Circuit Court for Cecil County
Case No.: C-07-CR-17-388

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1901

September Term, 2017

ALISHAWINE MONK

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 31, 2018

Appellant, Alishawine Monk, was indicted in the Circuit Court for Cecil County, Maryland, and charged with possession with intent to distribute cocaine, possession of cocaine, possession of cocaine-large amount, possession with intent to distribute Fentanyl, possession of Fentanyl, two counts of possession of a firearm (two different guns) with a nexus to drug trafficking, and possession of a firearm after a felony conviction. After a jury convicted him on all counts, appellant was sentenced to: ten years, all but five suspended, for possession with intent to distribute cocaine; ten years, all but five suspended, consecutive, for possession with intent to distribute Fentanyl; five years, consecutive, for possession of a firearm with a nexus to drug trafficking; five years, concurrent, for a second count of possession of a firearm with a nexus to drug trafficking; and ten years, all but three years suspended, consecutive, for possession of a regulated firearm after a felony conviction. On this timely appeal, appellant asks the following:

> 1. Did the trial court err in denying the motion to suppress evidence seized from the apartment?
>
> 2. Was the evidence legally insufficient to support Appellant's convictions?

For the following reasons, we shall affirm.

BACKGROUND

Motions Hearing

At a pre-trial motion to suppress, appellant argued that any evidence seized in this case should be suppressed as fruit of the poisonous tree because the search warrant was

preceded by a warrantless entry. Prior to hearing testimony, the court reviewed the search warrant.[1]

On March 2, 2017, at approximately 1:30 a.m., both Maryland State Corporal James Parker and Maryland State Trooper First Class Joshua Kelly, on separate patrol, overheard a transmission from the Perryville Police Department regarding a car chase involving their department, the Maryland Transportation Authority, and a white Chevy Impala, containing several unidentified occupants. Although neither trooper was directly involved in the car chase, the troopers later learned that the Impala was seen driving to 44 Charles Carroll Court, an address with a "previous history of guns and violence[.]"

After his arrival at that location, Corporal Parker found the Impala described in the radio reports, still "warm to the touch." Both Parker and Kelly then went to the front door of the residence where they encountered the owner, Mr. John Holloway. Holloway told them that he did not recognize the Impala parked near his home. He also advised that there were "tenants" living in the basement apartment near the garage, but that "he didn't know who was in the basement." Corporal Parker then knocked on the door to the apartment "several times," and appellant eventually answered the door. Appellant "exited and came out into the garage and spoke with us at the entry to the basement apartment there." When

[1] The search warrant identifies as its targets Antonio Stewart, residing in the basement apartment of 44 Charles Carroll Court, in Port Deposit, Maryland, and also lists a 2000 Chevrolet Impala. The warrant authorized the search of Stewart, the residence and "other person/s found in or upon said premises or in the above vehicle" who may be participating in violation of the controlled dangerous substances laws. The warrant was signed on March 2, 2017 at 6:30 a.m. by Judge Keith Baynes of the Circuit Court for Cecil County.

appellant was asked who else was in the apartment, he replied that he did not know their names. Corporal Parker's testimony then continued as follows:

> Q. Okay. Understood. Thank you. Did you have consent to search at any point in time at that apartment?
>
> A. We were led down there to make contact with the occupants who Monk said he did not know their names.
>
> THE COURT: Just so I understand, you were permitted access to the apartment by Mr. Monk?
>
> THE WITNESS: Yes. Mr. Monk led us down the stairs. He said he didn't know – I had asked about the names. He said he didn't know the names. I would have to check the report to see the exact language on what was said, but he said he didn't know any names so he led us down the steps.
>
> THE COURT: Thank you.
>
> By [DEFENSE COUNSEL]:
>
> Q. And can you tell me just what happened next after you had that interaction with Mr. Monk?
>
> A. He led us down the stairs into the basement.

Corporal Parker clarified on cross-examination:

> Q. You come in contact with Mr. Holloway who is the owner of the residence; is that correct?
>
> A. Yes.
>
> Q. What does he tell you about that Impala?
>
> A. That it wasn't his. It didn't belong there. Shouldn't be there.
>
> Q. Shouldn't be there, correct?
>
> A. Yes.
>
> Q. Did that heighten your suspicion?

A. Yes.

Q. And then you asked if there was anybody else in the house and you do a protective sweep; is that correct?

A. Yes.

Q. And then he indicates Mr. Monk is in the basement; is that correct?

A. Yes. I don't know if he actually said Mr. Monk. He said there might be people in the basement.

Q. And that's how you come in contact with Mr. Monk?

A. Yes.

Q. And you ask Mr. Monk if there are other people in the basement?

A. Yes.

Q. And Mr. Monk says yes and leads you in to show you where these other people are?

A. Yes.

Trooper Kelly was also asked about the entry into the apartment, and testified:

> Mr. Monk came up out of the basement. He was speaking with Corporal Parker for a little bit, asking, you know, who else was in – were you driving the car? Who else is in the basement with you? Eventually Mr. Holloway said, I thought your girl and your brother was down there? To which Mr. Monk advised that was correct. And when we asked further, you know, what their names, it was, Well, you got to ask them.

Trooper Kelly was also asked whether they had "consent to search the apartment." To this, Trooper Kelly replied, "Well, search, I would say no. But Mr. Monk led us down into the apartment so we could identify the other two individuals that he had acknowledged

were in the basement apartment." Trooper Kelly testified that he was concerned about "officer safety" as they went down into the apartment.[2]

Once downstairs, Corporal Parker stood at the open door and saw a girl laying on a bed. Appellant then told him that another man "might be in the bathroom or something like that." Parker saw that the bathroom door was open. Because he knew there had been prior incidents involving weapons in this residence, Corporal Parker pushed the bathroom door the rest of the way and saw an individual, Antonio Stewart, partially sitting on the toilet. Parker testified that he was only "halfway on the toilet" with his coat next to him, and that he appeared to "hover over it" and was "trying to look like he was using the toilet, because his pants were still up around his knees and he wasn't sitting all the way back on the toilet as you would normally do." Noting that he did not smell "anything," Corporal Parker explained that "it kind of led me even more to believe that I was probably being fooled here or they were attempting to fool me."

Corporal Parker then told Stewart to "go ahead and wipe and get up." Corporal Parker then saw "white powder in bags that looked like cocaine." At that point, everyone

[2] Earlier that same evening, apparently at around the same time or shortly after the car chase, Trooper Kelly apprehended one Kenneth Clark, a person known to frequent 44 Charles Carroll Court. Clark was arrested nearby moments earlier after a foot pursuit, and was found to be in possession of two handguns. Trooper Kelly testified that "since we had found two firearms on Mr. Clark, you know, we were concerned that there were other firearms in the house that could be used against us." In fact, when police arrived at the apartment, several of them "had their AR style rifles out and everything," according to Corporal Parker. Corporal Parker explained that the officers on scene were armed in this fashion, "just in case we wound up getting in some kind of shoot-out there outside the residence."

was ordered out of the basement apartment and Corporal Parker contacted the Drug Task Force and prepared a search warrant.

Appellant then testified on his own behalf at the motions hearing, first identifying his address as 22 Race Street, Port Deposit, Maryland. He agreed that he stayed at 44 Charles Carroll Court often and was staying there, "pretty much." Appellant had a key, kept items there, could have guests, and could "come and go" as he pleased. Turning to the night in question, appellant testified that he responded to the knocking at the door and encountered several police officers. The police did not tell him why they were there, but asked him to identify any other occupants inside the apartment. After replying that "you will have to ask those people," the police told appellant to "go get them." Appellant maintained that he did not invite the officers inside:

> So as I go downstairs, they just followed me. They just followed me downstairs, which in that case I didn't think anything was wrong with that either. But at the same time, I'm not giving them consent to search, which I don't have the right to give them consent to search as I know of. You know what I'm saying? So we went downstairs.

However, on cross-examination by the State, appellant testified as follows:

> Q. Mr. Monk, you lived at 44 Charles Carroll Court?
>
> A. I stay there from time to time.
>
> Q. Did you live there? Were you living there at the time?
>
> A. That's not my residence.
>
> Q. Were you living there at that time?
>
> A. No.

Q. Okay. So you weren't living there. You weren't paying rent?

A. No.

Q. Don't own the property?

A. No, I don't.

Q. You do remember telling the officers that you have two people, you'll have to ask them their names?

A. Yes.

Q. And you said that when they entered the premises you didn't object, correct? You felt like you didn't have the right to object, didn't object, correct?

A. I didn't consent.

Q. That's not my question. You said you didn't object. Did you object or not?

A. Did I object?

Q. You just said you didn't object.

A. In what way did you mean?

THE COURT: Let me ask a question. You heard knocking. Did you open the door?

THE WITNESS: Yes.

THE COURT: Okay. . . .

After testimony concluded, appellant argued that he had standing to challenge the warrantless entry because he had a key, could come and go, was permitted to stay in the apartment, and, as a house guest, had a reasonable expectation of privacy. Appellant continued that, to the extent that the case involved Kenneth Clark, because Clark had no connection to the residence, the entry was unwarranted. Appellant continued that, even

though the Impala was seen parked at the residence, the presence of the vehicle did not authorize entry into the residence.

Further, appellant argued this was not a case of hot pursuit or exigency suggesting the possible destruction of evidence, noting that there was no description of the individuals that were in the Impala during the car chase. Appellant concluded by suggesting that there was no explicit consent to either search or enter the apartment. Noting that he was not taking "issue with the warrant right now," appellant concluded that the warrantless entry and the discovery of the cocaine in the toilet were unreasonable under the Fourth Amendment, and that everything recovered thereafter, including pursuant to the search warrant, needed to be suppressed as fruit of the poisonous tree.

In response, the State indicated that the magistrate already reviewed the facts in the application for a search warrant and decided to issue a search and seizure warrant.[3] The State continued that, even if the warrant was issued in error, the officers acted in good faith in its execution. The State also argued that: appellant did not have standing to challenge the entry and search; there was consent to enter; and, entry was justified under exigent circumstances. After summarizing the facts presented, the motions court ruled, in pertinent part, as follows:

> I listened to the testimony with regard to this matter. Initially I do note the request from the defendant is that I suppress any and all evidence obtained as a result of the search.

[3] State's Exhibit 1, admitted at the motions hearing, is only the search warrant itself. As the motions court observed, the application and affidavit in support thereof is not included with the exhibit. Nor does the record include an inventory report.

> I find that there is a search warrant. It's a valid warrant issued by the Court.
>
> With regard to issues, if there is any basis for a challenge I don't find that Mr. Monk has standing.
>
> Additionally, I've listened to the testimony of the officers. I've listened to the testimony of Mr. Monk. Based on what the officers have provided to me, the testimony that they have provided, they were in pursuit, fresh pursuit of individuals who were involved in a vehicle chase. Corporal Parker specifically said he's been to this residence before, there have been shots fired there before.
>
> I do not believe Mr. Monk's testimony when he testifies that these officers were going to let him go into the basement and bring people back. That's just not credible given the circumstances.
>
> So I find that they went into this residence. They had implied consent by virtue of him allowing them to go in there. The actions that they had taken were reasonable and I'm going to deny the motion.

Trial

On March 2, 2017, police officers from the Perryville Police Department and the Maryland Transportation Authority attempted to stop a white Chevy Impala, containing four or five occupants, near the Pilot Travel Center in Cecil County, Maryland. After the vehicle refused to come to a stop, a high-speed chase ensued, at times reaching speeds of 85 to 90 miles per hour.

The Impala was eventually located in the driveway of 44 Charles Carroll Court. Corporal Parker and Trooper Kelly arrived at the location and met with the owner of the residence, Mr. Holloway. After informing him of the purpose of their visit, Holloway led the troopers to his garage and told them there were individuals renting the basement.

Corporal Parker knocked on the door to the basement apartment, five times, before appellant answered the door. Corporal Parker told appellant that the police were investigating the Impala. Appellant denied knowing anything about the vehicle or its occupants. When Corporal Parker asked if there was anyone in the basement who could provide any information, appellant replied "I don't know. You've got to ask them."

At that point, Corporal Parker asked appellant if he wanted to take him to these other individuals, and appellant "turned and walked down the steps." Corporal Parker followed appellant to the basement. There, he saw a female on the bed. After asking appellant if anyone else was present, appellant pointed to the slightly open bathroom door and said "over there."

Corporal Parker pushed the bathroom door open the rest of the way and saw Stewart sitting "up on the edge of the seat," with his "pants still up around his knees[.]" When Stewart rose up, Corporal Parker saw multiple bags of suspected cocaine in the toilet bowl. At that point, Corporal Parker had everyone leave the basement apartment while he contacted the Drug Task Force to obtain a search warrant.

When members of the task force searched the apartment, pursuant to the warrant, they discovered documents in a bedroom bearing appellant's name. These included appellant's birth certificate and Social Security card, located inside a safe. The key to that safe was found in a jacket in the bathroom. The police also found $11,260 in U.S. currency in that same safe. Appellant was still present in the apartment at this time, and admitted that everything retrieved from this safe belonged to him.

In all, the police recovered 545.2 grams of cocaine, with an approximate street value of $54,500.00, and three tablets of fentanyl from the apartment. The police also seized a spoon containing white residue, a digital scale, a box of sandwich baggies, and two cell phones, all of which were found inside a dresser in appellant's bedroom. In addition, a SIG Sauer .45 caliber semi-automatic handgun and a SIG Sauer Model 226 .9 millimeter semi-automatic handgun were found in a safe located inside a utility closet. Ammunition for these guns was also seized.[4]

An expert testified that the cash found in the bedroom safe, the baggies, the digital scale and the cell phones recovered from the dresser in his bedroom, and the quantity and nature of the narcotics recovered were consistent with drug distribution. The parties stipulated that appellant was a convicted felon who was not permitted to be in possession of a regulated firearm.

The defense called Antonio Stewart. Stewart claimed that the cocaine, the fentanyl, the guns, the baggies, and the ammunition found in the basement apartment belonged to him. On cross-examination, Stewart agreed that appellant was his cousin. In rebuttal, the State elicited that the safe in the appellant's bedroom was opened with a key that was found in a jacket that had been left in the bathroom.

We may include additional detail in the following discussion.

[4] The record does not appear to identify where the utility closet was located in the apartment.

DISCUSSION

I.

Appellant first contends that the court erred in denying his motion to suppress because: (a) he had standing; (b) he did not consent to the warrantless entry; and, (c) there was a lack of exigent circumstances justifying the entry. The State does not address appellant's standing or exigent circumstances arguments, and instead, argues that the entry was lawful based on appellant's consent. We conclude that appellant did have standing and that he consented to the entry.[5]

In reviewing a denial of a motion to suppress, we "rely solely upon the record developed at the suppression hearing." *Barnes v. State*, 437 Md. 375, 389 (2014) (internal citations omitted). We will not disturb the factual findings of the suppression court unless they are clearly erroneous, and, we view the evidence and inferences that may be drawn from the evidence in the light most favorable to the prevailing party, which, in this case, is the State. *Briscoe v. State*, 422 Md. 384, 396 (2011). But we review legal questions *de novo*. *Grant v. State*, 449 Md. 1, 14 (2016). In other words, we make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. *Id*. at 14-15.

[5] In light of our resolution of this issue, it is unnecessary to address whether the entry was justified under exigent circumstances. *See Bowman Grp. v. Moser*, 112 Md. App. 694, 702 (1996) (where relief granted on primary argument, appellate court may decline to rule on the merits of an alternative argument), *cert. denied*, 344 Md. 568 (1997). We also note that the parties on appeal do not address whether the subsequent search and seizure pursuant to the search warrant attenuated any alleged illegality or otherwise was executed in good faith. *See Thompson v. State*, 192 Md. App. 653, 677 (2010) (declining to address additional legal rationales under the Fourth Amendment).

The Fourth Amendment to the U.S. Constitution was made applicable to the States through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961), and guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourth Amendment does not proscribe all searches but only "those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The "reasonableness" of a search involves "'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Wilson v. State*, 409 Md. 415, 427-28 (2009) (quoting *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (internal citation omitted)).

Standing is the "threshold question of [one's right] to litigate the merits of [a] search and seizure," *Bates v. State*, 64 Md. App. 279, 282 (1985). When standing is challenged, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978).

Standing does not depend "upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143 (discussing *Katz v. United States*, 389 U.S. 347, 353 (1967)); *see also State v. Savage*, 170 Md. App. 149, 182-83 (2006) ("to enjoy Fourth Amendment standing, a defendant must have both 1) an actual subjective expectation of privacy and 2) an expectation that is objectively reasonable") (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).

"Whether one's expectation of privacy is legitimate is in 'large measure a function of its reasonableness, and that, in turn, is determined to some extent by the elements of time, place, and circumstance,'" *Joyner v. State*, 87 Md. App. 444, 450-51 (1991) (quoting *McMillian v. State*, 65 Md. App. 21, 31 (1985)), which include:

> "[T]he appellant's possessory interest in the premises; appellant's right to and duration of stay at the searched premises; whether or not he had unlimited access to the searched premises; whether appellant had a right to exclude others from access to the searched area; what precautions he took to maintain his privacy there; appellant's subjective expectation of privacy in the area searched; the location of the property at the time of the search; [and] ownership of the evidence seized . . . ."

Joyner, 87 Md. App. at 451 (quoting *McMillian*, 65 Md.App. at 32-33) (other citations omitted).

In addressing this issue, appellant cites *Minnesota v. Olson*, 495 U.S. 91 (1990). There, the Supreme Court discussed the reasonableness of an overnight guest's expectation of privacy. Following a fatal shooting during a robbery of a gas station, police learned where Olson was staying. 495 U.S. at 94. Police entered that residence without a warrant and arrested Olson, who then gave an inculpatory statement. *Id*. Olson argued that the police illegally entered the residence because there were no exigent circumstances justifying entry without a warrant. *Id*. The Supreme Court agreed, holding that "Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id*. at 96-97; *see Chapman v. United States*, 365 U.S. 610, 617 (1961) (observing that Fourth Amendment protections also extend to tenants). *Cf. Alston v. State*, 159 Md. App. 253, 264 (2004) (recognizing that

overnight guests have a reasonable expectation of privacy, but rejecting claim of standing and concluding that, where the evidence was that the defendant only stayed "from time to time," he was not an overnight guest), *rev'd on other grounds*, 433 Md. 275 (2013); *Simpson v. State*, 121 Md. App. 263, 282-83 (1998) (holding that defendant did not have standing because, although he had spent time at the apartment, and was in it when he was arrested, there was no indication that, on the day in question, he was there as an overnight guest).

Here, although appellant offered inconsistent testimony about his connection to the basement apartment and testified that he did not pay rent and only stayed there "from time to time," on direct examination, appellant claimed that he stayed there "pretty much." He also testified that he had a key, kept items there, could have guests, and could "come and go" as he pleased. As in *Minnesota v. Olson*, we are persuaded that appellant had standing. Thus, the motions court erred in concluding that appellant could not challenge the entry.

However, we agree with the court that appellant implicitly consented to the entry. It is well settled that a search committed without a warrant "does not violate the Fourth Amendment if a person consents to it." *Varriale v. State*, 218 Md. App. 47, 53 (2014), *aff'd*, 444 Md. 400 (2015), *cert. denied*, 136 S.Ct. 898 (2016); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (explaining that to be valid, consent to search must be voluntary, based on the totality of the circumstances); *Jones v. State*, 407 Md. 33, 51 (2008) ("A search conducted pursuant to valid consent, *i.e.*, voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement."). Whether a person consents to a search is a question of fact, for which the State has the burden of proof,

based upon a totality of the evidence. *McMillian v. State*, 325 Md. 272, 284-85 (1992). Consent may be given expressly, impliedly, or by gesture. *Turner v. State*, 133 Md. App. 192, 207 (2000). Because a court's determination on consent is a question of fact based upon the totality of the circumstances, we may not reverse the court's decision unless it is clearly erroneous. *McMillian*, 325 Md. at 285.

Both parties cite *Turner, supra*. There, on August 18, 1998, at approximately 1:50 a.m., Officer Stephen Gillespie, of the Baltimore County Police Department, attempted to make a traffic stop of an older model Chevrolet Caprice being driven westbound on White Marsh Boulevard because the tags did not match the vehicle. *Turner*, 133 Md. App. at 196-97. After activating his emergency equipment, the Caprice sped off and a chase ensued. When the vehicle was stopped, the driver fled the scene on foot and was not apprehended. *Id.*

Meanwhile, Officer Gillespie, who did not engage in the foot pursuit, gathered more information about the Caprice and learned that it was registered to Turner, who lived nearby. *Turner*, 133 Md. App. at 197. Officer Gillespie conveyed this information to Officer Stephen C. Price, who then went to Turner's apartment complex. *Id.* Turner's name was on a sign outside his third-floor apartment door, and Officer Price knocked. Turner opened the door, stepped outside, and closed the door behind him. *Id.* Officer Price could not see into the apartment, but noticed that Turner's breathing was "labored." *Id.* Officer Price relayed the reason for the inquiry and asked Turner for identification and if he knew where his car was located. Turner did not know where his car or his identification was at that time. *Id.*

Turner and Officer Price then went down the stairs to the first floor of the complex where they were met by Price's superior, Corporal Joseph Yeater. *Turner*, 133 Md. App. at 197. While they were awaiting the arrival of Officer Gillespie, to see if Gillespie could identify Turner as the driver, the subject of Turner's identification again arose. *Id.* at 198. The officers asked Turner if he had something in his apartment to confirm his identity, and Turner responded that he had a telephone bill with his name on it back upstairs in his residence. *Id.* Appellant then started up the stairs with the two officers following close behind. *Id.* We recounted the pertinent facts as follows:

> Appellant approached his apartment, opened the door, and entered. Officer Price followed behind him, and Corporal Yeater followed Officer Price. Nothing was said – the officers did not ask permission to enter or tell appellant that they were about to enter, and appellant did not tell them not to enter. Officer Price testified that because he was responding to a call for "fleeing and eluding a police officer," he would not have let appellant out of his sight. He stated, however, that if appellant had told him not to enter the apartment, he would have complied. He further testified that when he and Corporal Yeater entered the apartment, appellant did not say or do anything to indicate that he objected to their presence.

Turner, 133 Md. App. at 198.

The officers then immediately saw, in plain view, a gun and suspected crack cocaine. *Turner*, 133 Md. App. at 198. Turner declined to provide consent to search the rest of the apartment, so the officers obtained a search warrant and subsequently found other contraband. *Id.* at 199. The motions court denied a motion to suppress on the grounds that Turner consented to the entry. Id. This Court reversed. *Id.* at 215. Analyzing the pertinent cases and recognizing the variety of ways consent may be manifested, we

explained:

> To be sure, the Maryland and Fourth Circuit cases plainly establish that consent to search not only may be express, by words, but also may be implied, by conduct or gesture. Yet, in all of these cases, the police made it known, either expressly or impliedly, that they wished to enter the defendant's house, or to conduct a search, and within that context, the conduct from which consent was inferred gained meaning as an unambiguous gesture of invitation or cooperation or as an affirmative act to make the premises accessible for entry. By contrast, in those Fourth Circuit cases in which the court concluded that the facts could not support a finding of implied consent, the law enforcement officers either did not ask for permission to enter or search, and thus did not make known their objective, or, if they did, their request was met with no response or one that was nonspecific and ambiguous.

Turner, 133 Md. App. at 207-08 (internal citation omitted).

In *Turner*, the police did not request consent and appellant did not expressly give consent. And, "[Turner's] act of walking up the steps and entering his apartment was not taken in response to a police request to enter, and therefore cannot be interpreted in that context." *Turner*, 133 Md. App. at 208. Further, Turner did not consent by informing the officers that he had a telephone bill with his name on it inside his apartment because those "words did not constitute an invitation." *Id.* at n. 3. Therefore, "the failure to tell the police to stay put or to close the door in their faces cannot be likened to a positive gesture of assent to invitation, or to an affirmative act taken to facilitate their entry." *Id.* at 208.

In contrast to *Turner*, here, there was an invitation to enter. When appellant was asked if he could identify the other occupants of the apartment, he replied, according to his own testimony, "you will have to ask those people[.]" This was in addition to Trooper

Kelly's testimony that appellant responded, "Well, you got to ask them," along with Corporal Parker's testimony that appellant "didn't know any names so he led us down the steps." Moreover, appellant testified that, when the police followed him into the apartment, "[t]hey just followed me downstairs, which in that case I didn't think anything was wrong with that either." We are persuaded that appellant implicitly consented to the entry for the purpose of identifying the occupants of the basement apartment. *See generally, Redmond v. State*, 213 Md. App. 163, 186 (2013) ("The standard for measuring the scope of a [person]'s consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and [the person giving consent]?") (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). Accordingly, once Mr. Stewart stood up to be identified, the resulting discovery of the cocaine in plain view was lawful. *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (observing that when an officer discovers contraband during a protective search, it may be seized). The court properly denied the motion to suppress.

II.

Appellant next asserts that the evidence was insufficient to establish that he possessed the contraband found inside the apartment. The State counters that appellant was not merely present but constructively possessed the drugs and handguns. We agree with the State.

In reviewing the sufficiency of the evidence, we ask "whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hall v. State*, 233

Md. App. 118, 137 (2017) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). This Court has noted that in this undertaking, "the limited question before us is not 'whether the evidence should have or probably would have persuaded the majority of fact finders but only whether it possibly could have persuaded any rational fact finder.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (emphasis omitted) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)). "In short, the question 'is not whether we might have reached a different conclusion from that of the trial court, but whether the trial court had before it sufficient evidence upon which it could fairly be convinced beyond a reasonable doubt of the defendant's guilt of the offense charged[.]'" *Spencer v. State*, 422 Md. 422, 434 (2011) (emphasis omitted) (quoting *Dixon v. State*, 302 Md. 447, 455 (1985)).

To be convicted of a possessory offense, one must "exercise actual or constructive dominion or control over a thing by one or more persons." *State v. Gutierrez*, 446 Md. 221, 233 (2016) (quoting Md. Code (2002, 2012 Repl. Vol., 2013 Supp.), § 5-101 (v) of the Criminal Law ("Crim. Law") Article). In order to exercise actual or constructive dominion or control, "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 direct influence over it.' " *State v. Gutierrez*, 446 Md. at 233 (quoting *Moye v. State*, 369 Md. 2, 13 (2002)). And, "[i]nherent in the element of exercising dominion and control is the requirement that the defendant knew that the substance was a CDS." *Smith v. State*, 415 Md. 174, 187 (2010).

Possession may be constructive or actual, exclusive or joint. *See State v. Gutierrez*, 446 Md. at 234 (citing *Moye*, 369 Md. at 14). And, "the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Smith*, 415 Md. at 187; *see also State v. Suddith*, 379 Md. 425, 432 (2004) ("It has long been established that the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband"). The following factors may be considered in determining possession:

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

State v. Gutierrez, 446 Md. at 234 (quoting *Smith*, 415 Md. at 174).

The last two factors weigh significantly against appellant. There was evidence that appellant had a possessory interest in the basement apartment because, not only was he present and answered the door when the police arrived, but his birth certificate and Social Security card were also found in a safe in a bedroom following execution of the search warrant. Appellant admitted that these items, as well as the $11,260 inside the safe, belonged to him. There was also evidence that appellant mutually used and enjoyed the narcotics as, in addition to this cash, a spoon containing white residue, a box of sandwich baggies, a digital scale, and two cell phones, all indicative of drug distribution in various degrees, were found on a dresser in appellant's bedroom.

The first two factors, appellant's proximity to the contraband and whether they were in plain view and/or accessible, are only slightly favorable to appellant under the circumstances of this case. It is apparent that the narcotics were found closer to Mr. Stewart as they had been concealed in the toilet in the bathroom. And, the handguns were in another safe, located inside a utility closet.

We consider the Court of Appeals case in *Gutierrez, supra*, a constructive possession case. There, the police executed a search warrant on a small apartment, where they found cocaine in the front of a bathroom cabinet, in the hall closet, and under the kitchen sink, where a handgun was also found. *State v. Gutierrez*, 446 Md. at 224-25. They also found baggies testified to be commonly used for packaging drugs, in plain view, on the living room table. Also, the police found a "grinder" – a device used to powderize cocaine – along with various plastic baggies on the kitchen windowsill. *Id*. at 224-25, 239. Gutierrez and Perez-Lazaro, both present during the search, told the police that they slept in the living room and bedroom. The police also found two passports belonging to Gutierrez and a receipt belonging to Gutierrez in a hallway closet, and Perez-Lazaro's paystub in the sole bedroom. *Id*. at 224.

Gutierrez and Perez-Lazaro were convicted of possession with an intent to distribute and possession of a firearm with a nexus to a drug trafficking crime. *State v. Gutierrez*, 446 Md. at 230. The Court of Appeals affirmed the convictions and held that the evidence was legally sufficient, because Gutierrez and Perez-Lazaro were in constructive possession of the drugs and the handgun. Each man "had a possessory interest in the apartment, such that they had the ability and intent to exercise dominion and control," because they slept in

the apartment, and property belonging to them was found there. *Id*. at 236-37. Also, indicative of each man's possessory interest, the cocaine and handgun were found in "areas of common use" that would be "frequented by the apartment's inhabitants." *Id*. at 237. The "small size of the apartment" also rendered both men in close proximity to the cocaine and handgun. *Id*. They were also engaged in mutual use and enjoyment of the drugs because they were "participat[ing] in drug distribution." *Id*.

Contrast *Gutierrez* with *Moye, supra*. In that case, Prince George's County Police responded to a call that a "cutting" was in progress at the residence of Yolanda and Joseph Bullock, located in Temple Hills, Maryland. *Moye*, 369 Md. at 5. All of the occupants of the residence were present at the time, along with petitioner Kevin Moye. *Id*. However, the Court of Appeals noted that "[t]here was little evidence to establish that Moye 'lived' in the Bullock household." *Id.* at 5 n. 2. Further, the Court noted that "[t]he record is clear that Greg Benson was the sole lessee of the Bullocks's basement." *Id.*

When police responded, everyone except Moye exited the residence. After setting up a barricade, police observed Moye through the windows at various locations inside the home, including on the first floor and in the basement. 369 Md. at 5. After Moye eventually exited the residence and was arrested, police went inside the basement and discovered "several small baggies of marijuana, a small digital scale betraying white residue, and a dinner plate upon which rested a razor blade and white residue" located inside open or partially open drawers in a large counter area. *Id.* at 6-7. Marijuana and crack cocaine were found in a bag partially secreted inside the ceiling above that counter. *Id.*

On appeal, the Court of Appeals reversed Moye's convictions for possession of cocaine, possession of marijuana, and possession of drug paraphernalia. *Moye*, 369 Md. at 12, 24. Concluding that Moye's convictions were based "on circumstantial evidence of joint and constructive possession of the contraband," *id.* at 13, the Court stated that "we are left with nothing but speculation as to Moye's knowledge or exercise of dominion or control over the drugs and paraphernalia found in the Bullocks's basement." *Id*. at 17. Further, "[t]here is also nothing in the record establishing Moye's proximity to the drugs during the time he was in the basement. The evidence failed to establish where Moye was located in the basement in relation to the substances in question and the duration of his sojourn." *Id*. at 18. And, "there were no facts established at trial as to whether Moye was present in the room with the drugs for any given amount of time other than to say that he left the Bullocks's home through the basement door." *Id.* at 20.

Appellant relies on *Taylor v. State*, 346 Md. 452 (1997), *State v. Leach*, 296 Md. 591 (1983), and *Garrison v. State*, 272 Md. 123, 142 (1974). In *Taylor*, Taylor was lying on the floor of an Ocean City hotel room with four other individuals when police entered in response to a complaint of possible narcotics violations. *Id.* at 455. The smell of burnt marijuana emanated from the room. *Id*. Police discovered a baggie of marijuana contained within the belongings of someone other than Taylor. Inside another bag, which also did not belong to Taylor, another baggie of marijuana was recovered. And, rolling papers were recovered from another individual, not Taylor. *Id*. at 455-56. No other marijuana was visible, and none was recovered from Taylor's person, or his belongings. *Id*. at 459. However, according to the State's evidence, Taylor told the police that he had been present

when friends who were not staying in the room had come by earlier and had smoked marijuana in their presence. *Id.* at 456. The Court of Appeals held that this evidence was insufficient to sustain Taylor's conviction for possession. *Id.* at 459-461.

In *State v. Leach*, police executed a search warrant at the residence of Michael Leach and recovered phencyclidine (PCP) within a closed container on a bedroom dresser, as well as other paraphernalia. 296 Md. at 594. While there was evidence that the respondent, Stephen Leach, had access to the residence, at trial, the court refused to accept that Stephen Leach resided at the same apartment as his brother. *Id.* at 595-97. Thus, the Court of Appeals held the fact that "Michael was the occupant of the Premises precludes inferring that Stephen had joint dominion and control with Michael over the entire apartment and over everything contained anywhere in it." *Id.* at 596. Further, the controlled dangerous substances were found in closed containers in Michael's bedroom. *Id.* The Court of Appeals ruled that the trial court erred in not granting Stephen Leach's motion for judgment of acquittal. *Id*. at 197.

The appellant asserts that *Garrison, supra*, is the "most similar" to the facts in this case. In *Garrison*, the appellant was "nude, in bed, under the covers," in the second-floor front bedroom when police executed a warrant at around 8:15 a.m. At the same time, police found appellant's husband attempting to discard heroin down the commode in a bathroom accessible only through the rear bedroom. *Garrison*, 272 Md. at 126. There was no other contraband discovered in the bedroom where the appellant was located, other than U.S. currency. *Id.* at 127. The Court of Appeals found this evidence to be insufficient to sustain appellant's conviction. *Id.* at 142. The Court stated:

> No drugs of any kind nor paraphernalia were discovered in a search of the bedroom where the appellant was found; nor was there any evidence that the packet of heroin discarded by her husband had ever been kept in the bedroom, or had ever been in the plain view of the appellant.

Id. at 140.

The Court further stated that the trial court made an "impermissible inference" that the money found in the bedroom where appellant was located was contraband. *Id.* at 141. Further, the Court recognized that an anonymous informant had provided police with information that appellant was engaged in the distribution of narcotics with her husband, and that information formed the basis for a search warrant. *Garrison*, 272 Md. at 125-26. However, in reversing appellant's conviction, the Court noted that this information never came in as substantive evidence. *Id.* at 141-42. Further:

> The appellant and her husband may well have jointly participated in the distribution of heroin, but on this record there was no substantive evidence offered which showed directly or supported a rational inference that she had "the exercise of (either) actual or constructive dominion or control" – solely or jointly with her husband – over the 173 glassine bags of heroin seized while being discarded by her spouse. The action of the trial court in denying appellant's motion for judgment of acquittal was "clear error."

Id. at 142.

In considering the variety of cases concerning constructive possession, we have acknowledged a common thread:

> Knowledge of the presence of drugs is another necessary element of the offense and must be proven beyond a reasonable doubt. While this knowledge may be inferred from a defendant's exclusive possession, ownership, or control of the premises, when a defendant is not in exclusive possession of

> the premises or location where the [contraband was] found, knowledge may not be inferred unless there are other circumstances tending to support an inference of knowledge or control. Even though under some circumstances non-exclusive possession may suggest that all the occupants of a residence or car had knowledge of the contraband found there, mere suspicion is not enough. Some evidence that connects a defendant with the contraband is required.

Rich v. State, 205 Md. App. 227, 236-37 (2012).

Although appellant does not appear to have been in exclusive possession of the basement apartment, the circumstances tend to show that he had, at minimum, joint dominion and control over its contents. Indeed, as stated before, appellant answered the door and led the officers downstairs. Identification directly connected to him was found in the same room with some of the contraband. The remaining circumstances, including but not limited to, the presence of the Impala in the driveway, still warm to the touch after the recent high-speed chase, and the fact that the other occupant of the apartment, Stewart, appeared to be attempting to conceal the drugs in the toilet, provide a fair inference that appellant was in joint and constructive possession of the contraband. The evidence was sufficient to sustain his convictions.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.