Circuit Court for Washington County
Case No. C-21-CR-23-000003

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 816

September Term, 2023

DEMOND WILLIAMS

v.

STATE OF MARYLAND

Friedman,
Kehoe, S.,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: November 22, 2024

*This is an unreported opinion. This 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).

A jury in the Circuit Court for Washington County convicted Appellant Demond Williams of possession of drug paraphernalia, possession of ammunition, and two counts of possession of a regulated firearm. The court imposed a $500 fine for possession of paraphernalia, a term of 215 days with credit for 215 days and a $1000 fine for the ammunition count, and nine years consecutive for the firearm counts, which it merged.

Appellant presents four questions for review. We rephrase those questions as[1]:

1. Did the circuit court abuse its discretion by admitting witness testimony after determining that the State failed to disclose the witness until the morning of trial?

2. Is evidence that a person slept in an apartment with firearms and later made inculpatory statements about the firearms sufficient to sustain a conviction for possession of a regulated firearm by a disqualified person?

3. Is evidence of fentanyl on another person sufficient to sustain the conviction for possession with intent to use drug paraphernalia to contain fentanyl?

4. Must the conviction on Count Four, possession of a regulated firearm by a disqualified person pursuant to Public Safety Article § 5-133(b), be vacated when there is also a conviction under another basis for disqualification?

BACKGROUND

On the morning of November 3, 2022, members of the Hagerstown Police Department ("HPD"), including Officer Scott St. Clair and Officer Travis Wheat, both of

[1] Appellant presented the questions as:
1. Did the circuit court abuse its discretion in failing to exclude witness testimony as a sanction after determining that the State had violated discovery Rule 4-263 (d)?
2. Is the evidence insufficient to sustain the conviction(s) for possession of a regulated firearm by a disqualified person?
3. Is the evidence insufficient to sustain the conviction for possession with intent to use controlled dangerous substance paraphernalia?
4. Must the conviction on Count 4, possession of a regulated firearm by a disqualified person pursuant to Public Safety Article, § 5-133 (b), be vacated?

whom testified at trial, executed a search warrant at the apartment building at 36 South Mulberry Street. There are two units on the first floor and the warrant was for Unit 2, which was at the end of the hall; Unit 1 was on the right. Unit 1 was vacant at the time, and officers were unable to determine precisely who lived in Unit 2.

Officer St. Clair testified that he was stationed at the front of the building while the Special Response Team ("SRT") served the warrant at the rear door of Unit 2. He stated that after the SRT began their "knock and announce" protocol at the back of Unit 2, which required them to wait 20 seconds before entering, he saw through a window on the front door a woman exit Unit 2 and enter the hallway. The woman was later identified as the Appellant's sister, Lacey Williams. She was carrying a black bag with a handle, and after leaving the bag on the ground in the hallway, she reentered Unit 2, exited it again, picked up the bag, and entered Unit 1.

After the SRT cleared Unit 2, Officer St. Clair and others called for Ms. Williams to come out, but she did not, so they entered Unit 1 and took her into custody. They searched her and found what Officer Wheat described as a "fentanyl capsule" in her bra. The officers uncovered the black bag behind the bathroom door under a pair of sweatpants. Opening it revealed two loaded handguns, one pink and the other greyish black. Officer Wheat described the pink gun as a 9mm Ruger handgun with a magazine and a round in the chamber and the black gun as a Glock style P-80 handgun with only a round in the chamber and no serial number.

Officer St. Clair then entered Unit 2, where he found Appellant and Zavaria Burgess. He described the apartment's layout:

> [I]f you're entering from the front door of the apartment, it was the kitchen and then it went into a small living room. Off of the kitchen there was a hallway to the left, kind of like a storage area. They had a fridge there and the bathroom was on the left and the bedroom was on the right.

In the bedroom, police found an identification card bearing the name of Demond Williams, a safe with money inside, a shoebox with loose .22 caliber long rifle ammunition, a small amount of marijuana, a pack of suboxone, a pink liquid the police recognized as methadone, more money and a money counter. Officer St. Clair testified that Appellant appeared to be living in the room because of the presence of a male's clothing, shoes, and the ID bearing Appellant's name. He said that he had seen Appellant on the back porch of the apartment in the week preceding the warrant's execution.

The officers found at Appellant's direction a large amount of cash above the ceiling tiles in the storage area between the bathroom and the bedroom. In the kitchen area, there were what Officer St. Clair described as "gel capsules that are typically used for packing CDS," or controlled dangerous substances; the capsules contained no powder or residue. Scales "with white powder on them" were found, but the record does not reflect where. Nine-millimeter ammunition and a magazine appearing to match the pink firearm were found in the living room. Officers recovered in total $20,600 in cash from the apartment.

Officer St. Clair transported Appellant to the Washington County Detention Center. He testified that while waiting at a desk near, but out of sight of, the holding cells containing Appellant and Ms. Williams, he heard them conversing. He described Mr.

Williams as stating that "the guns shouldn't have been loaded," that "they didn't have the clip in them," that "he had ten years of backup time over his head" and that the police "couldn't charge them with the guns because" Ms. Williams "walked out of the house into another apartment."

Amy Adamson, a forensic scientist with the Western Maryland Regional Crime Laboratory, tested the firearms for operability by firing two rounds. She also analyzed them for fingerprints but found none. Neither her report nor that she would testify was disclosed to Appellant until the day of trial. The trial court excluded her report but allowed her to testify.

Lacey Williams testified at trial that everybody in her family stayed at the 36 Mulberry Street apartment. She said that Appellant was there that day, but that he didn't live there. She described waking up to the police at the door and deciding of her own accord to move the black bag to the vacant apartment. She said the guns were her own and that she had them for protection because she was using drugs, paranoid, and afraid of getting hurt or being attacked. On cross examination, Ms. Williams denied owning the $20,000 and conceded that it might belong to Appellant. She admitted that she and others used drugs in the apartment and that she was not going to let her brother "go down" for her problems. Although Ms. Williams was arrested and charged with possession of a controlled substance, possession of paraphernalia, burglary and altering evidence, the charges were dropped.

Appellant testified that he was asleep when the police entered the apartment. He said that his stepbrother usually slept in the bedroom, but that he had stayed there the night before the police raid with Zavaria Burgess. According to Mr. Williams, he woke up when the police entered and did not know that his sister or the firearms were in the apartment that morning. He was not made aware of the firearms until his sister was escorted back into Unit 2 in handcuffs and the police informed her, in his presence, that she would be charged with possession of the guns.

Appellant provided his perspective on his conversation with his sister at the Washington County Detention Center. He described his sister telling him that she had the guns for her safety and that they had never been inside the apartment; he told her he could not afford to get in trouble for them; he denied asking her to take the blame for something that was his responsibility; he said Officer St. Clair "mixed up" his words; Ms. Williams had told him she did not know if the guns were loaded, and he asked her why she would have unloaded guns if she wanted to protect herself. He also denied any knowledge of the guns or that he directed anyone to do anything with the guns.

The parties entered a *Carter*[2] stipulation that "The defendant, Demond Williams, has a previous finding that would prohibit him from possessing a regulated firearm." After the jury began its deliberations, the court received a certified copy of two convictions in case C-21-CR-19-000139, one of which satisfied the allegations in Count Six, but no evidence of a juvenile finding was offered in support of Count Four.

[2] *Carter v. State*, 374 Md. 693, 720-21 (2003).

Additional facts will be supplied as needed.

DISCUSSION

A. Sanction for Late Disclosure

Appellant first contends that the circuit court abused its discretion by allowing the firearms expert to testify to the conclusions in her operability report after it determined that the State had violated Rule 4-263 by failing to timely disclose the report. Appellant sought to exclude any evidence of the fire ability of the subject's firearms by excluding both the report and the testimony of Amy Adamson, the author of the report. Appellant contends that the court's sanction of excluding the report but not the testimony did not remedy the violation of the discovery rules. The State contends that the court's sanction was a proper exercise of discretion based on its determination that the evidentiary prejudice of the late disclosure was *de minimis*. We agree with the State.

The Maryland Rules require the State to disclose written statements of a witness that relate to the charged offenses. Md. Rule 4-263(d)(3)(C). The trial court found, and the parties do not contest, that the Rule 4-263 was violated by the failure to disclose the evidence before trial. The remedy for a violation of the rule is within the sound discretion of the trial judge. *Francis v. State*, 208 Md. App. 1, 24 (2012) (citing *Raynor v. State*, 201 Md. App. 209, 227 (2011)). Rule 4-263(n) provides a list of potential sanctions, including exclusion of the evidence, granting of a continuance, or any other appropriate order; the rule "does not require the court to take any action; it merely authorizes the court to act." *Raynor*, 201 Md. App. at 227 (quoting *Thomas v. State*, 397 Md. 557, 570 (2007)). We

review the admission or exclusion of the evidence itself for abuse of discretion. *Perry v. Asphalt & Concrete Servs.*, 447 Md. 21, 48 (2016). "Even where there is error, [an appellate court] will not reverse a lower court's judgment for harmless error." *Id.* at 49. "Rather, the complaining party must demonstrate that the error was prejudicial, or in other words, 'the error was likely to have affected the verdict below.'" *Id.* (quoting *Crane v. Dunn*, 382 Md. 83, 91 (2004)).

In determining appropriate sanctions, or whether sanction is necessary, "a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id.* at 228. "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571. Discovery rules serve to "assist the defendant in preparing his defense, and to protect him from surprise." *Jones v. State*, 132 Md. App. 657, 677 (2000). They are "not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles." *Ross v. State*, 78 Md. App. 275, 286 (1988). "Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Thomas*, 397 Md. at 572. But when a witness was not disclosed to the defendant until the day of trial, such a harsh sanction is appropriate. *See Breakfield v. State*, 195 Md. App. 377, 391 (2010). A judge abuses his discretion in fashioning a remedy when his sanction is "well removed from any

center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1,14 (1994)).

Here, the record does not contain explanation for the State's failure to include in its Rule 4-263 disclosure the name of the firearms tester or her report. It appears that the failure to disclose this information was not intentional. The State had provided the defense with a copy of the chain of custody for the firearms, which would have indicated that they had been sent to the lab for testing. The State did not indicate that it would supply evidence other than from witnesses present at the execution of the search warrant on November 3. The result was that the defendant learned on the morning of the trial that the government's evidence as to the operability of the weapon was significantly stronger than anticipated. The trial court acknowledged the issue and offered the defendant a continuance to form a defense to the State's operability evidence by inspecting the weapons themselves, which the defendant declined. The court noted that though Appellant was not apprised of the operability testing, he was aware of the State's possession of the weapon itself and had ample opportunity to prepare an argument regarding operability pre-trial. Such a continuance would essentially cure the prejudice, the court explained, because the operability of a firearm is an "on/off" switch that could be ascertained even by "shooting out the window." We acknowledge that any decision by the defendant regarding continuance was made with knowledge that any extension of the trial would extend his pre-conviction carceral stay, and that the disclosure rules prevent undue surprise.

Another consideration: the issue of operability is not dispositive as to whether the weapon was a "firearm" for the purposes of the charged crime. Though the definition of firearm under Public Safety Article § 5-101(h) "requires even a weapon designed and constructed as a firearm to be capable of actually discharging a missile," *Moore v. State*, 189 Md. App. 90, 108 (2009) (quoting *Powell v. State*, 140 Md. App. 479, 483, *cert denied*, 367 Md. 90 (2001)), it is well settled that "a firearm need not be operable to sustain a conviction under Pub. Safety § 5-133(b)," *Hicks v. State*, 189 Md. App. 112, 136 (2009). As the trial court noted, the State's strongest evidence that the weapons were indeed capable of discharging missiles was the operability report. But that evidence, though sufficient to prove the matter, was not necessary, and without it, the State still could have made its case. It could have elicited testimony to the weapon's conformance with the firearm definition from the officers who confiscated the weapons or from any of the other witnesses and relied on circumstantial evidence like the fact that the guns were found with ammunition and had bullets in the chamber to fashion a workable argument. It did not do so and decided to rely entirely on Amy Adamson's testimony as to the firearms and that she had fired them. The point is that the remedy of exclusion of Amy Adamson's report and of her testimony would not have destroyed the State's case. Had the prosecution hedged its bet and sought to prove through multiple avenues the nature of the weapon as a firearm any error on this issue may have proven harmless.

Though the disclosure rules are not an obstacle course, a party is not permitted to fail completely to disclose evidence without substantive sanction. In this case, the record

indicates that the State did not deliberately fail to disclose the report. The State's Attorney thought that it had been disclosed but could find no record that it was sent to defense counsel. The court offered to continue the matter to allow the Appellant to assess the report. The court also offered the Appellant the opportunity to see if the subject firearms were operable by having them tested before the trial resumed. Appellant declined these opportunities. This Court has warned that a defendant who seeks windfall by taking a double or nothing approach to a discovery violation may find that the gamble yields nothing if the court imposes a lesser sanction. *Raynor*, 201 Md. App. at 228. In this case, the trial court recognized that Appellant was relying on the lack of a report on the operability of the firearms. The court offered Appellant a number of alternatives to prepare for trial with the information in the report. Of note, Appellant was not contesting the operability of the firearms, just the lack of information about the operability. The trial court did not abuse its discretion in excluding the report and permitting Ms. Adamson to testify that she had fired the firearms.

B. Sufficiency of the Evidence for Possession of a Regulated Firearm

Appellant contends that the evidence sustaining his conviction(s) for possession of a firearm is insufficient. The State responds that the physical evidence found in the apartment combined with Appellant's statements in the detention center permit the inference that Williams was in constructive possession of the firearms. We agree with the State.

The inquiry for assessing the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ross v. State*, 232 Md. App. 72, 81 (2017); *accord Jackson v. Virginia*, 443 U.S. 307 (1979) (emphasis in *Jackson*). This court does not determine "whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 431 (2015). Rather, the trier of fact weighs the evidence, and "our concern is 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." *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1993)). "A conviction can rest on circumstantial evidence alone." *Taylor*, 346 Md. at 458; *Veney v. State*, 251 Md. 182, 201 (1968). "[I]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors." *Martin v. State*, 218 Md. App. 1, 35 (quoting *Hebron v. State*, 331 Md. 219, 227 (1993)).

But inferences made by the jury must be rational and based in "common sense, powers of logic, and accumulated experience in life." *State v. Suddith*, 379 Md. 425, 446 (2004) (quoting *Robinson v. State*, 315 Md. 309, 318 (1989)). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question 'is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the

evidence.'" *Id.* at 447 (quoting *State v. Smith*, 374 Md. 527, 557 (2003)) (alterations added in *Suddith*). The Supreme Court of Maryland relied upon Judge Benjamin Cardozo's[3] consideration of the extent to which reliance solely upon inference is permissible when other evidence directly controverts it. *See West v. State*, 312 Md. 197, 210-211 (1988) (citing *People v. Galbo*, 218 N.Y. 283 (1916)). "Conjecture," he concluded, may not "fill[] the gaps left open by the evidence" such that "the presumption of innocence has yielded to a presumption of guilt." *Galbo*, 218 N.Y. at 294.

Appellant was convicted of possession of a regulated firearm under § 5-133(b) of the Public Safety Article. To "possess" means "to exercise actual or constructive dominion or control over a thing"; multiple persons may possess a thing.[4] Md. Code Ann., Criminal Law § 5-101(v). "Control" is "the exercise of a restraining or directing influence over the thing allegedly possessed." *Williams v. State*, 231 Md. App. 156, 200 (2016) (quoting *Handy v. State*, 175 Md. App. 538, 563 (2007)). "Control may be actual or constructive, joint or individual." *Id*. We have explained that "the 'evidence must show or directly support a rational inference that the accused did in fact exercise some dominion or control over the prohibited . . . [thing] in the sense contemplated by the statute.'" *State v. Gutierrez*, 446 Md. 221, 233 (2016) (quoting *Moye v. State*, 369 Md. 2, 13 (2002)).

"[A]n individual would not be deemed to exercise 'dominion or control' over an object about which he is unaware. Knowledge of the presence of an object is normally a

[3] Judge Cardozo later became a Justice of the Supreme Court of the United States.
[4] The "thing" in this case is a firearm; "[t]he definition and contours of possession in drug cases apply equally to firearm possession cases." *Williams*, 231 Md. App. at 200.

prerequisite to the exercise of dominion and control." *Suddith*, 379 Md. at 432 (quoting *White v. State*, 363 Md. 150, 163 (2001)). "[K]nowledge may be proven by inference from the totality of the evidence, circumstantial or direct, presented to the trier of fact." *Id.* (citing *Moye*, 369 Md. at 14). "It has long been established that the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Id.* (citing *Henson v. State*, 236 Md. 518, 524-25 (1964), *overruled in part on other grounds, State v. Lee*, 374 Md. 275, 289 n.9 (2003)).

The threads that run through our cases affirming joint possession are (1) proximity between the defendant and the contraband; (2) the presence of the contraband in the field of view of the defendant or his knowledge of it otherwise; (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 in the mutual use and enjoyment of the contraband. *Folk v. State*, 11 Md. App. 508, 518 (1971); *accord Gutierrez*, 446 Md. at 234. No factor in and of itself is conclusive. *Gutierrez*, 446 Md. at 234 (citing *Smith v. State*, 415 Md. 174, 198 (2010)). We noted:

> 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. Nevertheless, the factors do not always coincide and are thus distinct concepts.

Belote v. State, 199 Md. App. 46, 55 (2011).

In *Garrison v. State*, police officers, upon entering the rear bedroom of the home of Shirley Garrison and her husband Ernest Garrison, privileged by search warrant, saw Mr. Garrison flushing a plastic bag down the toilet. 272 Md. 123, 127 (1974). Mrs. Garrison was found in the front bedroom without contraband. *Id.* Since "there was no evidence she was engaged in selling narcotics, she had made no inculpatory remarks, there were no 'fresh needle marks' on her body, and there was no 'juxtaposition between her (in the front bedroom) and contraband being jettisoned by her husband in the bathroom,'" there was insufficient evidence to support Mrs. Garrison's conviction for possession with intent to distribute heroin. *Taylor*, 346 Md. at 461 (quoting *Garrison*, 272 Md. at 130-31).

In *Taylor*, Ocean City police officers busted petitioner Taylor and four friends in their motel room after motel staff reported a suspicious odor. 346 Md. at 454-55. When police entered, Taylor was lying on the floor, possibly asleep, and there were clouds of marijuana smoke in the room. *Id.* The officers found baggies of marijuana and paraphernalia in the luggage of the other occupants. *Id.* at 455-56. The Supreme Court of Maryland reversed Taylor's conviction for possession of marijuana and paraphernalia, stating:

> under the facts of this case, any finding that he was in possession of the marijuana could be based on no more than speculation or conjecture. The state conceded at trial that no marijuana or paraphernalia was found on [Taylor] or in his personal belongings, nor did the officers observe [Taylor] or any of the other occupants of the hotel room smoking marijuana. Viewing the evidence in the light most favorable to the State, [the officer's] testimony established only that Taylor was present in a room where marijuana had been smoked recently, that he was aware that it had been smoked, and that Taylor was in proximity to contraband that was concealed in a container belonging to another.

> The record is clear that [Taylor] was not in exclusive possession of the premises, and that the contraband was secreted in a hidden place not otherwise shown to be within [Taylor's] control. Accordingly, a rational inference cannot be drawn that he possessed the controlled dangerous substance.

Id. at 459. The court explained that "mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or property on which it is found, is insufficient to support a finding of possession." *Id*. at 460 (quoting *Murray v. United States*, 403 F.2d 694, 696 (9th Cir. 1969)). When a person is in "joint rather than exclusive possession" of the premises, "mere proximity" to concealed contraband is insufficient to permit the inference that the defendant exercised a directing or restraining influence over a thing. *Id.*; *see also White*, 363 Md. at 167 ("[A] rational fact finder may not infer in the present case that Petitioner had dominion and control over the cocaine found in a sealed box in the trunk of a vehicle in which he apparently had limited access and no possessory interest."); *State v. Leach*, 296 Md. 591, 596 (1983) ("Even though [defendant] had ready access to the apartment, it cannot be reasonably inferred that he exercised restraining or directing influence over PCP in a closed container on the bedroom dresser or over paraphernalia in the bedroom closet.").

As Appellant notes, there was no evidence of actual or direct possession of the firearms by him, so the conviction must stand on constructive possession. We proceed with the *Folk* factors. The first is the proximity of the defendant to the contraband. The testimony from the police officers regarding the location of the firearms shows that a black bag, purse, or briefcase concealed them, and that Ms. Williams carried the bag out of Unit

2 through an adjoining hallway into Unit 1, where she deposited it. No evidence informs us as to the location of the bag when it was in Unit 2 or whether its contents were on display when it was there. The evidence as to the location of Appellant in the apartment comes from his testimony, which, as we noted, the jury was free to ascribe as much weight or credibility as it thought appropriate. Appellant testified that he slept in the apartment the night before the search warrant was executed and that he was asleep in the bedroom until the warrant's execution began. The jury is free to accord his testimony zero weight. But to assume that he was anywhere in particular in the apartment otherwise, with absolutely no evidence to show it, would be conjecture. The proximity of Appellant to the contraband is inconclusive.

The second factor is the presence of the contraband in the defendant's field of view or his knowledge of it otherwise. The record contains no indication as to the former. Regarding knowledge, Officer St. Clair testified that he overheard in the detention center Appellant tell his sister that the firearms "didn't have the clip in them" and that he had "ten years of backup time over his head and that they couldn't say that we couldn't charge them with the guns because she walked out of the house into another apartment." The State invited the jury to infer from these statements that Appellant knew of the firearms prior to the raid. Though it may have been natural for the jury to understand Appellant's statements about whether the firearms were loaded and the consequences for their having been found in the apartment adjacent to Appellant as commentary on knowledge only gained after the search, the jury was not forbidden from choosing the inference that the State urged. It was

their role as factfinder and reasonable for the jury to conclude that Appellant's awareness of the firearms indicated possession of the firearms.

The third factor is ownership or some possessory right in the premises in which the contraband is found. Officers testified that they could not ascertain the owner of the apartment. The evidence that Appellant had a possessory interest in the apartment is that he was seen around the apartment in the week preceding his arrest, that he slept there once, and that his ID was found near male clothing in the room. The trier of fact was invited to infer from the proximity of the identification to other objects that they shared an owner, and from that to infer not only that he lived there, but that he was in exclusive possession of the room. In *Moye v. State*, testimony showed that the premises were rented by a couple who permitted Moye to stay with them, but no evidence indicated the nature of his stay or its duration. 369 Md. 2, 13 (2002). On those facts, the court could not permit the inference that Moye had any possessory interest in the location. *Id.* Here, though no rational person could infer that Appellant had the sole possessory interest in Unit 2, the evidence does support the inference that he has a joint possessory interest in the premises.

The fourth factor, the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating in the mutual use and enjoyment of the contraband, provides the most grist for the mill. The State relies on Appellant's statements to his sister in the detention center, his knowledge of the money in the ceiling, his joint possessory interest in the apartment, and the presence of drug-selling paraphernalia present in the apartment as premises as evidence that Appellant enjoyed the

protection the weapons provided. In *Moye v. State*, Moye's presence in the vicinity of contraband marijuana, without more, permitted the inference that "*someone* may have been using the marijuana," but not "*who* may have been using it." 369 Md. 2, 21 (2002). Here, there is more evidence than mere proximity. The evidence puts Appellant in the apartment with the weapons, and it shows that he knew of them; that knowledge, combined with Appellant's knowledge of the other indicia of illicit activity in the apartment, including the gel capsules, the cash and the money counter, permits the inferences that Appellant participated in the mutual use and enjoyment of the firearms.

The factors must be taken together. The testimony establishes that Appellant was in a room where some paraphernalia and ammunition were present, that he was aware that there was money in the ceiling, that he made statements indicating mutual use and enjoyment of the firearms, and that he was in the same apartment as a black bag that contained firearms. Evidence shows that Appellant may have jointly possessed the premises but that the firearms were secreted in a hidden place not directly shown to be within his control. Knowledge and proximity, without exclusive possession of the premises, are not sufficient to draw rational inference that Appellant exercised a restraining or directing influence over the firearms, but knowledge, proximity, and joint possession of the premises, combined with evidence Appellant exercised a controlling influence over the firearms, permit the jury to conclude that Appellant constructively possessed the firearms. As such, the evidence is sufficient to sustain the conviction for possession of a regulated firearm.

C. Sufficiency of the Evidence for Possession of Drug Paraphernalia

Appellant contends that the evidence is insufficient to sustain his conviction for possession with intent to use controlled dangerous substance paraphernalia, the indictment for which charged him with possession of "controlled paraphernalia, to wit: clear gel caps used to store/contain a controlled dangerous substance of Schedule II, to wit: fentanyl[.]" He argues that the controlled dangerous substance which the gel capsules were intended to contain is an essential element, and that since the evidence was sufficient to show only that he possessed controlled paraphernalia that could be used to store a controlled dangerous substance, the variation between the proof and indictment is fatal to the conviction. The State contends first that the statute does not require that the State charge and prove the actual substance, and second, that since an officer testified that he found a fentanyl-filled capsule on the Appellant's sister's person, there is sufficient evidence to infer that the gel capsules could be used to store fentanyl. We agree with the State.

i. Material variance and essential element

Generally, "matters essential to the charge must be proved as alleged in the indictment." *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Green v. State*, 23 Md. App. 680, 685 (1974)). "'[T]he evidence in a criminal case must not vary from those allegations in the indictment which are essential and material to the offense charged.' When there is material variance between the *allegata* and the *probata*, the judgment must be reversed." *Green*, 23 Md. App. at 685 (quoting *Melia v. State*, 5 Md. App. 354, 363 (1968)). A "necessary" or an essential "element of an offense is one that is the *sine qua*

non for the determination of the crime and/or its grade." *Campbell v. State*, 325 Md. 488, 505 (1992). "[A] variance is material if it operated to the defendant's surprise, prejudiced the defendant's rights, or placed the defendant at risk of double jeopardy." 41 Am. Jur. 2d Indictments and Informations § 244. "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused."[5] *Berger v. United States*, 295 U.S. 78, 82 (1935). This general rule "is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enable to present his defense and not be taken by surprise by the evidence offered the trial; and (2) that he may be protected against another prosecution for the same offense." *Id.*

We applied this rule in *Melia v. State*, 5 Md. App. 354 (1968), where an appellant had been convicted of burglary. We were asked to decide whether a variation in the ownership of the premises as stated in the indictment compared to the proof was fatal to the case. Noting that many states required that a burglarized building's ownership "be stated in the indictment and proven so as negative a right of entry of the accused and to

[5] Article 21 of the Maryland Declaration of Rights provides that the accused has "a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense[.]" This corresponds with the safeguard against material variance. Article 21 serves to, *inter alia*, "put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct;" "protect the accused from a future prosecution for the same offense:" and "enable the defendant to prepare for his trial[.]" *Counts v. State*, 444 Md. 52, 57-59 (2015) ("[W]here a statutory offense is alleged, it has generally been held in Maryland that, at least where the terms of the statute include the elements of the criminal conduct, the crime may be sufficiently characterized in the words of the statute.").

establish identity," we determined that "ownership of the building broken into is not an essential element of the crime and need not be proved precisely as alleged." *Id.* at 364-65 (citations omitted). We decided that "the allegation . . . and the proof were enough to show that the storehouse broken into by the appellant was not theirs, that they had not [*sic*] right to enter it without the permission of the lawful occupier, and enough to identify the building broken into and the personal property there so as to protect the appellants against a subsequent prosecution for the same offense, which is all that is required." *Id.* (citing *Sparkman v. State*, 3 Md. App. 527, 530-31 (1968)); *see also Hackley v. State*, 237 Md. 566, 568-70 (1965) (citing 13 Am. Jur. 2d *Burglary* Sec. 37, p. 342, and 4 *Wharton's Criminal Law and Procedure* (Anderson 1957), Sec. 1784, p. 604)); *Green v. State*, 32 Md. App. 567, 578 (1976) (holding that defendant could not be convicted of forging check when proof showed that he forged only the indorsement); *Benjamin v. State*, 9 Md. App. 272 (1970) (holding variance between allegations and proof fatal when appellant was indicted for obtaining by false pretense two thousand dollars from bail bond agent, but proof showed only that he "may have received the security of the bond"); *McDuffy v. State*, 6 Md. App. 537, 538-39 (1969) (holding variance between allegations and proof fatal when indictment charged the defendant with forgery of a credit card, but evidence proved the forgery of a receipt for purchased merchandise); *Dotson v. State*, 234 Md. 333, 336 (1964) ("It appears rather generally to be accepted that a variance in names, between that alleged and that proven, is not fatal where it does not mislead the defendant so that he cannot make an

intelligent defense, or expose him to double jeopardy." (citing 1 Underhill, Criminal Evidence (5th Ed.), Sec. 86; 2 Wharton, Criminal Evidence (12th Ed.) Sec 653)).

Recently, in *Smith*, we considered variance alleged between the indictment and proof at a trial for threatening a State Official under a statute which "prohibits threats to 'take the life of, kidnap, or cause physical injury.'" 232 Md. App. at 594-95 (quoting Crim. Law Art. §3-708(b)). The appellant asserted that "the State specified the distinct type of injury threatened, bodily harm, which therefore limited the scope or type of threat that the injury could convict him for, but that the State then failed to present any evidence that Smith threatened bodily injury." *Id.* at 595. He claimed that even if his statement, "I'm going to find you," could constitute a threat to do bodily harm, the state could not prove beyond a reasonable doubt that Smith did not intend to "egg[] the complainant's house, slash[] her tires, or lobby[] in front of her office building to get her fired." *Id.* at 595-96. That conduct would vary from the charge of threatening bodily harm. *Id.* at 596. Noting that under *Jackson*, the burden is to persuade that no rational trier of fact could have found the essential elements of the crime, we described the evidence the state presented:

> Smith threatened to 'find' her, he shouted obscenities at her, he made 'violent motions' with his body, and that he leaned as close to the glass barrier as he could and pointed at her menacingly. . . . Smith's action of spitting at [the complainant] is particularly suggestive and . . . in a number of jurisdictions . . . is sufficient to support a conviction for battery or assault because it shows intent to harm the target.

Id. Despite the fact that Smith did not describe his exact threats, nor did the State prove that he did not intend threats other than bodily harm, we decided that a reasonable jury

could have found that his conduct could constitute threatening with bodily harm. *Id.* at 596-97.

Here, the State charged Appellant pursuant to § 5-619(c) of the Criminal Law Article with possession of "controlled[6] paraphernalia, to wit: clear gel caps used to store/contain a controlled dangerous substance of Schedule II, to wit: fentanyl[.]" The provision proscribes the "possess[ion] with intent to use drug paraphernalia to:"

> (i) plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, pack, repack, store, contain, or conceal a controlled dangerous substance; or
>
> (ii) inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance.

Md. Code Ann., Crim. Law § 5-619. The statute includes a non-exhaustive list of factors which are illuminative of whether an object is drug paraphernalia:

> (1) any statement by an owner or a person in control of the object concerning its use;
>
> (2) any prior conviction of an owner or a person in control of the object under a State or federal law relating to a controlled dangerous substance;
>
> (3) the proximity of the object, in time and space, to a direct violation of this section or to a controlled dangerous substance;

[6] Neither party noted that the information states "controlled paraphernalia" but cites § 5-619, which considers "drug paraphernalia," rather than § 5-620, which considers "controlled paraphernalia." In any event, the definitions of each "controlled paraphernalia" and "drug paraphernalia" contemplate a "gelatin capsule" as a suitable container for packing controlled dangerous substances. *See* Md. Code Ann., Crim. Law § 5-101. In *Campbell v. State*, noting that an illegal sentence may be challenged even on appeal, we vacated a sentence of possession of controlled paraphernalia when the alleged objects were smoking pipes, which could be considered drug paraphernalia but could not be considered controlled paraphernalia. 325 Md. 488, 508-09 (1992).

(4) a residue of a controlled dangerous substance on the object;

(5) direct or circumstantial evidence of the intent of an owner or a person in control of the object to deliver it to another who, the owner or the person knows or should reasonably know, intends to use the object to facilitate a violation of this section;

(6) any instructions, oral or written, provided with the object concerning its use;

(7) any descriptive materials accompanying the object that explain or depict its use;

(8) national and local advertising concerning use of the object;

(9) the manner in which the object is displayed for sale;

(10) whether the owner or person in control of the object is a licensed distributor or dealer of tobacco products or other legitimate supplier of related items to the community;

(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) the existence and scope of legitimate uses for the object in the community; and

(13) expert testimony concerning use of the object.

Md. Code Ann., Crim. Law § 5-619(a).

For Appellant's conviction under § 5-619(c) to stand, the State must have supplied enough evidence for a trier of fact to find that the person "exercise[d] actual or constructive dominion or control over a thing," in this case drug paraphernalia, with intent to use it to, most relevantly, "store, contain, or conceal" a controlled dangerous substance. Here, as drug paraphernalia the State identified gel capsules, which its indictment alleged could store fentanyl. These specifications serve several purposes. They provide notice to

Appellant of the exact nature of the allegations such that he could adequately prepare to defend against them. They protect the Appellant against double jeopardy: he can prove with certainty the objects at issue in the instant case to ensure against later prosecution for the same offense. The allegation of the precise object and its illegal use to contain fentanyl also serves to, at the charging stage, negate the possibility that the intended use of the gel caps was permissible, just as for a burglary indictment, the inclusion of the address and the ownership of the premises negates the possibility that the entrance upon the premises was legal. Gelatin capsules are "intrinsically innocuous"[7] and only become contraband under analysis of the circumstances; a defendant is of course permitted to supply a defense that he either had an innocuous intent regarding alleged paraphernalia or that he did not possess the paraphernalia, but the decision as to whether the argument is persuasive belongs to the trier of fact. Since the information adequately informed Appellant of the charges against him and protects him against double jeopardy, there is no material variation that impacts the substantial rights of Appellant.

Nor is proving the intent to contain fentanyl essential. In *McDuffy*, we decided that the variance from a credit card to a receipt of purchase between the allegations and the proof was fatal; in *Green*, it was the variance between the forging of a check and the forging

[7] Often, what is alleged to be paraphernalia is "intrinsically innocuous" but "becomes significant by association with drugs or cutting agents." *Belote v. State*, 199 Md. App. 46, 62 (2011) (quoting *State v. Leach*, 296 Md. 591, 596 (1983)). We have few cases that address borderline possession of paraphernalia cases where the evidence of the drugs associated with the paraphernalia is not in close proximity to the paraphernalia where it clearly renders those items otherwise "intrinsically innocuous" as contraband.

of an indorsement of a check. But here, the allegations were of gel capsules, and the proof is gel capsules; there is no variation. The inclusion of "to wit: fentanyl" is like the inclusion of the ownership of the property in *Melia*, which we determined was not an essential element. The *sine qua non* of burglary is that the property is "of another," not to whom specifically it belongs. Here, the essential element is that the paraphernalia be intended to contain a controlled dangerous substance in general; the specific substance may be useful or relevant in proving the case to a jury, but it "need not be proved precisely as alleged." *See Melia*, 5 Md. App. at 365.

ii. Permissible inference of possession

As we stated, when assessing whether evidence is sufficient to sustain a conviction, "the standard of review is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Jackson*, 443 U.S. at 319). We have permitted the inference that a hypodermic syringe and needle possessed "for the purpose of administering habit-forming drugs" without requiring that there be evidence of the proximity of the habit-forming drugs themselves. *Downes v. State*, 11 Md. App. 443, 450-51 (1971).

In *Davis v. State*, we upheld a conviction for possession of paraphernalia after a police lieutenant, authorized by search warrant to scour an appellant's vehicle for weapons, found a box labeled "five thousand gelatin capsules." 32 Md. App. 318, 326 (1976). On appeal, the appellant argued that possession of gelatin capsules was not illegal per se and

that there was "no evidence that these capsules were suitable for packaging heroin, or of circumstances reasonably indicating that it was his intention to use them for the manufacture or distribution of controlled dangerous substances." *Id.* at 327. The court rejected his argument because "there was direct evidence of the suitability of the capsules for use in the manufacture or distribution of heroin." *Id.* That evidence was elicited from the testimony of the lieutenant, who testified that based on his knowledge that "at that time on the street of Baltimore City gelatin capsules were being used for a packing device for heroin" and his "prior information that Davis was involved in narcotic trafficking, and was a lieutenant in an organization," the use of the gelatin capsules to distribute narcotics was probable. *Id.* at 326. The lieutenant further explained:

> The heroin, of course, would be cut down many times after it was brought into the country, and at that time it was cut down I believe the normal street value would be that it would be cut to three per cent with quinine mixed with sugar, there were many different devices. However, once cut the heroin is put into capsules and filled up and the cap is replaced, and it was selling at that time for two dollars on the street.

Id. Despite the fact that on cross examination, the lieutenant "said he knew of legal uses for gelatin capsules," the court found that the lieutenant's testimony provided "direct evidence of the suitability of the capsules for use in the manufacture or distribution of heroin," such that "[t]he circumstances permitted the trier of the facts to infer that the appellant intended such use." *Id.* (citing *Waller v. State*, 13 Md. App. 615, 284 (1971)). Notably, even though controlled dangerous substances were found in proximity to the gelatin capsules, it was the association with the weapons, as well as the prior knowledge

of the appellant's involvement in narcotic trafficking that allowed for the inference of the capsules' true purpose.

Here, the inference is permitted that the capsules could be used for fentanyl. In *Smith*, the range of possible behaviors that the jury could infer was threatened by the appellant's conduct included bodily harm, even if it was not spelled out. The gel capsules in the instant matter were found near ammunition. There was a money counter in the apartment, as well as over $20,000 in cash hidden in the ceiling. There was also testimony, without objection, that Lacey Williams had a capsule of fentanyl on her person. Officer Wheat testified that "based on his training, knowledge, and experience as a police officer," the gel caps he found were "commonly used to contain controlled dangerous substances." Our case law provides that drugs are not required to be discovered adjacent to paraphernalia and that an officer's testimony is sufficient to permit a jury to infer that paraphernalia is contraband. Regardless of the proximity of the paraphernalia to a fentanyl capsule found on the person of Lacey Williams or Appellant's knowledge of that capsule, the evidence is sufficient to sustain the conviction for possession of paraphernalia.

D. Possession Convictions on Multiple Bases for Disqualification

The parties agree that Appellant's conviction under § 5-133(b) of the Public Safety Article, for possessing a firearm after having been adjudicated delinquent by a criminal court for a crime that would be considered a crime of violence if committed by an adult, should be vacated, but they are not in alignment as to why. Appellant first contends that the parties and court proceeded as if Appellant was charged with possessing one firearm

that he was disqualified from possessing on two bases, and that since multiple bases of disqualification cannot result in separate multiple verdicts for the same conduct, Appellant may only be punished by a single conviction, here Count Six. His second contention is that the State presented no evidence to prove the disqualifying condition for Count Four. Finally, Appellant notes that the jury returned three, and not four verdicts; the implication must be that he should not be punished for four crimes. The State does not concede that the evidence was insufficient to support conviction for Count Four, and it avers that Appellant waived the issue by failing to raise it in his motion for judgment of acquittal, but it does concede that the record indicates Appellant was charged with possession of "a firearm" rather than two, that the parties and court proceeded as if the charges were for a single firearm, and that the difference between the counts is the basis for disqualification, rendering the multiple convictions illegal. We find that Count Four should be vacated.

In *Melton v. State*, the Supreme Court of Maryland held that "the Legislature did not intend for a court to render separate multiple verdicts of convictions on an individual for illegal possession of a regulated firearm pursuant to Md. Code (1957, 1996 Repl.Vol.2001 Supp.), Art. 27 § 445(d)(1)(i), (ii), and (iii) and 449(e) and (f), where that individual fits within several categories of prior qualifying convictions, but only possessed a single regulated firearm on a single occasion." 379 Md. 471, 474 (2004); *see Shannon v. State*, 468 Md. 322, 330 (2020) (applying *Melton* to Pub. Saf. § 5-133). It explained that "the statute was meant to create punishments for each act of possession and not for each prior conviction[.]" *Id.* at 503. As such, "the unit of prosecution was the regulated firearm

which the defendant possessed rather than the previous convictions of the defendant." *Snyder v. State*, 210 Md. App. 370, 398 (2013) (citing *Melton*, 379 Md. at 502). "[P]ossession of a regulated firearm, while prohibited under two different subsections of § 5-133 . . ., constitute[s] only one violation of the law." *Wimbish v. State*, 201 Md. App. 239, 272 (2011). Thus, a defendant may "receive only *one* conviction, a result with which the doctrine of merger, which involves the combination, for sentencing purposes, of *multiple* convictions, is unconcerned." *Id.*

Appellant was charged under Count Four with possession of a firearm while under the age of 30 after having been adjudicated delinquent by a juvenile court for a crime that would be considered a crime of violence if committed by an adult and under Count Six with possession of a regulated firearm after having been convicted under § 5-602 of the Criminal Law Article. During the jury instruction, the judge stated, "The defendant is charged with possessing a regulated firearm . . . . [T]he State must prove that the defendant knowingly possessed the firearm. That the firearm was a regulated firearm, and that the defendant had a previous finding that disqualified him form possessing a regulated firearm." The verdict sheet reflected that the jury found Appellant guilty of "possession of a firearm." At sentencing, the judge merged the charge under Count Four into the charge under Count Six, explaining, "he's only going to get sentenced for three events here." In almost every instance, the trial proceeded as if it were for possession of a single firearm, despite the record reflecting that two guns were found in close proximity to each other. The trial court recognized that "the unit of prosecution in this . . . case could have been two

counts for two weapons." But it was not. The court's entering guilty verdicts for both Count Four and Count Six was impermissible. If we punished Appellant for two convictions despite language in the indictment and throughout the proceeding indicating that Appellant was subject only to one "unit of prosecution," we would violate our maxim that the indictment should "put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct." *Counts v. State*, 444 Md. 52, 57 (2015) (quoting *Ayres v. State*, 291 Md. 155, 163 (1981)). The sentence for Count IV ignores the stipulation that effectively removed from the jury's consideration that the Appellant had been adjudicated delinquent for a crime that would be a crime of violence. The conviction on Count Four is vacated. Addressing the rest of Appellant's arguments for vacatur is unnecessary.

CONCLUSION

For the reasons discussed above, we hold that the trial court did not err by admitting the firearms tester's testimony; that the evidence was sufficient to sustain Appellant's conviction for possession of a regulated firearm; that the evidence was sufficient to sustain Appellant's conviction for possession of drug paraphernalia; and that Appellant's conviction under Count Four was not sustained and must be vacated.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY IS AFFIRMED IN PART, REVERSED IN PART AND VACATED IN PART. APPELLANT TO PAY THREE QUARTERS OF THE COSTS, APPELLEE TO PAY ONE QUARTER OF THE COSTS.