Circuit Court for Washington County
Case No. C-21-CR-21-000573

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 705

September Term, 2022

DARRYL DONNELL MOORE

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Tang,
JJ.

Opinion by Tang, J.

Filed: July 17, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** 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.

At the conclusion of a jury trial in the Circuit Court for Washington County, Darryl Donnell Moore, appellant, was convicted of several offenses arising from his possession of drugs as well as a firearm in relation to drug trafficking. The court sentenced him to an aggregate of 20 years of incarceration. On appeal, he presents the following questions, which we have reordered and rephrased for clarity:

I. Did the court err in denying appellant's motion to suppress evidence?

II. Did the court err in formulating three *voir dire* questions?

III. Did the court err in denying appellant's motion for a mistrial during jury selection?

IV. Was the evidence sufficient to sustain appellant's convictions?

V. Did the court err in not advising appellant of his right to file a motion for a new trial?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

SUPPRESSION HEARING

On the evening of October 30, 2021, Officer Travis Wheat was on uniformed patrol when he observed a van parked in a poorly lit, "private gravel lot" adjacent to a row of apartments. There were "No Trespassing," "No Parking," and/or "No Loitering" signs posted in that area. He focused his patrol there because of multiple trespassing complaints and drug and weapons violations, including a handgun violation a week prior in "the exact spot this van was parked." The officer suspected that the occupants might be involved in illicit drug activity, explaining that "all the other arrests that [he had] effected there [were] for people who didn't belong there. That was a common area for distribution."

Officer Wheat parked his marked vehicle at the end of the street and approached the van on foot "as a consensual encounter." The encounter was recorded on his body camera, and the video footage was admitted into evidence. As the officer approached, he observed occupants inside the van. The van had tinted windows, "was running," and had "loud" music playing inside. Appellant, who was in the front passenger seat, opened the door and appeared to "lift his body up" to engage the officer. Once appellant opened the door, Officer Wheat observed "white smoke" and smelled "a very strong odor of burnt marijuana" emanating from the van.

Officer Wheat asked, "What's up man? How you guys doing? You guys live here?" Appellant said, "No," but stated that he was waiting for someone that lived "in the house[.]" The officer asked for appellant's name and date of birth, and appellant provided the information. In the backseat, there were two other individuals, who later identified themselves as Lorenzo Gallegos ("Gallegos") and Nino Smith ("Smith"). Officer Wheat asked them if they "live here," and Gallegos responded, "No." Upon further questioning, appellant stated that the van belonged to "Mike," the person they "were waiting for," but he did not seem to know Mike's last name. Gallegos also indicated that they were "waiting for somebody to pull up" but could not provide details.

By that time, Officer Tim Cramer was on the scene to assist Officer Wheat. Officer Cramer also smelled the odor of burnt marijuana coming from the van. Officer Wheat testified that, based on the odor of marijuana, "the investigation turned into that and furthered [his] suspicion of distribution of CDS." He explained to the occupants that he

was detaining them for an investigation because of the odor of marijuana, "nobody knows who's who," they "don't live here," and "[t]here's signs posted here [that prohibit] loitering or trespassing." Officer Wheat proceeded "to do a probable cause search" of the van, which yielded various narcotics and a firearm, detailed *infra*.

Appellant moved to suppress this evidence, arguing that Officer Wheat's initial approach of the van was not supported by reasonable articulable suspicion that appellant was loitering. The court denied the motion and concluded that the officer's initial encounter with appellant was an accosting:

> I believe that the officer was certainly well within his rights to approach the vehicle, and at this point, I don't even think it's for investigatory purposes or maybe it is mildly on the loitering, but he certainly has the right to go up and say, "Hey, what's going on?" Just like encountering a pedestrian on the street, "Hey, what's going on?" [T]hey can certainly walk away. [T]hat's permitted. [I]n this instance, he walked up to try and figure out what's going on. Is this a loitering situation? Is this a trespassing situation? I think based on the totality of the circumstances, his familiarity with the signage in that location, the high crime that he's dealt with in that location, it was certainly reasonable for him to at least approach the vehicle . . . and have this encounter. [B]ut to dispel his concerns about what may or may not be going on, obviously he wants to talk to somebody.

(cleaned up). The court explained that the focus of the officer's investigation turned to the suspected drug activity when he observed smoke and smelled the odor of marijuana coming from the van:

> [T]hat's when the reasonable articulable suspicion for the marijuana comes to play[.] I think [the officer is] completely within his rights to investigate that, and you know then clearly he's probably moved off somewhat from the loitering, although I guess he can continue to investigate that.

> So I do not believe that the warrantless search was inappropriate at all under these circumstances[.]

TRIAL

At trial, the testimony about Officer Wheat's encounter with appellant and the other two occupants was consistent with the testimony at the suppression hearing. Additional evidence adduced at trial was as follows:

Officer Wheat asked a dispatcher to run the tag on the van through the National Crime Information Center ("NCIC"), and "it returned back to a Donnell Moore" of Baltimore, Maryland.

On the front passenger's seat where appellant had been seated, Officer Wheat discovered four "trashcans" (orange plastic containers) filled with a white rock-like substance that tested positive for cocaine. In the center console, to the left of where appellant had been seated, the officer found 23 multicolored plastic containers filled with marijuana.

Officer Wheat noticed that "[a]ll of the van was manipulated and all of the panels were loose from the front to back." He explained that people who "distribute and transport large amounts of narcotics often manipulate their vehicles" to create "traps" to hide the drugs from law enforcement. In the front passenger side where appellant had been seated, the officer recalled that "all of the paneling around the dash and the glove box was all loose and appeared like it was manipulated." Sergeant Steven Lucas, who assisted with the search, also noticed that the paneling along the edge of the glovebox was loose. A part of

the vent, adjacent to the glove box, had a florescent piece of paper inside. Sergeant Lucas "barely touched the panel" and it fell off, revealing the contents inside.

Inside the vent and towards the bottom of the panel, police discovered a knotted cellophane bag containing approximately 10 clear gel capsules; two knotted cellophane bags containing approximately 30 gel capsules; 20 individually knotted cellophane bags of a white, rock-like substance; a cellophane bag containing 15 plastic-type containers filled with a white, rock-like substance; cellophane bags containing approximately 30 plastic containers filled with a white, rock-like substance; and 100 clear unused baggies. Various substances in the bags and capsules tested positive for cocaine and/or fentanyl. Police also found, inside the compartment, a loaded 9-millimeter handgun and $3,000 in U.S. currency "folded tightly and put into cellophane." In addition, police recovered six cell phones from the van. Another cell phone kept ringing "somewhere in the van" but police could not locate it.

Smith was wearing a fanny-type bag around his chest which contained knotted cellophane bags, containers, and capsules that tested positive for cocaine and/or fentanyl. Gallegos was found to have crack cocaine in his pockets. Appellant did not have any drugs on his person, but he had $528 in various denominations.

Agent Brian Hook, the State's drug expert, opined that the amount of cocaine and fentanyl found, the way in which it was packaged, and the currency accompanying it, indicated an intent to distribute.[1]

[1] Agent Hook also opined that the amount of cocaine seized (approximately 2.86 ounces) had a street value of $1,200-$1,600 per ounce, for a total value of anywhere

After the State rested, defense counsel moved for a judgment of acquittal on Counts 1, 5, and 13. The court denied the motion as to using, wearing, carrying, and transporting a firearm while engaged in drug trafficking crime (Count 1)[2] and possession of marijuana in an amount over 10 grams (Count 5). It granted the motion as to use of a firearm in the commission of a felony (Count 13) because there was no evidence that appellant "used" the firearm.[3] The State entered a *nolle prosequi* as to possession with intent to distribute heroin/fentanyl (Count 4) and possession of heroin/fentanyl (Counts 7 and 8).

The jury convicted appellant of the following offenses: wearing, carrying, and transporting a firearm while engaged in drug trafficking crime (Count 1); maintaining a common nuisance for distribution of fentanyl (Count 2); possession of fentanyl in a large amount (over 5 grams) (Count 3); possession of marijuana in an amount over 10 grams (Count 5); possession with intent to distribute cocaine (Count 6); possession of crack cocaine (Count 9); illegal possession of a firearm (Count 10); possession of a firearm by a prohibited person (Count 11); possessing, owning, carrying, and transporting a firearm

between $3,600 and $4,800. The amount of fentanyl seized (20.94 grams) had a street value of approximately $20 per capsule, or a total of $1,750 for 87 capsules seized.

[2] The criminal information charged appellant with "use, wear, carry, and transport" a firearm. The verdict sheet, submitted to the jury without objection, omitted the word, "use." *See* Discussion, IV.A. (Count 1), *infra*.

[3] "Use" requires that a defendant "carry out a purpose or action or make instrumental to an end or process or apply to advantage the firearm." *Handy v. State*, 175 Md. App. 538, 580 (2007) (cleaned up); *see Wynn v. State*, 313 Md. 533, 544 (1988) (where the defendant did not actively employ or brandish the handgun while engaged in the underlying crime, he did not "use" the gun).

after being convicted of a disqualifying crime (Count 12); and possession of a firearm while engaged in a drug trafficking crime (Count 14).

Additional facts will be included in the discussion as they become relevant.

DISCUSSION

I.

Suppression Motion

Appellant argues that the trial court erred in denying his motion to suppress the evidence seized because Officer Wheat did not have reasonable articulable suspicion to approach the van upon his initial encounter. Specifically, he maintains that there was no indication of loitering and thus, no basis to believe that criminal activity was afoot.

A. Standard of Review and Applicable Law

Our review of the denial of a motion to suppress evidence is limited to the record of the suppression hearing and does not extend to any evidence adduced at trial. *Trott v. State*, 473 Md. 245, 253-54 (2021). The record is examined "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386 (2017). We give deference to the factual findings of the suppression court unless those findings are clearly erroneous. *Reynolds v. State*, 130 Md. App. 304, 313 (1999). We review *de novo*, however, the court's legal conclusions regarding any constitutional challenge under the Fourth Amendment and make our own independent evaluation as to whether the encounter in question was lawful. *Grant v. State*, 449 Md. 1, 14-15 (2016).

"It is well established that the Fourth Amendment guarantees are not implicated in every situation where the police have contact with an individual." *Swift v. State*, 393 Md. 139, 149 (2006). Courts have considered three tiers of interaction between the police and individuals: (1) an arrest, (2) an investigatory stop, and (3) a consensual encounter. *Id*. at 149-50. An arrest, the most intrusive encounter, requires probable cause to believe that the person has committed, is committing, or is about to commit a crime. *Florida v. Royer*, 460 U.S. 491, 499 (1983) (observing that the general rule is that "seizures of the person require probable cause to arrest").

An investigatory stop or detention, known as a *Terry* stop, is less intrusive than a formal custodial arrest and must be supported by reasonable suspicion that criminal activity is afoot, which permits an officer to stop and briefly detain an individual. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (noting that "[e]ach case of this sort will, of course, have to be decided on its own facts").

Finally, a consensual encounter, or mere accosting, is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. *Swift*, 393 Md. at 152 ("where the police *merely* approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away.") (emphasis in original). A consensual encounter "need not be supported by any suspicion and because an individual is free to leave at any time during such an encounter, the Fourth Amendment is not implicated; thus, an individual is not considered to have been 'seized' within the meaning of the Fourth Amendment." *Id*. at 151.

B. Analysis

Appellant contends that Officer Wheat's initial approach of the van was not supported by reasonable articulable suspicion that he was loitering. He presumes, without explanation, that the officer stopped or seized him within the meaning of the Fourth Amendment.

"Ordinarily, approaching a parked vehicle to question occupants about their identity and actions is a mere accosting and not a seizure." *Lawson v. State*, 120 Md. App. 610, 614 (1998). Our Supreme Court has identified several factors in determining whether a reasonable person would have felt free to leave:

> the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Ferris v. State, 355 Md. 356, 377 (1999). In determining whether a particular encounter is a seizure, "a court must apply the totality-of-the-circumstances approach, with no single factor dictating whether a seizure has occurred." *Id*. at 376.

Applying these factors, we conclude that the officer's initial encounter with appellant was an accosting. The encounter took place at night in an area posted with signage prohibiting trespassing, parking, and/or loitering. The first officer to arrive (Officer Wheat) parked his marked vehicle about a block away from the van. He approached by himself and did not order appellant out of the van. Although the officer did

not inform appellant that he was free to go, he also did not demonstrate threatening behavior that would indicate that appellant was not free to leave upon the officer's initial approach. Because appellant was not seized, there was no level of suspicion needed to justify Officer Wheat's initial approach. For the reasons stated, the court did not err in denying the motion to suppress.

II.

Voir Dire Questions

On appeal, appellant challenges the trial court's formulation of three questions posed to the jury venire during *voir dire*:

> 1. [I]s is there any member of this prospective jury panel who would be unable to base his or her verdict fairly upon the evidence presented without regard to pity, sympathy, passion or any other emotion?
>
> 2. [D]oes any member of this prospective jury panel have any moral, religious, or philosophical beliefs that would prevent him or her from sitting in judgment of another individual?
>
> 3. [W]hether any member of the prospective jury panel has such strong feelings about any of the crimes charged that would affect their ability to hear fairly?

During *voir dire*, appellant did not object to the questions. The court proceeded to call to the bench the prospective jurors who had responded affirmatively to these questions. After bench inquiries concluded and before striking from the box,[4] the court asked if the

[4] "Striking from the box is the process by which the parties in a criminal case exercise their respective peremptory challenges, in an alternating fashion, with twelve prospective jurors sitting in the jury box." *Campbell v. State*, 240 Md. App. 428, 462, n.7 (2019).

parties had "any objections at this point[.]" Defense counsel did not lodge any objection. The parties proceeded to exercise their peremptory challenges, ultimately selecting twelve jurors. At the conclusion of jury selection, the court asked if "counsel [was] satisfied with the jury as empaneled[.]" Defense counsel stated that the jury was acceptable to the defense.

Acknowledging that he failed to preserve these challenges, appellant invites this Court to afford him plain-error review. We decline to do so. We reserve our discretion to exercise plain error review "for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). To grant plain error review, four conditions must be met:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant;
>
> (2) the legal error must be clear or obvious, rather than subject to reasonable dispute;
>
> (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings; and
>
> (4) the error must seriously affect the fairness, integrity[,] or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (cleaned up).

Appellant fails to satisfy the first condition. Not only did appellant not object to the questions asked, but he also accepted the jury once seated. *See, e.g.*, *State v. Stringfellow*, 425 Md. 461, 469-72 (2012) (holding that defense counsel's unqualified acceptance of

empaneled jury waived complaints aimed at inclusion or exclusion of prospective jurors). Appellant affirmatively waived his contention, making plain error review unavailable. *Brice v. State*, 225 Md. App. 666, 679 (2015) (we will not review for plain error where the defendant affirmatively waived objections to the error); *Carroll v. State*, 202 Md. App. 487, 514 (2011) ("an affirmative act of commission[,] as opposed to an act of omission, constitutes a waiver rather than a forfeiture," and a waived claim "is not subject to plain error review.") (citation omitted).

III.

Motion for Mistrial

Appellant argues that the trial court erred in denying his motion for mistrial after the court mistakenly told the jury that appellant was charged with second-degree assault.

A. Proceeding Below

At the outset of *voir dire*, the court listed the offenses that appellant allegedly committed to include second-degree assault. Appellant neither objected nor alerted the court that it had mistakenly included the uncharged offense. Thereafter, the court posed the "strong feelings" question, *supra*, as follows:

> Okay I've given you a list of the crimes that are charged in this case and I can certainly go over it again. It is, uh, basically it's some drug trafficking crimes and possession of firearm crimes that go along with those. The question is whether any member of the prospective jury panel has such strong feelings about any of the crimes charged that would affect their ability to hear fairly?

Six prospective jurors responded to the "strong feelings" question in the affirmative. Examination of these jurors' responses at the bench did not involve concerns they had

about the misstated assault charge. Appellant moved to strike for cause four of these jurors, which the court granted, and the court *sua sponte* struck the other two. Although the six jurors were eventually struck for cause, none were struck because they indicated they could not be impartial in a case involving second-degree assault.

The court also asked if any member of the panel or their immediate family member had been involved in a criminal matter as a victim, witness, or a defendant. Affirmative responses by prospective jurors, Nos. 10, 14, 66, and 72, prompted appellant to move for a mistrial as follows:

Juror No. 72 stated that, as a member of law enforcement, he encountered various offenses ranging from simple violations "to up to DUI charges, first, second degree assault charges[.]"

Juror No. 10[5] said, "From what I understand, you were saying that some of the charges are possible assault charges[.]" The court clarified:

> There is not. And I apologize. That was in my document that I read from, but it was left over from last case. There was no assault charge, but there is a handgun charge. Uh, so the charges would be, uh, you know possession of a firearm, possession of firearm in connection with drug trafficking crime, and then drug trafficking crimes, but no actual assault or use of the gun.

Juror No. 10 assured the court that, if no assault or murder charge was involved, he could be fair. Appellant moved to strike for cause Juror No. 10 because of his apparent hesitation in responding. The court reserved on the motion because his response "was based on the

[5] We note that there is an error in the transcript. While the court reporter referred to this juror as No. 11, we understand, contextually, that this was Juror No. 10.

[c]ourt's error that once clarified, I do believe that he . . . did not have an issue." The court held the decision until "the point of actual selection."

Juror No. 66 revealed that he or she had a prior conviction for second-degree assault. The court remarked, "And just so you know, I misread the original charging document. There is no second degree assault in this case. Okay? This is a case of possession of a firearm and some alleged drug trafficking charge." Juror No. 66 responded, "Correct."

Juror No. 14 said that she had been charged with assault twice, the most recent being domestic-related where she "pressed them back on [her 'ex']." The court noted that it had "misspoke earlier. There is no assault as part of this case." Juror No. 14 responded, "Oh, okay." After the discussion with Juror No. 14, defense counsel moved for a mistrial:

> [DEFENSE COUNSEL]: I'm going to ask for a mistrial at this point. . . . The reason being is that that – presently we're on juror nine or 10 and this is the third person that's brought up the assault. I'm not saying that –
>
> THE COURT: Well she didn't actually bring up the assault, she brought up that she was charged with assault.
>
> [DEFENSE COUNSEL]: Right. But that's the reason why she stood up and the purpose of the mistrial, I'm not saying that the [c]ourt did anything intentional in reading out the charges, but we're nine, whatever the number is, a third of the jurors are responding that the assault was the reason for responding, among other reasons, they brought up the assault, either they were charged with the assault, even the, um Juror number 72, who was not stricken for cause, . . . indicates that he's had experience with first and second degree assaults. . . . I'm just concerned that, again while I appreciate the people stepping forward and raising their hands, I'm concerned that there's some people that may not have stepped up and raised their hands and may have been, as the young lady said, a victim of assault.
>
> THE COURT: Well but here's the thing, she said she's the victim of assault, but she had no concern that I read assault erroneously. What I'm going to do, I'm going to overrule the objection, uh, I'm going to deny the motion. When

> we go back in, I will clarify that there's no assault involved and see if that changes anyone's, uh, position as to the trial.[6] But I think we're going to proceed at this time.

Prior to striking from the box, the court struck Juror No. 10 for cause, which left over 30 prospective jurors in the pool. The State exercised a peremptory strike against Juror No. 14. Twelve members of the jury were then selected and seated. Juror Nos. 66 and 72 were not selected because the State and defense were satisfied with the selected jurors before Juror Nos. 66 and 72 could be considered for seating.

B. Analysis

Appellant argues that the court's misstatement "caused premature disqualification of jurors," explaining that "[i]t is unknown whether the prospective jurors that were struck for cause due to the judge's incorrect statement of charges would have been willing to follow the court's instructions in the case because they stated they were impartial due to the crime of second-degree assault." He argues that prospective jurors were effectively excluded from consideration because the court's misstatement tainted what would have otherwise been a larger jury pool.

[6] It does not appear, from the transcript, that the court made the clarification to the *venire*, nor does it appear that appellant brought the apparent oversight to the court's attention. In his brief, appellant did not take issue with any failure to make the *venire*-wide clarification. At oral argument, however, appellant raised for the first time that the court failed to give a "general curative instruction" to the *venire*. To the extent appellant asks us to address that point, we decline to do so. *See Uninsured Emp'rs' Fund v. Danner*, 388 Md. 649, 664 n.15 (2005) (declining to consider a point raised for the first time at oral argument); *see also* Md. Rule 8-504(a)(6).

Maryland courts have long recognized that "[a]lmost anyone can make a slip of the tongue, and judges are not immune from such errors." *Reed v. State*, 225 Md. 566, 570 (1961). The court is not required to declare a mistrial for every such error. *See e.g.*, *Colkely v. State*, 204 Md. App. 593, 625 (2012), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013). "[T]he granting of a mistrial is an extraordinary remedy that should only be resorted to under the most compelling of circumstances" when, for example, "such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Bynes v. State*, 237 Md. App. 439, 457 (2018) (citation omitted). Because the trial court has its "finger on the pulse of the trial," it is in the best position to assess the existence of prejudice. *State v. Hawkins*, 326 Md. 270, 278 (1992). Thus, a denial of a request for a mistrial is reviewed under an abuse of discretion standard. *See Simmons v. State*, 436 Md. 202, 211-12 (2013). We do not consider that discretion abused unless it has been exercised in an arbitrary or capricious manner. *Brewer v. State*, 220 Md. App. 89, 111 (2014).

We are not persuaded that the court's misstatement caused premature disqualification of prospective jurors. When certain prospective jurors referred to assault, the court clarified its misstatement directly, and they appeared to understand the clarification. Appellant, could have, but did not avail himself of the opportunity to ask follow-up questions about whether they could be fair and impartial jurors notwithstanding any concerns or prior involvement with assault. *See, e.g.*, *Nash v. State*, 439 Md. 53, 79 (2014) ("to the extent *voir dire* could have been useful in ferreting-out and resolving any

potential prejudice, the burden was on [defendant] to request it."). Instead, appellant successfully struck for cause many of these prospective jurors. Although the court's inadvertent reference to the second-degree assault charge was in error, it did not amount to prejudicial error warranting a mistrial. *See Walls v. State*, 228 Md. App. 646, 669-70 (2016) (affirming denial of motion for mistrial where an inadvertent one-word slip-up was minimal and not seriously prejudicial). We conclude that, under the circumstances presented, the court did not abuse its discretion in denying the motion for mistrial.

IV.

Sufficiency of Evidence

Appellant argues that the evidence was insufficient to support his convictions for wearing, carrying, and transporting a firearm while engaged in a drug trafficking crime (Count 1); maintaining a common nuisance for distribution of fentanyl (Count 2); possession of over 10 grams of marijuana (Count 5); and possession with intent to distribute cocaine (Count 6).

The State urges us to decline to consider the sufficiency claims because appellant failed to include a factual recitation of the evidence presented at trial pursuant to Rule 8-504(a)(4), he failed to preserve arguments with respect to Counts 2 and 6, and, in any event, the evidence was sufficient to support the convictions. We assume without deciding that appellant presented an adequate factual recitation, and we address each challenged count *seriatim*.

A. Analysis

"It is a well established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal." *Claybourne v. State*, 209 Md. App. 706, 749 (2013); *see also* Md. Rule 8-131(a); Md. Rule 4-324(a). Additionally, "[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" *Tetso v. State*, 205 Md. App. 334, 384 (2012).

Assuming the claim is preserved, the test for considering the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). "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." *Tracy v. State*, 423 Md. 1, 12 (2011).

Count 1

Appellant was charged, in Count 1, with a violation of § 5-621(b)(2) of the Maryland Code. Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), which provides that a person may not "use, wear, carry, or transport" a firearm during and in relation to a drug trafficking crime. This offense is distinguished from a violation of subsection (b)(1)

which prohibits "possessing" a firearm "under sufficient circumstances to constitute a nexus to the drug trafficking crime" (as charged in Count 14).

Here, at the close of the State's case, appellant moved for judgment of acquittal on Count 1, arguing that:

> [DEFENSE COUNSEL:] . . . I believe it's up to the trier-of-fact to determine the *possession* argument, *in count one*, which is CDS distribution, et cetera, with a firearm. And again, the point that the firearm is secreted behind something and not in plain view, *I don't believe rises to the appropriate standard for CDS distribution with a firearm*. I mean the testimony from Agent Hook is, is that he's an expert and this is trafficking or — or, yeah, this is trafficking but—
>
> THE COURT: Okay and I'm going to deny that, especially at this point where we're looking at everything in a light most favorable to the State. [T]hey could make—[b]ecause of the proximity to the—to some of the drugs and the fact that various different parts of the drugs were secreted in different parts of the car, uh, *they could certainly find that there is a concerted effort to go along*. So I'll deny that.

(emphasis added). Based on this colloquy, the court and defense counsel appeared to operate under the misimpression that Count 1 related to a (b)(1) violation, rather than a (b)(2) violation. The court also appeared to understand defense counsel's argument to mean that there was insufficient evidence to show that appellant possessed a firearm under sufficient circumstances to constitute a nexus to the predicate drug trafficking crime under subsection (b)(1). Appellant did not correct that understanding, nor did he argue that there was insufficient evidence that appellant had used, worn, carried, or transported the firearm under subsection (b)(2). The court later gave defense counsel an opportunity to add to his argument, but counsel declined.

As to Count 1, the court proceeded to instruct the jury, without objection, on "possessing a firearm during and in relation to a drug trafficking crime." The verdict sheet, which was submitted to the jury and "acceptable to the defense," however, described the offense as a (b)(2) violation: "*wear, carry and transport* a firearm while engaged in a drug trafficking crime." (emphasis added). The word, "use," was omitted from the verdict sheet.

On appeal, appellant argues that (1) the State neither proved that appellant had used, nor worn, carried, or transported a firearm while engaged in a drug trafficking crime, and (2) "[n]either question [was] submitted to the jury for consideration."

Appellant's first point is not preserved. Appellant did not argue below, in his motion for judgment of acquittal as to Count 1, that the State failed to prove that appellant had used, worn, carried, or transported a firearm.

As to his second point, appellant does not explain whether his challenge is premised on the jury instruction, the verdict sheet, or otherwise.[7] *See Moosavi v. State*, 355 Md. 651, 660 (1999) ("if a point germane to the appeal is not adequately raised in a party's brief, the [appellate] court may, and ordinarily should, decline to address it.") (citation omitted). Accordingly, we decline to address appellant's sufficiency claim as to Count 1.

[7] Assuming the challenge relates to the jury instruction and verdict sheet, appellant did not object to either at trial. *See* Md. Rule 8-131(a); Md. Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."); *Conyers v. State*, 354 Md. 132, 167 (1999) (a defendant may waive appellate review of claimed errors regarding jury instructions and the verdict sheet by failing to object at trial).

Count 2

With respect to maintaining a common nuisance for distribution of fentanyl, appellant contends that the State failed to prove that the act was of a "continuing or recurring nature." The claim, however, is not preserved because appellant did not move for judgment of acquittal with respect to Count 2. Even if preserved, we conclude that the evidence was sufficient to support the conviction.

The crime of keeping or maintaining a common nuisance is codified in CR § 5-605(b), which states: "[a] person may not keep a common nuisance." The statute defines "common nuisance" as

> a dwelling, building, vehicle, vessel, aircraft, or other place: (1) resorted to by individuals for the purpose of administering illegally controlled dangerous substances; or (2) where controlled dangerous substances or controlled paraphernalia are manufactured, distributed, dispensed, stored, or concealed illegally.

CR § 5-605(a). "The essence of this crime is the potential danger posed by the continuing and recurring character of the offense on such premises[.]" *McMillian v. State*, 325 Md. 272, 294 (1992) (citation omitted). Evidence found on a single occasion may be sufficient to show a crime of a continuing nature. *See, e.g.*, *Diaz v. State*, 129 Md. App. 51, 69-73 (1999) (evidence sufficient to show continuous criminal enterprise where large quantity of drugs and currency was found concealed within sophisticated, restructured and hidden compartments of the vehicle); *Hunt v. State*, 20 Md. App. 164, 167-69 (1974) (evidence sufficient to show "continuous narcotics operation" where search on single occasion yielded cellophane bag containing heroin; several measuring spoons; 250 glassine bags of

heroin, in 10 bundles, each consisting of 25 bags; empty glassine bags; and records of the purchase and sale of quantities of drugs).

Here, the search of the van revealed, *inter alia*, a hidden compartment where a gun, packaged drugs, and $3,000 in currency were kept. That evidence, along with Officer Wheat's testimony that the manipulation of the paneling was indicative of concealing large quantities of drugs for distribution and transportation, supports a rational inference of drug-related activity of a continuous and recurring nature. Based on the evidence viewed in the light most favorable to the State, we conclude that the evidence was sufficient to support the conviction for keeping a common nuisance.

Counts 5 and 6

With respect to possession of marijuana in an amount over 10 grams (Count 5) and possession with intent to distribute cocaine (Count 6), appellant argues that the evidence was insufficient to demonstrate that he possessed the drugs.[8]

The possession claims are not preserved for different reasons. As to Count 5, appellant moved for judgment of acquittal but limited his argument to an insufficient showing that the amount of marijuana exceeded 10 grams, arguing that "just on the sheer number reason," the evidence "doesn't meet the statutory [] amount." He did not argue the possessory aspect of the offense. As to Count 6, appellant did not move for judgment of acquittal.

[8] In his brief, appellant did not specify a basis to support his sufficiency challenge as to Count 5. At oral argument, he clarified that the basis is intertwined with the challenge against Count 6, namely that there was insufficient evidence of possession.

Even if the possession claims are preserved, we conclude that the evidence was sufficient to sustain the convictions on both counts. To support a conviction for a possessory offense, "[the] evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited . . . drug in the sense contemplated by the statute, *i.e.*, that [the accused] exercised some restraining or directing influence over it." *State v. Leach*, 296 Md. 591, 595-96 (1983) (quoting *Garrison v. State*, 272 Md. 123, 142 (1974)). The accused must have knowledge of the presence and illicit nature of the substance, and such knowledge may be proven "by circumstantial evidence and by inferences drawn therefrom." *Dawkins v. State*, 313 Md. 638, 651 (1988). Possession may be actual or constructive, as well as exclusive or joint in nature. *Mills v. State*, 239 Md. App. 258, 275 (2018).

In determining whether evidence supported a finding of constructive possession of a controlled substance, Maryland appellate courts have typically applied the four-factor test set forth in *Folk v. State*, 11 Md. App. 508 (1971). Those factors are:

> 1) proximity between the defendant and the contraband; 2) the fact that the contraband was within the plain view or otherwise within the knowledge of the defendant; 3) ownership or some possessory right in the premises or automobile in which the contraband is found; and 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual enjoyment of the contraband.

See also Veney v. State, 130 Md. App. 135, 143-44 (2000). No one factor is dispositive, and "possession is determined by examining the facts and circumstances of each case." *Smith*, 415 Md. at 198.

The *Folk* factors support the conclusion that appellant had constructive possession of the marijuana and cocaine. With respect to proximity and plain view, the drugs were found on or near the seat where appellant had been seated in the van—the marijuana was found in the center console, and the cocaine was found on the front passenger seat and inside the panel of the glovebox.

Turning to the "mutual enjoyment" factor, the officers testified to smelling the odor of marijuana "inside" and "near" the van. Additionally, a haze of smoke was apparent on the body camera video footage. The jury could have inferred that appellant knew the marijuana was there and was mutually enjoying its use with the other passengers in the van. *See, e.g.*, *id.* at 200 (evidence sufficient to show mutual use and enjoyment of marijuana where defendant was found shrouded in a haze of marijuana smoke); *In re Ondrel M.*, 173 Md. App. 223, 237 (2007) (officer's testimony that he smelled an odor of marijuana supported an inference of mutual use and enjoyment).

With respect to the cocaine, the jury could have inferred, based on the quantity of cocaine and currency, as well as the gun hidden in a secret compartment and the loose paneling all around the car, that appellant was participating with others in the mutual use and enjoyment of the cocaine. *See, e.g.*, *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (reasonable to infer a common enterprise where the "quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.").

As to an ownership/possessory right in the van, the NCIC check suggested that appellant had an ownership interest in the van where the contraband was discovered. Although appellant initially claimed the van belonged to "Mike," the jury could have reasonably inferred that this claim was appellant's attempt at disassociating himself from the van because he knew about the presence of drugs inside. *See, e.g.*, *Neal v. State*, 191 Md. App. 297, 316-18 (2010) (evidence sufficient to show possession of cocaine where defendant claimed the car where drugs were found belonged to a friend; witness credibility lies solely within the purview of the factfinder who is free to accept or reject the testimony). Viewing the evidence in the light most favorable to the State, possession was sufficiently demonstrated to support the convictions under Counts 5 and 6.

V.

Advisement of Motion for New Trial

Maryland Rule 4-331(a) provides, "On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." Here, the trial court informed appellant of his right to file a motion for a new trial at the time of sentencing, months after the verdict. Appellant's primary argument is that, pursuant to this rule, the trial court failed to "timely" advise him of his right to file the motion (*i.e.*, immediately following the verdict). Accordingly, he seeks leave to file a belated motion for a new trial.

Appellant does not cite to any legal authority that requires a court to advise a defendant of his right to file a motion for a new trial. Other rules, by comparison, expressly

mandate advisement of certain rights and matters. *See e.g.*, Md. Rule 4-215(a)(3) (at a defendant's first appearance in court, under certain circumstances, "the court *shall* . . . *[a]dvise* the defendant of the nature of the charges[.]") (emphasis added); Md. Rule 4-342(h)(1) ("At the time of imposing sentence, the court *shall* cause the defendant to be *advised of*" his post-sentencing rights) (emphasis added); Md. Rule 4-346(a) ("When placing a defendant on probation, the court *shall advise* the defendant of the conditions[.]") (emphasis added). As conceded by appellant at oral argument, there is no such mandatory language in Rule 4-331(a). Accordingly, we reject the claim that the trial court erred in not advising appellant of his right to file a motion for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.