UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2732

September Term, 2015

THOMAS ALVIN EPPS, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: December 16, 2016

Convicted by a jury, in the Circuit Court for Allegany County, of two counts of possession of a controlled dangerous substance (heroin and cocaine), two counts of possession with intent to distribute a controlled dangerous substance (heroin and cocaine), providing a false identification to avoid arrest or prosecution, and providing a false statement to a police officer, Thomas Epps, Jr., appellant, presents one question for our review. Rephrased to facilitate review, it is:

> Was the evidence sufficient to sustain Epps' convictions for possession of a controlled dangerous substance and possession with intent to distribute a controlled dangerous substance?

Finding that there was sufficient evidence to support those convictions, we affirm.

BACKGROUND

On November 9, 2014, Sergeant Korey Rounds, of the Cumberland Police Department, upon observing a car "going in and out of the traffic lane," initiated a traffic stop of the vehicle. Inside the car, were the driver and owner of the vehicle, Shay Gaskins; a front-seat passenger, later identified as Thomas Epps, Jr.; and a third occupant, who was seated in the rear of the car.

Upon approaching the vehicle in question on foot, Sergeant Rounds detected "the odor of marijuana coming from the vehicle," as well as "a strong fragrance of perfume." Moreover, the officer observed that Epps had "what appeared to be a large bulge in his right pants pocket" that was about the size of "a cue ball."

At this time, another officer, Nicholas Mazzone, drove by in his patrol car. After Sergeant Rounds signaled to him, Officer Mazzone pulled over. He then exited his vehicle and walked toward Sergeant Rounds, who was now standing at the rear of Gaskins' vehicle.

Sergeant Rounds then informed Officer Mazzone that he "was going to obtain [his] drug dog to do a sniff of the vehicle." At this point, the officers were "out of contact with the occupants of the vehicle" and could not see clearly what was going on in the vehicle.

During a K-9 scan of Gaskins' vehicle that ensued gave a positive alert to the odor of drugs. The officer then asked Epps to step out of the vehicle, at which time he conducted a search of Epps' person. As he performed that search, Sergeant Rounds noticed that the bulge in Epps' pants was "no longer present."

By this time, Officer Mazzone had moved to the driver's side of the vehicle and was speaking with Gaskins, who was still sitting in the vehicle's driver's seat. The officer then observed Gaskins "reach towards the center console" and "make furtive movements with her left hand," whereupon Officer Mazzone shouted for Gaskins and the remaining occupant to show their hands. Gaskins complied, and Officer Mazzone could see "a plastic baggie in her hand, which she then dropped."

Sergeant Rounds then handcuffed Epps and Gaskins. After all of the occupants of the vehicle were removed, a search of the vehicle was concluded. That search contained marijuana and several smaller bags, each of which contained either heroin or crack-cocaine. The bags were "all bundled together," which Sergeant Rounds believed comprised the previously observed budge in Epps' pants. The police also found a digital scale and some empty plastic baggies in the vehicle's glove compartment, which was closed but "directly in front…of [Epps]." Inside of Gaskins' purse, which was also recovered from the vehicle, the police found $3,700 in cash. Then, when Sergeant Rounds

asked Epps his name, he responded "Melvin Randolph Peters," the name he subsequently gave orally and, in writing, at the police station, after his arrest.

DISCUSSION

Epps contends that the evidence was insufficient to sustain his convictions, as "no reasonable juror could have found [him] in possession of drugs that were found in the car and seen being handled by Ms. Gaskins." He maintains that the evidence against him "was completely circumstantial" and that "there was a reasonable hypothesis of innocence," namely, that the "evidence at the scene connected the drugs to Ms. Gaskins." Epps further claims that there was no evidence that he had "knowledge" of the contraband, a necessary element of the possession charges he faced.

The State avers, and we agree, that Epps' sufficiency argument was not preserved for appellate review, because defense counsel failed to present that argument or, for that matter, any argument, moving for judgment of acquittal at the close of the State's case. To preserve for appellate review, a claim of insufficient evidence, a defendant must make a motion for judgment of acquittal on those grounds at trial. *Whiting v. State*, 160 Md. App. 285, 308 (2004). Indeed, Maryland Rule 4-324(a) requires that a defendant "state with particularity all reasons why the motion should be granted." *Id.* "The language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by [a defendant] in his motion for judgment of acquittal." *Whiting*, 160 Md. App. at 308 (internal citations omitted).

Although Epps moved for judgment of acquittal at the appropriate times, he did so, as noted, "without argument." Because the arguments now raised by Epps, in the instant

appeal, were not raised in the trial court, they were not preserved for our review. *See Correll v. State,* 215 Md. App. 483, 498 (2013) ("When a defendant only argues a generality, he does not preserve for review more particularized insufficiency arguments that could have been made but were not.").

Even if preserved, Epps' arguments are unpersuasive. "The test of appellate review of evidentiary sufficiency 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.'" *Donati v. State,* 215 Md. App. 686, 718 (2014), *cert. denied* 438 Md. 143 (2014) (internal citations omitted). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State,* 157 Md. App. 1, 11 (2004) (internal citations omitted). Moreover, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati,* 215 Md. App. at 718 (internal citations omitted). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Id.*

As for circumstantial evidence, "[i]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors." *Hebron v. State,* 331 Md. 219, 227 (1993) (internal citations omitted). "Many an inculpatory inference is permitted notwithstanding the fact that an exculpatory inference was just as likely and would also have been permitted."

Cerrato-Molina v. State, 223 Md. App. 329, 350 (2015), *cert denied* 445 Md. 5 (2015). In short, although circumstantial evidence "must afford the basis for an inference of guilt beyond a reasonable doubt, it is not necessary that each circumstance, standing alone, be sufficient to establish guilt, but the circumstances are to be considered collectively." *Hebron,* 331 Md. at 227 (internal citations omitted).

The evidence presented below was sufficient to prove Epps' guilt of the crimes charged, beyond a reasonable doubt. To be guilty of possession of a controlled dangerous substance, the State must prove "that the accused had actual or constructive possession and control of the contraband." *Handy v. State,* 175 Md. App. 538, 563 (2007). "Possession" means the exercising of "actual or constructive dominion or control over a thing by one or more persons." *Id.* (internal citations omitted). And "control" means to exercise a "restraining or directing influence over the thing allegedly possessed." *Id.* (internal citations and quotations omitted).

"[T]he mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Smith v. State,* 415 Md. 174, 187 (2010). "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). "To prove possession of contraband, whether actual or constructive, joint or individual, the State must prove, beyond a reasonable doubt, that the accused knew 'of both the presence and the general character or illicit nature of the substance.'" *Handy,* 175 Md. App. at 563 (internal citations omitted).

The Court of Appeals has articulated several factors it deems relevant to a determination of whether a defendant has exercised a knowing dominion or control over contraband. *Smith,* 415 Md. at 198. They are: 1) the defendant's proximity to the contraband; 2) whether the contraband was in plain view of or accessible to the defendant; 3) whether there was evidence of mutual use and enjoyment of the contraband; and 4) whether the defendant had an ownership or possessory interest in the location where the contraband was discovered. *Id.* In addition, possession may be inferred when circumstances suggest that the defendant and others are engaged in a common criminal enterprise. *Cerrato-Molina,* 223 Md. App. at 343.

Here, Sergeant Rounds testified that, following the traffic stop of Gaskins' vehicle, he could smell the odor of marijuana emanating from Epps' vehicle. In addition, he observed that Epps, the vehicle's passenger, had a "bulge" in his pants' pocket. When the officer removed Epps from the vehicle and searched his pants' pocket, the bulge was gone. It was then that Officer Mazzone observed Gaskins reach toward the center console area of the vehicle, which was "inches" from where Epps was sitting, and attempt to "move something." When the officer asked to see Gaskins' hands, he observed her holding the bag of drugs, which she then dropped but which was later recovered by police. The bag, noted the officer, was approximately the size of the bulge he had observed in Epps' pocket.

Based on these facts, a reasonable inference can be drawn that the drugs found in the vehicle had been in Epps' personal possession at the time of the stop, as indicated by the bulge in his pocket. Given that the bulge was gone by the time Sergeant Rounds searched Epps, and given that Gaskins was observed reaching into an area "inches" from

the passenger seat and then handling the drugs, it was reasonable to infer that Epps had removed the drugs from his person and placed them in the center console area. Accordingly, sufficient evidence was presented to permit the trier of fact to find beyond a reasonable doubt that Epps exercised actual and knowing dominion and control over the drugs recovered from the vehicle.

Furthermore, sufficient evidence was presented to permit the trier of fact to find beyond a reasonable doubt that Epps had joint, constructive possession of the drugs. First, the drugs were recovered from "the center console area," inches from where Epps was sitting at the time of the stop, and there was no evidence that the drugs were in an enclosed part of the vehicle.[1] Moreover, given that Sergeant Rounds smelled marijuana emanating from the vehicle, it was reasonable to assume that Epps, as the passenger, also smelled that odor and knew of the presence of marijuana. It was therefore reasonable to infer that Epps was engaged in the mutual use and enjoyment of, at least, the marijuana, which was found in the same baggie as the heroin and cocaine.

Finally, although Epps did not have a possessory interest in the vehicle, a reasonable inference can be drawn that he and the other occupants were engaged in a common criminal enterprise, in light of *Maryland v. Pringle,* 540 U.S. 366 (2003). In that case, the defendant, Joseph Pringle, was riding, as the front-seat passenger in a car, with two other individuals, when the car was stopped by police. *Id.* at 368. After the driver consented to a search of

[1] In his brief, Epps claims that the drugs were found "in the center console of the car." This assertion is factually misleading, as it implies that the drugs were *inside* of the center console, which was never established. Instead, the officers simply stated that the drugs were found in the center console *area.*

the vehicle, the police recovered "$763 from the glove compartment and five plastic glassine baggies containing cocaine from behind the back-seat armrest." *Id.* The police questioned all three men about the drugs and money, but none of the men offered any information regarding the ownership of either. *Id.* at 368-69. Pringle was ultimately convicted of possession with intent to distribute cocaine and possession of cocaine. *Id.* at 369.

On appeal, Pringle contended, in a motion to suppress, that the police lacked probable cause to believe that he was in possession of the cocaine found in the car. *Id.* at 370. The Supreme Court disagreed, holding that there was "an entirely reasonable inference from these facts that any or all three occupants had knowledge of, and exercised dominion and control over, the cocaine." *Id.* at 372. The Court explained that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* at 373 (internal citations and quotations omitted). The Court further noted that "[t]he quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." *Id.*

In *State v. Suddith,* 379 Md. 425 (2005), the Court of Appeals recognized that the *Pringle* holding, although it addressed a motion to suppress, was nevertheless applicable to the issue of the sufficiency of evidence at trial. *Id.* at 443. In short, *Pringle* established "generally the reasonableness, and hence permissibility, of an inference that people who know each other and are traveling in a car in circumstances indicating drug using or selling

activity are operating together, and thus are sharing knowledge of the essentials of their operation." *Larocca v. State,* 164 Md. App. 460, 481 (2005); *see also Cerrato-Molina,* 223 Md. App. at 346 (recognizing that the *Pringle* analysis is "equally pertinent in the context of finding guilt or innocence.").

Here, in addition to finding several individually packaged bags of heroin and cocaine inside of a larger baggie in an area immediately accessible to Epps, the police found a digital scale and empty baggies in the glove compartment, which was within arms' reach of where Epps was seated. The police also found a significant amount of cash – $3,700 – in the vehicle (albeit in Gaskins' purse), and, when questioned by police, Epps gave a false name, which he repeated again at the police station following his arrest. *See Colin v. State,* 101 Md. App. 395, 407 (1994) (Defendant's giving of a false name and nervousness "could reasonably be interpreted as showing that he had something to hide and that he knew where [the contraband] was to be found."). Taking all of these circumstances together, a fact-finder could infer beyond a reasonable doubt that Epps was engaged in a common criminal enterprise and, as a result, had knowledge of the existence and illicit nature of the drugs recovered from the vehicle.

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