Circuit Court for Carroll County
Case No.: C-06-CR-20-000221

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 183

September Term, 2022

DAVID T. MURPHY

v.

STATE OF MARYLAND

Graeff,
Tang,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: March 14, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury in the Circuit Court for Carroll County convicted appellant, David T. Murphy, of possession with intent to distribute fentanyl, possession of fentanyl, possession of clonazepam (Klonopin), and assuming the identity of another to avoid identification, apprehension, or prosecution. The court sentenced appellant to an aggregate sentence of 20 years of incarceration with all but 12 years suspended.

On appeal from his convictions, appellant presents the following questions for our review, which we have rephrased slightly:

I. Did the court err by denying appellant's motion to suppress evidence seized from his backpack?

II. Did the court abuse its discretion by denying appellant's motion *in limine* to exclude evidence of his prior conviction?

III. Was the evidence sufficient to sustain appellant's conviction for possession with intent to distribute fentanyl?

Finding no error or abuse of discretion by the circuit court, we shall affirm.

BACKGROUND

Evidence Introduced at the Suppression Hearing

On the evening of April 9, 2020, Sergeant Ecker of the Westminster Police Department was on patrol on Pennsylvania Avenue. He observed appellant, whom he recognized as a person with an outstanding arrest warrant. Sergeant Ecker approached appellant and asked for his name. Appellant said his name was "Dion Richard Gamble," which the sergeant knew was false. The sergeant requested backup, and Officer O'Neal arrived on the scene to assist. Sergeant Ecker returned to his vehicle to confirm appellant's identity. As he was doing so, appellant fled on foot. Officer O'Neal gave chase, followed

by Sergeant Ecker. During the chase, Sergeant Ecker observed appellant remove and throw from his person a black backpack. He testified,

> [SERGEANT ECKER]: As we were cutting through several residential yards in the area, I observed as [appellant] took off the backpack. I didn't get to see exactly like which shoulder he took off first or anything of that nature. I just saw the backpack flew – his hand and flew it off to the side off to his right as he was running across the yards.
>
> The other officer was able to make contact with him and was able to detain him. I was maybe 30 seconds behind and went over and helped get the handcuffs on.
>
> [THE PROSECUTOR]: Okay, so there was no arrest or police contact effectuated at the time the backpack was thrown by [appellant]?
>
> [SERGEANT ECKER]: No. He was still in motion. He was still running when he threw the backpack.

After appellant threw the backpack, he ran approximately 40 feet before Officer O'Neal "took [appellant] to the ground" and Sergeant Ecker handcuffed him. As the officer and sergeant walked back to the police vehicles with appellant, they retrieved the backpack from a grassy area close to a nearby fence. Appellant "made no mention of the backpack." Once appellant was arrested and seated on the ground, Sergeant Ecker searched the backpack, "[a]s it was abandoned."

At the conclusion of the suppression hearing, the court denied appellant's motion to suppress. It explained, in pertinent part, that:

> Here, the testimony is that [appellant] abandoned the property that was the backpack and its contents. Under circumstances where the [c]ourt can't find that there remained a Fourth Amendment interest to protect. I therefore, will deny the motion. I do find that the search was appropriate of abandoned property.

Trial

At trial, Sergeant Ecker testified consistently with his suppression testimony. A search of appellant's backpack yielded, *inter alia*, "user paraphernalia," a tin with 21 gel capsules containing fentanyl, 30 pills of clonazepam, and $189 in different denominations. Detective Jednorski, an expert in controlled dangerous substances, opined that appellant possessed the gel capsules with the intent to distribute them. Appellant testified in his defense, explaining that the drugs were for his personal use, not for distribution to others. Additional facts will be included as they become relevant in the following discussion.

DISCUSSION

I.

Suppression Ruling

Appellant contends that the circuit court erred by denying the motion to suppress evidence seized from the backpack. The State responds that the court properly found that the backpack was abandoned property and the search, therefore, did not implicate the Fourth Amendment.

A. Standard of Review

Appellate review of a ruling on a motion to suppress evidence "is limited to the information contained in the record of the suppression hearing." *Trott v. State*, 473 Md. 245, 253-54 (2021). We accept "the suppression court's factual findings and credibility determinations, unless clearly erroneous, viewing the evidence in the light most favorable to the prevailing party – here the State." *Portillo Funes v. State*, 469 Md. 438, 462 (2020). We determine whether there was a constitutional violation by conducting an "independent

constitutional evaluation that is made by . . . applying the law to the facts found in each particular case." *Richardson v. State*, 481 Md. 423, 445 (2022) (quoting *State v. Carter*, 472 Md. 36, 55 (2021)).

B. Analysis

The Fourth Amendment protects citizens and their property from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; *Williamson v. State*, 413 Md. 521, 534 (2010). "Fourth Amendment protection, however, does not extend to property that is abandoned or voluntarily discarded, because any expectation of privacy in the item searched is discarded upon abandonment." *Williamson*, 413 Md. at 535.

In determining whether the protections of the Fourth Amendment apply, we consider: (1) whether the individual's conduct showed an actual subjective expectation of privacy; and (2) whether the expectation of privacy is one that society would recognize as reasonable. *Richardson*, 481 Md. at 446 (citing *Bond v. United States*, 529 U.S. 334, 338 (2000)). "The test for abandonment is 'not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned.'" *Joyner v. State*, 87 Md. App. 444, 459(1991) (quoting *Duncan v. State*, 281 Md. 247, 262 (1977)). "Intent must be ascertained from what the actor said and did; intent, though subjective, is determined from the objective facts at hand." *Duncan*, 281 Md. at 264. In assessing "objective indications of the owner's intent," courts consider the location of the property, how long the property had been present at the location before it was searched, the condition of the property when it was searched, whether the property was protected or supervised by a third party, and whether the owner

disavowed the property when questioned by police. *Stanberry v. State*, 343 Md. 720, 732-33 (1996).

In *Richardson v. State*, the Supreme Court of Maryland[1] considered the issue of whether a backpack that had been dropped during a high school fight had been abandoned for Fourth Amendment purposes. 481 Md. at 435-36. After a school resource officer intervened in a fight in which Richardson was involved, Richardson's backpack dropped to the ground, and the officer picked it up before Richardson had a chance to retrieve it. *Id*. at 436-37. Richardson immediately fled on foot. *Id*. at 437. Inside the backpack, the officer discovered a handgun, school identification, three cell phones, and cash. *Id*. Police determined that one of the cell phones in the backpack had been stolen in an armed robbery and another was used by a perpetrator in connection with the robbery. *Id*. at 437-38.

The trial court denied Richardson's motion to suppress evidence discovered in the backpack, finding that Richardson had abandoned the backpack when he ran away. *Id*. at 442. Our Supreme Court determined that "the objective facts indicate that Richardson intended to relinquish his privacy interest in the backpack when he fled the scene." *Id*. at 447. The Court pointed out that Richardson did not comment on the backpack or ask the officer why he had picked it up. *Id*. He did not say that he had to leave and he intended to

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

return shortly, nor did he claim ownership of the backpack. *Id*. at 447-48. The Court determined that based on the circumstances, Richardson had abandoned the backpack before the officer had searched it. *Id*. at 449-50.

In the instant matter, the undisputed evidence adduced at the suppression hearing established that Sergeant Ecker observed appellant throw the backpack during the foot chase, and appellant neither claimed nor disavowed ownership of the backpack. On this record, appellant's actions were consistent with an intent to relinquish his privacy interest in the backpack.[2] *See, e.g., United States v. Nowak*, 825 F.3d 946, 948-49 (8th Cir. 2016) (holding that the defendant had abandoned a backpack in his friend's car when he fled the car following a traffic stop and made no request to the friend to store or safeguard it for him); *Jackson v. State*, 990 A.2d 1281, 1288-89 (Del. 2009) (concluding that the trial court properly denied the motion to suppress a bag and bicycle that the defendant discarded as he fled from police); *Abdullah v. State*, 745 So.2d 582, 582 (Fla. Dist. Ct. App. 1999)

[2] Appellant applies the search-incident-to-arrest principles in *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) to support his contention that the search of the backpack was improper where it was searched as he was handcuffed and seated about 15 feet away. Appellant's reliance on *Davis*, however, is misplaced. The issue in *Davis* was whether police can conduct warrantless searches of non-vehicle containers incident to a lawful arrest. *See id*. at 197. In answering in the affirmative, the *Davis* court held that such a search is permissible "only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search." *Id*. at 197 (quotation omitted). In *Davis*, the defendant fled from a traffic stop while carrying a backpack. *Id*. at 194. The police caught the defendant and ordered him to submit to the arrest. *Id*. The defendant complied, dropped the backpack, and laid down on his stomach. *Id*. Police searched his backpack and found cash and cocaine. *Id*. In evaluating the limits of the search-incident-to-arrest exception, the Fourth Circuit concluded that, based on the record, the search of the backpack following the arrest, while the defendant was handcuffed, was not justified as a search incident to arrest. *Id*. at 198-200. In *Davis*, unlike the case here, abandonment of the backpack was not an issue.

(affirming the denial of a motion to suppress cannabis, where the defendant had thrown the bag of cannabis into a tree as he fled the police, effectively abandoning it). The court properly denied the motion to suppress evidence seized from the backpack.

II.

Prior Conviction

Appellant contends that the circuit court abused its discretion in denying his motion *in limine* to preclude the State from introducing evidence of his 2019 conviction for distribution of a controlled dangerous substance (marijuana).

A. Background

At the hearing, defense counsel indicated that appellant was committed to testify at trial "to overcome claims of distribution." He argued that it was unfairly prejudicial to permit the State to introduce evidence of his prior conviction because that conviction involved the distribution of marijuana, which is "a lesser substance of concern to the community" than fentanyl. He asserted that there was a danger that the jury would believe that appellant was guilty of the crime charged because he had previously committed a nearly identical offense. The State, on the other hand, argued that the probative value of admitting appellant's prior conviction for impeachment purposes outweighed the danger of unfair prejudice because the distribution conviction was relevant to appellant's credibility. After considering various factors, explained *infra*, the trial court denied appellant's motion, ruling that the risk of unfair prejudice to appellant by introducing evidence of his prior conviction did not outweigh the probative value of the evidence.

B. Standard of Review

When reviewing a trial court's admissibility ruling for impeachment purposes regarding a defendant's prior conviction, we give considerable deference to that decision, affording the trial court wide discretion. *Cure v. State*, 421 Md. 300, 323 (2011). We disturb that discretion only when it has been "clearly abused." *Id*. (quoting *Jackson v. State*, 340 Md. 705, 719 (1995)). We have stated that an abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court" and "where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (quotation marks and citation omitted).

C. Analysis

Maryland Rule 5-609 provides a three-part test for determining whether prior convictions may be admitted for impeachment purposes. First, the conviction must be within the "eligible universe" of convictions that are relevant to impeach a witness's credibility. Md. Rule 5-609(a); *Cure*, 421 Md. at 324. Second, the conviction must not have occurred more than fifteen years ago, been reversed on appeal, nor been the subject of a pardon or pending appeal. Md. Rule 5-609(b), (c). Third, the trial court must determine whether the probative value of admitting the conviction outweighs the danger of unfair prejudice to the witness. Md. Rule 5-609(a).

Appellant does not challenge the court's findings that his prior conviction satisfied the first and second parts of the test; it was an infamous crime relevant to his credibility, and the conviction had occurred within the past fifteen years. Appellant contends,

however, that the court abused its discretion in deciding that the probative value of the conviction outweighed the risk of unfair prejudice and allowing the State to impeach him with evidence of the conviction.

In weighing the probative value of a prior similar conviction against the danger of unfair prejudice, the court considers five non-exhaustive factors, including:

> (1) the impeachment value of the prior crime; (2) the time that has elapsed since the conviction and the witness's history subsequent to the conviction; (3) the similarity between the prior crime and the conduct at issue in the instant case; (4) the importance of the witness's testimony; and (5) the centrality of the witness's credibility.

King v. State, 407 Md. 682, 700-01 (2009).

In this case, the trial court placed on the record its consideration of the factors affecting the admissibility of appellant's prior conviction. *See Jackson*, 340 Md. at 717 (urging trial courts applying Rule 5-609 "to place [on the record] the specific circumstances and factors critical to the decision."). First, the court found that the impeachment value of appellant's prior distribution conviction had bearing on his ability to be truthful. Second, with respect to the time that had elapsed, the court noted that the prior conviction was within sixteen months of the current charges. Third, it determined "that in cases where there are very similar charges involved, the courts of this state have allowed introduction of prior convictions for similar conduct[,]" and "this is the situation here." In assessing the importance of appellant's testimony to the case and the need for evidence relevant to his credibility (the last two factors), the court remarked that, because the case was essentially a credibility case between appellant and the State's witnesses, it was reasonable for the jury to have evidence of appellant's similar, prior conviction in evaluating his credibility.

Distribution of a controlled dangerous substance is an impeachable offense. *See Brewer v. State*, 220 Md. App. 89, 108 (2014). Though the similarity between appellant's prior conviction and the pending distribution charge weighed against admission, that factor alone "[did] not serve to automatically exclude such evidence." *Id*. (holding that the trial court did not abuse its discretion in permitting the State to introduce prior drug distribution convictions at trial for possession with intent to distribute drugs). Factors four and five weighed in favor of admission because appellant's credibility was the principal issue. As our Supreme Court has advised, "[w]here credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice." *Jackson*, 340 Md. at 721 (emphasis in original).

Appellant intended to (and did) testify that he had purchased the drugs for his personal use, not distribution to others. Because the verdict depended on whether the jury believed the police witnesses or appellant, credibility was the central issue. Accordingly, we perceive no abuse of discretion in the court's decision to allow the State to impeach appellant's credibility with evidence of his prior conviction.

III.

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to establish his intent to distribute fentanyl where the evidence demonstrated that he possessed the fentanyl for personal use. The State counters that the evidence was sufficient, and the issue of whether to credit appellant's testimony was for the jury to decide.

A. Background

At trial, Sergeant Ecker testified that the backpack he recovered following a foot chase with appellant contained 21 gel capsules, later determined to contain fentanyl, and 30 clonazepam pills. Inside the backpack, he also discovered a soda can with burn markings on it, syringes, cotton swabs, and a shoestring with blood on it, and he discovered $189 in cash on appellant's person. The sergeant testified "that someone who has 21 capsules individually like that with, you know, the amount of cash he had on him – $189 at that time – was indicative of someone who does, in fact, sell controlled dangerous substances."

Detective Jednorski of the Carroll County Drug Task force testified as an expert in "controlled dangerous substance[ ] detection, observation, packaging, manufacturing, and street level distribution." The detective opined that appellant was a "user/dealer," and the amount of fentanyl seized from appellant's backpack, 21 gel capsules, was consistent with an amount "that a lower level dealer would have." According to the detective, "one of the bigger problems we have in Carroll County are users that also are sellers to support their habit." Dealers will often travel to Baltimore City to buy a larger quantity of fentanyl for resale. Detective Jednorski noted that the backpack also contained paraphernalia for use. He explained that a typical drug user would carry one to five gel capsules at a time for personal use. Because fentanyl is 50 times more potent than heroin, many users do not use an entire gel capsule for one dose – they only use part of a gel capsule.

Appellant testified that he had abused drugs since the age of 18. At the time of his arrest, he was using fentanyl mixed with other substances, known as a "scramble," two

capsules at a time, which he injected six or seven times per day. He used clonazepam pills when he ran out of fentanyl to ease the symptoms of withdrawal. Appellant testified that, on the day of his arrest on April 9, 2020, he had traveled to Baltimore City to obtain fentanyl capsules and clonazepam pills solely for his personal use. He acknowledged that he had previously been convicted of distribution of marijuana to his former wife.

Following his testimony, appellant moved for judgment of acquittal as to the charge of possession with intent to distribute fentanyl. Appellant pointed to the lack of evidence of "dealer activities" such as "customer lists … scales, and baggies" which, he argued, forced the jury "to guess" at whether the charge had been proven beyond a reasonable doubt. The court denied the motion.

B. Standard of Review

When reviewing a challenge to the sufficiency of evidence, we "examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Wilson*, 471 Md. 136, 159 (2020) (quoting *Fuentes v. State*, 454 Md. 296, 307 (2017)). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Redkovsky v. State*, 240 Md. App. 252, 262-63 (2019) (quoting *Tracy v. State*, 423 Md. 1, 12 (2011)). Rather, we defer to any reasonable inferences a jury could have drawn in reaching its verdict and decide whether the evidence supported those inferences. *Id.* at 263 (citation omitted).

C. Analysis

"Whether a defendant possessed a controlled dangerous substance with an intent to distribute is . . . a question for the trier of fact" and "[t]he element of intent is generally proved by circumstantial evidence." *Collins v. State*, 89 Md. App. 273, 278 (1991) (citations omitted); *accord Salzman v. State*, 49 Md. App. 25, 55 (1981) ("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.'").

Based on the State's evidence, the jury could have reasonably concluded that appellant intended to distribute fentanyl. Detective Jednorski identified appellant as a "user/dealer" who both uses drugs and sells them to support his habit. He opined that the amount of fentanyl in appellant's backpack, combined with the amount of cash seized, was consistent with what a "lower level dealer" would possess. *See Hippler v. State*, 83 Md. App. 325, 338 (1990) ("[A]n intent to distribute may be indicated by the very quantity of narcotics possessed."); *Herbert v. State*, 136 Md. App. 458, 463 (2001) ("[A] much smaller quantity might yield such finding of intent, if evidence other than the quantity possessed showed that intent.") (emphasis and citation omitted). Appellant's testimony that he purchased the fentanyl for his personal use went to the credibility of the evidence, not to its sufficiency. *See Darling v. State*, 232 Md. App. 430, 467 (2017) (noting that "credibility is a matter left to the fact-finder and we do not re-weigh on appeal evidence presented at trial"); *Correll v. State*, 215 Md. App. 483, 502 (2013) ("It is the jury's task to resolve any conflicts in the evidence and assess the credibility of witnesses.") (quotation marks and

citation omitted). Though appellant offered evidence that the fentanyl was for personal use, that evidence did not, in itself, negate the sufficiency of the evidence supporting the distribution charge. Viewed in the light most favorable to the State, there was sufficient evidence from which the jury could conclude that appellant possessed fentanyl with the intent to distribute.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.