UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0145

September Term, 2015

JOSEPH MAC CASTER

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: August 1, 2016

When law enforcement officers executed a search warrant at a Frostburg apartment, Joseph Mac Caster, appellant, and other occupants of the apartment were arrested in possession of street-ready packages of heroin and cocaine. A jury in the Circuit Court for Allegany County convicted Caster of possession with intent to distribute heroin, possession with intent to distribute cocaine, conspiracy to possess heroin with the intent to distribute, conspiracy to possess cocaine with the intent to distribute, possession of heroin, possession of cocaine, and possession of controlled paraphernalia. The court sentenced Caster to a total of 32 years of imprisonment: 14 years for possession of heroin with the intent to distribute, a consecutive 14 years for possession of cocaine with the intent to distribute, and a consecutive four years for possession of paraphernalia. The remaining convictions, including both conspiracy convictions, were merged for sentencing purposes.

On appeal, Caster raises the following challenges to his convictions:

1. Was the evidence sufficient to sustain the conspiracy convictions?

2. Did the circuit court err in instructing the jury that possessing cocaine and heroin is unlawful unless one has permission from a medical provider?

We conclude that because the State presented no evidence of separate agreements with respect to the cocaine and the heroin, the evidence does not support separate convictions for conspiracy to possess heroin with intent to distribute and conspiracy to possess cocaine with intent to distribute. With respect to the jury instruction, Caster did not object, and plain error relief is not warranted. Accordingly, we shall reverse the

conviction for conspiracy to possess cocaine with intent to distribute and affirm Caster's remaining convictions and sentences.

FACTS AND LEGAL PROCEEDINGS

On April 29, 2014, members of an Allegany County-area narcotics task force prepared to execute a no-knock search warrant for an apartment in Frostburg. Although Caster was not one of the two persons named in the warrant, Caster and others were on the premises, in plain view of heroin and cocaine that was packaged for sale, when the law enforcement officers breached the front door without warning.

Sergeant Wade Sibley of the Allegany County Sheriff's Office, who watched the apartment for more than an hour before the warrant was executed, did not see Caster enter or exit during that time. He did, however, observe another person leave and return to the apartment "several times."

As members of the Cumberland Emergency Response Team entered the apartment without knocking, they saw three or four men in the living room. When ordered to raise their hands, each of the men threw small packages of heroin and cocaine into the air.

As other members of the Emergency Response Team moved to detain the men in the living room and a man who attempted to escape through a window, Cumberland City Police Lieutenant Brian Lepley detected some activity in the bathroom. When Lt. Lepley entered the bathroom, Caster was heading for the toilet. Lt. Lepley observed Caster drop a plastic bag containing what was later confirmed to be heroin. After Caster was

handcuffed, the officers recovered a larger, clear baggie from the bathroom floor. That baggie contained mini-bags of what were suspected to be illegal drugs.

From the apartment, the officers recovered a total of 18 "mini-bags" of black heroin, 16 bags of brown heroin, and 14 containing crack cocaine. According to Sgt. Sibley, who testified as an expert in the manufacture, use, processing, packaging, transport, and sale of controlled dangerous substances in Allegany County, all of the mini-bags were sealed in typical "corner baggie"-style packaging, and each contained an amount ready for sale at a price of $100.

In the apartment, the officers recovered a Social Security card and a birth certificate for Caster, as well as over $1,000 in an article of clothing. In addition, the officers found two digital scales (one in a bedroom; one in the kitchen) and baggies matching those cut down to make the "corner baggies" found elsewhere in the apartment. Sgt. Sibley explained that the scale and baggies found in the bedroom were common tools used by drug dealers to measure and package heroin and cocaine for sale.

Sgt. Sibley testified that people involved in selling heroin and cocaine typically work with others, from a "stash house," where "they actually will all meet up . . . to disseminate both . . . money and product." Individual "runners" may be observed coming and going in the course of making sales.

DISCUSSION

I. Conspiracy Convictions

A. Circumstantial Evidence of Agreement

Caster contends that "the evidence was insufficient to sustain the conspiracy convictions because the State presented insufficient evidence of an agreement between Mr. Caster and the others in the apartment." In his view, "[t]he evidence showed only that police found several persons, including Mr. Caster, in an apartment containing drug contraband[,]" which "might have been sufficient to establish possession or possession with to distribute[,]" but was "not necessarily . . . sufficient evidence for conspiracy." The State responds that it adduced sufficient evidence of a conspiracy through the expert and eyewitness testimony supporting inferences that "the apartment was a 'stash house' and that its occupants were running a drug distribution operation."

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486, *cert. denied*, 443 Md. 735-36, *cert. denied*, ___ U.S. ___, 136 S. Ct. 564 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id.* (citation omitted).

"In Maryland, conspiracy remains a common law crime." *Mitchell v. State*, 363 Md. 130, 145 (2001). The Court of Appeals has described the offense as follows:

> "A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown."

Id. (quoting *Townes v. State*, 314 Md. 71, 75 (1988)).

The Court continued:

> Although a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred, the requirement that there must be a meeting of the minds – a unity of purpose and design – means that the parties to a conspiracy, at the very least, must (1) have given sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy – the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also has achieved that conceptualization and agrees to cooperate in the achievement of that objective or the commission of that act. Absent that minimum level of understanding, there cannot be the required unity of purpose and design . . . . [T]herefore, conspiracy is necessarily a specific intent crime; there must exist the specific intent to join with another person in the accomplishment of an unlawful purpose or a lawful purpose by unlawful means.

Id. at 145-46 (citations omitted).

Applying these principles, we conclude that the evidence was sufficient to establish an agreement to possess the heroin and cocaine found in the apartment, with the intent to distribute it. The jury was entitled to infer a meeting of the minds among Caster and the other occupants of the small apartment, where heroin and cocaine were found in

plain view when the officers suddenly entered under the authority of the no-knock warrant.

According to the State's expert, drug distributors commonly work in groups out of a "stash house," with persons meeting to package illegal drugs, to collect and deliver money, and to supply runners who may be seen entering and exiting in the course of conducting sales. Sgt. Sibley, who watched the apartment before execution of the warrant, saw the man who later fled out the window come and go from the apartment "several times," as a runner from a stash house would. Caster was in that small apartment long enough to support an inference that he was aware of the drug-distribution activities that were openly taking place therein.

Moreover, Caster's behavior and other circumstantial evidence supported an inference that he was engaged in a drug-distribution enterprise with the other occupants of the apartment. Lt. Lepley testified that when police entered, Caster had fled into the bathroom. Caster was apprehended while heading for the toilet. Beside him on the floor was a large bag of illegal drugs. The material, sizes, and contents of the packages recovered in the bathroom matched the material, sizes, and contents of the packages thrown by the men in the adjacent living room. The total number (34 bags of heroin, 41 bags of crack) and value (approximately $7,500) of the sealed, street-sized packages supported an inference that the heroin and cocaine were intended for sale rather than for personal use. Finally, the digital scale, baggies, and money found in the bedroom with Caster's important personal documents were consistent with what one would find in an

ongoing drug-distribution operation. Caster's participation in the operation may be inferred from this evidence, as well as from his flight from police and his attempt to dispose of the illegal drugs.

When viewed in light of the simultaneous attempts by Caster and other occupants to dispose of the drugs when officers unexpectedly entered, the evidence of so many valuable and uniformly packaged mini-bags of heroin and crack, as well as multiple scales and packaging tools, in plain view throughout the apartment, supports an inference that Caster and the other occupants of the apartment agreed to jointly possess this heroin and cocaine with the intent to distribute it. *Cf. Bordley v. State*, 205 Md. App. 692, 723 (2012) (based on evidence that appellant and his companion were trying to retrieve drugs left in plain view inside their hotel room, "the trial court could reasonably find that appellant and [the companion] agreed to act in concert to distribute the [controlled dangerous substances] they were attempting to secure"); *Manuel v. State*, 85 Md. App. 1, 16 (1990) (to establish drug-distribution conspiracy, State was not required to "show direct communication between all persons in the chain of . . . supply and retailing of the narcotics" because "[t]he parties' knowledge of the existence and importance of the other links in the distribution chain may be inferred from the circumstances, and it is sufficient to show the combination and community of interest"); *Cook v. State*, 84 Md. App. 122, 133 (1990) (evidence of conspiracy to distribute cocaine included "testimony describing the actual raid," which "established that appellant Cook was armed, an indication that he was the leader of the drug operation, and that [other conspirators were present] in a room

in which significant amounts of cocaine and packaging materials, evidencing both ongoing and planned future cocaine distribution, were in plain view"); *Bolden v. State*, 44 Md. App. 643, 652 (1980) ("'the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connection with it, without requiring evidence of knowledge of all its details or of the participation of others'") (quoting *Blumenthal v. United States*, 332 U.S. 539, 557 (1947)).

Although we find sufficient circumstantial evidence that Caster had an agreement to possess the drugs with the intent to distribute them, the State presented no evidence of separate agreements with respect to the heroin and the cocaine. We address that problem next.

B. Separate Agreements With Respect to Heroin and Cocaine

When the State charges a conspiracy offense, "[t]he unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). The State "'has the burden of proving a *separate* agreement for each conspiracy.'" *Savage v. State*, 212 Md. App. 1, 15 (2013) (citation omitted). "In the multiple conspiracy context, the agreements are 'distinct' and 'independent' from each other" when "each agreement has 'its own end, and each constitutes an end in itself.'" *Id.* at 17 (citations omitted).

In determining whether the State proved two separate conspiracies, we examine the evidence and charging documents, the State's arguments to the jury, and the trial

court's instructions. *See id.* at 24-26. When the State does not advance a two-conspiracy theory or fails to prove separate agreements, the defendant may not be convicted of and sentenced for multiple conspiracies. *See id.* at 26. "If a defendant is convicted of and sentenced for multiple conspiracies when, in fact, only one conspiracy was proven, the Double Jeopardy Clause has been violated." *Id.* at 26. The underlying principle "is that, '[t]o convict [him] severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice.'" *Id.* at 15 (citation omitted).

"[A] defendant who distributes a number of controlled dangerous substances in accordance with a single unlawful agreement commits but one crime: common law conspiracy." *Mason v. State*, 302 Md. 434, 445 (1985). "It is irrelevant that a number of controlled dangerous substances are involved in the single conspiracy." *Id.*

It is not impossible to have multiple conspiracy convictions arising out of the distribution and possession of different kinds of illegal drugs. *See, e.g.*, *Manuel*, 85 Md. App. at 11-12 (convictions for conspiracy to possess and distribute cocaine did not merge with convictions for conspiracy to possess and distribute heroin because evidence established "separate, distinct agreement[s]" with respect to heroin and cocaine trafficking rings). But when "the evidence is not sufficient to show the existence of separate conspiratorial agreements," we must conclude that "there was merely one continuous conspiratorial relationship." *Vandegrift v. State*, 82 Md. App. 617, 645-46 (1990) (convictions for conspiracies to distribute marijuana, to distribute cocaine, and to

import cocaine merged for sentencing purposes); *cf. Ezenwa v. State*, 82 Md. App. 489, 498-99 (1990) (conspiracies to import heroin and to distribute heroin merged where "a single agreement underlay both conspiracy counts").

We conclude that Caster's separate convictions for conspiracy to possess heroin with intent to distribute and conspiracy to possess cocaine with intent to distribute are inconsistent with principles of double jeopardy. Because the cocaine and heroin were found at the same time in the same apartment in the simultaneous possession of multiple occupants, and because the State presented no argument or evidence of separate agreements relating to the heroin as opposed to the cocaine, the State proved only one conspiracy.

Although Caster does not explicitly advance this argument in support of his sufficiency challenge, he does argue that the State failed to prove the agreement element of conspiracy. In the interest of justice and judicial economy, we interpret Caster's challenge to encompass the principle that the State must adduce sufficient evidence of a separate agreement to support each conspiracy conviction. Because the evidence established only one agreement encompassing both heroin and cocaine, we shall affirm the conviction for conspiracy to possess heroin with intent to distribute it and vacate the separate conviction for conspiracy to possess cocaine with intent to distribute.[1]

[1] Because Caster's conspiracy convictions were merged for sentencing purposes, his sentences are unaffected.

II. Jury Instruction

As alternative grounds for reversing all his convictions, Caster argues that "the circuit court erred in instructing the jury that possessing cocaine and heroin is unlawful unless one has permission from a medical provider." This challenge arises from the highlighted portion of the following instruction, addressing what is known as the "medical-permission exception":

> Heroin and cocaine are what's [sic] called controlled dangerous substances. It's unlawful for any person to possess any controlled dangerous substance *unless that substance was obtained pursuant to a valid prescription or order form from a physician or other health care provider* while that course [sic] was acting in the course of his or her professional practice.

(Emphasis added.)

As Caster points out, the trial court had no factual basis to instruct the jury on the medical permission exception, because health care providers cannot lawfully prescribe heroin or cocaine. Castor, however, admits that he did not object to this instruction. Consequently, he seeks relief under the doctrine of plain error.

A jury instruction "must be a correct statement of the law and be applicable under the facts of the case." *State v. Bircher*, 446 Md. 458, 463 (2016). Under Md. Rule 4-325(e), however,

> [n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court . . . may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

This contemporaneous-objection rule serves "to ensure fairness for all parties in a case and to promote the orderly administration of law . . . by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors." *Robinson v. State*, 410 Md. 91, 103 (2009) (citation and quotation marks omitted). Preservation requirements prevent error that requires re-trial and precludes lawyers from sandbagging the trial judge to obtain "a second 'bite of the apple' after appellate review." *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff'd on other grounds*, 365 Md. 205 (2001).

For these reasons, "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). The Court of Appeals has articulated the following four-part test for plain error review:

> First, *there must be an error or defect* – some sort of "[d]eviation from a legal rule" – *that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant.* Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means *he must demonstrate that it "affected the outcome of the . . . proceedings*." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error – *discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"* Meeting all four prongs is difficult, "as it should be."

State v. Rich, 415 Md. 567, 578 (2010) (citations omitted; emphasis added); *see McCree v. State*, 214 Md. App. 238, 271 (2013).

Because Caster does not satisfy each of the requirements highlighted above, this is not one of those exceedingly rare appeals that warrants review for plain error.

As a threshold matter, Caster affirmatively waived his right to complain about the challenged instruction. The court could easily have corrected the instruction had defense counsel made a timely objection. Yet, after the trial court completed its instructions, Caster's counsel asked only for an additional instruction on Caster's right not to testify and then stated that he had no other objections or exceptions. Plain error review is inappropriate when, in addition to "the simple lack of an objection to the instruction as given," the defendant waives any error by "affirmatively advis[ing] the court that there was no objection to the instruction which the court immediately thereafter gave to the jury." *Booth v. State*, 327 Md. 142, 180 (1992).

Even if Caster had not affirmatively waived his objection, we would refrain from reviewing the instruction for plain error. While Caster might satisfy the second requirement (of an obvious error) because the medical-permission instruction was inapplicable to his case, he cannot establish the third requirement for plain error relief – that this instruction "affected the outcome of the proceedings." *See Rich*, 415 Md. at 578.

Caster does not directly contend that the instruction contributed to the guilty verdict. Instead, he complains that the instruction "almost certainly led the jury to consider whether there was evidence indicating that Mr. Caster had medical permission to possess heroin or cocaine." Caster relies on *Brogden v. State*, 384 Md. 631 (2005), as

support for the proposition that the mere consideration of a superfluous instruction gives rise to prejudice sufficient to warrant reversal.

Brogden involved charges of carrying a handgun during a burglary. *Id.* at 632. Over a defense objection, the circuit court gave the jury a supplemental instruction stating that "'[I]t's the burden of the Defendant to prove the existence of the [handgun] license, if one exists, not the State[.]'" *Id.* at 643. The Court of Appeals held that the circuit court committed prejudicial error in giving that instruction because the defendant had not raised the defense that he had a license that entitled him to possess the gun. *Id.* at 644.

The *Brogden* Court first explained that the supplemental instruction was superfluous:

> It is clear from the record before us that petitioner never attempted to set forth such an affirmative defense in any pleading or at trial. Nor did the State present any evidence of a license or lack thereof. Issues of a license are entirely absent from the trial prior to the point of the jury's question. Therefore, the trial judge's supplemental instruction to the jury . . . was inappropriately rendered. At that point, the burden was solely on the State to prove beyond a reasonable doubt that petitioner did indeed burglarize [the victim's] apartment and did have a gun on his person during the commission of that crime. Because petitioner chose not to pursue a defense relating to him possessing a license for a handgun (or any defense), there was absolutely no reason for the trial judge, over objection, to instruct the jury as to the law of handgun licenses and its effect on the burden of proof (whatever that effect might be).

Id. at 643-44 (footnote omitted).

The Court went on to explain why it was not harmless error to give the superfluous instruction:

> The supplemental jury instructions at issue here were simply not "appropriate" under Md. Rule 4-325 in that they did not state the

> "applicable law" as to the issues relating to the handgun charge then properly before the jury for deliberation. *At the point the supplemental instruction was given, the entire burden of proving the commission of that particular crime rested with the State. Petitioner had presented no defense. The jury had already been correctly instructed. To then inform the jury that petitioner had the burden of establishing the existence of a license in order to prevail on a defense that petitioner had never raised, was to impose a burden on petitioner that he never had. Under these circumstances it could not have been harmless.*

Id. at 644 (emphasis added).

Brogden is inapposite because, in contrast to the erroneous instruction that imposed a burden to establish a defense that Brogden had not raised, the challenged instruction in this case did not impose any burden on Caster. Even if the jury understood the instruction to mean that a person could obtain a prescription for heroin or cocaine and proceeded to consider whether Caster had such a prescription, it did so in accordance with an instruction that *the State* had the burden to prove, beyond a reasonable doubt, all elements of the charged offenses. *Compare Brogden*, 384 Md. at 644 (holding that trial court erred by erroneously instructing the jury that it was the *defendant's* burden to prove a defense that he had not raised). Unlike *Brogden*, this is not a case in which the superfluous instruction required a defendant to shoulder a burden that he had not agreed to accept. In these circumstances, we cannot say that the superfluous instruction affected the jury's verdict so as to satisfy the third requirement for plain-error review.

In summary, Caster has satisfied only one of the relevant requirements of the plain-error doctrine. Consequently we need not decide whether to exercise our discretion to remedy the error. *See Rich*, 415 Md. at 578 (appellate court has the discretion to remedy

the error if each of the first three requirements are satisfied). It would be injudicious to exercise that discretion in any event, because the error did not affect the jury's verdict and, hence, did not affect, much less "'seriously affect[],'" the "'fairness, integrity or public reputation of judicial proceedings.'" *Id.*

CONVICTION FOR CONSPIRACY TO POSSESS COCAINE WITH INTENT TO DISTRIBUTE VACATED; ALL OTHER CONVICTIONS AND SENTENCES AFFIRMED; COSTS TO BE PAID ONE-HALF BY ALLEGANY COUNTY AND ONE-HALF BY APPELLANT.