Circuit Court for Somerset County
Case No. C-19-CR-20-000130

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 308

September Term, 2022

LAMOUNT M. POTTER

v.

STATE OF MARYLAND

Kehoe,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: March 9, 2023

*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.

*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.

After a jury trial in the Circuit Court for Somerset County, Lamount M. Potter was convicted of possession of cocaine with the intent to distribute, possession of cocaine,[1] and illegal possession of body armor. As to the possession with the intent to distribute count, the court sentenced Potter to 20 years of incarceration, with all but 15 years suspended. As to the illegal possession of body armor count, the court sentenced Mr. Potter to a consecutive, suspended sentence of five years' incarceration. The court ordered three years of supervised probation. Mr. Potter presents two questions for our review:

1. Is the evidence insufficient to sustain Mr. Potter's three convictions?

2. Did the trial court plainly err by conducting voir dire in a manner that frustrated the purpose of uncovering bias?

We will affirm the judgments of the circuit court.

BACKGROUND

The following evidence was introduced at trial:

Maryland State Police Trooper Jon Dancho assisted the Somerset County Narcotics Task Force with a search warrant executed at 235 Broadway in Crisfield. At that time, Trooper Dancho was an assistant team leader with the State Police's Special Operation Division's Special Tactical Assault Team Element.

[1] The cocaine possession count merged into the possession of cocaine with intent to distribute count for sentencing purposes.

Early in the morning on September 16, 2020, before 5:00 a.m., the team entered the house located at 235 Broadway to secure the residence. Trooper Dancho testified about the process of securing a residence:

> [T]o secure a residence, it's to go in before the investigators or somebody that does not have the tactical training, knowledge, or proficiency, compared to somebody that does it full time. We go in there and we secure all persons inside the residence to make sure that there's no threat to anybody that's going to come in to do a proper search or investigation, after the fact. So I would go in. My teammates and I would detain anybody that's in the residence, not put them under arrest, but detain them, to make sure that the investigators can come in and safely search and seize part of whatever their warrant may be, after the fact.

The members of the team found Mr. Potter hiding under a blanket on a couch in the living room. The three other individuals inside the home were all juveniles: a 17-year-old, a 13-year-old, and a two-year-old.

As a member of the Somerset County Narcotics Task Force, State Trooper Nelly Daigle investigates the sales of controlled dangerous substances. For months leading up to the search warrant execution, Trooper Daigle surveilled the 235 Broadway address, including the hours before the search warrant was executed. During that time, she saw Mr. Potter at that address "well over 10, 15 times." Trooper Daigle also saw a white Ford Ranger pickup truck at that address "approximately 10 to 15 times[.]" "[O]ver the course of the investigation[,]" She saw Mr. Potter use that truck "approximately three to five times[,]" and she never saw anyone else driving it.

During the execution of the search warrant, Trooper Daigle searched the house and collected evidence. Under a couch cushion in the living room, she found a clear plastic bag containing a white substance that was tested and determined to be 7.876

grams of cocaine. In the vicinity of the couch, police recovered plastic bags inside a jacket pocket and $165 in cash inside a pants pocket. Police also found three cell phones in the living room.

In the master bedroom, police recovered the following items:

- a live round of .22 caliber ammunition inside a dresser drawer,
- Galls[2] body armor behind a dresser,
- $1,093 in cash in a nightstand,
- a wallet containing Mr. Potter's Maryland state-issued identification card, which listed his address as 235 Broadway.

Trooper Daigle testified about what was seized from the bathroom of the residence: "Located inside the bathroom was also numerous clear plastic baggies as well as numerous green apple bags and clear plastic empty capsules." Trooper Daigle further stated that "Inositol powder was located in a kitchen cabinet." Mr. Potter's mail was recovered in the house during the search warrant execution at 235 Broadway, but that mail was addressed to Mr. Potter at a different address. There was no testimony as to the location(s) within the home where the mail was found.

Police also recovered keys that were lying on an ottoman in front of the couch. Trooper Daigle used those keys to access the white Ford pick-up truck located outside the residence. Inside that vehicle, she found a Browning .22 caliber long rifle handgun, a Ruger 10/22 .22 caliber long rifle, and live ammunition. About two months after the

[2] Trooper Daigle testified that "Galls" is the brand name of the body armor recovered from behind the dresser.

search, Trooper Daigle obtained a DNA swab from Mr. Potter, who was in the same white Ford Ranger, at a gas station in Crisfield.

Valerie Imschweiler, a forensic scientist supervisor for the Maryland State Police, analyzes evidence submitted by law enforcement for the presence of controlled dangerous substances ("CDS"). The court admitted her as an expert in the field of chemistry and analysis of controlled dangerous substances. Ms. Imschweiler tested the substance that was found in a clear plastic bag located in the living room and determined that it was 7.876 grams of cocaine.

Corporal Charles Harvey of the "Maryland State Police, Criminal Enforcement Division, Computer Crimes Unit, Digital Forensic Lab" conducts "digital forensics on computers, laptops, and cellular devices." The court admitted Corporal Harvey as an expert "in the area of cell phone [data] extractions." Corporal Harvey conducted extractions on the phones recovered from 235 Broadway. Corporal Harvey generated an extraction report from a phone that was named "Lamount's iPhone." Corporal Harvey gave this report to the investigator to analyze.

The court accepted Maryland State Police Sergeant Joseph Meier — a member of the Somerset County Narcotics Task Force — as an expert "in the area of controlled dangerous substance identification, evaluation, investigation, and technique." Sergeant Meier testified that he had surveilled 235 Broadway on the morning of the search warrant execution. Sergeant Meier made the following observations around that time: "Mr. Potter was in and out of the house a few times on his cell phone. He walked towards the vehicle.

He leaned on the car as he was on the cell phone several times, kind of meandering while he was having a phone conversation." No one else was near the vehicle during that time.

Sergeant Meier examined the evidence that was collected from the search warrant. He opined that the white substance recovered from under the couch cushion was crack cocaine, rather than cocaine, because it was "hard, rock-like, chunky" and it had "an off-white color, which would differentiate it from cocaine." Sergeant Meier opined that Mr. Potter possessed cocaine for distribution. That opinion was based on the amount of crack cocaine recovered, which had a street value of more than $1,200 in Somerset County. Sergeant Meier noted that the investigators did not recover any smoking devices, which are typically needed to ingest crack cocaine. Sergeant Meier further testified that the Inositol powder recovered from a kitchen cabinet "is a health supplement but it's often used as a cutting agent for drugs, for recreational drugs." Sergeant Meier stated that the capsules and bags that were recovered are of the types often used to package CDS. The cash that was found in the house "was in various denominations in bill size that would also b[e] synonymous with CDS distribution[,]" because CDS distribution is "a cash-based business."

Sergeant Meier also testified as to the contents of the phone extraction report. One of the messages recovered from one of the mobile phones read: "'Yo, bring me a gram and I'll pay you when I get here." Sergeant Meier testified that the message "would indicate to me the user is looking for a gram of some kind of CDS. Most likely the dealer would already know what that specific person buys and they are asking for that amount, gram amount." He testified as to a text message that stated: "These [expletives deleted]

got the birds for 28." Sergeant Meier explained that: "'Birds' is a universal coded terminology for a kilogram amount of cocaine[,]" and "birds for 28" means "the sender of this message believes they have a source who is selling a kilogram of cocaine for $28,000." Sergeant Meier interpreted a note in the phone: "Big Hank 50, Wayne 50, Kirby 50, C.J. 300," to be a CDS ledger." He explained that his conclusion was "[b]ased on my training, knowledge, and experience and all the other factors of the case[.]" As to the multiple cell phones that were found in the residence, Sergeant Meier testified: "Numerous cell phones is indicative of a distributor. They oftentimes like to have, for lack of a better term, clean and dirty phones. They like to keep their family, legitimate life, separate from their illicit lifestyle." As to the firearms and body armor recovered during the search warrant execution, Sergeant Meier testified: "CDS distribution is illicit, it's a dangerous activity. You are dealing with criminal element. Oftentimes CDS distributors feel like they need to protect themselves and they carry firearms illegally."

The parties stipulated that Mr. Potter is prohibited from possessing a firearm and that the two firearms recovered were regulated firearms: a handgun and a long rifle. The parties stipulated that both firearms were swabbed for DNA. That stipulation read in relevant part:

> The swab from the Browning Arms .22 caliber handgun contained DNA from at least three contributors, including at least two male contributors, but no conclusions could be made concerning the DNA.
>
> The swab from the .22 caliber long rifle contained DNA from at least three contributors, including a significant contributor and at least one male contributor. Lamount Potter was excluded as the significant contributor DNA profile. No other conclusions could be made concerning the remainder of the DNA.

We shall supply additional facts in our analysis as needed.

ANALYSIS

1. Sufficiency of the evidence

When reviewing 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 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). "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.'" *McClurkin*, 222 Md. App. at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "retry the case," "re-weigh the credibility of witnesses," or "attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

A. Illegal possession of body armor

At trial, the State asserted that Mr. Potter constructively possessed the body armor. Mr. Potter's trial counsel argued that the body armor "did not belong to [Mr. Potter]."

Under Md. Code, Crim. Law § 4-107(a), "a person who was previously convicted of a crime of violence or a drug trafficking crime may not use, possess, or purchase bulletproof body armor" unless they have received a valid State permit to do so. Mr. Potter argues that the evidence is insufficient to sustain his conviction for illegal

possession of body armor because the State failed to establish that Mr. Potter possessed it. We do not agree.

The Oxford English Dictionary defines "possess" as "[t]o own, to have or gain ownership of; to have (wealth or material objects) as one's own; to hold as property." Possess, v., OED ONLINE, OXFORD UNIVERSITY PRESS. https://www.oed.com/view/Entry/148345? (last visited March 2, 2023). Possession may be actual or constructive; it may be exclusive or joint. *Belote v. State*, 199 Md. App. 46, 55 (2011). To support a finding of possession, the "evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control" or that the accused "exercised some restraining or direct influence over it." *State v. Suddith*, 379 Md. 425, 432 (2004) (quotation marks and citations omitted).

The Supreme Court of Maryland[3] has articulated four factors to determine whether the evidence is sufficient to support a finding of possession:

> [1] the defendant's proximity to the [contraband], [2] whether the [contraband was] in plain view of and/or accessible to the defendant, [3] whether there was indicia of mutual use and enjoyment of the [contraband], and [4] whether the defendant has an ownership or possessory interest in the location where the police discovered the [contraband]. None of these factors are, in and of themselves, conclusive evidence of possession.

[3] 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.

State v. Gutierrez, 446 Md. 221, 234 (2016) (quoting *Smith*, 415 Md. at 198). No one factor is dispositive and, ultimately, "possession is determined by examining the facts and circumstances of each case." *Smith*, 415 Md. at 198.

The evidence was sufficient. The investigators found the body armor in a bedroom behind a dresser, and Mr. Potter's wallet, containing his Maryland identification card, was found in the same bedroom as the body armor. Although Mr. Potter himself was found hiding on a couch in the living room, jurors could reasonably infer that Mr. Potter had been in the bedroom containing the body armor and that he intended to return there.

Mr. Potter unsuccessfully analogizes this case to *Moye v. State*, 369 Md. 2 (2002). In *Moye*, police approached a home, in response to a call about a man cutting people with a knife. 369 Md. at 5-6. That home belonged to a couple, the Bullocks, who rented their basement to a man named Benson. *Id*. at 5. As police approached the property, they encountered the Bullocks and Benson, all of whom had emerged from the house. *Id*. at 6. The officers briefly observed Moye on the first floor and again in the basement. *Id*. Moye eventually exited through a basement door and he was arrested. *Id*. In the basement, police discovered marijuana and cocaine in partially opened drawers, as well as in the ceiling. *Id*. at 7. Moye was later convicted of various charges relating to that contraband. *Id*. at 9.

The Supreme Court of Maryland reversed Moye's convictions because "Moye did not have any ownership or possessory right in the premises where the drugs and paraphernalia were found." *Id*. at 18. Indeed, "Benson was the sole lessee of the

Bullocks's basement." *Id*. at 5 n.2. By contrast, "[t]here was little evidence to establish that Moye 'lived' in the Bullock household." *Id*. And "[t]he only testimony at trial which suggested that Moye may have been residing" in the house came from Joseph Bullock, who "testified that at the time of the incident, Moye was 'living' in the house[.]" *Id*. at 18 and n.10. The Court ruled that the "State offered no evidence to suggest any relationship between Benson and Moye which would have established that Moye frequented the basement of the Bullocks's home or that he was aware of what items were stored in the drawers of the counter area." *Id.* at 20. The Court ultimately concluded that it was "left with nothing but speculation as to Moye's knowledge or exercise of dominion or control over the drugs and paraphernalia found in the Bullocks's basement." *Id.* at 17.

The Court in *Moye* recognized that there was no testimony "as to any belongings, residency papers, or any other evidence which could establish that [Moye] resided at the home." *Id.* at 5 n.2 (quotation marks and citation omitted). In contrast, the evidence here established that Mr. Potter's wallet was found in the same room as the body armor. Moreover, Mr. Potter's mail was found in the house at 235 Broadway as well. Mr. Potter notes that the mail was addressed to him at a different address: 325 West Chesapeake Avenue. We, however, agree with the State that the presence of Mr. Potter's mail allowed the jury to infer that Mr. Potter was a long-term resident at 235 Broadway, rather than a temporary visitor. Indeed, Mr. Potter was the only adult at the house at the time the search warrant was executed. And a juror could rationally infer that Mr. Potter took his mail to the 235 Broadway address.

Mr. Potter notes that the body armor was hidden from view, as it was stored behind a dresser. According to Mr. Potter, the location of the body armor makes it less likely that he constructively possessed the body armor. But a photograph taken by police and introduced into evidence shows that the body armor, although tucked behind the back of a dresser, was nonetheless visible. Thus, the body armor was not entirely out of view. Moreover, we agree with the State that the jury could reasonably infer that Mr. Potter stored possessions in the bedroom because his wallet was also found there.

Mr. Potter relies on *State v. Leach*, 296 Md. 591 (1983) in support of his argument that the evidence was insufficient to prove possession because the body armor was not found in a communal area. Mr. Potter's reliance on *Leach* is unavailing. In *Leach*, police recovered PCP and various drug paraphernalia from the sole bedroom of an apartment. 296 Md. at 593. Police found a photograph depicting the defendant, Stephen Leach, in the apartment. *Id*. at 594. Stephen's brother, Michael, and a third person were also depicted in that photograph. *Id*. That photo contained a handwritten reference to PCP. *Id*. Police also discovered personal papers in Michael's name in the bedroom. *Id*. at 595-96. Upon booking, both brothers provided the apartment address in question as their address. *Id*. at 595. During the bench trial, the court expressly found that only Michael had occupied that apartment:

> the trial judge stated he was "not going to assume that two gentlemen their age who are brothers were sleeping in the same bed. That's an inference I'm not drawing . . . ." He found "[t]he evidence in this case [to be] abundantly clear that Michael Leach was the occupant, possessor of the apartment . . . ."

Id. at 595 (alterations in original). But the trial court later concluded that Stephen had constructively possessed the drugs:

> Based on the evidence in the case, primarily the evidence of Mr. Stephen Leach's access to the apartment, the fact he had the key to the apartment, the fact he had at one point the motorcycle registered at the apartment, the fact that he gave this apartment as his address at the time of the arrest, I believe there is sufficient evidence to justify a . . . finding of guilty of . . . possession of Phencyclindine, and, in addition, I find that this evidence is buttressed by the . . . photograph in evidence[.]

Id. at 595 (cleaned up). The Supreme Court of Maryland concluded that the evidence was insufficient: "the fact finding that Michael was the occupant of the Premises precludes inferring that Stephen had joint dominion and control with Michael over the entire apartment and over everything contained anywhere in it." *Id.* at 596. The Supreme Court thus ruled that "[e]ven though Stephen 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." *Id*. Thus, in *Leach*, the trial court (as a factfinder) expressly found that the defendant's brother was the sole resident of the apartment, and then essentially ruled to the contrary. By contrast, the evidence here established that Mr. Potter was the only adult staying in the house, and his wallet and mail were found inside the house.

Lastly, Mr. Potter argues that the jury's acquittal of firearms possession charges supports his argument that he did not possess the body armor. He contends on appeal: "Significantly, the jury found that Mr. Potter did not have dominion or control over the two weapons found in the white truck because the jury did not convict him of those counts." Mr. Potter is correct, but the evidence linking him to the body armor was

different from, and stronger than, the evidence connecting him to the firearms in the truck. And the test is whether the jury could have reasonably concluded that he had possession of the body armor.

For all these reasons, we hold that the evidence that Mr. Potter possessed the body armor there was legally sufficient.

B. Possession with intent to distribute cocaine

Next, Mr. Potter argues that the evidence was insufficient to find that he possessed the cocaine found in the house. Mr. Potter concedes that he was discovered in close proximity to the cocaine, but he argues as follows: "Of the four factors, only proximity weighs in favor of constructive possession because the drugs were found under the cushions of the couch, on which Mr. Potter was lying." In addition to Mr. Potter's proximity to the cocaine, there was ample evidence to support the finding that he possessed the cocaine.

Indeed, text messages from a phone (identified as "Lamount's iPhone") included a conversation with someone who wanted to purchase a "gram," as well as a discussion with another individual about purchasing a kilogram of cocaine for $28,000. Sergeant Meier interpreted a note in the phone: "The content says 'Big Hank 50, Wayne 50, Kirby 50, C.J. 300.' Based on my training, knowledge, and experience and all the other factors of the case that appears to be a CDS ledger." Within the home, there were numerous packaging materials, and police found Inositol powder, which is "often used as a cutting agent for drugs, for recreational drugs." Sergeant Meier stated that the capsules and bags that were recovered are often used to package CDS.

In sum, aside from Mr. Potter's proximity to the drugs and the Inositol, other evidence from the house and Mr. Potter's phone indicated that he possessed cocaine for distribution. Given the value of the cocaine recovered ($1,200), we agree with the State that "it was not surprising that [Mr.] Potter would keep [the cocaine] concealed, but close at hand."

Mr. Potter's reliance on *Taylor v. State*, 346 Md. 452 (1997) is unavailing. In *Taylor*, police entered and searched a Days Inn Motel room in Ocean City occupied by Taylor and four other people. 346 Md. at 454-55. Officers searched the room and discovered marijuana inside two bags and rolling papers in a wallet belonging to another person. *Id*. at 455-56. The trial court convicted Taylor of possession of marijuana. *Id*. at 456-57. The Supreme Court of Maryland reversed, explaining that the evidence, viewed in the light most favorable to the State, "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." *Id*. at 459. Taylor "was not in exclusive possession of the premises," and "the contraband was secreted in a hidden place not otherwise shown to be within [Taylor's] control." *Id*.

Unlike in *Taylor*, the evidence here established that Mr. Potter was the only adult when police executed the search warrant, his wallet was found in a bedroom, and he had mail in the house. Moreover, there was ample evidence that Mr. Potter was involved in cocaine distribution. For all these reasons, the evidence was sufficient to find Mr. Potter guilty of possession with the intent to distribute cocaine.

2. Mr. Potter waived any challenge to the voir dire process

Mr. Potter next argues that the circuit court erred when it made statements about juror qualifications and the need for jurors to be fair and impartial. Mr. Potter also claims that the court improperly used a two-part method of asking jurors questions during *voir dire*. Mr. Potter concedes that this issue is unpreserved, but he asks us to conduct plain error review.

"To preserve any claim involving a trial court's decision about whether to propound a voir dire question, a defendant must object to the court's ruling." *Foster v. State*, 247 Md. App. 642, 647 (2020). *See also* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Mr. Potter failed to preserve this challenge to the court's *voir dire* process, and we decline to conduct plain error review. This issue is better addressed in post-conviction proceedings where a court can engage in fact-finding as to defense counsel's reasons, if any, behind the decision to not object.

THE JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY ARE AFFIRMED. THE COSTS ARE TO BE PAID BY APPELLANT.