UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1850

September Term, 2015

LARRY SYLVESTER MOORE

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: September 9, 2016

The State charged appellant Larry Sylvester Moore with possession of cocaine, possession of marijuana, possession with intent to distribute marijuana, and distribution of marijuana. Over Moore's objection, the State entered a nolle prosequi on the charge of simple possession of marijuana, because he was arrested with less than 10 grams, which is not a criminal offense.

A Prince George's County jury convicted Moore of possession of marijuana with intent to distribute and distribution of marijuana, but acquitted him of possession of cocaine. The court sentenced Moore to two, concurrent ten-year terms of incarceration, with all but four years suspended. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented is whether the circuit court erred in permitting the State, over objection, to enter a plea of nolle prosequi with respect to the offense of possession of marijuana. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

According to the State's evidence at trial, Detectives Clinton Foster and Jacai Colson were working undercover, attempting to purchase illegal narcotics on November 19, 2014. The detectives told Moore that they were looking for "some tree," which is a slang term for marijuana. The detectives said that they wanted to purchase "a dub," meaning a gram of marijuana, for $20.

After Moore said that he could supply the marijuana, the three men entered the detectives' unmarked car and drove to the side of a nearby store to complete the

transaction. Detective Foster drove the vehicle, Moore sat in the front passenger seat, and Detective Colson sat in the backseat behind Moore.

Detective Foster had obtained a marked $20 bill from his supervisor. After Detective Foster gave Moore the $20, Moore retrieved a plastic bag from his pocket. Detective Foster testified that Moore had marijuana packaged in clear plastic bags:

> I saw him going through the bag and he had a little bit, I think it was clear plastic bags of marijuana bundled up into like half grams . . . As soon as he gave me four little plastic bags which equals a gram of marijuana and that's when I gave him the $20 bill and an exchange was made[.]

After the transaction occurred, Detective Foster gave a signal, and police officers moved in and arrested Moore. During a search incident to the arrest, police found crack cocaine on the passenger side of the detectives' car (where Moore had been sitting), but found no cocaine on Moore's person.

Moore called no witnesses and put on no defense.

We shall include additional facts in our discussion and analysis of the issue presented.

DISCUSSION

A. Nolle Prosequi

The State charged Moore with possession of marijuana, distribution of marijuana, possession of marijuana with intent to distribute, and possession of cocaine. Before jury selection, however, the State advised the trial court that it wanted to enter a plea of nolle prosequi to the charge of possession of marijuana. The State explained that on the date of

the alleged transaction it was no longer a criminal offense to possess the amount of marijuana that the State accused Moore of possessing.

Defense counsel objected to the entry of a nolle prosequi. He argued that possession was a lesser-included offense both of distribution and possession with intent to distribute marijuana, and "[a] substantial part of [the] defense was that [Moore] only possessed [the marijuana]" and did not distribute it.

After some discussion of that issue, the following colloquy occurred:

> [PROSECUTOR]: Well, Your Honor, the State is going to enter Count 3, possession of marijuana, nolle prosequi.
>
> [DEFENSE COUNSEL]: Please note that that's over the objection of the defense. It's the presentation of that count which is a substantial part of my defense to this case. If the Court allows it, I request a continuance.
>
> THE COURT: I don't have a choice.
>
> [DEFENSE COUNSEL]: Well –
>
> THE COURT: But I'm going to certainly let you argue to the jury that the State, two minutes before the jury –
>
> [DEFENSE COUNSEL]: Well, my defense was going to be to find him guilty of just the possession because he is [sic], but not the other. So please note my objection to that nol-pros at this point. I request a continuance because I'm in an entirely different posture than I was a few minutes ago. I await the Court's ruling at my request for the continuance.
>
> THE COURT: I think we're going to go forward today and I deny the request for a continuance.

B. Possession of Marijuana

Under Maryland law, marijuana is a Schedule 1 controlled dangerous substance. *See* Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), §§ 5-401(a) and 5-402(d)(1)(vii) of

the Criminal Law Article ("CL"). On October 1, 2014, however, possession of less than 10 grams of marijuana became a civil offense, punishable only by a fine. CL (2015 Supp.) § 5-601; *see also* CL § 5-601.1(b)(1). If a court finds that a person violated § 5-601 by possessing less than 10 grams of marijuana, the adjudication "is not a criminal conviction for any purpose" and "does not impose any of the civil disabilities that may result from a criminal conviction." CL § 5-601.1(b)(2).

CL § 5-101(v) defines "to possess" to mean "to exercise actual or constructive dominion or control over a thing by one or more persons." To possess an item, a defendant "must know of both the presence and the general character or illicit nature of the substance," which may be proven by circumstantial evidence and the reasonable inferences drawn therefrom. *See Timmons v. State*, 114 Md. App. 410, 418 (1997). Possession is an element of both distribution and possession with intent to distribute a controlled dangerous substance. *See*, *e.g., Anderson v. State*, 385 Md. 123, 132-33 (2005); *State v. Woodson*, 338 Md. 322, 329 (1995) (possession is an element of possession with intent to distribute); *Hankins v. State*, 80 Md. App. 647, 658-59 (1989) (possession is an element of distribution).

Possession of marijuana is a lesser-included offense of possession with intent to distribute and distribution of marijuana, provided that the defendant possesses a sufficient amount of marijuana for possession alone to rise to the level of a criminal offense.

C. Restraint on the State's Right to Enter Nolle Prosequi

Md. Rule 4-247(a) permits the State's Attorney to "terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court."

"The entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent." *Ward v. State*, 290 Md. 76, 83 (1981). That discretion, however, is not without restraint. *Id.* Under the concept of fundamental fairness, "the broad authority vested in a prosecutor to enter a nolle prosequi may be fettered in the proper circumstances." *Hook v. State*, 315 Md. 25, 37 (1989).

In *Hook* the Court of Appeals reversed a first-degree murder conviction after the trial court had allowed the State to enter a nolle prosequi on the lesser-included offense of second-degree murder. *Id.* at 42. Hook had admitted to killing and robbing his victims (*see id*. at 34, 42), but he claimed to have been intoxicated, which was relevant to whether the killing was premeditated and to whether he could have formed a specific intent to rob them. *Id.* at 30. Because the evidence would have supported a conviction for second-degree murder (*see id.* at 41), the dismissal of that lesser-included offense "left the jury with a [H]obson's choice" (*id*. at 38)[1] of either convicting Hook of first-degree murder or acquitting an admitted killer. *Id.* at 42. The Court explained:

> When the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection, to nol pros the lesser included offense. . . . [I]t is simply offensive to fundamental fairness, in such circumstances, to deprive the trier of fact, over the

[1] "After Thomas Hobson, 1631 English liveryman, from his practice of requiring every customer to take the horse which stood nearest the door. Thus, the forced acceptance of something whether one likes it or not; the necessity of accepting something objectionable through the fact that one would otherwise get nothing at all; something that one must accept through want of any real alternative." *Id.* n.18 (citing *Webster's Third New International Dictionary of the English Language Unabridged* (1981) at 1076).

> defendant's objection, of a third option of convicting the defendant of a lesser included offense. And if the trial is before a jury, the defendant is entitled, if he so desires, to have the jury instructed as to the lesser included offense.

Id. at 43-44; *accord Fairbanks v. State*, 318 Md. 22, 26-27 (1989) (where a defendant faced charges of burglary and the lesser-included offense of misdemeanor breaking and entering, which did not require proof of specific intent to steal, the entry of a nolle prosequi on the lesser-included offense deprived the defendant of a fair trial, because it "foreclosed the possibility of a guilty verdict of less than burglary" and left the jury with the "singular choice" of finding him guilty of burglary or "finding him not guilty of any crime").

Despite *Hook*, the Court has warned that in many instances a prosecutor remains free to enter a nolle prosequi to a lesser-included offense and to proceed only on the greater offense. In particular, the Court has stated that, "[i]n considering whether an entry of nolle prosequi to a lesser included offense is unfair to the defendant, it is not enough to determine that the evidence would be sufficient for the jury to convict on that offense; rather the evidence must also be such that the jury could rationally convict *only* on the lesser included offense." *Burrell v. State*, 340 Md. 426, 434 (1995) (emphasis in original) (citing *Jackson v. State*, 322 Md. 117, 127-28 (1991)); *see also Jackson*, 322 Md. at 127-28 ("the State is not precluded from entering a nolle prosequi of that offense if, under the particular facts of the case, there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense").

In other words, "[i]f there is no rational basis for the jury to convict a defendant of the lesser offense without also convicting of the greater offense, the State may use its discretion to withdraw that verdict option from the jury by nolle prossing the lesser included offense." *Burrell v. State*, 340 Md. at 434. The State, therefore, may abandon the lesser-included offense if a rational jury would have no choice but to convict the defendant of both the greater offense and the lesser-included offense.

For example, in *Jackson v. State*, 322 Md. at 123, the State charged the defendant with possession with intent to distribute cocaine and with the lesser-included offense of simple possession of cocaine. At trial, the evidence established that Jackson had repeatedly accepted money from persons "exhibiting the physical characteristics of [] drug addict[s]" and handed the money to another person, who retrieved small baggies containing a white substance and handed them to the purchasers. *Id.* at 125. In affirming the trial court's decision to permit the State to enter a nolle prosequi to the charge of simple possession, the Court said that it "'would have been irrational'" for the jury to convict Jackson of simple possession without also convicting him of possession with intent to distribute. *Id.* at 126 (quoting *Jackson v. State*, 82 Md. App. 438, 447 (1990)). Unlike *Hook*, *Jackson* "was not" a case "where the defendant was almost certainly guilty of criminal activity in some fashion but where there was legitimate doubt about the level of his complicity." *Id.* (quoting *Jackson v. State*, 82 Md. App. at 447). Consequently, it was appropriate to permit the State to use the nolle prosequi to eliminate "'intermediate offenses that were only theoretically possible but not realistically plausible.'" *Id.* (quoting *Jackson v. State*, 82 Md. App. at 447).

Similarly, in *Burrell v. State*, 340 Md. at 428-29, the State charged Burrell, as a principal in the second degree, with robbery with a deadly weapon and with the lesser-included offense of robbery. At trial, "[t]here was absolutely no evidence . . . from which a rational jury could infer that Burrell was guilty of aiding and abetting a simple robbery only." *Id.* at 436. Instead, "the only rational inference from the evidence which *was* presented was that an armed robbery, not a simple robbery, had been committed[.]" *Id.* In affirming a decision to permit the State to abandon the charge of simple robbery, the Court stated that "the evidence at trial rationally supported only two choices: a conviction of accomplice to a robbery with a deadly weapon or acquittal." *Id.* Because it was "uncontroverted" that an armed robbery had occurred, "a rational jury was virtually compelled to convict Burrell" of that offense once it was persuaded that he was involved as an accomplice. *Id.* Because there was no evidence to support a conviction of the lesser-included offense of robbery without also convicting Burrell of the greater offense of robbery with a deadly weapon, the trial court did not err in allowing the State to withdraw the lesser charge. *Id.* at 436-37.

In discussing the related issue of whether a defendant is entitled to a jury instruction concerning an uncharged, lesser-included offense, the Court of Appeals has said that a trial court must apply a two-step process. *State v. Bowers*, 349 Md. 710, 721 (1998). First, it must determine whether one offense qualifies as a lesser-included offense of a greater offense. *Id.* at 721-22. If so, the court must then review "the facts of the particular case" to assess "'whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was

guilty of the lesser offense, but not guilty of the greater offense.'" *Id*. at 722 (quoting *Ball v. State*, 347 Md. 156, 191 (1997)).

In *Bowers* a jury had been unable to reach a unanimous decision on the greater offense of involuntary manslaughter, but had acquitted Bowers of the lesser-included offense of reckless endangerment. *Id.* at 712. After the State elected to retry Bowers for involuntary manslaughter, he asked the trial court to instruct the jury on the lesser-included offense, of which he had been acquitted. *Id.* at 714. In affirming the trial court's decision not to give that instruction, the Court of Appeals explained that "[a] defendant is not entitled to have the jury instructed on an offense for which he cannot be legally convicted." *Id.* at 724. Because the first jury had acquitted Bowers of reckless endangerment, a subsequent conviction for that offense "would have been a legal nullity – a sham verdict." *Id.* "An appeal to the jury to return a verdict which is in itself a legal nullity exceeds the scope of the right." *Id.*

D. Moore's Contentions

According to Moore, the trial court erroneously believed that it had no choice but to allow the State to enter a nolle prosequi as to the possession of marijuana charge and that it, therefore, abused its discretion in doing so. He argues that the court allowed the State to enter the nolle prosequi before trial, and hence before the court had an evidentiary basis to evaluate whether a rational jury could convict him only of simple possession without also convicting him of possession with intent to distribute. In addition, Moore cites a detective's testimony that he possessed more than the gram of marijuana that he sold to the detectives – that he took that gram out of a bag that

contained a "larger corpus" of marijuana. He complains that there was no evidence that the "larger corpus" weighed less than ten grams. We find no merit in Moore's contentions.

The trial judge did appear to believe that he had no discretion but to permit the State to abandon the charge of simple possession. If so, however, it was undoubtedly because the State had just informed him that it had charged Moore with something that was not a crime – possession of less than 10 grams of marijuana. In those circumstances, it may well have been an abuse of discretion *not* to permit the State to abandon those charges and, instead, to insist that the State to pursue a criminal charge for which it said it had no factual basis. The restrictions on dismissing lesser-included offenses cannot conceivably apply if, as in this case, the lesser-included "offense" is not actually a criminal offense.

Moore is correct that, in evaluating the propriety of a nolle prosequi on a lesser-included offense, the cases typically look to the evidence at trial. He complains that in this case the court heard no evidence about the lesser-included "offense" because the State entered the nolle prosequi before the proceedings began. We reject his complaint because in our view, the State is to be commended, not castigated, for dismissing unfounded charges before trial.

In his reply brief, Moore responds that the evidence at trial could have led the jury to conclude that he possessed considerably more than the one gram of marijuana that he sold to the detectives. He cites the detectives' testimony that he withdrew the four, small packages of marijuana from another plastic bag, which, he says, contained a "larger

corpus of marijuana." There was no evidence, he says, that the "larger corpus" weighed less than 10 grams.

Nor, however, was there any evidence – or any real reason to believe – that the "larger corpus" weighed more than 10 grams and that the State misinformed the court that it weighed less. In this regard, we note that the other packages appear to have weighed only a quarter or (at most) half of a gram each.[2] In addition, we note Detective Foster's testimony that Moore did not have "a lot" of packages, because the packages typically "are broken down for a quick sale," after which the sellers "go back" to their source and "get more."

But assuming that Moore possessed more than 10 grams of marijuana, a rational jury could not have convicted him only of the lesser-included offense of simple possession without also convicting him of the greater offenses of distribution and possession with intent to distribute. As in *Jackson*, the possession of the controlled dangerous substance was part and parcel of the *actus reus* of distributing it: the detectives asked Moore if he could sell them some marijuana; Moore agreed to sell marijuana to the detectives; and when one of the detectives gave him a marked $20 bill, he reached into a bag containing smaller bags of marijuana that were pre-packaged for sale and handed four of those bags to the detectives. This is not a case like *Hook*, where, without the nolle prosequi, the jury had to make a binary choice between convicting the defendant of the

[2] The detectives bought a gram, consisting of four packages, each of which would have contained only a quarter of a gram. On the other hand, Detective Fowler referred to half-gram packages in Moore's bag.

greater offense (first-degree, premeditated murder) or convicting him only of the lesser-included offense (second-degree murder). To the contrary, because the jury could not rationally have convicted Moore "*only* on the lesser included offense," it would have been appropriate for the State to enter nolle prosequi as to that offense even if Moore had possessed more than 10 grams of marijuana. *Burrell v. State*, 340 Md. at 164-65

In our view, this case is quite similar to *Bowers*. There, the defendant wanted to argue that the jury could convict him of a crime of which he had previously been acquitted (and of which he could, therefore, not be convicted). Here, the defendant wanted to argue that the jury could convict him of a something that is not a crime (and of which he could, therefore, not be convicted). Had the jury convicted Moore of simple possession in the face of the State's representation that he possessed less than 10 grams of marijuana when he was arrested, the verdict "would have been a legal nullity – a sham." *Bowers*, 349 Md. at 724. The court did not abuse its discretion in allowing the State to preclude the possibility of a sham verdict.

Moore did not have the right to block the State from dismissing a charge that it could not prove so that he could attempt to persuade the jury to acquit him of the charges that the State could prove. We affirm the judgments below.

. **JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**