Circuit Court for Cecil County
Case No. C-07-CR-22-000430

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 1910

September Term, 2022

TIMOTHY A. HAND, SR.

v.

STATE OF MARYLAND

Leahy,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 8, 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).

Appellant, Timothy A. Hand, Sr., was indicted in the Circuit Court for Cecil County, Maryland, and charged with various narcotics-related offenses, including, but not limited to, possession with intent to distribute methamphetamine, heroin, and fentanyl. After his motion to suppress evidence was denied, Appellant was tried by a jury and convicted of possession with intent to distribute fentanyl and possession of methamphetamine. He timely appealed and presents the following questions, which we have slightly modified:

I. Did the suppression court err by denying the motion to suppress evidence seized from a backpack?

II. Did the trial court abuse its discretion by admitting a portion of Deputy Cryder's testimony?

III. Is the evidence legally insufficient to sustain Appellant's convictions?

For reasons explained below, we hold that: (1) the suppression court did not err by denying Appellant's motion to suppress evidence seized from the backpack because the backpack was not located in the curtilage when Appellant placed it in the common driveway; and, because Appellant voluntarily abandoned the backpack; (2) the trial court properly exercised its discretion in admitting Deputy Cryder's contested testimony; and (3) the evidence was sufficient to sustain Appellant's convictions. We affirm.

BACKGROUND

Motion Hearing

At the hearing on Appellant's motion to suppress held on September 9, 2022, Deputy First Class Nathan Cryder, of the Cecil County Sheriff's Office, testified for the

State.[1] Deputy Cryder had been employed with the Sheriff's Office for six-and-a-half years, the last three of which were in the patrol division, where he was primarily assigned to the Elkton area. During that time, he had been to several "street cop trainings[,]" had conducted multiple operations with both the county drug task force and the street crimes unit, and had received training in the recognition and detection of a variety of controlled dangerous substances. From 2020 to 2021, Deputy Cryder was in a supervisory role and had personally made over 250 drug arrests, recovering a variety of controlled dangerous substances, including heroin, fentanyl, methamphetamines, crack cocaine, and marijuana.

On the day in question, April 1, 2022, at approximately 3:00 a.m., Deputy Cryder was on uniformed patrol in the Farr Creek area of Elkton, near Keithley Lane, Cox Lane, and Leo Road—known for "high levels" of drug activity, robberies, and thefts. Deputy Cryder testified that he saw Appellant, whom he knew from prior encounters, riding a bicycle. The bicycle did not have a required rear light or reflector. *See generally*, Md. Code (1977, 2020 Repl. Vol.), Transportation Article ("Transp."), § 21-1207(a)(ii) (mandating rear red reflector on bicycles). Deputy Cryder related that Appellant was carrying a black backpack around his shoulders, and, without objection, explained that his prior encounters with Appellant "involved drug activity, and several [] warrants for various drug violations."

[1] As will be discussed later, the court found that Appellant had standing to challenge the search and seizure. The State does not contest standing on appeal.

Deputy Cryder turned his vehicle around and notified another nearby deputy, Deputy Sebastian Nagovich. Then, according to Deputy Cryder, Appellant began to accelerate and "to pedal extremely fast down Leo Road," which, the deputy explained, "in my experience is an attempt to flee." He further testified that he turned on his overhead white spotlights, but not his red and blue emergency lights, and pursued Appellant to 33 Keithley Lane. There, he saw that Appellant was in the driveway and "had thrown the backpack that he was carrying, and he had also abandoned the bicycle that he was riding." Asked what Appellant did at that point, Deputy Cryder responded that Appellant was "running or fast, fast-walking" towards the residence at 33 Keithley Lane.

Deputy Cryder got out of his patrol car, called Appellant by name, and said something akin to "what are you doing, Timmy." As the deputy started walking toward the discarded bicycle, Appellant, who had been walking towards the residence, turned and ran towards the deputy in an "aggravated" manner with his fist clenched, repeatedly telling him that he was on private property. The deputy clarified that Appellant "just appeared to be kind of all over the place. His voice was, was higher. Seemed aggravated or, or, I guess, passive aggressive." Believing Appellant was about to "throw a punch[,]" and that "an assault could take place[,]" Appellant was detained and placed in handcuffs. Although it was not clear if this transpired in the driveway, the deputy testified that he and Appellant were "a few feet[] . . . off the roadway." He also testified that the backpack was located approximately five feet or less from Appellant when Appellant was handcuffed.

After Appellant was detained, Deputy Cryder turned to the backpack, which was lying on the driveway near a small camper. On cross-examination, Deputy Cryder agreed

with defense counsel that the camper was "basically parked at the [sic] almost near the meeting of the driveway to the road," and added that "[t]here's a little bit of gap, but not much."

Deputy Cryder retrieved the backpack and asked Appellant what the police would find inside. Appellant then told Deputy Cryder that "it wasn't his."[2] After Appellant denied ownership, Deputy Cryder took the backpack, placed it on the hood of Deputy Nagovich's car, and searched it.[3] Deputy Cryder testified as follows:

> So, upon search of the bag, I did locate a Tupperware bowl which contained a small stem of green, leafy vegetable-like substance, which I suspected marijuana. So, approximately two grams. I located 113 clear zip-locked bags containing a blue wax paper with various stamps containing a white, powdery substance. They were packaged into eight separate bundles. I knew through my training, knowledge, and experience that it was consistent with heroin and fentanyl. I also located a clear plastic cup containing a crystal rock-like substance. I -- which I also knew through my training, knowledge, and experience, to be consistent with methamphetamines. There was also a cell phone, a black digital scale. And I believe that was it inside the bag.

According to Deputy Cryder, Appellant was not placed under arrest until after the backpack was searched. His person was then searched incident to arrest. The police recovered $701 in U.S. currency in multiple denominations from his person.

[2] Appellant has not raised any issue under the Fifth Amendment. *See generally, Thomas v. State*, 429 Md. 246, 259 (2012) (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966), and the law governing custodial interrogations).

[3] We note that the dash cam video from Deputy Nagovich's patrol vehicle, showing the search of the backpack, was not admitted at the motions hearing, but was admitted at trial.

Pertinent to the issue raised, the suppression court heard additional evidence as to whether the backpack was abandoned in the curtilage of Appellant's residence. Deputy Cryder gave a description of 33 Keithley Lane, noting that he had seized drugs and money from that same location on a prior occasion in November 2020. The residence was located approximately 25 feet from the main road, and the driveway was located on the right side of the residence. On the night in question, there were no obstructions across the driveway nor did the officer see any posted signs preventing or prohibiting access.

On cross-examination, Deputy Cryder clarified that the camper was parked in the driveway. Referring to dash cam footage[4] from the deputy's patrol car, the court inquired as to the location of the backpack, as follows:

> THE COURT: Okay. Where is the driveway? Is that showing on there?
>
> THE WITNESS: It's directly to the right. Where that initial camper is there, on the right. That's the driveway.
>
> THE COURT: Is that where the bag was found?
>
> THE WITNESS: Correct.

[4] Defendant's Exhibit 1 is a video of the encounter taken from Deputy Cryder's marked patrol vehicle. The video was taken at 3:00 a.m. during the night, and begins during the pursuit of Appellant on the bike and continues to when the deputy parked his vehicle near the residence. Notably, the driveway at issue is only seen, briefly, near the beginning of that video, from about the time designated between 00:15 and 00:20. Appellant, in his brief, observes that a fence is shown in a photograph taken from this dashcam video. The referenced photograph shows a number of white posts connected in series and described as a "partial fence." Based on our review of the entire video, it is apparent that the photograph was taken from the police dash camera footage taken *after* Deputy Cryder's patrol car passed the driveway and parked. The deputy maintained that the driveway at issue was not shown on this photo.

On redirect, Deputy Cryder testified that Appellant stated he was thirsty and wanted his soda. Appellant was provided with his soda, which was located close to the backpack. Deputy Cryder further testified as follows:

> Q. But as far as the backpack, what if anything did he say as to the backpack?
>
> A. I believe he just stated that it wasn't his.
>
> Q. Okay.
>
> A. He may have said something else. I'd have to hear audio again. I'm sorry.
>
> Q. But you do recall him saying it wasn't his.
>
> A. That's correct.

The suppression court asked counsel numerous questions about Defendant's Exhibit 1, the video recording taken from Deputy Cryder's marked patrol vehicle, which was played in its entirety. The court also heard additional evidence about the living arrangements, albeit at the beginning of the hearing when addressing Appellant's standing to challenge the search and seizure. Appellant testified that he lived at 33 Keithley Lane with Louis Lephew, Kirsten Marie Watkins, and Jennifer Graves, and paid rent to the current homeowner, Louis Lephew. Appellant explained that there was a modular house, a trailer, an RV and a small camper on the property. He maintained that he lived in the house, but sometimes stayed in "one of the campers." Appellant testified that Jenny Graves lived in the little camper. The trailer was used for storage and no one lived in the RV. Appellant disagreed that he told police he was staying in the camper the night in question, and testified that "I didn't tell the officers anything, the – homeowner did."

Defense counsel argued the police did not have probable cause to arrest Appellant for the bicycle equipment violation (for not having a rear light or reflector), or for disorderly conduct or failure to obey a lawful order. Counsel also contended there was no reasonable articulable suspicion that Appellant was armed and dangerous and needed to be handcuffed during the encounter. Furthermore, there were no exigent circumstances, according to defense counsel, that permitted Deputy Cryder to enter onto Appellant's property. Counsel argued that the driveway to the residence was part of the curtilage and, therefore, the police violated the Fourth Amendment by walking on the driveway and picking up the backpack.

Defense counsel also maintained that Appellant never abandoned the backpack. Conceding that Appellant placed the backpack down before he walked back to "meet the officers," counsel asserted that he did not relinquish control over it. Defense counsel expounded:

> He had put the bag down, Your Honor. I don't believe he abandoned the bag at all. You know, the bag is placed down and he goes to meet the officers. And kind of getting into my argument, you know, the place where he puts the bag, right? The action of putting the bag down in and of itself, is not abandonment. You know, the cases again are clear. I can pull out some of these other cases, but they say, you know, temporarily, you know, relinquishing control over something does not, in and of itself, show an intent to abandon the property. Right? Putting something down doesn't mean I am never going to come back and get it. If I put my bag down temporarily out there, it doesn't mean I am not coming back for it. I am going to talk to someone.
>
> And much in the same way that that happens, right, if you are putting it down in an area in which you have constitutional protection of an area in which you live, not an area in public.

Defense counsel argued that this case was not like *Richardson v. State*, 481 Md. 423 (2022), a case in which, after a police officer and Richardson reached for a backpack on the ground simultaneously, Richardson let go and fled. In this case, counsel pressed, Appellant did not intend to abandon his backpack by merely placing it down in his driveway. According to defense counsel, Appellant's statement that the backpack did not belong to him was an after-the-fact statement made after the police illegally seized the backpack. Defense counsel concluded:

> To kind of sum it all up, Your Honor, the basics of this case are that for an alleged traffic violation, the officers came onto a property that I think is clearly, you know, by the way that it is set up by what we can tell, not property that you know, is just free for anyone to kind of come up to. It is not something where they were trying to, you know, say, like, anybody can come up and solicit something from us.
>
> They go into the curtilage. They accost Mr. Hand. It is clearly not a consensual encounter because they keep ordering him to come to them. They seize him for purposes of the Fourth Amendment by placing handcuffs on him.
>
> And at that point in time, they take him, they then go take the bag, a bag that is a black opaque bag that does not have anything about it that would show that it is contraband just by looking at it. So they don't have probable cause to come and get it. So you know, I don't think that abandonment applies because again, merely relinquishing you know, control over it for a mere second doesn't show an intent to abandon, and you can't seize something that you have no right to and then present it to someone and then, you know, say I am going to search this, is this your bag.
>
> And then when they say no, use that to then say well, they have abandoned the property and they have retained no Fourth Amendment interest in it. I don't believe his actions, you know, prior to that show an intent to abandon. And it is only after the illegal activity that there is anything that would possibly, you know, fall in line with abandonment. And really, it is just trying to distance himself from the bag, and that is again, after the illegal activity.

The State responded first that Appellant was lawfully detained considering the totality of the circumstances. These included the bicycle equipment violation at 3:00 a.m. in an area known for drugs, as well as the fact that police knew Appellant from prior encounters and that, when the police turned around, Appellant began to flee. Additionally, when the officers arrived at Appellant's residence, also known to the officers from prior encounters, Appellant confronted them with a clenched fist. The State continued that the backpack was abandoned on the driveway and that this was not within the curtilage of Appellant's residence. Specifically, the State argued that:

> In this case, you have the Defendant, from the very beginning, before the officers even get there, throws the bag to the side of the driveway by the camper. So again, the bag is abandoned. When he is asked what he is going to find in it, the Defendant denies that it is his bag. Before he even searches it, he denies it. So again, it is clear that there was abandonment by the Defendant.
>
> But again, we don't get into all of that because we are not in the curtilage. That curtilage argument fails. This is not a curtilage. It is no different than any other house as most houses that are built now that has a driveway in front. Basically, you walk up the driveway to get into the residence.
>
> Your Honor, when you look at the case in its totality as far as the actions of the officers, certainly, the officers acted reasonable in what was before them that night with the -- what was occurring or knowledge of the Defendant and the Defendant's actions that night, that there was a basis for them to search that bag as it was abandoned. It was not in the curtilage and it was not until that point that the drugs were found that the Defendant is finally placed under arrest. So I would ask the Court to deny the motion.

After hearing a response from defense counsel, primarily as to the curtilage and abandonment arguments, the court denied the motion to suppress. The judge first acknowledged reviewing the very recent case in which the Supreme Court also considered

whether a defendant had abandoned a backpack. *Richardson v. State*, 481 Md. 423 (2022). Applying the principles in *Richardson*, the court found that Appellant abandoned the backpack, stating:

> Now, abandonment can be manifested in two ways.
>
> One is if the facts clearly show that where the property was thrown, the property was abandoned, and that person took off and left it there. In this case, we have the property being placed or thrown in front of a van or a camper van in the driveway of the property. And then Mr. Hand unwisely disclaiming any ownership in the property, which would indicate to any reasonable person that he abandoned the property.

On the issue of whether the driveway was in the curtilage, the court explained:

> The issue is, on this property, we have four or five structures that are intermittently or simultaneously or occasionally used as occupant -- of residences for people. Mr. Hand says one of these properties, he testified that one of these residences uses a back entrance. . . . We have several people, several unrelated people, living in that house that apparently use this driveway which is also open to the public to come up to visit if they have visitors, or for these people to exit and go back and forth from the house.
>
> It [is] not like Mr. Hand has exclusive rights to this property where he leaves the band [sic] -- where he leaves the bag. And I find that he did abandon the property on this -- that day, by his actions and also probably just as importantly, by his words.
>
> I also find that the property doesn't fit neatly into the arguments . . . that the property was in the curtilage. But the nature of the property, it is almost like a multifamily dwelling where you have common walkways and common entrance ways. But this way, different people using the same entranceway to the property.
>
> And also, the factual -- I find the factual pattern does not completely make this area where the bag was placed as part of the curtilage.
>
> So for those reasons, I deny the motion to suppress.

Trial

At trial, Deputy Cryder testified consistently to the stop, search and arrest of Appellant as he did at the earlier motions hearing. In brief, he testified that he saw Appellant riding a bicycle with no rear reflector at 3:00 a.m. with a black backpack on his back, followed him to 33 Keithley Lane, saw the same backpack on the ground in the driveway, detained him after he became aggressive, retrieved the backpack, searched it, notably after Appellant denied ownership, and then discovered therein a large quantity of controlled dangerous substances, including fentanyl and methamphetamine. Deputy Nagovich, who was assisting Deputy Cryder at the scene, also testified at trial and confirmed that he saw the same backpack on the ground in the driveway.

Deputy Cryder was further accepted as an expert in the identification of packaging and methods of distribution of controlled dangerous substances. He testified that the fentanyl recovered in this case was packaged in blue wax paper, placed together in ziplock plastic bags, which were typically sold for $10 per bag, and then "bundled" together into eight bundles with rubber bands. In addition, he asserted that the $701 in currency recovered from Appellant's person compared favorably to other drug cases where currency was recovered. Deputy Cryder also stated that needles were seized from Appellant's bag, that fentanyl users most commonly inject the drug intravenously, and that narcotics dealers often carry clean needles with them so that buyers can "actually use [the dealer's] product in front of them . . . so they can . . . determine whether or not it contains . . . what they believe to be buying[.]" The deputy further testified that the entire quantity of the narcotics

recovered, and indeed, even just half, was consistent with distribution. The drugs tested positive for xylazine, a known cutting agent for heroin and fentanyl.

On cross-examination, Deputy Cryder agreed that the police did not observe Appellant engage in any hand-to-hand drug transaction. He also agreed that there was no ledger of drug sales, no text messages or social media indicating distribution, and no controlled buy of drugs from Appellant.

Appellant was sentenced on January 6, 2023, as follows: 15 years, with all but five years suspended, for possession with intent to distribute fentanyl; one year for possession of methamphetamine, to run concurrently; three years of supervised probation following time served.

We shall supplement these facts in our discussion of the issues.

DISCUSSION

I.

Motion to Suppress Evidence Seized from the Backpack

Appellant maintains that: (1) the police unlawfully entered the protected curtilage of his home, without probable cause, reasonable articulable suspicion or exigent circumstances; (2) there was no reasonable articulable suspicion to detain him; (3) there was no probable cause or reasonable articulable suspicion to support a search of the backpack; and (4) the backpack was not abandoned.

Although the State limits its very brief response to whether the driveway was in the protected curtilage, it does declare that Appellant "disavowed ownership of a backpack

that was laying in a driveway[.]" From this, the State generally argues that the suppression court properly denied the suppression motion.

Standard of Review

"When reviewing a trial court's denial of a motion to suppress, we are limited to information in the record of the suppression hearing and consider the facts found by the trial court in the light most favorable to the prevailing party, in this case, the State." *Washington v. State*, 482 Md. 395, 420 (2022) (citing *Trott v. State*, 473 Md. 245, 253-54, *cert. denied*, ___ U.S. ___, 142 S. Ct. 240 (2021)). "We accept facts found by the trial court during the suppression hearing unless clearly erroneous." *Id*. (citation omitted). "In contrast, our review of the trial court's application of law to the facts is *de novo*." *Id*. (citation omitted). "In the event of a constitutional challenge, we conduct an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Id*. (quotation omitted). *Accord State v. McDonnell*, 484 Md. 56, 78 (2023).

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or

property." *McDonnell*, 484 Md. at 78-79 (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)). Ultimately, "[t]he touchstone of the Fourth Amendment is reasonableness." *Jimeno*, 500 U.S. at 250 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

Analysis

The Bicycle Equipment Violation

On April 1, 2022, at around 3:00 a.m., Deputy Cryder was on uniformed patrol when he saw Appellant, a person he knew, riding a bicycle in an area known for "high levels of CDS activity," robberies, and thefts. Appellant was wearing a black backpack and the bicycle he was riding was missing its rear reflector. This was a violation of Transp. Section 21-1207(a)(ii), which states:

> (a) *Lamp and reflector.* – (1) If a bicycle or a motor scooter is used on a highway at any time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet, the bicycle or motor scooter shall be equipped:
>
> (i) On the front, with a lamp that emits a white light visible from a distance of at least 500 feet to the front; and
>
> (ii) On the rear, with a red reflector of a type approved by the Administration and visible from all distances from 600 feet to 100 feet to the rear when directly in front of lawful upper beams of head lamps on a motor vehicle.

Transp. § 21-1207(a).

Although Appellant was never cited under this statute, the missing rear reflector provided probable cause for Deputy Cryder to issue a traffic citation. *See* Transp. § 26-201(a)(1) (Power of police officer to charge violation of the Maryland Vehicle Law); *see also Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (restating the long-prevailing standard of probable cause to be a "a fluid concept—turning on the assessment of

probabilities in particular factual contexts[,]" concerning "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[,]" and that this standard "depends on the totality of the circumstances") (citations omitted). *Accord State v. Johnson*, 458 Md. 519, 535 (2018); *see Johnson v. State*, 254 Md. App. 353, 387 (2022) ("The entire phenomenon of probable cause deals with investigative clues and with heightened suspicion, not with the proof at trial of a legally sufficient case of guilt"). *Cf. Whren v. United States*, 517 U.S. 806, 810, 813 (1996) (decision to stop an automobile "is reasonable where the police have probable cause to believe that a traffic violation has occurred[,]" and reasonableness of traffic stop does not depend "on the actual motivations of the individual officers involved").

Warrantless Entry onto the driveway at 33 Keithley Lane

After the deputy turned around, activating his spotlights, but not his emergency lights, Appellant accelerated and rode his bicycle quickly to 33 Keithley Lane. Deputy Cryder followed him to that address, and the evidence elicited during the course of the entire suppression hearing revealed that this address was comprised of multiple domiciles (a modular house, a camper, and an "RV"), and multiple occupants, including: the owner, identified as Louis Lephew; Appellant; and at least two other individuals, Kirsten Marie Watkins and Jennifer Graves.

Once the pursuit concluded at 33 Keithley Lane, Deputy Cryder testified that Appellant "had thrown the backpack that he was carrying, and he had also abandoned the bicycle that he was riding." Deputy Cryder got out of his marked patrol car, walked onto

the driveway, and called Appellant by name. Appellant's argument is that, by walking on the driveway, the deputy unlawfully entered the curtilage of his home.

In *Florida v. Jardines*, 569 U.S. 1 (2013), the United States Supreme Court explained how the Fourth Amendment protects not only a person's home, but also, the area surrounding the home:

> The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. *Oliver v. United States*, 466 U.S. 170, 176[] (1984). The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to [*Katz v. United States*, 389 U.S. 347 (1967)]) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. *Hester v. United States*, 265 U.S. 57[] (1924).
>
> But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511[] (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Jardines, 569 U.S. at 6. *See also Collins v. Virginia*, 584 U.S. __, 138 S. Ct. 1663, 1672 (2018) ("[I]t is a settled rule that warrantless arrests in public places are valid, but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. That is because being arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.") (cleaned up).

The *Jardines* Court continued that "[w]e therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of

the home itself for Fourth Amendment purposes." *Jardines*, 569 U.S. at 6 (quotations omitted). "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id*. at 7 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). Further, "[w]hile the boundaries of the curtilage are generally 'clearly marked,' the 'conception defining the curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience.'" *Id*. (citation omitted).

The area at issue in this case is the driveway for 33 Keithley Lane. This Court has addressed access points to property, including walkways, driveways and porches, in a case pre-dating *Jardines*, as follows:

> People commonly have different expectations, whether considered or not, for the access areas of their premises than they do for more secluded areas. Thus, we do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck. In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police. *If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that police will do so.*
>
> Thus, when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g. walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment. But other portions of the lands adjoining the residence are protected, and thus if the police go upon these other portions and make observations there, this amounts to a Fourth Amendment search.

McGurk v. State, 201 Md. App. 23, 38-39 (2011) (quoting *Brown v. State*, 75 Md. App. 22, 33-34 (1988), emphasis added in *McGurk*). *Accord* Wayne R. LaFave, *Search and Seizure,*

A Treatise on the Fourth Amendment § 2.3(f), at 817-23 (6th Ed. 2020) (hereinafter, "LaFave, *Search and Seizure*").

At the time when Deputy Cryder first arrived at 33 Keithley Lane, got out of his patrol vehicle, and then walked on the driveway and called to Appellant by name, there was a legitimate reason for him to approach Appellant, namely, to issue a citation for the bicycle equipment violation. Indeed, at this juncture, and before Appellant told the deputy he was on private property, this was akin to a "knock and talk." As our Supreme Court has explained, "[t]he crux of the validity of the knock and talk procedure is that it is a consensual encounter in a place where the officer, like the public, has a right to be." *Jones v. State*, 407 Md. 33, 52 (2008) (quotation omitted). As the Court has also explained:

> The prevailing rule, applicable both to and beyond a pure "knock and talk" situation, is that, absent a clear expression by the owner to the contrary, police officers, in the course of their official business, are permitted to approach one's dwelling and seek permission to question an occupant.

Scott v. State, 366 Md. 121, 130 (2001).

We acknowledge that the nature of the encounter as a simple "knock and talk" changed when Appellant stopped "fast-walking" towards the residence, turned and told Deputy Cryder he was on private property. It changed further when Appellant escalated the encounter by his demeanor and clenched fist. Deputy Cryder testified that he thought Appellant was "about to throw a punch" or that "an assault could take place." *See* Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 3-203(a), (c) (assault in the second degree, assault on a law enforcement officer); *Watts v. State*, 457 Md. 419, 439 (2018) (Under both the common law and the Maryland statutes, "various modalities of

assault, battery, and intent to frighten each constitute second degree assault") (discussing *Lamb v. State*, 93 Md. App. 422 (1992), *cert. denied*, 329 Md. 110 (1993), and *Robinson v. State*, 353 Md. 683 (1999)). *See also Riggins v. State*, 223 Md. App. 40, 61-64 (2015) (recognizing that an officer may arrest for second degree assault when there is probable cause, but that, in this case, the restraint applied was lawful pursuant to a valid investigatory stop). Contrary to Appellant's argument on appeal, and regardless of whether Appellant ultimately was charged with assault—he was not—Appellant's actions, at minimum, warranted a brief detention and the use of handcuffs. *Chase v. State*, 449 Md. 283, 311 (2016) (authorizing use of handcuffs in a valid *Terry* stop).[5]

Returning to the issue of whether this all occurred within the constitutionally protected curtilage of 33 Keithley Lane, we note that the issue of whether a driveway is "curtilage" is fact specific. *See United States v. Alexander*, 888 F.3d 628, 637 (2d Cir. 2018) ("The police do not have unlimited authority to search driveways for incriminating evidence, even if the particular driveway is visible from the street, even if a fence does not block pedestrian access, and even if the public is implicitly licensed to traverse a portion of the driveway in order to seek entry into the home."). The case of *Collins v. Virginia*, *supra*, frames our analysis.

[5] In addition to the narcotics offenses, Appellant initially was charged with disturbing the public peace and failure to obey a lawful order of a law enforcement officer. As indicated, the State does not argue that the police could search Appellant incident to an arrest for assault. *See Lewis v. State*, 470 Md. 1, 20-21 (2020) (explaining search incident to arrest doctrine); *see also Carter v. State*, 236 Md. App. 456, 474 (observing that "the search incident to arrest exception 'is applicable as long as the search is "essentially contemporaneous" with the arrest'") (citation omitted), *cert. denied*, 460 Md. 9 (2018).

There, over the course of several weeks, separate police officers in Virginia witnessed the same orange and black motorcycle commit traffic infractions, including speeding well over the posted limit, and then eluding detention. *Collins*, 138 S. Ct. at 1668. Further investigation revealed that the motorcycle was likely stolen and in the possession of Ryan Collins. *Id*. Officer David Rhodes determined that Collins stayed at a particular residence and that he had posted pictures of the motorcycle to his Facebook profile. *Id*. Officer Rhodes went to the address in question and saw what appeared to be a tarp-covered motorcycle at the top of the driveway, parked underneath a semi-enclosed area immediately adjacent to the house. *Id*. at 1668, 1670-71. Officer Rhodes, without a warrant, walked up the driveway, then lifted the tarp and saw the orange and black motorcycle. *Id.* at 1668. After confirming that the motorcycle was stolen, Officer Rhodes knocked on the front door and arrested Collins after he admitted that the motorcycle belonged to him, but that he did not have a title. *Id*. at 1668-69. The Supreme Court held that Officer Rhodes unlawfully entered the curtilage in violation of Collins's Fourth Amendment rights, stating that "[i]n physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i.e*., the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home." *Collins*, 138 S. Ct. at 1671.[6]

Although a tarp-covered motorcycle is not too dissimilar from a closed backpack sitting in a driveway—they are both, arguably, closed containers with their contents

[6] The Court continued that the search also could not be justified under the automobile exception. *Collins*, 138 S.Ct. at 1671-72.

concealed from plain view—we conclude that this case is distinguishable from *Collins v. Virginia*, *supra*, in several respects. First, the driveway at 33 Keithley Lane was not simply a driveway to one dwelling; it was a shared driveway to multiple dwellings. The suppression court herein found, "the nature of the property, it is almost like a multifamily dwelling where you have common walkways and common entrance ways. But this way, different people using the same entranceway to the property." This Court has stated that:

> [C]ommon areas, such as the hallways of a multi-unit apartment building, are generally not areas in which a tenant is deemed to have "exclusive control." *See generally* [*United States v. Dunn*, 480 U.S. 294, 302-03 (1987)] (noting that respondent was the owner of the barn, which was within his exclusive control). *See Grymes v. State*, 202 Md. App. 70, 94-95[] (2011) (noting the consensus amongst federal circuit court cases in support of our holding that tenants of multi-unit apartment buildings do not have a legitimate expectation of privacy in the common hallways and areas of the buildings due to lack of exclusive possession therein). *See also* Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 Hous. L. Rev. 1289, 1304 (2015) (noting that a tenant's "dwelling" within a multi-unit apartment building does not extend beyond the apartment and areas subject to the tenant's exclusive control).

Lindsey v. State, 226 Md. App. 253, 280 (2015), *cert. denied*, 447 Md. 299 (2016); *see also* LaFave, *Search and Seizure* § 2.3(b), at 770 ("There is no invasion of privacy when a policeman without force enters the common hallway of a multiple-family house in the furtherance of an investigation") (quotation omitted). The fact that the backpack was located in the common driveway is persuasive support for the motion court's finding that the backpack was *not* in the curtilage of 33 Keithley Lane.

Second, in *Collins*, the tarp-covered motorcycle was parked under a "partially enclosed top portion of the driveway that abuts the house." *Collins*, 138 S.Ct. at 1671. Here, the backpack was located in an open area near the driveway's entrance, away from

the main house and the front of the small camper, less than five feet away from Appellant's person.

The final distinguishing factor is that, unlike the circumstances presented in *Collins*, after Deputy Cryder picked up the backpack and asked Appellant something to the effect of "what's going to be in your book bag?" or "[w]here [sic] are we going to find in your backpack[?]," Appellant affirmatively denied ownership of the backpack, stating "it wasn't his."

Abandonment

Given our holding that the suppression court was correct in determining that Appellant did not drop the backpack in the curtilage of the home, we now examine whether the suppression court correctly found that Appellant abandoned the backpack. The Maryland Supreme Court has reaffirmed that "Fourth Amendment protection from a warrantless search does not extend to property that has been abandoned by its owner." *Richardson v. State*, 481 Md. 423, 446 (2022) (quoting *Stanberry v. State*, 343 Md. 720, 731 (1996), *cert. denied*, 520 U.S. 1210 (1997)). "By abandoning property, the owner relinquishes the legitimate expectation of privacy that triggers Fourth Amendment protection." *Id*. (quoting *Stanberry*, 343 Md. at 731). "The person invoking Fourth Amendment protections bears the burden of demonstrating his or her legitimate expectation of privacy in the place searched or items seized." *Williamson v. State*, 413 Md. 521, 534 (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)), *cert. denied*, 562 U.S. 984 (2010)). Moreover, "[w]hen the justification offered is that the property was abandoned, the State must prove that the evidence was voluntarily abandoned and was not tainted by a Fourth

Amendment violation." *Powell v. State*, 139 Md. App. 582, 599 (quoting *Partee v. State*, 121 Md. App. 237, 259 (1998)), *cert. denied*, 366 Md. 248 (2001). *See also Partee*, 121 Md. App. at 259 ("[T]he State bore the burden of proving that appellant abandoned the contraband-containing pouch, that he acted voluntarily in doing so, and that the evidence was not tainted by the illegal seizure of his person").

Our Supreme Court has explained that in considering abandonment: "[F]irst, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private[,]" and "[s]econd, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Richardson*, 481 Md. at 446 (first and third alterations in original) (quoting *Bond v. United States*, 529 U.S. 334, 338 (2000)). The *Richardson* Court explained these tests in the following context:

> The test for abandonment of property in a search and seizure context under the Fourth Amendment is distinct from the property law concept of abandonment. 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(b) (6th ed. 2020, Dec. 2021 update) (citations omitted). In the law of property, "the question is whether the owner has . . . relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest." *Id*. However, "[i]n the law of search and seizure . . . the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment." *Id*. (citation omitted). Thus, a person can retain a property interest in an item but at the same time relinquish their reasonable expectation of privacy in it. *Id*.

Richardson, 481 Md. at 446-47.

"[W]hether property is abandoned is generally a question of fact based upon evidence of a combination of act and intent." *Everhart v. State*, 274 Md. 459, 483 (1975)

(citation omitted); *see also Richardson*, 481 Md. at 447 ("Although the Fourth Amendment abandonment inquiry focuses on the property owner's actual expectation of privacy, a subjective question, courts must frequently rely on objective indications of the owner's intent.") (quoting *Stanberry*, 343 Md. at 732). Further, "[a] property owner's 'intent may be inferred from words spoken, acts done, and other objective facts. . . . All relevant circumstances existing at the time of the alleged abandonment should be considered.'" *Richardson*, 481 Md. at 447 (quoting *Duncan v. State*, 281 Md. 247, 265 (1977)); *see also* LaFave, *Search and Seizure* § 2.6(b) at 920-21 ("A number of courts have held that an abandonment may arise out of a disclaimer of ownership made in response to police questioning.") (footnotes omitted). Questions of voluntary abandonment are considered under the totality of the circumstances. *See generally*, *Stanberry*, 343 Md. at 724-25, 739 (concluding, "under the totality of the circumstances," State Troopers should not have inferred abandonment when, during a routine drug interdiction investigation, no bus passenger claimed ownership of a black suit bag, left unattended in the overhead rack of a Greyhound bus while its owners used the facilities at a rest stop).

The Maryland Supreme Court has identified several objective factors in determining whether an item was voluntarily abandoned. These include:

> (1) "the location of the property and … whether the area is secured";
>
> (2) "how long the property remained in the location prior to the search and the condition of the property at the time of the search";
>
> (3) "whether the owner requested a third party to watch or protect the property"; and,

> (4) "whether the owner disclaimed or failed to claim the property when questioned by police."

Stanberry, 343 Md. at 733 (cleaned up).

Applying these factors to the evidence in the light most favorable to the prevailing party—the State in this case—the record established that: (1) the backpack was located in the common driveway shared by multiple dwellings; (2) it was closed to inspection and located there only briefly; (3) Appellant did not request anyone to watch over or protect the backpack; and, (4) Appellant expressly disclaimed ownership of the backpack when questioned by Deputy Cryder.

In *Richardson*, a school resource officer, Corporal Myron Young, broke up a fight behind Crossland High School in Temple Hills, Maryland, involving several individuals, including Anthony Richardson. *Richardson*, 481 Md. at 436. During the course of the incident, a backpack that was strapped to Richardson's body fell to the ground. *Id.* Both the officer and Richardson reached for it at the same time, but, after the officer grabbed it first, Richardson immediately fled the scene. *Id*. at 437. Suspecting that there was a weapon in the bag, the officer opened it, searched it, and found a handgun, identification card, several cell phones, and cash. *Id*. One of the several issues on appeal was whether Richardson had abandoned the backpack. *Id*. at 443. The Maryland Supreme Court concluded that:

> [D]espite Richardson's initial reach for his backpack after it fell, we hold that Richardson relinquished all reasonable expectation of privacy in the backpack when he fled the scene. It follows that Richardson abandoned his backpack before Corporal Young searched it, and that the circuit court correctly denied Richardson's motion to suppress evidence based on the warrantless search of the backpack.

Id. at 449-50. The Court instructed: "Because Richardson abandoned the backpack, Corporal Young's subsequent search of the backpack did not implicate the Fourth Amendment." *Richardson*, 481 Md. at 450 n.11.

Appellant distinguishes *Richardson* by arguing that, because the backpack was within the constitutionally protected curtilage of the home, Appellant's Fourth Amendment rights had already been violated by the time he disclaimed any rights in the backpack. Appellant presses that he only made the statement denying ownership after Deputy Cryder picked up the backpack and asked what the police would find. We are not persuaded by Appellant's contentions. We agree with the suppression court that the backpack was not within the curtilage of the home, and, to the degree that Appellant's conduct before the disclaimer of ownership constituted an "initial expression of intent to maintain his privacy interest in the backpack[,]" we note that "[a] person's intent to maintain their expectation of privacy in an object can change in a matter of days . . . or in a few seconds, as occurred here." *Id.* at 448-49.

Moreover, we are not persuaded that Appellant's action was involuntary, especially in light of our conclusion that Appellant was lawfully detained after aggressively approaching Deputy Cryder, and the suppression court's express finding that "Mr. Hand unwisely disclaim[ed] any ownership in the property, which would indicate to any reasonable person that he abandoned the property." We conclude that the backpack was not located in the curtilage when Appellant placed it in the common driveway shared by the multiple occupants of the multiple dwellings, and thus there was no Fourth Amendment violation of the curtilage. Under the totality of the circumstances, therefore, we hold that

Appellant voluntarily abandoned the backpack prior to the search and seizure of its contents. The suppression court properly denied the motion to suppress.

II.

Admissibility of Deputy Cryder's Expert Testimony

Appellant next asserts that the trial court erred in permitting Deputy Cryder, after he was recalled and accepted as an expert in the identification, packaging, and distribution of controlled substances, to testify about what he believed was contained in all of the ziplock baggies recovered on the ground that his expert opinion lacked an adequate factual basis. The State responds that the court properly exercised its discretion and that any error was harmless beyond a reasonable doubt. We agree with the State.

"An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion." *State v. Galicia*, 479 Md. 341, 389 (quoting *Portillo Funes v. State*, 469 Md. 438, 478 (2020)), *reconsideration denied* (Aug. 10, 2022), *cert. denied*, 143 S. Ct. 491 (2022). Such an abuse of discretion occurs when "a trial judge exercises discretion in an arbitrary or capricious manner or . . . acts beyond the letter or reason of the law." *Galicia*, 479 Md. at 389 (quoting *Cooley v. State*, 385 Md. 165, 175 (2005)). However, "[i]n some circumstances, the admissibility of particular evidence is a legal question, in which case an appellate court accords no special deference to a trial court." *Id.* at 389 (citing *Brooks v. State*, 439 Md. 698, 708 (2014)).

Pertinent to our discussion, Maryland Rule 5-702 provides that:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of

> fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill experience, training or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.

As with general admissibility standards, the appellate standard of review for the admission of expert testimony—including when the factual basis is challenged—is whether the trial court has abused its discretion. *Abruquah v. State*, 483 Md. 637, 652 (2023) (citing *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020)). This Court will "not reverse simply because . . . [we] would not have made the same ruling." *Abruquah*, 483 Md. at 652 (alteration in original) (quoting *State v. Matthews*, 479 Md. 278, 305 (2022)).

In considering the factual basis of an expert's opinion, we must consider two factors; namely, whether the expert's opinion has: "(1) an adequate supply of data; and (2) a reliable methodology." *Matthews*, 479 Md. at 309 (citing *Rochkind*, 471 Md. at 22). Without either, the expert's opinion amounts to "mere speculation or conjecture." *Id*. (quoting *Rochkind*, 471 Md. at 22).

Maryland courts have found that data from an expert's first-hand knowledge, facts from testimony, and facts related to an expert through hypothetical questions constitute a sufficient factual basis. *Santiago v. State*, 458 Md. 140, 155 (2018) (citations omitted). To meet this requirement, "an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational

explanation of how the factual data led to the expert's conclusion." *Id.* (quoting *Exxon Mobile Corp. v. Ford*, 433 Md. 426, 481 (2013)).

Ultimately, as our Supreme Court has recently explained:

> The overarching criterion for the admission of relevant expert testimony under *Rochkind*, and the goal to which each of the ten *Daubert-Rochkind* factors and the five principles summarized in [*State v. Matthews*, 479 Md. 278 (2022)] are all addressed, is reliability. The question for a trial court is not whether proposed expert testimony is right or wrong, but whether it meets a minimum threshold of reliability so that it may be presented to a jury, where it may then be questioned, tested, and attacked through means such as cross-examination or the submission of opposing expert testimony.
>
> Because we evaluate a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard, our review is necessarily limited to the information that was before the trial court at the time it made the decision. A trial court can hardly abuse its discretion in failing to consider evidence that was not before it.

Abruquah, 483 Md. at 655-56 (footnote omitted); *see also Matthews*, 479 Md. at 310-11 (explaining the *Daubert-Rochkind* factors).[7]

Here, prior to trial, defense counsel moved in limine to limit testimony from Heather Baxivanos, a forensic chemist, to only the bags that she actually tested. Further, counsel sought to prohibit the State from arguing that all the bags recovered, including the ones not tested, were proof of Appellant's intent to distribute. After hearing from the State, the court denied the motion, finding that many of the issues raised could be adequately addressed during trial and cross-examination.

[7] At trial, defense counsel acknowledged that Appellant had not raised any issue under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

As part of the evidence in this case, Baxivanos—who was accepted by the court as an expert in forensic chemistry—testified that she received 113 clear ziplock bags that contained blue wax bags holding an "off-white powdery substance." After observing that these items each appeared to be similar to one another, Baxivanos examined a random sample of five baggies. Baxivanos testified, without objection, that random sampling "is a common practice specifically with statistical sampling[,]" and that it was a generally accepted practice within the field of forensic chemistry. After explaining the forensic procedures that she used in this case, Baxivanos testified that the contents of the five baggies tested positive for fentanyl. Baxivanos also testified that a second exhibit tested positive for methamphetamine. Returning to the first exhibit, she further testified, again without objection, as follows:

> Q And after conducting your -- the analysis on the five bags, what, if any, statistical analysis were you -- excuse me -- were you able to perform on the remaining bags?
>
> A Because I analyzed five bags, I was able to make a statistical conclusion that at least 56 of the total bags, of the total 113, contained fentanyl at 95 percent confidence.
>
> Q And as far as using your statistical analysis, how common is that to use a statistical analysis in the field of forensic chemistry?
>
> A It's a fairly common practice. I can't speak to all labs' protocols but it's the common practice across the science community.
>
> Q And it is a generally accepted practice?
>
> A Yes.

On cross-examination, Baxivanos maintained that she selected five samples in order to make a "statistical statement[,]" and that this was pursuant to "an approved deviation

request to deviate from the standard operating procedures." She explained that, normally, she would test just three samples, but that testing five samples in this case allowed "statistical inferences" to be made.

After Baxivanos testified and the jury was excused, the court and the parties discussed the expected renewed expert testimony of Deputy Cryder. Summarizing defense counsel's argument as it relates to the issue raised, because counsel expected that Deputy Cryder would be qualified as an expert and offer opinion testimony that the amount of drugs recovered in this case was consistent with distribution rather than simple possession, defense counsel wanted to inquire as to the factual basis for the deputy's opinion outside the presence of the jury. Namely, and as counsel explained, considering that Baxivanos could only opine about the contents of half of the seized bags based on a sample size of five bags, defense counsel wanted to voir dire Deputy Cryder before he was allowed to conclude that *all* of the 113 bags contained a mixture of heroin and fentanyl.

The State responded that it was unnecessary to voir dire Deputy Cryder because the issues raised by defense counsel were relevant to the weight that the jury may decide to give to Cryder's testimony rather than the admissibility of his testimony. Defense counsel replied that there was inadequate proof of the basis of the deputy's anticipated opinion that all of the bags contained heroin and/or fentanyl, and that his opinion amounted to speculation or conjecture. Pertinent to the issue raised on appeal,[8] the trial court then ruled:

[8] There was also further discussion and a ruling with respect to Deputy Cryder's expert opinion testimony concerning the seizure of methamphetamine, primarily on grounds related to inadequate disclosure prior to trial. The court granted Appellant's motion to limit Cryder's testimony on that ground.

> So that issue I do think is more proper for cross, and it might come out and if they make certain -- they alter their opinions, or if there -- we can raise this again after they testify. I do believe that's more a proper for cross-examination based on what we have and based on potential totality. I have no idea necessarily what they're going to say.

After the jury returned to the courtroom, Deputy Cryder was recalled and accepted as an expert in the identification, packaging, and distribution of controlled dangerous substances, over Appellant's objection directed at the factual basis of his opinion. Deputy Cryder testified to the manner in which fentanyl is generally packaged and sold and compared that to the actual drugs recovered in this case. He also testified to the money and assorted paraphernalia that was seized from Appellant and the typical manner in which buyers and sellers meet to exchange money for drugs.

Thereafter, Deputy Cryder was asked the following: "Now, looking at the drugs that you have before you, the 113 baggies of suspected fentanyl, what does that appear to be to you?" Appellant objected and the following ensued at a bench conference:

> [DEFENSE COUNSEL]: Again, I don't know what basis he has, if we're just going based off appearance, you know. It appears to be fentanyl. I don't think that that's proper given that we have testing (indiscernible) so.
>
> [THE STATE]: Your Honor, I think that it's fair, within his area of expertise and also as part of what he recovered that night and what he believed he had, why he submitted it to the lab for analysis.
>
> THE COURT: I'm going to allow it, but again I -- you have broad leeway in cross-examination to talk about what was actually tested and what the amount is. And [the State] can address that (indiscernible).
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: I'll overrule the objection.

The jury then heard the following testimony:

Q Again, deputy, as far as the 113 bags that you recovered at night and you have before you, what did you believe they contained?

A I believe they contained fentanyl with a mixture of heroin.

Q Okay. And we know that from the chemist report that she tested five. And you have the report in front of you. She tested five. They were fentanyl. She also did a statistical analysis where she determined at least 50 percent of them she was 95 percent confident that they contained fentanyl. Okay. So even factoring in the -- in her -- in the report where she has the 56, she notes 56 bags, that she's 90 -- she's -- as her confidence level. Looking at just the 56, do you have an opinion what the 56 bags would be consistent with?

A The 56 bags again would be consistent with fentanyl.

Q But would it be consistent -- how would it be consistent as far as whether it is personal use or for distribution?

A Yeah. So again 56 bags in my experience is consistent with -- still with distribution, not something that a user carries around with them.

Q As far as 113 bags, how does that compare?

A Again, that's still comparative with distribution and not for personal use.

Although not cited by either party, we find *United States v. McCutchen*, 992 F.2d 22 (3d Cir. 1993), instructive. There, Phillip McCutchen was arrested with 119 vials of cocaine base (crack) in his possession and convicted of possession with intent to distribute and distribution within one thousand feet of an elementary school. *McCutchen*, 992 F.2d at 23. The issue on appeal concerned the manner in which his base offense level would be calculated, pursuant to statute, for purposes of sentencing. *Id.* at 23-24. McCutchen challenged the police chemist's conclusion with respect to the total amount of cocaine base recovered. *Id*.

At the sentencing hearing, the chemist testified that he analyzed a random sample of 15 of the seized vials and determined that they contained 1,381 milligrams of a substance or mixture of cocaine base. *Id.* From this, and testifying that this was the common manner to test submissions of this size, the chemist projected that the total weight of all 119 vials was 9.866 grams of cocaine base. *Id*. at 24. This amount affected the base offense level for purposes of sentencing under the applicable federal statute. *Id*. at 23-24 (citations omitted). McCutchen challenged the chemist's extrapolation to the greater quantity based on the limited random sample. *McCutchen*, 992 F.2d at 23-24. Summarizing McCutchen's argument, the Third Circuit stated:

> [T]o arrive at the defendant's sentence, the court had to rely on the chemist's extrapolation from the 15 tested vials to the 104 untested vials. In order to do so, the court had to assume that the untested vials, like the tested ones, contained cocaine base. Since no test was performed to determine the amount of pure cocaine base in each vial or to determine what other substances were present, and since the milligram net weight per tested vial varied (from a low of 69 to a high of 153 milligrams), the defendant argues that it is neither fair nor reasonable to assume that all of the untested vials also contained cocaine. The defendant contends that while the court may consider the net weight of the mixed substance, in contrast to only considering the quantity of the pure cocaine base, to calculate his offense level, *see United States v. Gurgiolo*, 894 F.2d 56, 60-61 (3d Cir. 1990), the government's preponderance burden is not met by assuming that since 15 vials tested positive for cocaine base, the remaining 104 also contain cocaine base.

Id. at 25 (footnote omitted).

The Third Circuit also summarized the Government's argument that it is permissible to use "quantity estimates based on extrapolation from tested samples." *Id.* As noted by the court, the Government's argument relied on *United States v. Pirre*, 927 F.2d 694 (2d Cir. 1991). *Id.* As summarized by the Third Circuit, *Pirre* was a case where, after the

chemist determined that eight out of fifteen similarly sized and packaged bricks of drugs contained cocaine, the chemist then extrapolated that all 15 bricks contained cocaine and weighed a certain amount. *Id.* (discussing *Pirre*, 927 F.2d at 697). Again, pertinent to an issue of sentencing under the federal statute, the Second Circuit affirmed and held that "[i]t is sufficient for the government to show that its method of estimating the total is grounded in fact and is carried out in a manner consistent with accepted standards of reliability." *Id*. at 25-26 (alteration in original) (quoting *Pirre*, 927 F.2d at 697).[9]

The *McCutchen* Court adopted this approach:

> We endorse the analysis and holding of *Pirre*. If a defendant challenges a drug quantity estimate based on an extrapolation from a test sample, the government must show, and the court must find, that there is an adequate basis in fact for the extrapolation and that the quantity was determined in a manner consistent with accepted standards of reliability.
>
> That does not mean, however, that the government must produce expert statistical evidence on sampling techniques. Rather, reasonable reliability is the touchstone of the determination.

McCutchen, 992 F.2d at 25-26 (citations omitted).

Suggesting that the district court should have been more explicit in its finding, the Third Circuit ultimately affirmed, concluding that there was sufficient evidence in the case "to establish that the method used to determine quantity was grounded in fact and met accepted standards of reliability, as well as the government's general preponderance

[9] No issue was raised, in either *McCutchen* or *Pirre*, under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). Although not at issue in this case, it is not clear if some of the holdings in these cases are consistent with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g., United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (discussing *Apprendi* and enhanced sentences based on quantity).

burden[.]" *Id.* at 26 (citation omitted). There was also other evidence supporting a reasonable inference that all the vials, including the untested ones, contained cocaine base, namely the similar weight, size and appearance of the vials, and the context in which they were seized. *Id*. Further, considering that the minimum quantity for the enhanced penalty was five or more grams of cocaine base, the chemist's conclusion that the total quantity was 9.866 grams allowed for a "significant margin of error[.]" *Id*. *Cf. Stephenson v. I.R.S*., 629 F.2d 1140, 1145-46 (5th Cir. 1980) (approving random sampling as one way, among others, to review voluminous requests under the Freedom of Information Act, 5 U.S.C. § 552).

Here, in considering the trial court's ruling, we do not look at the evidence from Deputy Cryder in a vacuum. As set forth above, prior to the challenged expert opinion from the deputy, the court heard extensive expert testimony from Baxivanos, the forensic chemist who performed the underlying analysis at issue, including her expertise, her procedures in analyzing the specific drugs seized by Deputy Cryder, and the procedures associated with her lab. She explained that she performed a "color test," a "presumptive instrumental test" and a "confirmatory instrumental test" for each individual exhibit examined.

She testified that random sampling—her analysis of five sample bags, selected at random—represented a "common practice" that was generally accepted within the field of forensic chemistry. Use of five bags, rather than just three, was done pursuant to an "approved deviation request" and this increased sample size allowed Baxivanos to make "statistical inferences[.]"

Baxivanos concluded that all the bags looked the same, that the packaging was the same, and that the contents were "visually similar." She then described the "color test," which tested for the presence of opiates; the first instrumental test, which also tested for opiates by comparing certified reference material to sample material using a gas chromatograph flame ionization detector; and the confirmatory instrumental test, which tested for opiates using a gas chromatograph mass spectrometer. Based on the results of these tests, Baxivanos testified that she was able to "form an opinion to a reasonable scientific certainty" that "[a]ll five" sample bags contained fentanyl.[10] In addition, prior to the testimony at issue by Deputy Cryder, the court heard testimony concerning his experience, including having made over 250 drug arrests, 90% of which involved fentanyl. The deputy testified that fentanyl was typically packaged a certain way, usually in a blue wax fold, with a stamp on the fold that indicates both the area and the distributing dealer. These items are then further packaged in small ziplock bags, and then bundled together with rubber bands. Both Baxivanos and Deputy Cryder were subjected to extensive cross-examination about their expert conclusions, respectively.

Returning again to the question presented, Appellant objected when Deputy Cryder was asked, on direct examination: "Now, looking at the drugs that you have before you, the 113 baggies of suspected fentanyl, what does that appear to be to you?" Appellant maintained that "I don't know what basis he has, if he's just going based off appearance,

[10] The color test produced a result that was indicative of "[n]othing specific[.]" The presumptive instrumental test produced a result that was "within one percent of the known standard of fentanyl." Lastly, the confirmatory instrumental test was "indicative of fentanyl."

you know." Although the trial court did not expressly find that a sufficient factual basis had been established, the court stated that "I'm going to allow it" subject to further cross-examination.[11] We are persuaded that the court properly exercised its discretion in permitting Deputy Cryder's opinion testimony.

Considering the record as a whole, Baxivanos testified to a reliable methodology. *See Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 376 (2023) ("[W]here an expert has applied a reliable methodology to an adequate supply of data – courts should not exclude an expert merely because the expert's particular conclusions may be inaccurate, but rather should only exclude expert testimony that is 'mere speculation or conjecture.'") (quoting *Matthews*, 479 Md. at 316). That methodology allowed for use of three samples; instead, she used five pursuant to an approved deviation.[12] That permitted a statistical inference as to the

[11] Appellant does not claim that the court failed to find a factual basis, only that it erred in doing so. *See generally*, *Freeman v. State*, __ Md. App. __, __, No. 1118, Sept. Term, 2021, slip op. at 17-19 (filed Sept. 27, 2023) (concluding that a trial court may implicitly accept a witness as an expert). As our Supreme Court has explained:

> When a court must exercise discretion, failure to do so is error, and ordinarily requires reversal. There is a distinction, however, between an explicit abdication of discretionary responsibility and the very different circumstance wherein a judge makes the required ruling but simply does so without setting forth any reasoning. In that event, the exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly.

In re Adoption of Jayden G., 433 Md. 50, 87 (2013) (cleaned up).

[12] We again note that, at trial, defense counsel acknowledged that: "I didn't lodge a, you know, a challenge, a Daubert challenge to [Baxivanos'] sampling plan or anything like that." Indeed, at trial defense counsel did not object to Baxivanos being admitted as an expert in forensic chemistry, or to Baxivanos stating that she was "able to make a statistical (continued)

identity of the drugs seized by Deputy Cryder. Furthermore, Deputy Cryder's expert opinion was based on his own extensive experience investigating narcotics, specifically, fentanyl.

Moreover, we note that Baxivanos limited her testimony to opining that 56 of the bags (rather than all of the one 113 bags) contained fentanyl—thus ensuring that her conclusions did not outpace her chosen methodology—and that this is what Deputy Cryder testified to: "So again 56 bags in my experience is consistent with . . . distribution, not something that a user carries around with them."[13] Considered along with the fact that all of the bags appeared to be similar in nature, as well as the context in which they were found, we hold that the court properly exercised its discretion.[14]

III.

Sufficiency of the Evidence

Finally, Appellant asserts that the evidence was insufficient to sustain his convictions because: (1) he did not possess the backpack of narcotics that was recovered in the driveway; (2) had the motion to suppress been properly granted, there would have

conclusion that at least 56 of the total bags, of the total 113, contained fentanyl at 95 percent confidence."

[13] Because Deputy Cryder testified that 56 bags of fentanyl (the number supported by Baxivanos' testimony) is consistent with distribution, rather than personal use, it is irrelevant to our analysis that he also testified that an even greater number—namely 113 bags—would be consistent with distribution as well.

[14] In light of our holding on the merits, we need not consider the State's harmless error argument. However, to the extent that Appellant is claiming prejudice by Deputy Cryder's testimony that the bags contained a mixture of fentanyl and heroin, we do note that Appellant was only convicted on the fentanyl and methamphetamine counts.

been no other evidence against him; (3) Baxivanos only tested five of the packages of the 113 packages of suspected fentanyl and, according to Appellant, "five bags is not a quantity that rises to the level needed to prove possession with intent to distribute"; and (4) apparently alternatively, there was other evidence suggesting, at most, mere possession as opposed to distribution, including scales, needles, and the absence of an actual drug transaction, ledger of sales, or indication that Appellant traveled out of state to obtain drugs. The State responds under standard principles of sufficiency and possession law, and counters that Appellant's second and third arguments, as listed herein, are not preserved for our review.

Initially, we concur with the State that Appellant failed to advance his second and third contentions (with respect to the denial of his motion to suppress and the number of packages actually tested) in his motion for judgment of acquittal and, therefore, those contentions are not preserved for our review. *See* Md. Rule 4-324(a) (procedure for motion for judgment of acquittal); *Hobby v. State*, 436 Md. 526, 540 (2014) ("[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 in challenging the denial of a motion for judgment of acquittal.") (quotation omitted).

With respect to the remaining arguments, "[t]he sufficiency of the evidence is viewed in the light most favorable to the prosecution." *State v. Morrison*, 470 Md. 86, 105 (2020). Accordingly, "we examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Wilson*, 471 Md. 136, 159 (2020) (quoting *Fuentes v. State*, 454 Md. 296,

307 (2017)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question 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.") (citation omitted). Moreover, this Court "does not 're-weigh' the credibility of witnesses or attempt to resolve any conflicts in the evidence," *Morrison*, 470 Md. at 105 (quoting *Fuentes*, 454 Md. at 307-08), but rather, we "assess 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged[.]'" *Id*. (alteration in original) (quoting *White v. State*, 363 Md. 150, 162 (2001)). "Although circumstantial evidence alone is sufficient to support a conviction, 'the inferences . . . must rest on more than mere speculation or conjecture.'" *Id*. at 106 (quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

At issue is whether Appellant possessed the narcotics-filled backpack that was seized by Deputy Cryder in the driveway of 33 Keithley Lane in the early morning hours of April 1, 2022. Appellant was charged in the third count of the indictment with possession with intent to distribute fentanyl and in the fifth count with possession of methamphetamine. Under the version of CR § 5-602 in effect in April 2022, it was unlawful to "possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance." Section 5-601(a)(1) provided that it was unlawful to "possess or administer to another a controlled dangerous substance," with exceptions that do not apply in this case. CR § 5-601(a)(1). Pertinent to this question, CR § 5-101(v) defines "possess" as "to

exercise actual or constructive dominion or control over a thing by one or more persons." CR § 5-101(v); *see also Nicholson v. State*, 239 Md. App. 228, 252 (2018) ("To possess something is 'to exercise actual or constructive dominion or control' over it.") (quoting CR § 5-101(v)), *cert. denied*, 462 Md. 576 (2019).

"'Control' is defined as 'the exercise of a restraining or directing influence over the thing allegedly possessed.'" *Williams v. State*, 231 Md. App. 156, 200 (2016) (quoting *Handy v. State*, 175 Md. App. 538, 563, *cert. denied*, 402 Md. 353 (2007)). That said, "[c]ontraband need not be found on a defendant's person in order to establish possession." *Handy*, 175 Md. App. at 563. "Rather, a person may have actual or constructive possession of the [contraband], and the possession may be either exclusive or joint in nature." *Moye v. State*, 369 Md. 2, 14 (2002). The following factors are relevant to whether evidence is legally sufficient to support a conviction for constructive possession of illegal drugs:

> (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 were "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."

Rivera v. State, 248 Md. App. 170, 184 (2020) (quoting *State v. Gutierrez*, 446 Md. 221, 234 (2016)).

Applying these factors: (1) both Deputy Cryder and Deputy Nagovich saw Appellant wearing the black backpack when he was riding the bicycle and then saw that same backpack on the ground in the driveway. Further, although there was no specific testimony as to Appellant's exact distance from the backpack when it was in the driveway, Deputy Cryder testified that Appellant was 10 to 15 feet up the driveway when he arrived,

the bicycle was on the ground approximately 15 to 20 feet off the street, and the backpack was a "few steps away from the bicycle near the front tire or the front hood, left tire of the RV" in the driveway; (2) although the drugs were not in plain view, the backpack was accessible to Appellant as he was seen wearing it moments before he was found near it in the driveway; (3) Appellant had $701 in U.S. currency in small denominations on his person, and Deputy Cryder, testifying as an expert, opined that this could be consistent with drug distribution; and (4) as for Appellant's possessory interest in the location where the drugs were found, *i.e.*, his interest in the backpack in the driveway of 33 Keithley Lane, as indicated, Appellant had been wearing the backpack. Moreover, after he was detained, Appellant asked for his soda, and that soda was located a foot away from the backpack.

In addition to this evidence of possession, there was also evidence that Appellant was engaged in distribution of narcotics. This included the manner of packaging, the contents of those packages, the amount, the paraphernalia, and the currency found on Appellant's person. Finally, Appellant's flight after Deputy Cryder turned his patrol vehicle around and followed him home, as well as Appellant's denial of ownership, was evidence of consciousness of guilt for the jury to consider, which it did under the instructions presented. *See Thomas v. State*, 397 Md. 557, 575-76 (2007) (recognizing that a person's behavior may be circumstantial evidence from which guilt may be inferred). *Accord Ford v. State*, 462 Md. 3, 47 (2018).

In sum, we are persuaded that there was direct and circumstantial evidence supporting a rational inference that Appellant possessed the narcotics recovered from the

black backpack and that he did so with an intent to distribute. The evidence was sufficient to sustain Appellant's convictions.

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