Circuit Court for Baltimore City
Case No. 119262012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1412

September Term, 2020

VERNON COX

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: November 17, 2021

Appellant, Vernon Cox, was convicted by a jury in the Circuit Court for Baltimore City of conspiracy to possess and conspiracy to possess with intent to distribute heroin, cocaine, and fentanyl, and possession of and possession with intent to distribute heroin and cocaine. He presents two questions for our review, which we have rephrased:

> 1. Was the evidence sufficient to support the judgments of convictions beyond a reasonable doubt?
> 2. Did the circuit court abuse its discretion or commit any error related to certain comments made by Detective Clasing either in-court or on the video from her body camera?

We shall hold that the evidence was sufficient to support the judgments of convictions. As to question two, we find no error or abuse of discretion. Accordingly, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City. He proceeded to trial before a jury in March 2020. The jury acquitted him of possession and possession with intent to distribute fentanyl but convicted him as detailed above. The court imposed an overall sentence of ten years of incarceration, five years suspended, and three years' supervised probation.

The following evidence was presented at trial. On August 27, 2019, the Baltimore City police arrested appellant and Aubrey Faulk on the 1700 block of North Castle Street in Baltimore City. Both men were in front of two adjoining row houses: 1741 and 1739 North Castle Street. From the front windowsills of both houses, the police seized a bag of

cocaine and a bag of heroin, respectively. The police seized a bag of fentanyl from the outer windowsill of the basement window of 1722 North Castle Street, which was across the street from 1741 and 1739.

Detective Deonte Duck testified for the State as both a fact and an expert witness. He testified that on the morning of August 27, 2019, he sat in an unmarked car in a covert location observing the 1700 block of North Castle Street. He watched appellant, Faulk, and a third person sitting in the place where appellant and Faulk were arrested. Det. Duck watched both men engage in what were, in his expert opinion, drug transactions with other people who came to, and went from, that block. At some point that morning, Det. Duck saw appellant go up to the front window of 1741, reach through it, take the bag of what Det. Duck believed to be a controlled substance, inspect the contents of that bag, and put it back. He watched Faulk walk across the street to the front basement window of 1722 and walk back across the street and place "packs" in the windowsills of 1739 and 1741. After observing appellant and Faulk for approximately two hours that morning, Det. Duck radioed for an arrest team to arrest Faulk and appellant. That team did so, and they seized the cocaine, heroin, and fentanyl from the 1741, 1739, and 1722, respectively, windowsills. The third person sitting with Faulk and appellant was not arrested.

One of the subjects of this appeal is the in-court testimony and body camera footage of Det. Morgan Clasing. She testified for the State as both a fact and expert witness, was part of the arrest team, and was the officer who recovered the drugs. That video, with audio

comments, portrayed Det. Clasing assisting with the arrest, looking for drugs, and recovering those drugs. In summary, the video showed the following.

Det. Clasing arrived at the 1700 block of North Castle street and parked across the street from 1739. She then assisted with the handcuffing and pat-down of appellant and Mr. Faulk. Then, she opened the 1741 window that Det. Duck had seen appellant reach through. From that windowsill, she retrieved a clear zip lock baggy of cocaine. She then assisted with the arrest and search of appellant and Mr. Faulk.

Det. Clasing walked around the side of 1741 to observe the back of that house. She returned to the unlocked front door of 1739 and pushed it open. The house was dark. The windows were covered with thick curtains. The house was filled with garbage. Behind the window curtains, she found a bag of heroin. She then proceeded to 1741. It was very dark inside and in complete disrepair. Heavy curtains were drawn, structural wood was exposed, and there was no furniture. The house was filled with garbage and it looked "foul." She did not search 1741 as she had 1739; she looked around for only a moment and left.

She went across the street to 1722 and removed a wood plank that was partially covering a basement window (the window was right above the sidewalk). On the outside windowsill of that window, behind that plank, she found a bag of fentanyl, which she seized.

Appellant moved *in limine* to exclude some of Det. Clasing's oral comments on the video. The comments appellant moved to exclude were: (1) "the coke has got to be around

here"; (2) "It's the same packaging material. I mean you know like they print the tops off"; (3) "they're definitely cutting up in here. All this packaging material right here. See if there is anything—where they cut"; (4) "Where's the dope for the rest of the day"; and (5) "Maybe, but they're definitely cutting up in here. All the packaging stuff and there's—cut up. A razor right here." Appellant stated that these statements were irrelevant. He argued to the court as follows:

> "I would object . . . and I think another one of the reasons being to that is Det. Clasing says 'they.' When she uses the term, 'they,' to me that implies the [appellant]. As far as I know, there's no—they haven't charged him with anything that's in there and there's no connection to the house that they have or ever saw them go inside the house."

The court granted that motion with respect to statements four and five but denied the motion with respect to statements one, two, and three.

The State played that video to the jury, but the prosecutor failed to mute out statement five. Defense counsel asked to approach the bench, but he neither objected nor moved to strike. At the bench, the trial judge remarked that he had not heard anything that was unduly prejudicial.

During direct examination of Det. Clasing, following the State playing the video, the following colloquy occurred:

> "[THE STATE]: Do you have an expert opinion as to the location of the suspected narcotics that you recovered, what those locations were being used for?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Overruled, go ahead.

> DET. CLASING: Typically, when it's street level narcotics sales going on in small areas like that, stashes which are referred to as, you know, the individual bags that contain the specific count, they're kept in a close proximity of the dealer. Somewhere where it's easily accessible, quick and can go undetected by law enforcement. So, my expert opinion, I believe that these houses were being held, used as stash locations.
>
> [DEFENSE COUNSEL]: Objection, Your Honor, move to strike.
>
> [THE COURT]: Okay, it's overruled. Go ahead."

The State rested and appellant presented no evidence. The jury convicted appellant. The court imposed sentence, and appellant noted this timely appeal.

II.

Before this Court, appellant raises two issues for our review: the sufficiency of the evidence, and evidentiary issues related to Det. Clasing's comments on her bodycam video and statements at trial.

Appellant's complaint as to the sufficiency of the evidence is that the evidence was insufficient to establish beyond a reasonable doubt that he was the person involved in the crimes charged. He argues that mere proximity to drugs is not sufficient. And, he argues there was neither evidence of his intent to distribute the drugs, nor evidence he agreed with Faulk to possess or distribute the same.

As to the evidentiary issues, he argues lack of relevance and that the prejudicial effect of the evidence outweighs its probative value. Specifically, appellant objects to two

of Det. Clasing's statements: (1) the bodycam video statement "they're definitely cutting up in here . . . All this packaging material right here" and (2) Det. Clasing's trial statement "these houses were being held, used as stash locations." Apparently, appellant argues the former statement was unduly prejudicial because of the word "they're." He argues "they're" implied that he was associated with the suspected drug activity inside the house when no other evidence linked him to it. He argues Det. Clasing's in-court statement that the houses were used as stash locations was irrelevant and unduly prejudicial because it increased neither the likelihood that appellant possessed drugs, the likelihood that he intended to distribute drugs, nor the likelihood that he conspired with anyone to do the same. His position is that the detective's statement was an inadequate substitute for evidence linking appellant to any stash locations.

The State argues that the evidence was sufficient to support the judgments of convictions. The State points to appellant's proximity to the drugs recovered, ability to easily access those drugs, and the eyewitness testimony that appellant and Faulk were dealing drugs. As to Det. Clasing's comments, the State argues first the issue is not preserved for our review, and, assuming preservation, they were relevant and the probative value was not substantially outweighed by the prejudicial effect.

III.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Morrison*,

470 Md. 86, 105 (2020). We give due regard to the trial court's finding of facts, its resolution of conflicting evidence, and its opportunity to observe and assess the credibility of witnesses. *State v. Raines*, 326 Md. 582, 589 (1992). This deferential standard recognizes the better position of the trier of fact to assess witness credibility and the evidence. *Smith v. State*, 415 Md. 174, 184-5 (2010). We neither re-weigh witness credibility nor the evidence, nor attempt to resolve conflicts in the evidence. *Id.* Our concern "is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts that could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). The verdict "must rest on more than mere speculation or conjecture." *Smith*, 415 Md. at 185.

The evidence was a combination of direct evidence and circumstantial evidence presented by the State. We hold that it was sufficient to support each judgment of conviction beyond a reasonable doubt.

We address first the possession charges. "'Possess' means to exercise actual or constructive dominion or control over a thing by one or more persons." Md. Code (2002, 2018 Repl. Vol.), § 5-101(v) of the Criminal Law ("CL") Article.[1] To prove dominion or control over drugs, the evidence must show directly, or support a rational inference, that

[1] Unless otherwise specified, all future statutory references herein shall be to Md. Code (2002, 2018 Repl. Vol.), § 5-101(v) of the Criminal Law ("CL") Article.

the defendant exercised some restraining or direct influence over those drugs. *Moye v. State*, 369 Md. 2, 13 (2002). "[P]ossession may be either exclusive or joint in nature." *Id.* at 14.

Here, there is no evidence of appellant exercising *actual* control over the drugs he was charged with possessing. The question becomes whether the State presented sufficient evidence of constructive possession of the drugs. Four non-exclusive factors are relevant in considering whether evidence is sufficient to support a finding of constructive possession:

> "[One] [T]he defendant's proximity to the drugs, [two] whether the drugs were in plain view of and/or accessible to the defendant, [three] whether there was indicia of mutual use and enjoyment of the drugs, and [four] whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs."

Smith. 415 Md. at 198. In applying those factors, possession is determined by examining the facts and circumstances of each case. *Id*. at 198.

Appellant is correct that there was no evidence that he had an ownership or possessory interest in either 1739, 1741 or 1722, the alleged stash houses. Nonetheless, possessory interest in the property where the drugs were found is only one factor, and lack of proof as to one factor is not fatal to a conviction. *See Cook v. State*, 84 Md. App. 122, 135 (1990) (noting that the evidence was sufficient to find appellant in possession of drugs even though he lacked possessory interest in the house where those drugs were located). We hold that the evidence presented by the State satisfies factors one, two, and three.

Appellant concedes that he was proximate to the cocaine, heroin, and fentanyl recovered on the 1700 block of North Castle Street on August 27, 2019. This evidence satisfies factor one: proximity.

The evidence presented at trial showed that the drugs were accessible to appellant. Det. Clasing's body camera video, played for the jury, showed the location of the drugs and how easily accessible they were to appellant. She opened the front window of 1741 to reach the cocaine. Det. Duck testified he saw appellant do this as well. Det. Clasing easily went into the unlocked door of 1739 and retrieved the heroin from that windowsill. This evidence satisfies factor two: accessibility or plain view.

As to 'mutual use and enjoyment,' actual use is not the exclusive consideration; whether individuals participated in drug distribution is a consideration. *State v. Gutierrez*, 446 Md. 221, 237 (2016). Det. Duck testified that he saw appellant and Faulk engage in hand-to-hand drug transactions with other people on the 1700 block of North Castle Street on August 27, 2019. This evidence satisfies factor three: indica of mutual use and enjoyment.

In sum, we hold that the evidence was sufficient to support a finding that appellant possessed the cocaine and heroin recovered by the Baltimore City Police Department on the 1700 block of North Castle Street on August 27, 2019.

The evidence was sufficient to prove intent to distribute. "Intent to distribute controlled dangerous substances is seldom proved directly, but is more often found by drawing inferences from facts proved [that] reasonably indicate under all the circumstances

the existence of the required intent." *Purnell v. State*, 171 Md. App. 582, 612 (2006) (quoting *Salzman v. State*, 49 Md. App. 25, 55 (1981)), *cert. denied* 398 Md. 315. Here, the State presented direct evidence showing appellant distributing drugs and counting packets of drugs. Clearly, this evidence was sufficient to show appellant's intent to distribute drugs.

We hold that the evidence was sufficient to support the conspiracy convictions. To establish a criminal conspiracy, the State must prove the combination of two or more persons to either accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Mitchell v. State*, 363 Md. 130, 146 (2001). Direct evidence is not required to prove a conspiracy; it may be shown by circumstantial evidence. *Jones v. State*, 132 Md. App. 657, 660 (2000). Appellant was convicted of conspiring with Faulk to possess, and to possess with intent to distribute, cocaine, fentanyl, and heroin.

With respect to the cocaine, Det. Duck testified that he: saw Faulk place the pack of cocaine on the windowsill of 1741; saw appellant remove, inspect, and put that pack back; saw appellant and Faulk sitting together in front of the stash houses; and saw appellant and Faulk distribute, in his expert opinion, drugs. That evidence was sufficient to permit the jury to infer a conspiracy, between appellant and Faulk, to possess cocaine and to possess cocaine with the intent to distribute it. *Prioleau v. State*, 179 Md. App. 19, 31-2 (2008).

The analysis is a little more complicated with respect to the heroin and fentanyl, but the end result is the same: the evidence is sufficient to support the judgment. Circumstantial evidence of a tacit agreement may be sufficient to convict a defendant of

conspiracy. *Acquah v. State*, 113 Md. App. 29, 50 (1996). "The concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy." *Id.*; *see also Hill v. State*, 231 Md. 458, 461 (1963).

In the instant case, there was evidence of concurrence of action between appellant and Faulk from which the jury could infer the existence of a conspiracy. Det. Duck testified that he: saw Faulk place the pack of cocaine on the windowsill of 1741; saw appellant remove, inspect, and put that pack back; saw Faulk place the pack of heroin on the 1739 windowsill; saw Faulk walk over to the windowsill of 1722 where the pack of fentanyl was found; and saw both appellant and Faulk engage in hand-to-hand drug transactions. From this evidence, the jury was entitled to infer that appellant and Faulk agreed to possess and distribute fentanyl and heroin in addition to the cocaine. We hold that the evidence was sufficient to support appellant's conviction for conspiracy to possess, and conspiracy to possess with intent to distribute, fentanyl and heroin.

IV.

A. The Bodycam Video

Appellant objects to Det. Clasing's comment on her bodycam video: "[m]aybe, but they're definitely cutting up in here. All the packaging stuff and there's—cut up. A razor right here." His objections are keyed to the detective's use of the word "they're." He

argues it suggested to the jury that appellant was connected to the drug activity inside the house merely because he was arrested nearby.

Here, the trial judge committed no error. After the prosecutor failed to mute portions of the video, defense counsel asked the court for neither curative action nor relief. He did not request a mistrial, request a curative instruction, or move for the statement to be stricken. As explained below, there was no court error:

> "Only a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling."

DeLuca v. State, 78 Md. App. 395, 397-8 (1989), *cert. denied*, 316 Md. 549 (1989). When the jury heard the "they're definitely cutting up in here" statement on the bodycam footage, defense counsel did not object. The trial judge made no ruling. We hold the trial judge made no error.

B. Det. Clasing's In-Court Statement

We address first the State's argument that this issue is not preserved for our review. At trial, appellant's counsel did not offer a basis for his objection to Det. Clasing's expert opinion. Instead, he offered a general objection[2] and the trial court did not request defense counsel state the basis for his objection. It is well settled that "where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will

[2] A general objection is one where the objecting party does not express a specific ground for that objection. *Boyd v. State*, 399 Md. 457, 474 (2007).

ordinarily be deemed to have waived grounds not specified." *Thomas v. State*, 301 Md. 294, 328 (1984), *cert. denied*, 470 U.S. 1088 (1985). In Maryland, a contemporaneous general objection preserves any argument as to the admissibility of evidence, including relevancy. *Gross v. State*, 229 Md. App. 24, 31 n. 6 (2016). Defense counsel's general objection to the admissibility of the statement did not alert the trial judge to perform the requisite balancing under Rule 5-403. That issue arose in *Borchardt v. State*, 367 Md. 91 (2001), where the Court of Appeals held that, based on the language of Md. Rule 5-103(a),[3] the issue was preserved for appellate review. Judge Alan Wilner, Chair of the Court of Appeals Standing Committee on Rules of Practice and Procedure, writing for the court, explained the conundrum as follows:

> "Unlike the practice in Federal court and the courts of other States, the rule in Maryland is that, '[i]f neither the court nor a rule requires otherwise, a general objection is sufficient to preserve all grounds of objection which may exist.' *Grier v. State*, 351 Md. 241, 250, 718 A.2d 211, 216 (1998); *Ali v. State*, 314 Md. 295, 305–06, 550 A.2d 925, 930 (1988); Md. Rule 5–103(a)(1). Trial judges in this State have lived under that rule for quite some time, and ordinarily it causes no problem, especially since the judge can always demand specificity when faced with an uncertain situation. When a party seeks to exclude other crimes or prior bad act evidence under Maryland

[3] "Effect of erroneous ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and

> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form."

Md. Rule 5-103(a).

> Rule 5–404(b) or to exclude otherwise relevant evidence under Rule 5–403 on the ground that the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, however, a special problem emerges, for in those situations the court must make one or more preliminary findings in order to determine admissibility. In the case of other crimes evidence, it must engage in the three-part analysis required by *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989). A general objection may not alert the court to the need to conduct that analysis or to make any other preliminary findings that may be required. That, however, is a problem with the rule."

Id. at 132 n. 7. We hold that appellant's arguments were preserved for our review.

Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-401. The Court of Appeals discussed the standard of review of a relevancy determination on appeal in *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619-20 (2011), explaining as follows:

> "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.' Maryland Rule 5–402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. While the 'clearly erroneous' standard of review is applicable to the trial judge's factual finding that an item of evidence does or does not have 'probative value,' the '*de novo'* standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'" (internal citations omitted).

The State does not argue that Det. Clasing's expert opinion, that 1722, 1739, and

1741 were being used as drug stash houses, was offered to prove that appellant possessed the drugs inside those houses. Instead, the State argues Det. Clasing's expert opinion was offered to show that appellant (or anyone) had the intent to distribute the drugs inside those houses. Of course, the State has to prove the *corpus delecti* of the crimes, *i.e.*, each element of the offense, as well as the criminal agency of the crimes, *i.e.*, the 'who dunnit.' If the jury was persuaded beyond a reasonable doubt that appellant possessed the drugs found in 1722, 1739, and 1741, it could then infer from Det. Clasing's expert opinion that appellant intended to distribute those drugs. We hold that Det. Clasing's testimony was relevant to the issue of intent.

We turn now to appellant's Rule 403 argument: unfair prejudice versus probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 5-403. "Probative value is the tendency of evidence to establish the proposition that it is offered to prove." *Molina v. State*, 244 Md. App. 67, 127 (2019). This Rule is derived from Federal Rule of Evidence 403. In *Old Chief v. United States*, 519 U.S. 172, 187 (1997)), the United States Supreme Court explained the concept of "unfair prejudice" as follows:

> "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of 'unfair prejudice'

> under Rule 403). So, the Committee Notes to Rule 403 explain, ''Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860."

"This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

Det. Clasing's testimony was highly probative as to intent to distribute, which was an element of several of the crimes charged. Her opinion was that the residence was a stash house used to store drugs for distribution. If the jury connected appellant with the property, then the evidence was relevant to appellant's intent to distribute drugs. Appellant possessed drugs inside stash houses. Stash houses are used to store drugs for distribution. *See United States v. McArthur*, 11 F.4th 655, 662 (8th Cir. 2021). This was a case of direct and circumstantial evidence. We hold the trial court did not abuse its discretion in admitting the evidence because the prejudicial effect did not outweigh its probative value.

JUDGMENTS OF CONVICTIONS IN THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.