficiency of evidence supporting Gregory’s convictions. Gregory argues that “[t]o find sufficiency in this case would be to ignore the *only* direct evidence presented in the case[.]” but this argument is misguided. When reviewing sufficiency of evidence, we do not “distinguish between circumstantial and direct evidence[.]” *Morris v. State*, 192 Md. App. 1, 31 (2010). Rather, “circumstantial evidence is as persuasive as direct evidence.” *Brown v. State*, 182 Md. App. 138, 156 (2008). Indeed, if the jury had been persuaded not to convict Gregory based, in part, on the lack of fingerprint evidence, we would “not second-guess the jury’s determination where there are competing rational inferences available.” *Smith*, 415 Md. at 183. Since we have already determined that the circumstantial evidence was sufficient for the jury to convict Gregory, we need not consider the absence of additional evidence.

For these reasons, we conclude that there was sufficient evidence to sustain Gregory’s convictions.

II.

Sentences for Possession of a Firearm

A. Background

At Gregory’s sentencing hearing on March 7, 2023, the State requested that the court exceed the five-year sentence recommended under Maryland Sentencing Guidelines⁸ and impose a total of thirteen years in prison – five years for illegal possession of a regulated firearm (Count 1), consecutive five years for possession of a regulated firearm while being under age of 21 (Count 2), and additional three years for wearing, carrying, and knowingly transporting a loaded handgun in a vehicle upon the public road (Count 3). The State also detailed Gregory’s criminal history as a juvenile and an adult.

Gregory’s counsel requested concurrent sentences or, alternatively, a fully suspended sentence. Counsel claimed that all three convictions should merge because their elements were “very similar, if not the same,” and “[t]he facts necessary to prove each [offense] are required to prove each other.” Gregory’s counsel also invoked the rule of lenity, claiming that the legislature could not have intended for multiple consecutive sentences in this situation.⁹ He argued that, due to the merger of the convictions, the court

⁸ The recommended sentence for Gregory under the Guideline was five years.

⁹ Specifically, Gregory’s counsel explained:

(Continued)

could not sentence Gregory to more than five years.

The court rejected Gregory’s merger argument. Applying the “required evidence” test, as established in *Blockburger v. United States*, 284 U.S. 299 (1932), the court held that distinct elements in each conviction precluded merger. The court noted that possession of a regulated firearm after being adjudicated delinquent (Count 1) and possession of a regulated firearm while being under 21 (Count 2) each had unique elements. Similarly, the court explained that wearing, carrying, and knowingly transporting a loaded firearm (Count 3) has two extra elements – the gun being “loaded” and inside a vehicle – that were not present in the other counts. The court also disagreed that the rule of lenity applied. Nevertheless, it merged Count 3 into Count 2, stating, “I don’t think . . . the added elements [for Count 3] are of any significance.”

The court also declined to impose concurrent sentences for Count 1 and Count 2, describing concurrent sentences as “pretend time,” which is “no time at all.” Citing Gregory’s criminal history and the failure of prior interventions, the court declared, “[t]he sentence must be substantial.” The court then sentenced Gregory to five years of imprisonment for his illegal possession of a regulated firearm after being adjudicated

If you look at the three charges, I would argue that they are lesser included to the more serious charge. You can’t be convicted of a possession of a loaded firearm without having a loaded gun in your possession. So he’s charged with a loaded gun in the vehicle. The elements of that are very similar, if not the same, to possession of a firearm under a minor. Then you have regulated possession of a firearm. Look at the elements of each. They are all of the same offense and same occurrence. The facts necessary to prove each are required to prove each other. Given that, I don’t believe that they would not merge.

delinquent (Count 1) and two consecutive years for possession of a regulated firearm while being under 21 (Count 2).

B. Parties' Contentions

Gregory contends that the court erred by failing to merge his convictions for possession of a regulated firearm, highlighting that both convictions arise under the same statute, though under different subsections. He points out that PS § 5–133(b) applies to individuals “under the age of 30 years at the time of possession” who have been adjudicated delinquent for a disqualifying act, while PS § 5–133(d) applies to those under 21 at the time of possession. Because a person under 21 is also under 30, Gregory argues that the only distinguishing element is the requirement of a prior delinquency adjudication under PS § 5–133(b). Thus, Gregory argues that his conviction under PS § 5–133(d) (Count 2) should merge into the conviction under PS § 5–133(b) (Count 1), and requests that the sentence for Count 2 be vacated.

The State agrees that the court erred in imposing separate sentences for Counts 1 and 2, but argues that the doctrine of merger does not apply. Instead, the State asserts that since only one firearm was recovered, there was a single “unit of prosecution” under PS § 5–133, rendering one of the convictions redundant. Thus, the State requests that we vacate Gregory’s conviction for either Count 1 or Count 2 and remand the case for resentencing. The State further notes that remand is necessary because the court erroneously merged Gregory’s conviction for wearing, carrying and knowingly transporting a loaded handgun in a vehicle upon the public road, under CL § 4–203(a)(1)(v) (Count 3) into Count 2.

C. Legal Framework

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects individuals from multiple punishments for the same offense. U.S. Const. amend. V; *Bey v. State*, 259 Md. App. 324, 334 (2023). A double jeopardy claim involving multiple offenses arises “generally in ‘two different sets of circumstances: those involving two separate statutes embracing the same criminal conduct, and those involving a single statute creating multiple units of prosecution for conduct occurring as a part of the same criminal transaction.’” *Purnell v. State*, 375 Md. 678, 692 (2003) (quoting *Richmond v. State*, 326 Md. 257, 261 (1992) (in turn citing *Gore v. United States*, 357 U.S. 386, 393–94 (1958) (Warren, C.J. dissenting)).

The doctrine of merger applies in the first scenario, where two different statutory offenses cover the same criminal conduct. “Maryland courts recognize three grounds for merging a defendant’s convictions: (1) the required evidence test; (2) the rule of lenity; and (3) principles of fundamental fairness.” *Carroll v. State*, 202 Md. App. 487, 516 (2011) (citing *Kelly v. State*, 195 Md. App. 403, 440–42 (2010)). The required evidence test and the rule of lenity could “both be decided as a matter of law, virtually on the basis of examination confined within the ‘four corners’ of the charges[.]” *Pair v. State*, 202 Md. App. 617, 645 (2011), while a merger under principles of fundamental fairness requires “a fluid test dependant upon a subjective evaluation of the particular evidence in a particular case[.]” *Id.* at 649. Once the convictions for two offenses merge, only the sentence on the

greater offense remains; however, “the *convictions* for both offenses stand inviolate, unaffected by the merger.” *Moore v. State*, 198 Md. App. 655, 689 (2011) (emphasis in the original) (internal citation and quotation marks omitted).

In cases involving multiple punishments for a single statutory offense, the “unit of prosecution” analysis applies. *Brown v. State*, 311 Md. 426, 434 (1988). Thus, when considering whether a violation of multiple subsections under PS § 5–133 warrants separate sentences, we do not apply the doctrine of merger but instead make “a determination of the appropriate ‘unit of prosecution’ for the offense.” *Wimbish v. State*, 201 Md. App. 239, 271 (2011) (citations and internal quotations omitted), *abrogated on other grounds by State v. Davis*, 249 Md. App. 217 (2021).

In *Wimbish*, the defendant was convicted under PS § 5–133(c)(1), 5–133(d), and § 5–203(a), and received consecutive five-year sentences for each conviction. 201 Md. App. at 270. In addressing *Wimbish*’s two convictions under PS § 5–133, we explained that the doctrine of merger was not at play:

[The defendant’s] contention with respect to his two convictions under § 5–133 (for possessing a firearm, while under the age of twenty-one, and possessing a firearm, after having been previously convicted of a crime of violence) requires a different legal analysis than does his contention with respect to the merger of his convictions under that section with his conviction under § 5–203 (for possessing a short-barreled shotgun). **In fact, although appellant describes the former claim as implicating the doctrine of merger, we conclude that it involves, instead, a different issue, namely, a determination of the appropriate “unit of prosecution” for the offense.**

Wimbish, 201 Md. App. at 271 (emphasis added). *Cf. Burroughs v. State*, 88 Md. App. 229, 246–47 (1991) (noting that “[i]n homicide case, the units of prosecutions are dead

bodies,” and because the defendant “did not murder [the victim] twice . . . there are not, therefore, two convictions capable of merging into each other.”). We also reasoned that the unit of prosecution for PS § 5–133 was “the prohibited act of illegal possession of a firearm,” and “the statute [does] not support multiple convictions . . . where there [is] only a single act of possession.” *Id.* at 271–72 (quoting *Melton v. State*, 379 Md. 486 (2004)).

Accordingly, we affirmed Wimbish’s conviction for the offense with the greater statutory penalty—conviction under PS § 5–133(c)(1), carrying a minimum sentence of five years without the possibility of parole—and reversed his conviction under PS § 5–133(d), which carried a maximum penalty of five years’ imprisonment, explaining that when Wimbish “possessed a single regulated firearm, which was illegal under § 5-133 for two reasons (his age and his prior conviction for a crime of violence), he committed only one violation of that section. As a result, only one of [Wimbish’s] convictions under § 5–133 can stand.” *Id.* at 272; *see also Melton*, 379 Md. at 503 (affirming the conviction for the offense with the greater statutory penalty and reversing the other two convictions, where all three convictions were based upon a single act of illegal possession of firearm).

D. Analysis

We review without deference whether a circuit court made a legal error in sentencing. *Scott v. State*, 454 Md. 146, 188 (2017) (citation omitted). We conclude that one of Gregory’s convictions under PS § 5–133—either Count 1 or Count 2—should be reversed. Here, the police found only one firearm inside the vehicle that Gregory was riding in. There is no evidence in the record, nor did the State argue, that Gregory was in

possession of more than one regulated firearm at the time of his arrest. Thus, while Gregory’s possession of a single regulated firearm may be illegal under two separate subsections of PS § 5–133, it constitutes only one violation of that statute, and only one conviction—the one with the greater maximum penalty—can stand. *See Wimbish*, 201 Md. App. at 272. Because both PS § 5–133(b) and (d) carry the same maximum penalty,¹⁰ either conviction may be reversed.¹¹ Accordingly, we remand the case to the circuit court for the sole purpose of determining which of Gregory’s convictions under PS § 5-133 should be reversed.

We are not persuaded that a remand for resentencing is an appropriate remedy. The State claims that the circuit court’s merger of Gregory’s conviction under CL § 4–203(a)(1)(v) (Count 3) into his conviction under PS § 5–133(d) (Count 2) at the sentencing hearing was erroneous, and that that merger should be revisited upon remand. We disagree.

¹⁰ In *Jones v. State*, 420 Md. 437 (2011), our Supreme Court instructed that PS § 5–144 (then codified as PS § 5–143) serves as the penalty provision for the violation of PS § 5–133 except for subsection (c), which contains its own penalty provision. *Id.* at 450–51. In turn, PS § 5–144 states that, unless otherwise provided, a person illegally possessing a regulated firearm “is subject to imprisonment not exceeding 5 years or a fine not exceeding \$10,000 or both.” PS § 5–144(a)-(b); *Jones*, 420 Md. at 450.

¹¹ To be clear, “[w]here there is a *merger* of a lesser included offense into a greater offense, we are not concerned with penalties—the lesser included offense generally merges into and is subsumed by the greater offense regardless of penalties.” *Spitzinger v. State*, 340 Md. 114, 125 (1995) (emphasis added). This principle, however, does not control our analysis here because Gregory’s convictions under PS § 5–133 are not “capable of merging into each other.” *Burroughs*, 88 Md. App. at 246–47. In *United States v. Peel*, 595 F.3d 763, 768 (7th Cir. 2010), the Seventh Circuit reasoned that determining “which conviction must be vacated is . . . a matter committed to the trial judge’s discretion because functionally it is a decision concerning the length of the defendant’s sentence.” We find this rationale persuasive in the instant appeal.

At the sentencing hearing, the court explained its rationale for merger as follows:

So there is no merger there as each of those counts has something different.

As to the Third Count, the possession of a loaded firearm in an automobile, two extra elements come in there. The loaded firearm. The other counts don't require it to be loaded, but in a vehicle. I don't find great significance to that extra element because the other choice, there are two other choices for a citizen over the age of without a disqualifying background. You can possess a gun in your home in your own property, on the street or in a car. The reason this law is here is because the first and basic law was possession of a gun, wearing and carrying and transporting on the street. Well, someone came up with the idea that if you're in a car and you're on a street, you're not really on the street. So they added this. So I don't think that the elements, the added elements are of any significance.

So I will grant your request to merge the Third Count, possession – it's handgun, unlawfully wearing, carrying, transporting a loaded handgun in a vehicle. I will merge that into the Second Count of possession of a regulated firearm by a person under 21. Since that is slightly broader in that if you possess the gun in your house, you would be in violation of the law, but I will merge the Third Count into the Second Count, but I will not merge the Second Count into the First Count because they each have a completely different element that plays no part in the other charge.

I don't believe that the rule of lenity is implicated in this case[.]

Based on the court's explanation, it appears that the merger was based upon the principle of fundamental fairness—the only ground for merger that the circuit court did not expressly rule out. Merger under fundamental fairness requires a “fluid test dependant upon a subjective evaluation of the particular evidence in a particular case.” *Pair*, 202 Md. App. at 649. Thus, “our caselaw is clear that ‘[u]nlike the required evidence test or the rule of lenity’ the ‘failure to merge a sentence based on fundamental fairness does not render the sentence illegal.’” *Hamrick v. State*, 263 Md. App. 270, 287 (2024) (quoting *Koushall*

v. State, 479 Md. 124, 163 (2022)). Rather, “to preserve the issue for appeal[,] the argument must be made to the [sentencing] court.” *White v. State*, 250 Md. App. 604, 643 (2021). As the State did not argue below that the merger of Counts 2 and 3 was fundamentally unfair, we decline to give the State (or the sentencing court) “a second bite of the apple” by remanding the case for resentencing. *See Johnson v. State*, 248 Md. App. 348, 355 (2020) (refusing to remand where a “conviction had been reversed, not merged, and a resentencing with the potential to increase the sentence for other convictions could defeat our reversal on that charges.”).

For these reasons, we remand this case with instructions for the circuit court to reverse one of Gregory’s convictions under PS § 5–133 (either Count 1 or Count 2), vacate that sentence, and affirm the remaining conviction and sentence.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED
IN PART AND REVERSED IN PART. CASE
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID 50%
BY APPELLANT AND 50% BY
BALTIMORE COUNTY.**