Circuit Court for St. Mary's County
Case No.: C-18-CR-23-000089

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2038

September Term, 2023

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DIMITRI P. BROOKS

v.

STATE OF MARYLAND

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Berger,
Reed,
Shaw,
JJ.

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Opinion by Shaw, J.

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Filed: March 21, 2025

* 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 Maryland Rule 1-104(a)(2)(B).

On September 14, 2023, following a trial in the Circuit Court for St. Mary's County, a jury found Dimitri P. Brooks, Appellant, guilty of possession with intent to distribute cocaine, possession of a firearm with a nexus to a drug trafficking crime, possession of cocaine, illegal possession of ammunition, and illegal possession of a regulated firearm. The court sentenced him to an aggregate of twenty years' imprisonment with all but fifteen years suspended and five years' supervised probation upon his release.[1]

Appellant noted this timely appeal and he presents three questions for our review:

1. Did the trial court err in allowing a State's lay witness to give prejudicial expert testimony?
2. Did the trial court err in failing to merge simple possession of cocaine into the conviction for possession with intent to distribute where both convictions were based on the same evidence?
3. Is the evidence legally insufficient to sustain the convictions?

For the reasons that follow, we remand the case with instructions to merge Appellant's sentence for possession of cocaine into his sentence for possession of cocaine with intent to distribute it, and otherwise affirm the judgment.

[1] Specifically, the court imposed the following sentences:

- 20 years, with all but 10 years suspended for possession with intent to distribute cocaine;
- 20 years with all but 5 years suspended, consecutive to count 1, for possession of a firearm with a nexus to a drug trafficking crime;
- 1 year, concurrent to counts 1 and 2, for possession of cocaine;
- 1 year, concurrent, for illegal possession of ammunition; and
- 15 years with all but 5 years suspended, consecutive to count 1, but concurrent to count 2, for illegal possession of a firearm after being convicted of a disqualifying crime.

## BACKGROUND

In the early morning hours of February 1, 2023, officers from the St. Mary's County Sherriff's Office Narcotics Unit, acting pursuant to a warrant, searched a residence after they confirmed, through investigation and surveillance, that Appellant lived there. Among those who conducted that search were Detective Michael Graves, Detective Edward Godwin, Detective Brian Fennessey, and Sergeant Kevin Meyer, the lead investigator. The conduct of that search, and the evidence it produced, was largely uncontested at trial.

Appellant was not inside the residence at the time of the search.[2] Detective Graves said that, prior to the search while he conducted surveillance of the residence, he saw a Honda Accord registered to Appellant parked out front along with a Toyota Rav4 that had two occupants in it who he could not identify. Eventually, the Toyota drove off and Detective Graves saw Appellant sitting in the passenger seat. The police stopped the Toyota and took Appellant into custody without incident. A later search of the Toyota resulted in the recovery of two crack pipes.

The residence contained two bedrooms. One of them appeared to be a child's room and one appeared to be the master bedroom. In the master bedroom, the police found and recovered two cell phones from the bed, and a single loose prescription tablet suspected to be oxycodone from the nightstand. Inside a mini refrigerator in the bedroom the police found a digital scale with suspected drug residue on it and numerous empty clear plastic

[2] The only person in the residence when the police began their search was Jeremy Berry. Mr. Berry had fentanyl in his possession, he was charged with possession of it, and he was allowed to leave the residence.

baggies. Sergeant Meyer testified that the empty clear plastic baggies were seized because they were indicative of drug distribution.

The police found a safe inside a closet in the master bedroom, and next to it, they found three knotted clear bags containing cocaine and marijuana.[3] Inside the safe, the police found a baggie containing crack cocaine, a loaded and operable 9-millimeter handgun, and what appeared to be Appellant's wallet.[4] The wallet contained Appellant's Maryland identification card and learner's permit, two health insurance cards, one in Appellant's name and the other in the name of his child, cash app payment cards bearing Appellant's nickname, and $348 in cash.[5, 6] The police also found the key to Appellant's Honda Accord in the safe.

The police found in the kitchen, a Pyrex glass measuring cup on the counter next to the sink, an open box of baking soda, and a plastic baggie. Sergeant Meyer said that the circumference of the bottom of the Pyrex measuring cup was similar to the "cookie-type" shape of two of the packages of crack cocaine that were in the bedroom. He also testified that baking soda was typically used as a cutting agent.

[3] The cocaine was sent to the crime lab, but the marijuana was not.

[4] The police found another wallet on the bed in the master bedroom. The identification found in that wallet indicated that it belonged to another known drug user.

[5] Sergeant Meyer testified that Appellant's nickname is "Meach."

[6] There were also numerous Independence cards found in the wallet, some in Appellant's name, some in others' names, and some with no name. The names of the other individuals were familiar to police as drug users in St. Mary's County.

## DISCUSSION

### I.

Appellant contends that the court erroneously allowed Sergeant Meyer to offer, as a lay witness, his allegedly expert opinion concerning the significance of the baggies and baking soda seized from his residence. Sergeant Meyer testified that he collected them as evidence because the baggies were suspected packaging materials that one would use to resell drugs, and baking soda was typically used as a cutting agent. According to Appellant, "[a]s a lay witness, Sergeant Meyer was not qualified to opine on the necessity of baggies and baking soda to a drug distribution operation."

During trial, on direct examination of Sergeant Meyer by the State, the following occurred:

> Q[:] Can you tell the [c]ourt what you recovered from the mini-fridge [found in Appellant's bedroom].
>
> A[:] It would have been a digital scale with residue, with drug residue – suspected drug residue and some empty bags, I believe, packaging materials.
>
> Q[:] What do you mean when you say packaging materials?
>
> A[:] Typically if we see a bunch of empty bags –
>
> [DEFENSE]: Objection, Your Honor. May [w]e approach?
>
> THE COURT: Come on up.
>
> ****
>
> [DEFENSE]: I think he's about to testify, sort of, like I said, as a quasi-expert and he's going to say typically we associate bags with possession with the intent to distribute, which we had a whole other hearing about that. This

wasn't [the] expert that they qualified - - or that they attempted to qualify, so I think it's beyond the scope of his lay witness testimony.[7]

[STATE]: He's testifying to the significance to him as a narcotics investigator of a piece of evidence that they recovered. He's not giving an opinion about whether or not the cocaine was –

[DEFENSE]: The significance.

[STATE]: -- for the purpose of and intention to distribute. But he is testifying to the reason why they collected the plastic baggies.

THE COURT: Overruled.

****

Q[:] What is the significance of the plastic baggies as far as why you collected them, to you as – in the course of this investigation?

A[:] Well, the investigation is into drug distribution and typically an individual involved in drug distribution is going to need to package this material from a larger bag into smaller bags for resale. And clear plastic bags that are empty, that are in the vicinity of larger plastic bags containing substance that is believed to be drugs will be taken from that bag, and placed into another bag and sold for money.

[DEFENSE]: Your Honor –

THE WITNESS: So if it's an empty bag –

[DEFENSE]: I'm going to renew my objection. Can we approach again so that I can be heard on this?

THE COURT: Come on up.

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[7] Prior to trial, Appellant moved *in limine* to prevent a different police officer from testifying as an expert witness concerning whether the circumstances around the narcotics recovered in this case were indicative of an intention to distribute them, or simply possess them for personal use. After holding a hearing on Appellant's motion, the trial court granted it largely, if not entirely, based on its assessment of the unreliability of the proposed expert, but clarified: "I want to be clear … it doesn't mean that I don't believe a police officer can come in here and be qualified to give an opinion and that that opinion can't be based on his training, and his knowledge and his experience. I just don't think that that was presented in this particular case on this particular day."

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[DEFENSE]: Now at this point, he's absolutely testifying as an expert and the very thing that they intended to have Corporal Potter testify to. Simply saying the significance is one thing, but coming in and saying – and speculating to what those things mean in the context of a PWID investigation is exactly what we had a whole hearing about.

[STATE]: I don't think he's giving an opinion as to the overall issue of whether or not these drugs were possessed with the intention to distribute, as you objected to yesterday. He's testifying to the significance in his investigation of why these bags were recovered. But I will move on. I think he's answered the question.

[DEFENSE]: I would ask to strike.

THE COURT: So at this point, he's not qualified as an expert. He's not being offered as an expert. He has given his reason for why he collected the bags. And I do think that the Defense will be able to cross-examine him, and if you choose to cross-examine him, you can certainly cross-examine him as to whether there's significance to that or not. But I don't think he's being offered as an expert, so I'm going to overrule the objection. But we're not going to belabor this or beat this - -

[STATE]: I am ready to move on.

Later, during the State's direct examination of Sergeant Meyer when he began to testify about the baking soda that police recovered from Appellant's residence, the following occurred:

Q[:] Was anything else recovered from within the kitchen?

A[:] That's correct. There was a box of baking soda. Baking soda is typically used as a cutting agent.

[DEFENSE]: Objection. May we approach?

THE COURT: Come on up.

****

[DEFENSE]: So I think the State is free to argue that, but at this point, he's sort of just doing the exact same thing he's been doing all along, which is

> testifying about what his experience is in other cases, not based on his personal observations. I think he can say he found baking soda, but saying that it's typically used as a cutting agent is more of an expert opinion.
>
> [STATE]: It's not an expert opinion.
>
> THE COURT: I don't know what his – I know what his experience is, eight years as a narcotics officer. But him explaining why, which he probably would have objected, I don't think it requires an expert to say whether or not baking soda is used as a cutting agent. He's not being offered as an expert. But I'll let [the prosecutor] – if she wants to follow down that path, she needs to ask him questions that will maybe get you where you're going.
>
> [STATE]: I am not trying to qualify as an expert. I'm aware of the [c]ourt's ruling from yesterday, and he's not being offered as an expert. But then I believe that in the context of a narcotics investigation by a narcotics officer, he can testify factually to what he seized and why it was seized based on his experience. He's not testifying or giving his opinion –
>
> THE COURT: I agree.
>
> [STATE]: -- but in this case, it was being used for those purposes.
>
> THE COURT: I agree. Overruled.

Maryland Rule 5-701 provides that lay witness opinion or inference testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." On the other hand, "'when the subject of the inference … is so particularly related to some science or profession that is beyond the ken of the average layman,' it may be introduced only through the testimony of an expert witness properly qualified under Maryland Rule 5-702." *State v. Galicia,* 479 Md. 341, 389, *cert. denied*, 143 S. Ct. 491 (2022) (quoting *Johnson v. State*, 457 Md. 513, 530 (2018)). "Md. Rule 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Ragland v. State*, 385 Md.

706, 725 (2005). "When a court considers whether testimony is beyond the 'ken' of the average layman, the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding." *Galicia*, 479 Md. at 394.

Ordinarily, we review evidentiary rulings for abuse of discretion. *Id.* at 389. However, if "'a court admits evidence through a lay witness in circumstances where the foundation for such evidence must satisfy the requirements for expert testimony[,] … the court commits legal error and abuses its discretion.'" *Id*. (quoting *Johnson*, 457 Md. at 530).

Appellant asserts that Sergeant Meyer's testimony was inadmissible as lay opinion because it was "specialized knowledge" based on his "training and experience as a narcotics police officer" and "[a] lay person does not know what 'typically' happens in a drug distribution operation." According to Appellant, his opinions were expert opinions and were therefore inadmissible because he did not testify as an expert.

We disagree. As noted above, "the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding." *Galicia*, 479 Md. at 394. Here, we hold that it is within the range of perception and understanding of an average person that unused baggies and a large open and partially used box of **baking** soda, found along with various narcotics, a scale, and a handgun, could be used in the distribution of narcotics to package, re-package, and/or dilute those narcotics even if that same average person was previously unaware that those items could be used for that purpose. Sergeant Meyer's explanation for why he

collected those items from Appellant's residence was therefore not inadmissible and we discern neither error nor abuse of discretion in overruling Appellant's objections to the testimony.

**II.**

Appellant contends that his concurrently imposed one-year sentence for possession of cocaine must be merged into his sentence for possession with intent to distribute cocaine. He argues that they arose from the same circumstances, and that possession of cocaine is a lesser-included offense of possession with intent to distribute cocaine under the *Blockburger* required evidence test. The State agrees and, although we are not bound to accept the State's concession, *see, e.g., Coley v. State*, 215 Md. App. 570, 572 n.2 (2013), so do we.

"Where a defendant is convicted of more than one crime as a result of one criminal act or transaction, we determine whether he may be punished for each crime by applying the 'required evidence' test." *Hankins v. State*, 80 Md. App. 647, 658 (1989). The required evidence test, as set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), asks whether "each offense requires proof of a fact that the other does not." *Jones v. State*, 357 Md. 141, 158 (1999). If each offense requires proof of a fact that the other does not, then they are not the "same" offense and they do not merge. If only one offense requires proof of a fact which the other does not, the offenses are deemed the "same" and separate sentences for each offense are not permitted. *Blockburger*, 284 U.S. at 304; *Newton v. State*, 280 Md. 260, 268 (1977).

In this case, the same cocaine, which was found in Appellant's closet and his safe

in that closet, formed the basis of Appellant's convictions for both possession of cocaine and possession with the intent to distribute cocaine. Those two offenses are deemed the "same" offense under the *Blockburger* required evidence test. *Hawkins v. State*, 77 Md. App. 338, 349 (1988); *McCoy v. State*, 118 Md. App. 535, 540 (1997). As a result, the sentence for the lesser-included offense, *i.e.*, the sentence for possession of cocaine, merges into the sentence for the greater offense, *i.e*., the sentence for possession with the intent to distribute cocaine.

**III.**

Appellant next contends that the evidence is legally insufficient to show that he possessed the narcotics, the pistol, or the ammunition that the police recovered from his residence. Alternatively, he asserts that the "competent" evidence is legally insufficient to show his intent to distribute narcotics.

As indicated earlier, Appellant was prosecuted for, and found guilty of, possession with intent to distribute cocaine, possession of a firearm with a nexus to a drug trafficking crime, possession of cocaine, illegal possession of ammunition, and illegal possession of a regulated firearm. Possession of some form of contraband is a necessary component of each of those offenses.

In the context of the narcotics the police recovered from Appellant's residence, the trial court instructed the jury on the concept of possession as follows:

> Possession means having control over something, whether actual or indirect. The Defendant does not have to be the only person in possession of the substance. More than one person may have possession of the substance at the same time. A person has actual possession of a substance when the

> person has both direct control over the substance and the intention to exercise that control.
>
> A person not in actual possession, who has both the power and the intention to exercise control over something, either personally or through another person, has indirect possession. In determining whether the Defendant had indirect possession of the substance, consider all of the surrounding circumstances. The circumstances include the distance between the Defendant and the substance, whether the Defendant had some ownership or possessory interest in the place where the substance was found and any indications that the Defendant was participating alone or with others in the use and enjoyment of the substance.

The trial court similarly instructed the jury with respect to possession of the pistol.

"'The standard for appellate review of evidentiary sufficiency 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.'" *Tracy v. State*, 423 Md. 1, 11 (2011) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). "We do not re-weigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Smith*, 374 Md. at 534 (quoting *White v. State*, 363 Md. 150, 162 (2001)).

Section 5-101(v) of the Criminal Law Article of the Maryland Code states that "'[p]ossess' means to exercise actual or constructive dominion or control over a thing by one or more persons." "[T]he 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." *State v. Suddith*, 379 Md. 425, 432 (2004) (citation omitted). Possession may be "constructive or actual, exclusive, or joint," *Belote v. State*, 199 Md. App. 46, 55 (2011).

Knowledge of the contraband is required because an individual ordinarily would not be deemed to exercise "dominion or control" over an object about which he is unaware. *Dawkins v. State*, 313 Md. 638, 649 (1988). Such knowledge "'may be proven by circumstantial evidence and by inferences drawn therefrom.'" *Handy v. Stat*e, 175 Md. App. 538, 563 (2007) (quoting *Dawkins*, 313 Md. at 651).

"To prove possession of contraband, whether actual or constructive, joint or individual, the State must prove, beyond a reasonable doubt, that the accused knew of both the presence and the general character or illicit nature of the substance." *Id*. at 564 (cleaned up).

In this case, Appellant did not actually physically possess any of the contraband found in his residence as he was in police custody at the time the police recovered it. Thus, the question is whether the evidence is sufficient to show that Appellant constructively possessed the contraband.

Maryland's Supreme Court has outlined several factors to be relevant in the determination of whether an individual was in constructive possession of contraband, including, (1) the defendant's proximity to the drugs, (2) whether the drugs were in plain view of or otherwise within the knowledge of the defendant, (3) whether there was indicia of mutual use and enjoyment of the contraband, and (4) and whether the defendant has an

ownership or possessory interest in the location where the police discovered the contraband. *State v. Gutierrez*, 446 Md. 221, 234 (2016); *Smith v. State*, 415 Md. 174, 198 (2010). No single factor is dispositive and ultimately "possession is determined by examining the facts and circumstances of each case." *Smith*, 415 Md. at 198.

Appellant argues that the evidence was "woefully insufficient" to prove that he was in possession of the contraband. He asserts that there was no evidence to show how long the narcotics, the pistol, or the keys were in the safe, how long the Honda was in the driveway, or how long since the Appellant was in the residence. Moreover, Appellant points out that another person was in the residence, not Appellant, and that it was not clear who owned the residence. There is further uncertainty, according to the Appellant, because the Honda was co-registered to another person and some of the documents within the residence had other persons names on them. Under those circumstances, Appellant contends that "there can be nothing but speculation as to [Appellant]'s knowledge or exercise of dominion or control over the drugs or the firearm."

We disagree. Appellant indisputably resided in the residence. Also, the police witnessed Appellant sitting the in the passenger seat of the Toyota in front of the residence before the car drove away and was stopped. The residence itself had two bedrooms with one appearing to be a child's bedroom and the other appearing to be a master bedroom. The police found drugs, Appellant's wallet with his identification and insurance cards, and Appellant's car keys in the safe of the master bedroom.

In our view, that evidence, "if believed and if given maximum weight," *Starke v. Starke*, 134 Md. App. 663, 678 (2000), was sufficient to allow a rational juror to conclude

Appellant had knowledge of, and exercised dominion and control over, the contraband located in that bedroom. Thus, the evidence is sufficient to show that Appellant possessed the contraband.

Alternatively, Appellant asserts that, even if the evidence of possession of the narcotics were sufficient, there was no "competent evidence" of an intent to distribute narcotics. Appellant contends that the State did not produce evidence, either direct or indirect, to demonstrate he had the intent to distribute narcotics. Additionally, the evidence that the baggies and the baking soda were used for distribution of narcotics was erroneously admitted, and that there was no evidence that Appellant ever went near the baggies or baking soda regardless. Appellant further argues that "the presence of multiple other people in the residence" makes any allegation linking Appellant to the contraband "pure speculation."

We disagree.

"'Since intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence.'" *Spencer v. State*, 450 Md. 530, 568 (2016) (quoting *Davis v. State*, 204 Md. 44, 51 (1954)). "When charged with the intent to distribute [narcotics], the element of intent is generally proved by circumstantial evidence." *Purnell v. State*, 171 Md. App. 582, 614 (2006) (citation omitted). "[A]n intent to distribute controlled dangerous substances is seldom proved directly, but is more often found by drawing inferences from facts proved which reasonably indicate under all the circumstances the existence of the required intent." *Id*. (cleaned up).

> When a fortuitous snapshot of the very happening of the *corpus delicti*, to wit, an eyewitness, is not available, then to survey the surrounding predicate facts and to observe the scene over a longer time span permits us to paint on a circumstantial canvas. What then is the palette with which we work? What then are the ways in which to paint a picture of constructive possession? Like Elizabeth Barrett Browning, let us count the ways. There is, of course, the place. There are possible sub-divisions of that place. There may, moreover, be people in or about that place. There are goods and chattels in that place. From the concatenation of all of those predicate facts, there may emerge the discernible mosaic of the crime that probably transpired in that place. Inference can be an amazingly powerful technique.

*Moseley v. State*, 245 Md. App. 491, 497-98 (2020).

Again, it is not disputed that the residence searched by the police belonged to Appellant. The police also saw Appellant sitting in the passenger seat of a Toyota vehicle in front of the residence before they searched it. There was a safe in the closet of one of the bedrooms that had a wallet with Appellant's identification card and learner's permit. His photograph was on both cards. The wallet also had his insurance card and his son's insurance card. His keys to his Honda were in that safe. The police further found drugs, a black digital scale, and clear plastic bags in the bedroom, and they found baking soda in the kitchen.

Given all of those circumstances, we hold that the evidence was legally sufficient for a jury to draw the inference that Appellant had the intent to distribute narcotics. That it was also possible for some other inference to have been drawn from the evidence does not, *ipso facto*, mean that it is "pure speculation," as Appellant suggests, to draw that inference.

**CASE REMANDED TO THE CIRCUIT COURT FOR ST. MARY'S COUNTY WITH INSTRUCTIONS TO MERGE THE SENTENCE FOR POSSESSION OF COCAINE INTO THE SENTENCE FOR POSSESSION OF COCAINE WITH THE INTENT TO DISTRIBUTE IT. JUDGMENT OTHERWISE AFFIRMED. COSTS ASSESSED SIXTY-SEVEN PERCENT TO APPELLANT AND THIRTY-THREE PERCENT TO ST. MARY'S COUNTY.**