UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2262

September Term, 2015

JEFFREY J. MOORE

v.

STATE OF MARYLAND

Graeff,
Friedman,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: August 24, 2016

Within our criminal justice system, the protection of an individual's *Miranda*[1] rights is a paramount concern. A great deal of jurisprudence exists on the appropriate method of providing to a suspect in a criminal investigation the now standard warning. This appeal considers an alleged *Miranda* two-step violation. Basically, Jeffrey Moore (Appellant) made statements in response to police questions before he was given his *Miranda* warning. After receiving the warning, he made further statements in response to additional questioning. Moore argues further that the evidence presented by the State was insufficient to support his conviction for possession of CDS with an intent to distribute. We find no error in the Circuit Court for Montgomery County's trial of Moore's case and, thus, we affirm its judgment.

FACTS AND LEGAL PROCEEDINGS

On 23 July 2015, Moore was indicted for possession with an intent to distribute heroin as a result of a police drug bust on 24 June 2015. Prior to trial, a pre-trial hearing was held on 29 October 2015 to consider Moore's Motion to Suppress all of his statements to the police. The following testimony was adduced at the suppression hearing from two State's witnesses: Officer John Wigmore and Officer Vincent Sylvester.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing a criminal suspect's constitutional rights to silence and legal counsel during a custodial interrogation).

I. The Testimony Before the Suppression Court

On 24 June 2015, a Special Assignment Team of the Montgomery County Police Department undertook an undercover surveillance/investigation of a man named Lawrence Turner, who it was believed was connected to heroin sales in a certain area in the County. Officer Wigmore sent a text message to a cell phone number understood to be associated with Turner, seeking to make a CDS purchase. A reply came back that "a guy named Jeff" would call him. Minutes later, a person identifying himself as "Jeff" called Officer Wigmore, offering to sell him $50.00 worth of heroin. They agreed to meet at a convenience store near the Grosvenor Metro Station to consummate the sale, while, simultaneously, other members of the undercover team surveilled Turner. Officer Sylvester testified that he observed Turner arrive in a car and meet with Moore at the convenience store. Over police radio, the surveilling officers received a transmission from Officer Wigmore that he had completed a phone call with a suspect, who offered to sell him a $50 bag of heroin and that they would meet at the convenience store by the Grosvenor Metro.

Officers Sylvester and Neil Bumgarner placed Moore under arrest. When Officer Wigmore arrived back at the Metro Station, he recognized Moore from previous face-to-face encounters. At this point, Officer Wigmore asked Moore "if he sold heroin to Mr. Turner," to which Moore responded in the affirmative. Officer Wigmore testified that this questioning was motivated by his concern to avert a potential medical crisis if

Turner, who was arrested prior to Moore, had swallowed the heroin because no drugs were located on his person at the time of his arrest.[2]

Approximately an hour after Moore was placed under arrest and brought to the police station, Officer Sylvester informed Moore of his rights, reading from the form MCP-50: Advice of Rights. Officer Sylvester ascertained that Moore understood his rights. At this point, Moore asked: "if there was some type of deal that [Officer Sylvester] could offer him" if he could provide the police with information. Officer Sylvester told him no. Subsequently, in his formal statement, Moore denied selling drugs to Turner. He insisted that he only pretended to offer to sell a $50 bag of heroin to another man he identified as "Taylor," but that his actual intent was to "take the money from Taylor but not to give him anything" because "Taylor" owed him money.

At the conclusion of the hearing, Moore argued to the suppression court that the police had used improperly a *Miranda* two-step approach prohibited by *Missouri v. Seibert*, 542 U.S. 600 (2004), as recognized also in Maryland under *Cooper v. State*, 163 Md. App. 70, 877 A.2d 1095 (2005). The hearing court concluded that *Seibert* did not govern this case and, as a result, there was no *Miranda* violation. The motion was denied.

[2] Officer Wigmore asked Moore also whether he had syringes on him. Officer Wigmore testified that, where heroin is present, syringes are present often because one of the means of administering heroin is by syringe. A syringe could cause danger to an arresting officer if he or she were stuck by it – accidentally or intentionally by an arrestee.

II. Additional Evidence Introduced at Trial

Moore's two day jury trial was held on 3 – 4 November 2015. Eight witnesses, including Moore, gave testimony.

Officer Wigmore testified again regarding Moore's arrest. He explained that the investigation was initiated after the Montgomery County Police received information that Lawrence Turner was dealing heroin in a certain area. Officer Wigmore threw out the first ball in the investigation by sending a text message to Turner requesting to purchase heroin, to which a response was received that "a guy named Jeff" would call him. Shortly thereafter, Officer Wigmore received a call from "Jeff" who offered to make a $50 sale of heroin. The two arranged to meet at a convenience store next to the Grosvenor Metro Station. Observing the meeting place from a distance, Officer Wigmore saw two men enter the convenience store and leave. About three to four blocks away, Officer Wigmore stopped Turner on Montrose Avenue. While talking with him, Officer Wigmore realized that Turner's voice was not that of the person with whom he had spoken earlier on the phone. Corporal John O'Brien placed Turner under arrest. Three syringes and a spoon were recovered from his person, but no demonstrable heroin was discovered.

Officer Wigmore received another phone call from "Jeff" asking why he had failed to meet him in front of the convenience store. Officer Wigmore recognized this

voice as that of "Jeff," who he had been speaking with on the phone previously and identified Moore as that individual.[3]

As Officer Wigmore walked back towards the store, dialing the number for "Jeff," he saw the man, who had been with Turner at the store, about to answer a cell phone. Meanwhile, Officer Bumgarner, also a member of the surveillance team, stopped that man (who turned out to be Moore) on the street. He had a cell phone in his hand and the phone began to ring. Moore was arrested and searched. "[T]hree small twisty baggies" of heroin were found in the left breast pocket of his shirt. Moore had also $105.00 in cash on his person.[4]

The State called, as an expert witness in the fields of forensic chemistry and analysis of controlled dangerous substances, Azize Zekiroski, a forensic scientist for the Maryland State Police Crime Lab. Zekiroski had analyzed the three bags of suspected CDS found on Moore and determined that they contained a total 0.18 grams of heroin.

Following the State's case-in-chief, Moore made a motion for judgment of acquittal, which was denied. Moore took the stand in his defense. He testified that he

[3] Two other officers, Sergeant William Thomas and Officer Sylvester also testified about this encounter. Both saw Moore take a cell phone down from his ear right after hearing from Officer Wigmore, over the police radio, that he had just completed the call with "Jeff."

[4] Sergeant Jason Cokinos, a State expert witness in "narcotics distribution and sales," testified that the drugs were packaged in a manner indicating that heroin was intended to be sold. He estimated the value of the heroin seized from Moore at $40.00 to $50.00.

knew Turner and that, earlier on the day of Moore's arrest, Turner had told him that someone had called him about purchasing drugs. Moore explained that the person he spoke to later on the phone identified himself as "Taylor," that he knew a Taylor from a drug treatment center, and that Taylor owed him $70:

> A: My thinking in terms of the $70, when I thought I was talking to Taylor on the phone, that, you know, once I met up with him I was going to get my $50 from him.
> Q: What was your plan to get the $50 from Taylor, or the $70 from Taylor?
> A: My plans were like, like I said, to meet up with him. When Turner asked me did I want to meet up with Taylor, I said, sure. I didn't tell Turner that he owed me money. I said, sure, I'll meet up with Taylor, but my intentions were, once I saw Taylor, was to, you know, get my 50, my $70 from him.
> Q: Okay. And what did you use to get Taylor to show up to meet with you?
> A: I told him that I would sell him drugs.
>
> * * *
>
> Q: All right. Where were you – what were you intending on doing with that heroin?
> A: I was – at that time I had an opiate addiction, so I was going to use it at my home, in my house.

On cross-examination, Moore asserted that Officer Wigmore identified himself as "Taylor" on the phone. He denied telling Officer Wigmore, prior to the administration of the *Miranda* warning at the police station, that he had sold drugs to Turner.

During its rebuttal case, the State recalled Officers Wigmore and Sylvester to clarify the statements Moore made before and after he received his *Miranda* warning. Officer Wigmore testified about the statements made by Moore immediately following his arrest:

> Q: And did you ask him any questions after he was arrested on the street?
> A: Yes, I did. I asked him if he had dealt to Mr. Turner, the guy we just saw him with previously, and he told me that he had –

> DEFENSE COUNSEL: Objection [as to relevance, which was overruled]
> THE WITNESS: – sold some heroin to him.
> Q: And what was his response?
> A: He said he had dealt some heroin to Mr. Turner.
> Q: And was he asked a second question?
> A: Just questions about if he had anything on his person, any kind of – any kind of evidence, like, you know, syringes and stuff like that, on his person.

Officer Sylvester testified that Moore informed him at the police station that the three bags of heroin were for his personal use, but that Turner asked to buy $50.00 worth of heroin and that Moore did not make a sale. Officer Sylvester was then asked about the other story Moore told him after waiving his *Miranda* rights:

> Q: And did he admit to you that he had been talking to someone on the phone?
> A: Yes. He stated a person that he knew as quote, unquote Taylor from Avery Road Treatment Center had hit him up and asked him for some dope and that he had told him he had a $50 bag for him.

At the close of all evidence, Moore renewed his motion for judgment of acquittal, which was denied.

No jury instruction was requested by Moore or the State as to limitations on the jury's consideration of Moore's pre-trial statements to the police. The jury found Moore guilty of possession with intent to distribute heroin. He was sentenced on 23 November 2015 to a mandatory minimum sentence of 25 years, without parole. Moore appealed timely to this Court. Additional evidentiary facts will be iterated as appropriate to our analysis.

QUESTIONS PRESENTED

Appellant presents two questions for our consideration:

1. Did the pre-trial hearing court err by denying the motion to suppress Moore's statement made while in custody at the police station?

2. Is the evidence legally insufficient to sustain Moore's conviction for possession with intent to distribute heroin?

For the following reasons, we find no error in the circuit court's judgment and affirm.

DISCUSSION

I. Motion to Suppress

a. Contentions[5]

Moore contends here that the statement he made at the police station, after receiving his *Miranda* warning, should have been suppressed because it was obtained through an impermissible *Miranda* two-step violation. He maintains that the State failed to meet its burden to show that its failure to provide him with his *Miranda* warning when he was taken into custody initially was not a deliberate attempt then to procure a statement from him. Moore argues that the delay in receiving his *Miranda* warning showed, under a totality of the circumstances, a deliberate attempt by the police to circumvent his *Miranda* protections.

The State responds that this question is moot because the pre-*Miranda* warning statement was introduced by the State only for impeachment purposes and was not used in the State's case-in-chief as direct, substantive evidence of Moore's guilt. Moreover,

[5] The parties agree that Moore's initial statement, made prior to receiving his *Miranda* warnings, was inadmissible in the State's case-in-chief as substantive and direct evidence of Moore's culpability.

the nature of the literal statement tended, in any event, to be exculpatory. If used for this purpose only, the statement, regardless of whether it was obtained in violation of *Miranda*, could be admitted properly for impeachment purposes. In addition, the State maintains that there was no evidence of a *Miranda* two-step technique because the content of the statement made at arrest and the post-*Miranda* warning statement do not overlap, the police personnel were different, and the soliciting questioning was not of a continuous nature.

b. Standard of Review

When we review the denial of a motion to suppress, we are "confined to the record developed at the suppression hearing." *McCracken v. State*, 429 Md. 507, 515, 56 A.3d 242, 246 (2012) (citation omitted). We view the evidence in the light most favorable to the prevailing party on the motion and defer to the court's findings of fact "unless clearly erroneous." *McCracken*, 429 Md. at 515, 56 A.3d at 246. We "review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Walker v. State*, 206 Md. App. 13, 22-23, 47 A.3d 590, 595 (2012) (quotation omitted).

c. Analysis

Moore's argument implicates two major Supreme Court cases dealing with *Miranda* warnings and violations: *Oregon v. Elstad*, 470 U.S. 298 (1985) and *Missouri v. Seibert*, 542 U.S. 600 (2004). The first-in-time, *Elstad*, invited the Supreme Court "to decide whether an initial failure of law enforcement officers to administer the warnings

required by *Miranda* . . . , without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." *Elstad,* 470 U.S. at 300. In *Elstad*, two police officers began to interrogate Elstad in his living room, as one testified later:

> I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."

470 U.S. at 301. Elstad was taken then to the police station. An hour later, he was advised of his *Miranda* rights. He stated that he understood his rights and gave a statement:

> explaining that he had known that the Gross family was out of town and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent, read back to him for correction, initialed and signed by Elstad and both officers.

Elstad, 470 U.S. at 301.

The Supreme Court rejected the argument that the failure to give a *Miranda* warning requires automatic exclusion of a confession given prior to the warning, explaining that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." *Elstad*, 470 U.S. at 306. The Court noted that there was a "vast difference between the direct consequences flowing from coercion of a

confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case." *Elstad*, 470 U.S. at 312. The Supreme Court reasoned that "[w]hen a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310.

Following *Elstad* was *Missouri v. Seibert*, 542 U.S. 600 (2004), where the Supreme Court made clear that statements taken through an impermissible two-stage procedure were not admissible as substantive evidence of guilt against a defendant. In *Seibert*, the defendant was taken to the police station and questioned for 30-40 minutes, prior to being given her *Miranda* warning, during which time she made an incriminating statement. 542 U.S. at 604-05. She was then given a 20 minute break before the officer returned, read her the *Miranda* warning, received a signed waiver of rights, and began to record the conversation that followed. *Seibert*, 542 U.S. at 605. The officer confronted the defendant with her pre-*Miranda* warning statements and testified that he "made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Seibert*, 542 U.S. at 605–06.

The Supreme Court's plurality opinion concluded that this form of questioning would render the *Miranda* warning likely ineffective:

> After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Seibert, 542 U.S. at 613. According to the plurality of the Court, to determine if a violation occurs, a court should look at:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Seibert, 542 U.S. at 615.

Maryland, parsing the precedential lessons of *Seibert*, concluded that Justice Kennedy's concurring opinion was controlling as to the analysis to be undertaken in considering whether there exists a *Miranda* two-step violation. *See infra* note 6. Justice Kennedy explained that "not every violation of the rule requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert*, 542 U.S. at 618–19 (Kennedy, J., concurring). These types of situations include, among others, statements used for impeachment "so

that the truth-finding function of the trial is not distorted by the defense" and to protect public safety. *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring). Justice Kennedy viewed these situations as ones where admission of the statement "would further important objectives without compromising *Miranda's* central concerns." *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring).

The Court of Appeals adopted Justice Kennedy's concurrence because the "overwhelming majority of courts to decide the issue post-*Seibert* hold that Justice Kennedy's concurring opinion controls a *Seibert*-type analysis." *Wilkerson v. State*, 420 Md. 573, 594, 24 A.3d 703, 715 (2011).[6] In summarizing Justice Kennedy's concurrence, this Court explained that admissibility of post-*Miranda* warning statements would be governed by *Elstad*, unless it was shown that a deliberate two-step approach was used. *Cooper v. State*, 163 Md. App. 70, 92, 877 A.2d 1095, 1108 (2005). In that case "[i]f the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative

[6] The Court of Appeals reasoned that this result was "[c]onsistent with the principle that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" *Wilkerson v. State*, 420 Md. 573, 594, 24 A.3d 703, 715 (2011) (quoting *Marks v. United States,* 430 U.S. 188, 193 (1977)).

measures are taken before the postwarning statement is made." *Cooper*, 163 Md. App. at 92, 877 A.2d at 1108 (quoting *Seibert*, 542 U.S. at 622).[7]

In the present case, the State conceded in its opening statement at the suppression hearing that the statement made by Moore on the street was not admissible in its case-in-chief because he was not "Mirandized" at the time. When asked by the State, Officer Wigmore explained that his questioning of Moore was not a deliberate avoidance of *Miranda,* but was for informational purposes to determine, after being told by Moore that he had sold heroin to Turner, if Turner may have consumed by mouth any heroin, because none had been found on him at his arrest. Officer Wigmore stated that he only asked whether Moore had any syringes on him, prior to the search of Moore's person, for self-protection. No additional questions were asked.

During Officer Sylvester's testimony, he explained his questioning of Moore at the police station, after Moore was advised of and waived his *Miranda* rights:

> Q: Okay. So when you spoke to Mr. Moore, did you have a conversation with him about the incident involving Officer Wigmore?
> A: I did.

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[7] These curative measures may include:

> Such measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and waiver. For example, a substantial break in time and circumstances between the prewarning statement and the warning may suffice in most instances, as may an additional warning explaining the likely inadmissibility of the prewarning statement.

Missouri v. Seibert, 542 U.S. 600, 603 (2004).

> Q: Okay. And did you also have a conversation about the incident involving Mr. Turner?
> A: I did.
> Q: Okay. What did he tell you about the incident involving Mr. Turner at the time in the station?
> A: . . . He stated that he had met his friend, L.T. – that's what he called Lawrence Turner, L.T. – and that Lawrence Turner initially had asked to buy a $50 bag of dope [street name for heroin] from him, and he stated that he needed the dope for himself, so he didn't sell Mr. Turner anything.

In denying Moore's Motion to Suppress, the suppression court concluded:

> I find that *Seibert* does not govern this situation. I think this is more analogous to what happened in *Elstad*, you know, literally the number of questions, the proximity of the second round to the first round. So for all of those reasons I don't find any *Miranda* violation.

Our review of the evidence presented at the suppression hearing does not lead us to conclude any differently than did the suppression court. For the first round of questioning, as noted by the suppression hearing judge, it was "completely justifiable to ask those preliminary questions to know what they are dealing with . . . because of some public safety issues . . . ." There was a facially legitimate public safety consideration involved with the potential presence of a syringe or syringes, which could harm a police officer if that officer was cut or poked with same, whether innocently or maliciously. Additionally, there was a facially legitimate concern articulated by Officer Wigmore that Turner, who was arrested with no heroin found on his person, might have swallowed any heroin to avoid its confiscation, creating the potential for a medical emergency.

As to the criterion of "overlapping," Moore's "second statement was not confirmatory of the first" statement. Therefore, although the content may overlap in that drugs and paraphernalia were addressed in both statements, the provocation for the

questions and resultant responses were not similar. The information gathered from the first round of questioning was limited to contextually routine questions asked of an arrestee in an attempt to promote public safety and to anticipate a possible medical emergency. The second round of questioning (accomplished by Officer Sylvester after Moore waived his *Miranda* rights) focused more on the investigation of criminal activity and gathering evidence for the possible case against Moore:

> Q: And do you then proceed to talk to him about the incident – the overall incident with Officer Wigmore?
> A: I did.
> Q: Okay. And what did he tell you about that?
> * * *
> A: He stated that an individual named Taylor had called him, and that Taylor had asked to buy a $50 bag of heroin, but that he wasn't actually going to sell him the $50 bag of heroin, that Taylor – he knew him from Avery Road, which is a treatment center here in Montgomery County, and that he – Taylor had owed him $50, and then he went on to say that Taylor actually owed him $70 from before – he just said from a previous time – and that the reason he had told him he had a $50 bag of heroin for him was because he wanted Taylor to bring the money with him and that he intended to take the money from Taylor but not to give him anything.

This second statement leans actually to exculpation (if taken at face value), which makes it contradictory to Moore's first statement and, thus, these statements were not overlapping, in the sense meant for a *Seibert* analysis.

Although the police personnel remained largely the same throughout, there was no apparent prior discussion between the officers regarding how Moore was to be questioned. When asked at the hearing, Officer Sylvester made clear that he did not confront Moore later with his earlier statements:

> Q: Okay. And you heard the statement that Mr. Moore made on the street that he had sold heroin to Mr. Turner?
> A: Yes.
> Q: When you were questioning him and he told you that he did not sell heroin to Mr. Turner, did you batter him or do anything regarding the previous statement?
> A: No, I never brought that statement up to him.

Officer Sylvester indicated further, during redirect examination, that the questioning of Moore was not treated any differently than any other arrestee:

> Q: Did you guys have – did you guys have a little conversation on the side and say, "Hey, go ask him if he sold heroin?"
> A: No.
>
> * * *
>
> Q: Was there any sort of conversation about the procedure that was going to be employed in order to potentially interview Mr. Moore at the station?
> A: No, I used the same procedure that I've used for anyone that I've ever interviewed in my career.
> Q: Okay. Did Officer Wigmore ever come into the room while you were interviewing Mr. Moore?
> A: No.

Although Officer Sylvester was aware of Officer Wigmore's questions and Moore's responses to him, the evidence at the suppression hearing does not indicate the existence of a deliberate *Miranda* two-step violation. Furthermore, approximately an hour passed between the street questioning and the police station questioning, where, during the latter, Moore was fully-informed of his right to remain silent. He chose to speak to the officers and to provide them with additional statements regarding his version of what did (and did not) happen on June 24.

The State's argument continues that, because it introduced Moore's challenged statement solely for impeachment purposes, Moore's current suppression argument is

moot. In *Harris v. New York*, 401 U.S. 222 (1971), the Supreme Court concluded that a voluntary statement made by a defendant could be used for impeachment purposes, even if that statement was taken in violation of *Miranda*:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.

Harris, 401 U.S. at 225. The Supreme Court stated further that the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris*, 401 U.S. at 226.

The situation in *Harris* is similar to the record in Moore's case. At trial, Moore elected to testify in his defense and reiterated the story that he told to the police (after receiving a *Miranda* warning) about creating a ruse to trick a man named "Taylor" into paying $70 owed to Moore. The State then used his conflicting statements to impeach Moore's credibility, but not in its case-in-chief. Additionally, during the discussion of the verdict sheet and the jury instructions, no request or objection was lodged by the defense as to any limitations on the jury's consideration of Moore's statements or the giving of Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:19A: Prior

Statements, which allows the jury to use prior statements by a defendant (who testified) as substantive evidence against him.[8]

In short, there was no basis presented at the suppression hearing of a violation of *Seibert* or *Elstad*. Any coercion present in the first round of questioning did not carry over to the second round. Moreover, the use of the statements during the State's cross-examination of Moore and in its rebuttal did not prejudice unduly his defense as the statements were used solely to impeach Moore's credibility. Reversal is not appropriate. Thus, we affirm the suppression court's ruling.

[8] Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:19 governs the use of prior statements of a witness. MPJI-Cr 3:19A provides this instruction to the jury and allows the evidence to be considered as substantive evidence:

> You will recall that (_____) testified in the [State's case] [defense case] during the trial. You will also recall that it was brought out that before this trial [he] [she] made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

MPJI-Cr 3:19B on the other hand, handles when statements are only used for impeachment purposes:

> You have heard testimony that (_____) made a statement [before trial] [at another hearing] [out of your presence]. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.
>
> It is for you to decide whether to believe the trial testimony of (_____) in whole or in part, and you may not use the earlier statement for any purpose other than to assist you in making that decision.

Only MPJI-Cr 3:19A was provided to the jury at Moore's trial.

II. Sufficiency of the Evidence

a. Contentions

Moore contends that his conviction must be reversed because the State failed to prove beyond a reasonable doubt that he intended to distribute the heroin. Although Moore concedes that he possessed 0.18 grams of heroin, he maintains that the State failed to show additionally his intent to distribute it.

The State responds that there was sufficient direct and circumstantial evidence (and reasonable inference permitted to be drawn therefrom) before the jury to permit it to find Moore's intent to distribute the heroin found within his shirt pocket. Viewing the evidence in the light most favorable to it, the State maintains that the testimony of Officer Wigmore regarding the text messages and phone calls with "Jeff," the three, separately-packaged baggies found on Moore's person, and Moore's contradictory statements about his plans for the heroin make it clear that a rational trier-of-fact could conclude beyond a reasonable doubt that Moore had an intent to distribute the heroin.

b. Standard of Review

On appeal, we review a sufficiency of the evidence claim pursuant to the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). We view "the evidence in the light most favorable to the prosecution [to determine if a reasonable jury] could have found the essential elements of the crime beyond a reasonable doubt." *Hobby v. State*, 436 Md. 526, 537-38, 83 A.3d 794, 800 (2014) (citing *Jackson*, 443 U.S. at 319). Our goal is not to re-try the case:

> Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We recognize that the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.

Hobby, 436 Md. at 538, 83 A.3d at 801 (quoting *Titus v. State*, 423 Md. 548, 557-58, 32 A.3d 44, 50 (2011)). We look to the record to see if the "verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457, 697 A.2d 462, 465 (1997) (citation omitted). To persuade us to reverse, "it is necessary to show that there was no legally sufficient evidence, or inferences drawable therefrom, from which the jury could find the accused guilty beyond a reasonable doubt." *Boddie v. State*, 6 Md. App. 523, 535, 252 A.2d 290, 297 (1969) (citation omitted).

c. Analysis

Under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 5-602 ("Crim. Law"), a person may not: "(1) distribute or dispense a controlled dangerous substance; or (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance." To prove possession with an intent to distribute, the

State is required to adduce evidence satisfying two elements: "(1) possession of CDS; and (2) circumstances indicating an intent to distribute the CDS." *Kyler v. State*, 218 Md. App. 196, 226, 96 A.3d 881, 898 (2014). Possession is defined as "the exercise of actual or constructive dominion or control over a thing by one or more persons." *Taylor*, 346 Md. at 457, 697 A.2d at 465 (citation omitted).

Here, three baggies were found on Moore's person and in his control. The possession element was established by direct evidence. As to the evidence indicating an intent to distribute, the State produced the testimony of multiple police officers to show the interactions Officer Wigmore had with Moore and Moore's subsequent arrest. Officer Wigmore testified that an individual named "Jeff" agreed to sell him $50 worth of heroin and that when he arrived at the agreed-upon meeting location, Moore went to answer his phone when Officer Wigmore called "Jeff's" number. Thus, it could be concluded reasonably that "Jeff" was Moore.

Moore took the stand in his defense and presented an explanation of his understanding of his text message interactions with Officer Wigmore, who he claimed to believe to be a man named Taylor. Moore recounted his story (as told to Officer Sylvester at the police station) involving his Moriarty-like ruse to trick Taylor into repaying a debt that Moore was owed:

> Q: And you admitted to [Officer Sylvester] that you had been talking to who you thought was Taylor on the phone, right?
> A: Yes ma'am, I did.
> Q: Okay. And that you told the person on the phone that you were going to sell them heroin, right?
> A: Yes ma.am, I did.

* * *

Q: And then after that, you waited for Officer Wigmore to arrive, right?
A: Which I thought was Taylor with my $50, $70.
Q: And you kept making phone calls to Officer Wigmore, right?
A: To get my money. Yes, ma'am, I did.
Q: But you never talked to him about money, did you? Other than that it was $50 worth of heroin?
A: If you owe a person and you tell them you want your money, do you think he would have came? I don't mean to be sarcastic, but I don't think he would have came if he knew I wanted my money.

Moore denied the earlier statement he made to Officer Wigmore regarding his desire to sell the heroin he possessed:

Q: You did not say that to Officer Wigmore [regarding the sale of heroin to Turner]?
A: No, ma'am, I did not say that statement.
Q: Okay.
A: I'm not saying he's lying. I'm saying I don't know why he said it, but I know what I said to the officer, and I did not tell him I just sold somebody some heroin. If I – no, I didn't say that.

Later, defense counsel was given the opportunity, during the State's rebuttal case, to confront Officer Sylvester about Moore's statements regarding the purported ruse:

Q: So even on the very day that this incident happened, Mr. Moore said that the whole thing was a ruse to get his money back, right?
A: Yes.
Q: That he never intended to actually distribute the heroin to Taylor – excuse me, well, to the person he understood to be Taylor?
A: Never intended?
Q: On June 24th, what he told you was that his intention was to get the $50 or $70 back from the person he understood to be Taylor, right?
A: Yes.
Q: He never intended to actually give or sell any heroin to the person he knew to be Taylor?
A: Yes. He said he stated he was just trying to get the money and that he wasn't going to give him dope.

The State produced additional evidence regarding the amount of heroin found on Moore and its packaging into three separate baggies, which could show, if believed, an intent to distribute. Sergeant Jason Cokinos, an expert witness, testified to the effect that Moore "was stopped and in possession of 0.18 grams of heroin, which coincides with what a dosage amount would be, and coincides with what the price would be for said dosage amount about, you know, 40 to $50, this case $50." The State presented sufficient evidence for the jury to convict.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.