

Circuit Court for Prince George's County
Case No. CT-15-0686B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 518

September Term, 2016

ERIC GARRIS

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 1, 2018

*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.

In the Circuit Court for Prince George’s County, the State charged Eric Garris, the appellant, with: Count 1, wearing, carrying and knowingly transporting a handgun in a vehicle; Count 2, possession of a regulated firearm by a person with a felony conviction; Count 3, possession of a regulated firearm by a person with a disqualifying conviction; and Count 4, possession of ammunition by a person prohibited from possessing a regulated firearm. On March 2, 2016, after a trial with the Honorable John Paul Davey presiding, a jury convicted Garris on all charges. On May 16, 2016, the court imposed a sentence of three years on Count 1 (wearing, carrying, and knowingly transporting a handgun in a vehicle), 5 years consecutive without possibility of parole on Count 2 (possession of a regulated firearm by a person with a felony conviction), and one year concurrent on Count 4 (possession of ammunition by a person prohibited from possessing a regulated firearm). For sentencing purposes, Count 3 (possession of a regulated firearm by a person with a disqualifying conviction) was merged. The appellant filed a timely appeal and presents three questions for review, which we rephrase:¹

1. Did the circuit court correctly deny Appellant’s motion to suppress evidence after police testimony that an officer searched the car after smelling a strong odor of marijuana?
2. Did the circuit court act within its discretion by giving jury instructions for “possession” without explicitly stating the “knowing” component?

¹ The appellant presented the following questions:

1. Did the circuit court err in denying appellant’s motion to suppress evidence?
2. Did the circuit court err in failing to instruct the jury that the State had to prove that appellant “knowingly possessed” the firearm and ammunition?
3. Did the circuit court err in imposing separate sentences for possession of a regulated firearm by a person with a felony conviction and possession of ammunition by a person prohibited from possessing a regulated firearm?

3. Did the circuit court correctly decline to merge sentences for illegal possession of a firearm and illegal possession of ammunition?

For the following reasons, we answer questions 1 and 3 in the affirmative, and question 2 in the negative. Therefore, we shall affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

The Traffic Stop

On April 15, 2015, at approximately 7:45 p.m., Officer Kyle Negrin conducted a traffic stop on a Honda Accord in Prince George’s County. The vehicle pulled into a Dash-In gas station near the 8800 block of southbound Branch Avenue in Clinton. There were two people in the vehicle. The driver, Jerel Devoe, exited the vehicle after pulling the car into the gas station. Mr. Garris, the appellant, remained in the passenger seat. The officer discovered that Mr. Garris along with Rondea Garris, who was not present, owned the car. Officer Negrin ordered Mr. Devoe to get back into the car and then called for backup officers. When the backup officer arrived, he approached the vehicle.

Officer Negrin testified that he smelled a strong odor of raw marijuana emanating from the vehicle. Although he was trained to detect the smell of fresh and burnt marijuana, he conceded that he was unable to decipher whether he could smell less than 10 grams of fresh or burnt marijuana. Officer Negrin asked both Mr. Devoe and the appellant to get out of the vehicle and then searched it. Recovered from the search was 8.8 grams of suspected marijuana, a black digital scale, a pair of black gloves, a black ski mask, and a computer bag from the trunk. Additionally, there was a loaded semiautomatic handgun found inside of the computer bag with a second empty magazine. Both men were arrested.

The Trial

At trial, Officer Negrin testified consistent with his testimony at the motions hearing. The parties stipulated that the appellant was not permitted to possess a regulated firearm as a result of a prior conviction. The firearm was found to be operable after a test fire. Jerel Devoe also testified that he drove the appellant to a job interview in Bowie on April 15, 2015. Mr. Garris arrived at Mr. Devoe’s house in Suitland to pick him up. Mr. Devoe, who did not have a license, drove the vehicle because Mr. Garris had a suspended license and a “messed up” leg. Mr. Devoe denied having a black shoulder bag or placing anything in the trunk of the vehicle on April 15, 2015.

During trial, jury instructions pertaining to Counts 2, 3, and 4 of the indictment,² which charged illegal possession of a regulated firearm and ammunition, were as follows:

The defendant is charged with possession of a regulated firearm after having been convicted of a disqualifying crime. In order to convict the defendant, the State must prove that the defendant possessed a regulated firearm. The parties have stipulated that the defendant had been convicted of a disqualifying crime at the time the defendant is alleged to have possession of the firearm.

Possession means having control over a thing, whether actual or indirect. The defendant does not have to be the only person in possession of the object. More than one person may have

² Count 1, CR 4:203 – Knowingly transported a handgun in a vehicle upon public roads, highways, and parking lots generally used by the public.

Count 2, PS § 5-133(c) – a person may not possess a regulated firearm if the person was previously convicted of: (i) crime of violence . . .

Count 3, PS § 5-133(b) subject to § 5 – 133.3 of this subtitle, a person may not possess a regulated firearm if the person: (1) has been convicted of a disqualifying crime . . .

Count 4, PS § 5-133.1(a) – a person may not possess ammunition if the person is prohibited from possessing a regulated firearm under § 5 – 133(b) or (c) of this subtitle.

possession of the same object at the same time. A person not in actual possession who has both the power and the intention to exercise control over a thing, either personally or through another person, has indirect possession.

In determining whether the defendant had indirect possession of the object, consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the object, whether the defendant had some ownership or proprietary interest in the place where the object was found, and any indications that the defendant was participating with others in the mutual use and enjoyment of the object.

A regulated firearm is a handgun that has a barrel of less than 16 inches in length, and is a weapon that's designed to expel or may readily convert to expel a projectile by the action of an explosive; or the frame or receiver of such a weapon. The State is not required to prove that the firearm was operable.

The defendant is charged with possession of a regulated firearm after having been convicted of a felony. In order to convict the defendant the State must prove that the defendant possessed a regulated firearm. The parties have stipulated that the defendant had a felony conviction at the time of the incident. A disqualifying crime is a violation classified as a felony in the [S]tate of Maryland.

Possession means having control over a thing, whether actual or indirect. The defendant does not have to be the only person in possession of the object. More than one person may be in possession of the same object at the same time. A person not in actual possession who has both the power and intention to exercise control over a thing either personally or through another person, has indirect possession. In determining whether the defendant had indirect possession of an object, consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the object, whether the defendant had some ownership or proprietary interest in the place where the object was found, and any indications that the defendant was participating with others in the mutual use and enjoyment of the object.

A regulated firearm is a handgun that has a barrel of less than 16 inches in length and is a weapon that is designed to expel or may be readily converted to expel a projectile by the action of an explosive or the frame or receiver of such a weapon. The State is not required to prove that the firearm was operable.

The defendant has been charged with illegal possession of ammunition. Ammunition means a cartridge, shell or any other device containing explosive or incendiary material designed and intended for use in a firearm. A person may not possess ammunition if the person is prohibited from possessing a regulated firearm.³

Defense counsel objected to the jury instruction of possession as follows:

[Defense Counsel]: Just one exception. That is, our proposed jury instructions really cover all of the counts of possession. We ask the Court to instruct the jury -

[Assistant State's Attorney]: Which one?

[Defense Counsel]: Possession needs to be knowing and voluntary. The bottom paragraph on page 2 of our submitted instructions. We would ask the Court to so instruct the jury.

[Assistant State's Attorney]: Did you not say that, [J]udge, already?

THE COURT: I used the standard definition of possession. I'll note your objection.

³ The Maryland Pattern Jury Instruction (MPJI-Cr) 4:35.6, entitled "Possession of Firearm/Disqualifying Conviction," states the following:

- (1) that the defendant knowingly possessed a regulated firearm; and
- (2) that the defendant was previously convicted of a crime that disqualified [him] [her] from possessing a regulated firearm. . . .

DISCUSSION

I. MOTION TO SUPPRESS EVIDENCE

A. The Contentions of the Parties

The appellant argues that the circuit court erred in denying appellant's motion to suppress evidence. In light of Maryland decriminalizing possession of less than ten grams of marijuana, the appellant contends that the odor of marijuana alone is not an indication that a criminal amount of marijuana is present. Therefore, the appellant contends that the search of his vehicle violated his Fourth Amendment rights. The appellant argues that the smell of marijuana emanating from a vehicle does not serve as probable cause to justify a warrantless search.

The State responds that the appellant's argument has been recently considered and rejected by the Court of Appeals. The State relies on the recently decided case of *Robinson v. State*, 451 Md. 94 (2017), to support their argument that the odor of marijuana serves as probable cause for warrantless searches of vehicles. In relying on *Robinson*, the State also asserts that possession of marijuana in any amount remains unlawful in Maryland. Additionally, the State asserts that decriminalization does not affect searches and seizures.⁴

B. Standard of Review

This Court has laid out the appropriate standard of review for a ruling on a motion to suppress:

⁴ Maryland joined numerous other jurisdictions in decriminalizing, but not legalizing, small amounts of marijuana. *Robinson*, 451 Md. at 96. Possession of marijuana is still illegal, however, possession of small amounts less than 10 grams is now punishable by a fine and not incarceration. *Id.*

In reviewing a lower court’s ruling on a motion to suppress, this Court extends “great deference to the fact finding of the suppression court and accepts the facts found by that court unless clearly erroneous.” We are limited to considering the evidence introduced at the suppression hearing, and the inferences therefrom that are most favorable to the party who prevailed on the motion. But the ultimate decision on whether the evidence was seized in violation of the law is made independently of the lower court's decision. The U.S. Supreme Court noted in *Ornelas v. United States*, 517 U.S. 690, 697 (1996), that when an appellate court reviews probable-cause or reasonable-suspicion determinations, the legal conclusions of the motions court are reviewed de novo.

State v. Harding, 166 Md. App. 230, 237 (2005) (citations omitted). *See also Varriale v. State*, 444 Md. 400, 410 (2015).

C. Analysis

We find the State’s argument that the smell of marijuana provided probable cause for the police to conduct a warrantless search persuasive. Therefore, we hold that the odor of marijuana emanating from a vehicle is probable cause to perform a warrantless search.

Under the *Carroll* doctrine, warrantless searches of vehicles are permitted based on probable cause to believe the vehicle contains contraband or evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 153 (1925). In *Carroll*, the defendants were stopped on the highway by police officers, their vehicle was searched, and liquor was recovered from the vehicle. *Id.* at 135. The defendants contended that the search of their vehicle and seizure of their alcohol was a violation of their Fourth Amendment rights. *Id.* Furthermore, the defendants argued that the use of the evidence seized was improper. *Id.* The Supreme Court held that “contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant.” *Id.* at 153.

In *Robinson*, The Court of Appeals consolidated three separate cases where defendants' vehicles were searched by police officers, without warrants, based on the odor of marijuana emanating from the vehicle. *Id.* at 98. The court used the *Carroll* doctrine,⁵ which provided that warrantless searches of vehicles are permissible based on probable cause to believe the vehicle contains contraband or evidence of a crime. *Id.* at 99. The Court concluded that the odor of marijuana emanating from a vehicle provides probable cause for law enforcement officers to conduct a warrantless search of the vehicle. *Id.*

The present case is factually identical to *Robinson*. Officer Negrin testified to there being a strong odor of raw marijuana coming from the appellant's vehicle. The appellant does not dispute this. The appellant's car was searched, without a warrant, pursuant to the emanating smell of marijuana, akin to *Robinson*. It is clear that Officer Negrin's search was lawful according to the recent holding in *Robinson*. The strong smell of marijuana coming from appellant's vehicle constituted probable cause for the officer to conduct a search after the traffic stop. The odor of marijuana coming from a vehicle continues to serve as probable cause for searches, regardless of a warrant.

We do not find the appellant's attempt to use case law from other jurisdictions to refute that persuasive. The appellant relies on *Commonwealth v. Cruz*, 459 Mass. 459, 945 N.E.2d 899 (2011), to refute that the odor of marijuana emanating from a vehicle constitutes probable cause to search the vehicle. In *Cruz*, the court's decision was dependent upon Massachusetts' law regarding the validity of warrantless searches based

⁵ In *Carroll*, the Supreme Court held that vehicles may be searched without a warrant, thus creating the *Carroll* doctrine. *Carroll*, 267 U.S. at 153.

on the standard for search warrants issued by magistrate judges. We find that the present case is distinguishable. The present case does not concern the same reasoning as *Cruz* because the standard for magistrate judges issuing warrants is unrelated. Additionally, *Cruz* is an outlier case. The appellant provided numerous cases from various jurisdictions that align with Maryland law. Maryland law adequately addresses the present issue. Thus, we are not bound by the law from other jurisdictions. The Court of Appeals has plainly and explicitly held that the odor of marijuana emanating from a vehicle does serve as probable cause to search a vehicle without a warrant. *Robinson*, 451 Md. at 124. Therefore, we hold that the odor of marijuana detected by the officer in this case constitutes probable cause for the warrantless search of vehicles.

The appellant also asserts that the search was unlawful because the officer was not able to detect a criminal amount of marijuana simply by the smell. We also reject this argument. Marijuana is still categorized as contraband regardless of the decriminalization of possession of less than 10 grams of marijuana. *Robinson*, 451 Md. at 99. The decriminalization of possession of less than 10 grams does not serve as a legalization of marijuana; the concepts are not synonymous. *See Id.* In Maryland, the possession of any amount of marijuana is still an illegal act. *Id.* at 125. The officer smelling a strong odor of marijuana from the appellant's vehicle, regardless of whether criminal amounts were discernable, was probable cause for a warrantless search.

Lastly, the appellant asserts that his offense was a civil offense because of amendments to the marijuana statute. Specifically, the appellant argues the search and seizure of his vehicle was unlawful because of his civil violation as opposed to a criminal

violation. We reject this argument. The amendment of the marijuana statute has changed only the categorization of possession of less than 10 grams of marijuana and the maximum punishment. *Id.* at 125. Also, the Maryland General Assembly did not intend to preclude the search of a vehicle by decriminalizing possession of marijuana. *See Id.* at 127. Md. Code Ann., Crim. Law § 5-601(d) (2) states, “making the possession of marijuana a civil offense may not be construed to affect the law relating to . . . seizure and forfeiture.”⁶ The Maryland General Assembly made clear that the decriminalization of marijuana was not intended to affect the law pertaining to searches and seizures.

In *Bowling v. State*, this Court found that the Maryland General Assembly intended to continue to classify marijuana as “contraband.” 227 Md. App. 460, 476 (2016). We find the appellant’s argument that the amended marijuana statute should constitute punishment by fine only to be unsupported. In Maryland, marijuana is still classified as “contraband,” and possession of any amount remains illegal. Therefore, we hold that the decriminalization of marijuana does not affect searches and seizure.

II. JURY INSTRUCTIONS FOR POSSESSION

A. The Contentions of the Parties

⁶ Md. Code Ann., Crim. Law § 5-601(d) reads as follows: (d) The provisions of subsection (c)(2)(ii) of this section making the possession of marijuana a civil offense may not be construed to affect the laws relating to:

- (1) operating a vehicle or vessel while under the influence of or while impaired by a controlled dangerous substance; or
- (2) seizure and forfeiture.

The appellant argues that the circuit court committed reversible error by not giving a sufficient jury instruction for “possession” under the Maryland Pattern Jury Instruction. The appellant asserts that the circuit court failed to instruct the jury that the State had to prove that the appellant *knowingly* possessed the firearm and the ammunition. The appellant contends that the court committed error by reading only part of the jury instructions for possession, and failing to correct its mistake when defense counsel asked the court to do so. In sum, the appellant asserts that the convictions for Counts 2, 3, and 4 should be reversed and that the sentences for Counts 2 and 4 should be vacated.

Conversely, the State argues that reversal is not warranted. Specifically, the State counters that the trial judge’s jury instructions adequately filled any gaps from the description of possession. The State contends that when read as a whole, the jury instructions given at trial sufficiently relayed that “possession” encompasses someone knowing that the thing is in their control. The State further contends that Garris’ demeanor at trial gave the impression that he knew the firearm and ammunition were in the vehicle. Ultimately, the State argues that the trial judge explained possession in a manner that clearly implied knowledge as an element.

B. Standard of Review

The Court of Appeals has laid out the appropriate standard of review for a trial court’s jury instructions:

We review a trial court’s decision whether to grant a jury instruction under an abuse of discretion standard. On review, jury instructions

[M]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect[ed] the defendant's rights and adequately covered the theory of the defense.

Cost v. State, 417 Md. 360, 369 (2010).

C. Analysis

We find that reversal is required here. *Dawkins v. State*, 313 Md. 638 (1988) is dispositive of this issue. In accordance with *Dawkins*, we hold that the accused is entitled to a jury instruction that knowledge is an element of possession. We explain.

In *Dawkins*, the defendant was convicted in the Circuit Court for Baltimore City for possession of a controlled dangerous substance and possession of controlled paraphernalia. *Id.* at 640. During the trial, defense counsel asked the trial judge to instruct the jury that knowledge is an element of possession after the jury asked for reinstructions on the elements of possession. *Id.* at 641. The trial judge declined defense counsel's request, ruled that knowledge is not an element of possession, and then gave further reinstructions but omitted knowledge as an element. *Id.* On appeal, the Court of Appeals concluded that knowledge is an element of possession and the accused was entitled to an instruction that knowledge is an element. *Id.* at 651–52. The Court reversed the conviction and remanded the case to the circuit court for a new trial. *Id.* at 652.

Additionally, we rely on *Parker v. State*, 402 Md. 372 (2007). In *Parker*, the Circuit Court for Baltimore City convicted the defendant, among other things, of possession of a regulated firearm. *Id.* at 377. The conviction was the result of police officers entering a

residence where the defendant was located and recovering, among other things, a loaded handgun. *Id.* On appeal, the accused challenged his conviction for possession and asserted that there was insufficient evidence to support the conviction. *Id.* at 375. In *Parker*, the Court of Appeals relied on *Moye v. State*, 369 Md. 2 (2002), to establish that a conviction of possession normally requires knowledge of the item. *Id.* at 407. The Court reversed the conviction for possession of a regulated firearm because of insufficient evidence to establish possession.⁷ *Id.* at 411. Specifically, the Court of Appeals found the evidence was insufficient to support an inference that the appellant *knowingly* exercised dominion and control over the handgun. *Id.*

We also rely on the Maryland Criminal Pattern Jury Instructions for Possession of a Firearm, which states that knowledge is essential to possession.

The Maryland Criminal Pattern Jury Instructions for Possession of a Firearm states:

The defendant is charged with possessing a regulated firearm after having been convicted of a crime that disqualified [him] [her] from possessing a regulated firearm. In order to convict the defendant, the State must prove:

- (1) that the defendant knowingly possessed a regulated firearm; and
- (2) that the defendant was previously convicted of a crime that disqualified [him] [her] from possessing a regulated firearm.

Possession means having control over the firearm, whether actual or indirect. More than one person can be in possession of the same firearm at the same time. A person not in actual possession, who knowingly has both the power and the

⁷ The Court found that the mere proximity to the item, mere presence on the property where the item was located, or mere association, without more, with the person who does control the property where the item was found, was insufficient to support a conviction of possession. *Moye*, 402 Md. at 411 (citing *Taylor v. State*, 346 Md. 452, 460 (1997)).

intention to exercise control over a firearm, has indirect possession of that firearm. In determining whether the defendant has indirect possession of a firearm, you should consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the firearm, and whether the defendant has some ownership or possessory interest in the location where the firearm was found.⁸

MPJI-Cr 4:35.6 Weapons – Possession of Firearm/Disqualifying Conviction.

This instruction was not used in this case. Appellant submitted his own special instruction for possession of a regulated firearm after conviction for a disqualifying crime. Appellant did not use the 2016 MPJI-Cr. 4:35.6. In the Appendix, appellant only makes use of MPJI Cr. 4:24 (instruction of possession of narcotics and controlled dangerous substances.)

We find that *Dawkins* is similar to the present case. In *Dawkins*, the jury instructions failed to specifically state that knowledge was an element of possession. Additionally, there was an objection to the jury instructions in *Dawkins*, which the court took note of but did not correct. Here, similarly, the jury was not specifically made aware that knowledge was an element of possession. This is a fatal flaw in the instructions given to this jury. The instruction that was provided by counsel contained the knowledge element that would have also been present in MPJI c. 4:35.6. A review of what the court read seems to indicate he was using the MPJI and not the special instruction. Moreover, in the present case, the court

⁸ The State must prove that the defendant knowingly possessed the firearm, and that the defendant was previously convicted of a crime making him ineligible to have a regulated firearm.

took note of defense counsel's objection to the jury instruction and did not correct the error similar to *Dawkins*. Furthermore, although the court did not decline to find knowledge as an element in the present case, it declined to correct the jury instructions after objection and stated:

[THE COURT]: I used the standard definition of possession.

I'll note your objection.

We find that *Parker* is also applicable to this case, regarding knowledge as an element of possession. As explained in *Parker*, we find that establishing a conviction of possession requires knowledge. As in *Parker*, a jury was unable to properly establish that the defendant had possession. However, the present case has distinguishable factors from *Parker*. In *Parker*, the jury was unable to establish possession because of insufficient evidence. Here, the inability to establish possession is due to improper jury instructions. Nonetheless, in both cases the jury was unable to establish that the defendant *knowingly* possessed the item. The inability to establish *knowing* possession of an item warrants reversal.

We agree with the appellant's argument that the circuit court committed reversible error by failing to read the jury instructions as a whole. As previously stated, a conviction of possession requires knowledge as an element. The circuit court committed reversible error by not informing the jury of the *knowing* component of the standard jury instructions, specifically after the objection of defense counsel. Through *Dawkins* and *Parker*, the Court of Appeals held that a conviction of possession requires knowledge. In accordance with *Parker*, we hold that there cannot be dominion and control over something the accused is

unaware of. In sum, similar to *Dawkins*, the fact remains that the jury was not made sufficiently aware that knowledge is an element of possession. We find that the court's failure to correct the jury instructions to include knowledge as an element, is identical to the error in *Dawkins*. Thus, the error warrants reversal.

Lastly, The Maryland Criminal Pattern Jury Instructions for Possession of a Firearm clearly states that knowledge is a requirement for possession. The circuit court failed to read the instructions as a whole during trial to convey that knowledge is an element. Instead, the court, without explanation, omitted the essential components of the instructions:⁹

- (1) that the defendant knowingly possessed a regulated firearm; and
- (2) that the defendant was previously convicted of a crime that disqualified [him] [her] from possessing a regulated firearm.

In the present case, the court only read the jury instructions pertaining to the definitions of possession, which is as follows:

Possession means having control over the firearm, whether actual or indirect. More than one person can be in possession of the same firearm at the same time. A person not in actual possession, who knowingly has both the power and the intention to exercise control over a firearm, has indirect possession of that firearm. In determining whether the defendant has indirect possession of a firearm, you should consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the firearm, and whether the defendant has some ownership or

⁹ The second element, conviction of a disqualifying crime, was previously stipulated by the parties.

possessory interest in the location where the firearm was found.¹⁰

We find that the court committed reversible error by failing to read the jury instructions as a whole by omitting knowledge as an element. We find that this error requires our reversal. The Court of Appeals previously established, which we agree, that the accused is entitled to know that knowledge is an element of possession. *Dawkins*, 313 Md. at 651–52. Here, it was never explicitly made clear that knowledge was an element of possession.

The defense counsel submitted proposed jury instructions and special instructions to the court. The court did not read the proposed jury instructions or special instructions during trial. The trial judge neglected to include defense counsel’s proposed instructions, and then failed to read the essential part of the standard jury instructions. The lower court committed error by not reading the jury instructions in its entirety. Specifically, the lower court committed error by omitting the two essential elements of the charge, knowledge and the previous disqualifying conviction. Therefore, we shall follow the Court of Appeals in holding that failure to instruct the jury on the element of knowledge for possession is reversible error.

III. MERGER OF SENTENCES

A. The Contentions of the Parties

¹⁰ The State must prove that the defendant knowingly possessed the firearm, and that the defendant was previously convicted of a crime making him ineligible to have a regulated firearm.

The appellant argues that the circuit court incorrectly declined to merge the sentences for illegal possession of a firearm and illegal possession of ammunition. Specifically, the appellant urges that the sentence for possession of ammunition must be vacated, whether viewed as an issue of unit of prosecution or under traditional merger principles. The appellant contends that as a unit of prosecution issue, there was only one “act” predicated upon possession of the same loaded firearm for purposes of sentencing. The appellant asserts that it falls within the same “act” or unit of prosecution as illegal possession of a firearm. Therefore, the appellant argues, the sentence for possession of ammunition must be vacated.

Alternatively, the appellant argues that the circuit court incorrectly declined to merge the sentences under traditional merger theories. The appellant contends that under the required evidence test, the two sentences should merge because the elements of both offenses are included in one another, with a distinct element separating them. Next, appellant contends that the two sentences should merge under the “rule of lenity” because of the ambiguous legislative intent on whether to merge or separate the sentences. The appellant asserts that the lack of an anti-merge clause indicates legislative intent to merge sentences. Finally, the appellant contends that the sentences should merge under “considerations of fairness and reasonableness” because the two offenses were in some sense incidental to one another. Ultimately, the appellant argues that whether they are viewed as an issue of unit of prosecution or under the traditional merger theories, the two sentences should be merged.

The State counters that the two charges are rooted in different statutes, punishing two different acts, therefore the sentences should not merge. The State argues that appellant would fail the unit of prosecution test because the neighboring statutes are different in purpose and effect. The State contends that unit of prosecution analysis is incorrect because the legislative intent was to punish the illegal possession of a firearm and illegal possession of ammunition separately and distinctly. According to the State, legislative intent to punish separately is apparent because statutes were enacted at two different times, for different reasons, and based on possession of two different prohibited items.

Additionally, the State contends that the two sentences should not merge under any traditional merger theory. The State argues that the sentences should not merge under the required evidence test because the two charges have separate elements with only one commonality. The State also argues that the sentences do not merge under the “rule of lenity.” The State contends that Legislature was clear that it intended to punish possession of ammunition separately by making a separate statutory provision.¹¹ Lastly, the State argues that the sentences should not merge under “fundamental fairness.” The State argues that allowing two separate and distinct charges to merge would encourage bad practices. In sum, the State argues that the trial judge correctly followed legislative intent in finding that the sentences should not merge under any principle or theory.

¹¹ The legislature passed the Firearm Safety Act of 2013 to separately punish possessors of ammunition.

B. Standard of Review

The Court of Appeals has laid out the appropriate standard of review for a ruling on whether two sentences should merge:

While the required evidence test is the normal and the threshold standard for determining whether there should be a merger when two offenses are based on the same act or acts, it is not the exclusive standard under Maryland law. *Monoker v. State*, supra, 321 Md. at 222-224, 582 A.2d at 529. When two offenses do not merge under the required evidence test, we have applied as a principle of statutory construction the “rule of lenity.” Considerations of fairness and reasonableness reinforce our conclusion.

Williams v. State, 323 Md. 312, 320–21, 324 (2005).

C. Analysis

Unit of Prosecution

We shall hold that, for the purposes of sentencing, the possession of ammunition and the illegal possession of a firearm constitute two different and distinct units of prosecution. Therefore, we hold that two separate sentences may be imposed for the different “acts” or units of prosecution. We explain.

“A single criminal episode may, of course, give rise to a number of separate charges, some of which may be multiplied and some of which may not. The key is to identify the unit of prosecution.” *Brown v. State*, 311 Md. 426, 434 (1988) (quoting *Battle v. State*, 65 Md. App. 38, 50 (1985)). The unit of prosecution is a question of what the legislature intended to be the act or conduct prohibited by the statute for purposes of sentencing and convictions. *Id.* The same act is determined by whether the defendant’s conduct was “one

single and continuous course of conduct” without a break in time or conduct between the acts. *Clark v. State*, 218 Md. App. 230, 255–56 (2014) (quoting *Alexis v. State*, 437 Md. 457, 486 (2014)).

We are unpersuaded by the appellant’s argument that both convictions were based upon the same “act,” namely, illegal possession of a firearm. For the purposes of unit of prosecution, the legislature clearly displays its intent to punish offenses separately by enacting two different and distinct statutes. The appellant was in possession of a loaded firearm and another empty magazine. We do not agree with the appellant that the sentences are predicated on the possession of the same regulated firearm. Rather, we hold that the “act” of possessing an illegal firearm and possessing ammunition are two distinct acts. These two acts should also be separate and distinct for sentencing purposes. Therefore, the convictions and sentences stand under the issue of unit of prosecution. We hold that the two acts are separate and distinct and sentencing should accordingly reflect that.

Required Evidence Test

We hold that the two sentences should not merge under the required evidence test. The required evidence test resolves the question of whether one criminal offense merges into another, or whether one offense is a lesser included offense of another. *Claggett v. State*, 108 Md. App. 32, 45 (1996). One offense merges with another when both offenses are based on the same act(s) and one offense is a lesser included offense of the other. *Clark*, 218 Md. App. at 254. The required evidence test focuses on distinct elements of each offense that if all of the elements of one offense are included in the second then the former merges into the latter. *Claggett*, 108 Md. App. at 46.

Under the required evidence test, the appellant argues that each offense has the same elements with the latter offense only having one distinct element. We do not agree. This Court recently decided in *Latray v. State*, that each offense requires proof of a fact which the other does not. 221 Md. App. 544, 553 (2015) (citing *Cousins v. State*, 277 Md. 383, 388–89 (1976)) This Court further explained, “[n]either multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode.” *Id.*

§ 5-133 of the Public Safety Article (PS) of the Maryland Code explains restrictions on possession of a regulated firearm as follows:

- (c) *Penalty for possession by convicted felon.* – (1) A person may not possess a regulated firearm if the person was previously convicted of:
- (i) a crime of violence;
 - (ii) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, or § 5-614 of the Criminal Law Article; or
 - (iii) an offense under the laws of another state of the United States that would constitute one of the crimes listed in item (i) or (ii) of this paragraph if committed in this State.

On the other hand, PS § 5-133.1 explains the prohibition of possession of ammunition as follows:

- (b) *Possession of ammunition prohibited.* – A person may not possess ammunition if the person is prohibited from possessing a regulated firearm under § 5-133 (b) or (c) of this subtitle.

We do not agree with appellant that both statutes contain all of the same elements. There is only one commonality: possession of a regulated firearm. We do not find that the two statutes are only separated by one distinct element, but that they are two distinct

statutes with only one commonality. Therefore, under the required evidence test we hold that the two sentences should not merge.

Rule of Lenity

Next, we hold that the two sentences do not merge under the rule of lenity. The purpose of the rule of lenity is to direct courts to construe ambiguous criminal statutes in favor of criminal defendants. *Clark*, 218 Md. App. at 255. When the legislative intent is unclear and the statute is ambiguous, courts then hold that the offenses will merge. When determining whether to merge sentences under rule of lenity, a court should consider: (1) whether the charges arose out of the same act or transaction; (2) whether the crime charges are the same offense; and (3) if the offenses are separate, whether the legislature intended multiple punishments for conduct arising out of a single act or transaction which violate two statutes. *Id.* (quoting *Alexis v. State*, 437 Md. 457, 484–85 (2014)).

In the present case, we find that the charges did not arise out of the same act or transaction. The act of illegally possessing a regulated firearm is distinct from possessing ammunition. The legislature made its intent clear by enacting separate statutes containing punishments for two different acts. If the legislature intended for both acts to be viewed and punished as one, it would not have enacted the separate statute governing possession of ammunition. The crime charges are not the same offense, which is apparent through the language of the statutes. The first statute pertains to restrictions on possession of regulated firearms, while the second pertains to the possession of solely ammunition.

Each statute lays out the specific act that violates the subsection, and the latter is not identical to the former. Also, both statutes have different punishments for violations of the

respective subsections. Thus, we hold that the legislature communicated its intent not to merge the sentences by enacting two different statutes with separate punishments for two distinct acts. We also reject the appellant’s argument that the absence of an anti-merger clause indicates legislative intent to merge sentences.¹² Therefore, we hold that the rule of lenity is inapplicable.

Considerations of Fundamental Fairness

Finally, we hold that the two sentences do not merge under considerations of fairness and reasonableness. Considerations of fundamental fairness is a defense that is rarely successful, by itself, in the context of merger.¹³ *Latray*, 221 Md. App. at 558. When determining whether sentences will merge under this theory, courts may consider whether it is fair to have multiple punishments for a crime in a particular situation. *See Id.* (citing *White v. State*, 318 Md. 740, 745-46 (1990)). Fairness does not solely depend on the elements of the crime, but also on the circumstances surrounding the convictions. *Id.* (citations omitted). The most frequent reason why fundamental fairness does not require merger is that the given offenses punish separate wrongdoings. *Id.*

We find appellant’s argument that the sentences should merge under considerations of fundamental fairness to be unpersuasive. We find it fair that the two sentences imposed

¹² In *Latray*, this Court rejected appellant’s argument that lack of an anti-merger provision within the statute implied ambiguity for multiple sentences. 221 Md. App. at 557. The Court also found that the absence of an anti-merger provision inferred only that Legislature did not explicitly address the topic of merger in the statute, and nothing more. *Id.*

¹³ Only two cases in Maryland have successfully applied fundamental fairness requiring merger – *Monoker v. State*, 321 Md. 214 (1990), and *Marquardt v. State*, 164 Md. App. 95 (2005).

remain separate. The sentences were predicated on separate and distinct acts in violation of two different statutes. Thus, fundamental fairness in this instance does not require merger. Each statute specifically lays out a unit of prosecution along with a specific punishment, and to merge the two separate and distinct sentences would be unfair and set bad precedent.

CONCLUSION

For the aforementioned reasons, and relying on *Robinson*, we hold that the odor of marijuana emanating from a vehicle is enough to provide probable cause for the warrantless search of a vehicle. We also hold that the jury instructions were insufficient to relay that knowledge was an element of indirect possession. We hold that this error requires reversal. Lastly, we hold that two sentences predicated on two different acts in violation of two separate and distinct statutes does not require merger under any traditional merger theory.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED IN PART AND REVERSED IN
PART. ½ COSTS TO BE PAID BY
APPELLANT AND ½ TO BE PAID BY
PRINCE GEORGE'S COUNTY.**